



WORKSHOP ON HUMAN TRAFFICKING

On
26th July, 2014 (Saturday)
At
Nyaya Sadan, Doranda, Ranchi



Organised by :

JHARKHAND STATE LEGAL SERVICES AUTHORITY (JHALSA)
in collaboration with
Dept. Of Social Welfare, Women & Child Development, Jharkhand
&
UNICEF, Jharkhand

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HON'BLE THE CHIEF JUSTICE AND HON'BLE JUDGES OF HIGH COURT OF JHARKHAND



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-cum-Patron-in-Chief, JHALSA



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Judge, High Court of Jharkhand



**Hon'ble Mr. Justice
Amitav Kumar Gupta**
Judge, High Court of Jharkhand

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(2011) 8 SCC J-1

OFFENCES RELATING TO WOMEN AND CHILDREN[†]

by

P. Sathasivam, Former Chief Justice, Supreme Court of India

Hon'ble Mr Justice M.Y. Eqbal, Chief Justice of Madras High Court, Justice P.K. Balasubramanyan, Judge (Retired), Supreme Court of India, Justice Ibrahim Kalifullah, and other Hon'ble Judges of the Madras High Court, District Judges of the State, Registrar General and other officers of the High Court, Madras, first I convey my sincere thanks to the Hon'ble Chief Justice and Justice Ibrahim Kalifullah who is heading this Judicial Academy for giving me an opportunity to interact with the Higher Judicial Officers of the State. It is correctly named as Refresher Course. Let us refresh our memories on various subjects. The topic allotted for discussion to me is "Offences relating to Women and Children". Before taking up this topic, since I have been given enough time, I want to clarify the statement made by Hon'ble Chief Justice about the pendency of cases in this State.

First, I convey one information i.e. compared with other High Courts, the Madras High Court is the best in disposal of cases. I request you to go through the official bulletin of the Supreme Court, Court News which we publish once in three months. This is the official newsletter from the Supreme Court, which I think our High Court library is getting and I request the Hon'ble Chief Justice to circulate the same to all the Hon'ble Judges. We publish all relevant information about the present position of the Supreme Court — sanctioned and working strength of all the High Courts. If we see those details therein the Madras High Court is better than other States. Though the Hon'ble Chief Justice mentioned that 11 lakh cases are pending, if we analyse those details it shows that only few districts have more pendency. For example, I come from Erode District. The western part of Tamil Nadu is well developed. If you see the pendency in these areas, the criminal pendency is less because people are fully educated and are employed in industries and they are getting decent incomes. Since the Chief Justice has introduced several important schemes in this State, by his efforts, I hope even this pendency will come down. The Chief Justice has pointed out the pendency of 1 lakh 30 thousand motor accident cases and he has also mentioned some districts where more cases are pending. As a person hailing from this State, I know where the National Highways go through, those districts, for example Cuddalore, Tindivanam, Tiruppur, Coimbatore, more vehicles are passing through these areas, more accidents taking place. In accident cases, important issues have been settled by either the Madras High Court or the Supreme Court. You can apply the formula and arrive at a fair compensation. Another thing, we need not bother about the pendency because among other States, Tamil Nadu is the pioneer in implementing/conducting Lok Adalats. I visited several High Courts in my three years of experience in the Supreme Court. I had an opportunity to attend several High Courts. Motor accident cases are more suitable for considering before the Lok Adalats.

When I was a Judge of this Court, I was in charge of Coimbatore District and I arranged several Lok Adalats. One day, when I visited Coimbatore, all the Judicial Officers of Coimbatore were present. I requested the District Judge, one month in



advance, to arrange meeting of all the higher officials of the insurance companies, banks and the government officials. Before initiating, deliberation, I spent half an hour with those officers. Initially, I explained the legal aspect in respect of insurance cases. What is the law? What are all the judgments of the High Court and the Supreme Court? Then I persuaded them by saying that, if you agree to our suggestion, lakhs of rupees would be saved by way of interest, or if the matter is ultimately heard and decided by the Court, you may have to pay more, even crores. To save money and time, please accept whatever the outcome of the Lok Adalats. So almost all of them have agreed. In this way, on that day several cases relating to motor accident, industrial disputes and recovery of loan were settled through Lok Adalat.

One more aspect I want to inform the District Judges present here. This relates to Section 138 of the Negotiable Instruments Act. Everywhere thousands of cases are pending. Whether it is Madras or Tirupur or Madurai or elsewhere. This is a very big problem for courts. It is an all India problem too. In fact the Central Law Minister has announced creation of separate courts for these cases. I request the District Judges present here, that when you convene a meeting of your officers working under you at the district level, kindly convey the importance of this subject. Here also, the Supreme Court has recently interpreted Section 138. Several reported decisions are available as to how the matters have to be dealt with. Very recently, I had an opportunity to decide along with the then Chief Justice of India the implication of Section 147 — compounding. In this Act all the provisions are compoundable. So the Judicial Officers handling these offences have to utilise and I used to convey this message to the members of the Bar and litigants to avail. Though Section 147 enables the parties to compound, there is no guideline. For example, after fighting the case for 3 years or 5 years from the Magistrate Court up to the Supreme Court, in the Supreme Court there is a rule. In the Supreme Court procedure rules, in all convicted matters if any person wants to challenge it in the Supreme Court if you want to settle, you have to pay more by way of compensation to the complainant. We have held that if the party settles immediately after the receipt of summons at the first stage, he can do it. He need not pay any additional amount. If it is after contest, he has to pay the cheque amount, cost plus another 10% of the cheque amount. It is the discretion of the Court, either the Court can direct this amount to be paid to the opposite party or to the Legal Services Authority. If the matter is compounded at the stage of the High Court, the parties have to pay more. Ultimately, if the party wants to settle only at the Supreme Court, he has to pay in addition to the cheque amount. In view of the same, it is desirable to settle at the earliest stage. We need not worry about more pendency. There are ways to solve this problem.

Then, coming on to today's deliberations "offences relating to women and children". First I have to highlight the offences relating to women. Even in this, I want to show the constitutional provisions, how our women are protected, how our Constitution-makers have taken note of the grievances of the women, and the march of law, how the Supreme Court handled those cases and then the provisions in the Penal Code, the Domestic Violence Act, then finally, I want to highlight adoption, property rights of the women, female infanticide and surrogacy, etc. Thereafter, I will take the topic relating to children.

Status of women



In India, women constitute nearly fifty per cent of the population. About 48.60% of the rural population is that of women and they are the vital labour force of the country. However, they remain amongst the most oppressed ones and are often denied the basic human rights.

Pre-Independence

According to studies, women enjoyed equal status and rights during the early Vedic period. However, later (approximately 500 BC), the status of women began to decline with the Smritis and with the Islamic invasion and later Christianity curtailing women's freedom and rights. By and large, the women in India faced confinement and restrictions. The practice of child marriage is believed to have started from around the sixth century. Women played an important role in India's independence struggle.

Constitution of India

The Constitution of India guarantees to all Indian women equality (Article 14), no discrimination by the State [Article 15(1)], equality of opportunity (Article 16) and equal pay for equal work [Article 39(d)]. In addition, it allows special provisions to be made by the State in favour of women and children [Article 15 (3)], renounces practices derogatory to the dignity of women [Article 51-A(e)], and also allows for provisions to be made by the State for securing just and humane conditions of work and for maternity relief (Article 42).

Reservation of 50% of the posts in favour of female candidates is not arbitrary. Reservation of certain posts exclusively for women is valid under Article 15(3). Clause (3) of Article 15 which permits, special provisions for women and children has been widely resorted to and the courts have upheld the validity of special measures in legislation or executive orders favouring women. In particular, provisions in the criminal law in favour of women or in the procedural law discriminating in favour of women have been upheld. Similarly, provisions providing for reservation of seats for women in local bodies, Panchayats or in educational institutions are valid. Article 39 of the Constitution mandates certain principles of policy to be followed by the State. The State shall, in particular, direct its policy towards securing that the citizens, men and women equally have the right of adequate means of livelihood, equal pay for equal work for both men and women.

Part III of the Constitution, consisting of, Articles 12 to 35 relating to Fundamental Rights, is considered as the heart of the Constitution.

Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws within the territory of India. Though Article 14 permits reasonable classification, yet classification based on sex is not permissible¹.

In *Air India v. Nergesh Meerza*², the Supreme Court, while dealing with fixation of different ages of retirement for male and female employees and preventing female employees from having children, expressed the view that the retirement of air hostesses in the event of marriage taking place within four years of service does not suffer from any irregularity or arbitrariness but retirement of air hostesses on first pregnancy is unconstitutional. It was considered that such a provision was callous, cruel and an insult to Indian womanhood.



Payment of equal pay for equal work has also been justified under Article 14. Unequal pay for materially equal work cannot be justified on the basis of an artificial classification between the two kinds of work and employment³.

Article 15 widens the scope of Article 14. Article 15(1) prohibits the State from discriminating on the grounds of religion, race, caste, sex, place of birth or any of them. The Supreme Court has held that a law which deprived a female proprietress to hold and enjoy her property on the ground of her sex was violative of Article 15⁴.

In *Yusuf Abdul Aziz v. State of Bombay*⁵ the validity of Section 497 IPC (adultery) was challenged under Articles 14 and 15(1) of the Constitution. Section 497 IPC only punishes a man for adultery and exempts the women from punishment though she may be equally guilty as an abettor and this section was held by the Supreme Court to be valid since the classification was not based on the ground of sex alone, thus relying on the mandate of Article 15(3). Even Section 354 IPC (assault or criminal force to woman with intent to outrage her modesty) is not invalid because it protects the modesty only of women and Section 125 is valid although it obliges the husband to maintain his wife but not vice versa. Similarly, Section 14 of the Hindu Succession Act, 1956 converting the women's limited ownership of property into full ownership has been found in pursuance of Article 15(3)⁶.

It is noteworthy to mention *Associate Banks Officers' Assn. v. SBI*⁷ wherein the Apex Court held that women workers are in no way inferior to their male counterparts and hence there should be no discrimination on the ground of sex against women. In *Air India Cabin Crew Assn. v. Yeshaswinee Merchant*⁸ the Supreme Court has held that the twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour.

Article 19(1)(g) of the Constitution guarantees that all citizens have a right to practise any profession or to carry on any occupation or trade or business. Sexual harassment in exercise of this right at the workplace amounts to its violation. In *Delhi Domestic Working Women's Forum v. Union of India*⁹, relating to rape and violence on working women, the Supreme Court called for protection to the victims and provision of appropriate legal representation and assistance to the complainants of sexual assault cases at the police station and in courts. To realise the concept of gender equality, the Supreme Court has laid down exhaustive guidelines in *Vishaka v. State of Rajasthan*¹⁰ to prevent sexual harassment of working women at their workplace. The Supreme Court held that it is the duty of the employer or other responsible person to prevent sexual harassment of working women and to ensure that there is no hostile environment towards women at their working place. These guidelines were framed to protect the rights of working women to work with dignity under Articles 14, 19 and 21 of the Constitution. The Supreme Court had also observed, "[e]ach incident of sexual harassment of woman at workplace results in violation of the fundamental rights of 'Gender Equality' and the 'Right to Life and Liberty'."¹¹

Article 21 contains provisions for protection of life and personal liberty of persons. In *State of Maharashtra v. Madhukar Narayan Mardikar*¹² the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy. This article has also been invoked for the upliftment of and dignified life for the prostitutes. The right to life enshrined in Article 21 of the Constitution also includes the right to live with human dignity and rape violates this right of women¹³.



Article 23(1) of the Constitution of India prohibits traffic in human beings and beggars and other similar forms of forced labour. To curb the deep-rooted social evil of prostitution and to give effect to this article, Parliament has passed the Immoral Traffic (Prevention) Act, 1956. This Act protects the individuals, both men and women, not only against the acts of the State but also against the acts of private individuals and imposes a positive obligation on the State to take all measures to abolish these evil practices.

Another evil practice of the Devdasi system, in which women are dedicated as Devdasi to the deities and temples, was abolished by the State of Andhra Pradesh by enacting the Devdasis (Prohibition of Dedication) Act, 1988. The Supreme Court has also held that traffic in human beings includes Devdasis and speedy and effective legal action should be taken against brothel keepers¹⁴.

Similarly, evil practices are prevalent in India such as selling the female infant and girls to foreigners under the guise of inter-country adoption and marriages.

The directive principles of State policy are fundamental in the governance of the country. These directive principles are ideals which are based on the concept of “welfare State” and they fix certain goals; social and economic; for immediate attainment by the Union and State Governments while formulating a policy or enacting a law. According to Article 39(a), the State shall direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood¹⁵. The Supreme Court has held that under Article 39(d), the State shall direct its policy towards securing equal pay for equal work for both men and women¹⁶. This article draws its support from Articles 14 and 16 and its main objective is the building of a welfare society and an equalitarian social order in the Indian Union. To give effect to this article, Parliament has enacted the Equal Remuneration Act, 1976 which provides for payment of equal remuneration to men and women workers and prevents discrimination on the ground of sex. Further Article 39(e) is aimed at protecting the health and strength of workers both men and women.

A very important and useful provision of women’s welfare and well-being is incorporated under Article 42 of the Constitution. It imposes an obligation upon the State to make provisions for securing just and humane conditions of work and for maternity relief. Some of the legislations which promoted the objectives of this article are the Workmen’s Compensation Act, 1923, the Employees’ State Insurance Act, 1948, the Minimum Wages Act, 1948, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965, and the like. In *Dattatraya Moreshwar Pangarkar v. State of Bombay*¹⁷ the Supreme Court held that legal provisions to give special maternity relief to women workers under Article 42 of the Constitution do not infringe Article 15(1). In *MCD v. Female Workers (Muster Roll)*¹⁸ the Supreme Court held that the benefits under the Maternity Benefit Act, 1961 extend to employees of the Municipal Corporation who are casual workers or workers employed on daily-wage basis. This applies to the claim of nonregularised female workers for maternity relief.

Article 44 provides that:

44. *Uniform civil code for the citizens.*—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. Placing reliance on Article 44 by the Supreme Court in upholding the right of maintenance of a Muslim



divorcee under Section 125 of the Criminal Procedure Code has resulted in a separate law of maintenance for Muslim female divorcee.¹⁹

Article 51-A under Part IV-A of the Constitution of India lays down certain fundamental duties upon every citizen of India, which were added by the Fortysecond Amendment of the Constitution in 1976. The latter part of clause (e) of Article 51-A, which related to women, gives a mandate and imposes a duty on Indian citizens, “to renounce practices derogatory to the dignity of women”. The duties under Article 51-A are obligatory on citizens, but it should be invoked by the courts while deciding cases and also should be observed by the State while making statutes and executing laws.

The Protection of Women from Domestic Violence Act, 2005 (PWDVA)

Prior to the passing of PWDVA in 2005 and its enforcement in October 2006, women could only seek criminal sanctions for domestic violence under Section 498-A of the Penal Code or Section 304-B, or face the social stigma of getting a divorce. These two pieces of legislation could be used only in very limited circumstances: 498-A only punishes husbands or relatives of husbands for acts of harassment or violence that would likely to drive a woman to commit suicide or cause grave danger to her life, limb or health; 304-B may only be used to punish violence against a woman when the cause of her death can be shown to be related to dowry demands.

Recognising these significant gaps in the law excluding numerous women victims, the National Commission for Women approached the Lawyers Collective in 1993 to draft legislation to close these loopholes. After years of work and with the combined efforts of the Lawyers Collective, other women’s rights groups, and input from government officials, PWDVA was born. Its remedies consist of ex parte, interim and permanent orders including protection orders, residence orders, monetary relief and custody orders.

Section 2 of the Act provides protection against any act/conduct/omission/commission that harms or injures or has the potential to harm or injure, and it will be considered as “domestic violence”. Under this, the law considers physical, sexual, emotional, verbal, psychological and economic abuse or threats of the same. Even a single act of commission or omission may constitute domestic violence. Now, women do not have to suffer a prolonged period of abuse before taking recourse to the law. This legislation has widened the scope of domestic violence and now it can be broadly related to human rights.

Very recently, on 4-11-2010 the Government approved the introduction of the Protection of Women against Sexual Harassment at Workplace Bill, 2010, which aimed at providing protection to women against sexual harassment at the workplace. The Bill provides protection not only to women who are employed but also to any woman who enters the workplace as a client, customer, apprentice, and daily wage worker or in ad hoc capacity. Students, research scholars in colleges/university and patients in hospitals have also been covered under it. Further, the Bill seeks to cover workplaces in the unorganised sectors. It allows women to complain of harassment ranging from physical contact, demand or requests for sexual favours, sexually coloured remarks or showing pornography.

The Bill also has a penalty provision for employers who do not comply. It is sad that even today the number of dowry deaths in India are very high. Due to the non-



fulfillment of demands of dowry, many women die at the hands of their in-laws in both rural and urban India.

Indian Penal Code

Section 304-B was introduced in the Penal Code in order to strictly deal with and punish the offence of dowry death. It was a new offence created with effect from 19-11-1986 by insertion of the provision in the Penal Code providing for a more stringent offence, than provided by Section 498-A of the same Act, which deals with punishment for cruelty by husband and his relatives.

If the two conditions as mentioned in the section exist, it would constitute a “dowry death”, and the husband and/or his relatives shall be deemed to have caused her death. For the purposes of this sub-section, dowry shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. The definition of “dowry” includes any property or valuable security given or agreed to be given either directly or indirectly:

- By one party to a marriage to the other party to the marriage; or
- By the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person at or before or any time after the marriage in connection with the marriage of the said parties.

Section 304-B also provides that whoever commits a dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

According to Section 8-A of the Dowry Prohibition Act, which came into force for taking or abetting any dowry, the burden to explain is placed on such person against whom the allegation of committing the offence is made. Similarly, under the Explanation to Section 113-B of the Evidence Act, there is a presumption that a death caused within seven years of marriage is a dowry death.

The demand for dowry is itself punishable if the other ingredients of Section 304-B are established. In *Pawan Kumar v. State of Haryana*²⁰ the periphery of the word “dowry” was considered. The earlier meaning confining and limiting dowry to the time at or before the marriage got extended and enlarged even after the marriage and that there be no need to show any agreement for the payment of such dowry to make it a punishable offence. The Court also held that the facts proved cruelty in connection with dowry demand.

In *Kunhiabdulla v. State of Kerala*²¹ the Supreme Court recognised that the menace of dowry cuts across caste, religion and geographical location.

Chapter XX-A of the Penal Code, 1860, refers to “cruelty by husband or relatives of husband” and includes Section 498-A. Section 498-A states, that whoever being the husband or relative of the husband of woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and also be liable to fine. The section was enacted to combat the menace of dowry deaths. It was introduced in the Code by the Criminal Law (Second Amendment) Act, 1983 (46 of 1983). By the same Act Section 113-A has been added to the Evidence Act to raise presumption regarding abetment of suicide by a married woman. The main objective



of Section 498-A IPC is to protect a woman who is being harassed by her husband or relatives of husband.

The object for which Section 498-A IPC was introduced is amply reflected in the Statement of Objects and Reasons while enacting Criminal Law (Second Amendment) Act 46 of 1983. As clearly stated therein the increase in number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961. In some of the cases, cruelty of the husband and his relatives which culminate in suicide or murder of the helpless woman concerned, which constitute only a small fraction involving such cruelty. Therefore, it was proposed to amend IPC, the Code of Criminal Procedure, 1973 (CrPC) and the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also with cases of cruelty to married women by the husband, inlaws and relatives. The avowed object is to combat the menace of dowry death and cruelty.

It was held by the Supreme Court in *Kaliyaperumal v. State of T.N.*²² that cruelty is a common essential in offences under both Sections 304-B and 498-A IPC. The two sections are not mutually inclusive but both are distinct offences and persons acquitted under Section 304-B for the offence of dowry death can be convicted for an offence under Section 498-A IPC. The meaning of “cruelty” is given in the Explanation to Section 498-A. Section 304-B does not contain its meaning but the meaning of “cruelty” or “harassment” as given in Section 498-A applies in Section 304-B as well. Under Section 498-A IPC cruelty by itself amounts to an offence whereas under Section 304-B the offence is of dowry death and the death must have occurred during the course of seven years of marriage. But no such period is mentioned in Section 498-A.

The presumption of cruelty within the meaning of Section 113-A, Evidence Act, 1872 also arose making the husband guilty of abetment of suicide within the meaning of Section 306 where the husband had illicit relationship with another woman and used to beat his wife making it a persistent cruelty within the meaning of Explanation (a) of Section 498-A.

Section 375 of the Penal Code defines “rape”, which means an unlawful intercourse done by a man with a woman without her valid consent. In certain cases, when consent is taken by fraudulent means or by misrepresentation, the act is still quite rightly taken as rape. The consent of a woman of unsound mind and of a girl below 16 are not taken to be lawful consent because it is presumed that these women are not in a position to truly understand the nature and gravity of sexual intercourse.

The Supreme Court does vividly acknowledge the plight of many Indian women by stating that they often live their lives “at the mercy” of their employers and the police and are therefore especially susceptible to violence and intimidation by men. Many of the rape cases that have been handled as PIL cases are of an extreme nature, and have led the Supreme Court to indicate broad parameters in assisting the survivors of rape.

Property right

Prior to enactment of the Hindu Succession Act, 1956, Hindus in India were governed by Shastric and customary laws which varied from region to region and sometimes it varied on caste basis. A Hindu wife was not capable of holding any property separate from her husband. Of the two types of property women were to hold



— Streedhan and women's estate, the holder of the latter enjoyed the right during her lifetime and she could not alienate the same. To secure equality of status to improve Hindu women's right to property, the Hindu Succession Act, 1956 came into force. This Act, under Sections 14(1) and 14(2) gives women absolute right of ownership over property and also the right to alienate it.

At the time of enactment of this Act, daughters could not become members of the coparcenary and the Act did not afford the right of natural inheritance to daughter because of the very concept of right by birth and by reason of sex as only males can be coparceners. This Act was then amended in the year 2005 and Parliament passed the Hindu Succession (Amendment) Act, 2005. By amending Sections 6 and 23 of the amended Act, daughters were given equal status to that of sons. It now provides that the daughter shall have a right to claim partition in the joint family properties as well as the right to claim right of partition in the dwelling house of the joint family and she shall also have a right to claim partition during the lifetime of her father. This privilege is only given to Hindu women. The laws applicable to Muslims and Christians do not give equal status to women.

Female infanticide

It is unfortunate that for one reason or the other the practice of female infanticide still prevails. One of the reasons may be the problem faced by the parents during marriage coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in society. The traditional system of female infanticide whereby female child was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advanced medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing fully well that it is immoral and unethical as well as it may amount to an offence; foetus of a girl child is aborted²³.

Further in *Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India*²⁴ the Supreme Court has admitted that:

1. ... in the Indian society, discrimination against the girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mindset or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that a number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of eliminating discrimination against women, still however, we are not in a position to change the mental set-up which favours a male child against a female. Advanced technology is increasingly used for removal of foetus (may or may not be seen as commission of murder but it certainly affects the sex ratio). The misuse of modern science and technology by preventing the birth of a girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off.

Surrogacy

A standard surrogacy arrangement involves a contract for the surrogate to be artificially inseminated, carry a foetus to term, and relinquish her parental rights



over the child once born. In some countries around the world²⁵, surrogacy is legally recognised only if it is non-commercial.

India's first gestational surrogacy took place in 1994 in Chennai²⁶. In 1997, a woman from Chandigarh agreed to carry a child for Rs. 50,000 in order to obtain medical treatment for her paralysed husband²⁷. In 1999, a villager in Gujarat served as a surrogate for a German couple²⁸. In 2001, almost 600 children in the United States were born through surrogacy arrangements. In comparison, in India, it is estimated that the number of births through surrogacy doubled between 2003-2006²⁹, and estimates range from 100-290 each year³⁰ to as many as 3000 in the last decade. A major case involving the issue of surrogacy before the Supreme Court was *Baby Manji Yamada v. Union of India*³¹.

Conclusion

The Government of India declared 2001 as the Year of Women's Empowerment (Swashakti). The National Policy for the Empowerment of Women was framed in 2001. On 9-3-2010 one day after International Women's Day, Rajya Sabha passed Women's Reservation Bill, ensuring 33% reservation to women in Parliament and State legislative bodies.

In India, the judiciary is the ultimate guarantor of fundamental rights and is the guardian of the Constitution. Naturally, the judges have a special role and responsibility in correcting the distortions in law enforcement and upholding the rights of women who approach the courts. Women generally approach the courts seeking reliefs in matrimonial disputes, in matters of maintenance and custody of children, domestic violence and dowry harassment cases, rape and sexual harassment as well as in discrimination in respect of employment. Parliament has enacted laws giving preferential rights to women in many of these situations. However, the enforcement of these laws depend first on the government departments entrusted with the task and when they fail to do so, with courts of law. There is enough evidence to suggest that there are many barriers in accessing justice. The Family Courts Act, 1984 is the legislative response to some of these barriers. The judiciary should also consciously recruit more and more women judges to have gender balance among judges as well. Gender justice training should extend to the ministerial staff of courts and advocates also.

Children

Children who form 42% of India's population are at risk on the streets, at their workplace, in schools and even inside their own homes. Every year thousands of children become victims of crime — whether it is kidnappings, violent attacks or sexual abuse.

According to National Crime Records Bureau and NJRC, crime against children increased by 3.8% nationally (14,975 cases in 2005 from 14,423 in 2004); Child rape increased by 13.7% (4026 cases from 3542 in 2004); Madhya Pradesh reported the highest number (870) followed by Maharashtra (634). Together they accounted for 37.3% of rape cases. Delhi tops the list of 35 Indian cities on crime against children (852 cases of violence against children in 2005, 27% of all cases) followed by Indore (448), Pune (314) and Mumbai (303). 1327 children were reported murdered in 2005 up from 1304 in 2004 (an increase of 1.8%), Uttar Pradesh reported the highest number



(390) accounting for 29.4% of cases. Nearly 45,000 children go missing every year; more than 11,000 are never traced³².

Offences against children need a humanitarian legislative approach. As was opined by the Supreme Court in *Bandhua Mukti Morcha v. Union of India*³³:

4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood—socially, economically, physically and mentally—the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development. Dr. Bhimrao Ambedkar, who was far ahead of his time in his wisdom projected these rights in the directive principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law.

Constitutional provisions

There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation.

These provisions have been inserted into the Constitution to ensure the welfare and well being of children in the country without which it would not be possible for the nations to progress as a whole. The Constitution of India provides a comprehensive understanding of child rights. A fairly comprehensive legal regime exists for their implementation. India is also a signatory to several international legal instruments including the Convention on the Rights of the Child (CRC).

Article 15(3)³⁴ of the Constitution has provided the State with the power to make “special provisions” for women and children.

Article 21-A of the Constitution mandates that every child in India shall be entitled to free and compulsory education up to the age of 14 years³⁵. The word “life” in the context of Article 21 of the Constitution has been found to include “Education” and accordingly the Supreme Court has implied that “Right to Education” is in fact a fundamental right.

Article 23 of the Constitution prohibits traffic in human beings, begar and other similar forms of forced labour and exploitation. Although this article does not specifically speak of children, yet it is applied to them and is more relevant in their context because children are the most valuable section of the society. It is a known



fact that many children are exploited even by the parents who allow their exploitation because of their poverty. They are deprived of education, made to do all sorts of work injurious to their health and personality.

The word “begar” has been explained by the Supreme Court in *People’s Union for Democratic Rights v. Union of India*³⁶ and held that labour or service for remuneration which is less than minimum wage, amounts to violation of Article 23. This includes inadequate payment for the work rendered by the child which may amount to begging or forced labour. Sometimes, the children of tender age are enticed to the flesh trade, thus all in violation of Article 23. In this case, which is otherwise referred to as *Asiad Workers case*³⁷, the Supreme Court said, We are, therefore, of the view that when a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words “forced labour” under Article 23 of the Constitution of India.

Article 24 expressly provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any hazardous employment³⁸. The Supreme Court has issued elaborate guidelines to child labour. Child labour shall not be engaged in hazardous employment. There shall be set up a Child Labour Rehabilitation Welfare Fund in which offending employers should deposit Rs. 20,000. It must be noted that this article does not absolutely bar the employment of children below the age of 14 years. The employment is prohibited only in factories or mines or in any other hazardous occupation. This provision raises a question as to what are the “hazardous” employment. While interpreting the nature and extent of hazardous employment the Supreme Court in *Labourers, Salal Hydro Project v. State of J&K*³⁹ has held that child below the age of 14 years cannot be employed and allowed to work in onstruction process. The Supreme Court has issued various directions as to education, health, nutrition and child labour.

In *M.C. Mehta v. State of T.N.*⁴⁰ it was held that in view of Article 39 the employment of children within the match factories directly connected with the manufacturing process of matches and fireworks cannot be allowed as it is hazardous. Children can, however be employed in the process of packing but it should be done in an area away from the place of manufacturing to avoid exposure to accidents. In addition to regulating the phases of production that could involve child labour, the Court ordered that:

- Children involved in certain positions must be paid at least 60% of the minimum wage of their adult counterparts.
- Education, recreation, and socialisation facilities must be provided; and
- The State Government must ensure that factories meet their responsibilities to provide recreation, medical care and compulsory insurance, and must pay attention to the basic diet of children.

The Apex Court in *M.C. Mehta*⁴¹ was of the opinion that children below the age of 14 years cannot be employed in any hazardous industry, mines, or other works and has laid down exhaustive guidelines how the State authorities should protect economic, social and humanitarian rights of millions of children, working illegally in public and private sectors. Subsequently, wide-ranging directions were issued by the Court with regard to the employment and exploitation of children wherein it was specifically prohibited to employ children below the age of 14 years. The Court went on to instruct



the Government on the importance of a child's health, nutrition, and education, and affirmed a child's constitutional right to education.

These guidelines and directions were also reiterated in *Bandhua Mukti Morcha v. Union of India*⁴². Here, the Supreme Court held,

[w]hensoever it is shown that a labourer is made to provide forced labour, the court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is therefore a bonded labour.

There are certain other provisions contained in Part IV, dealing with the directive principles of State policy, which although do not lay emphasis on the child welfare directly, yet the children are bound to be the beneficiaries if these provisions are implemented. The directive principles of State policy embodied in the Constitution of India provide policy of protection of children with a selfimposing direction towards securing the health and strength of workers, particularly to see that the same in the children of tender age is not abused, nor are they forced by economic necessity to enter into avocations unsuited to their strength.

Article 39 provides for certain principles to be followed by the State. These principles of policy are to be followed by the State to ensure public welfare.

Articles 39(e)⁴³ and 39(f)⁴⁴ specifically include children within the ambit of workmen who should not face abuse and that children should be provided with equal opportunities and facilities for their growth and development.

Clause (f) was modified by the Constitution (Forty-second Amendment) Act, 1976 with a view to emphasise the constructive role of the State with regard to children.

Reading Articles 39(e) and (f), the Constitution also incorporates a few more provisions to promote the welfare of the children. The Supreme Court has through a plethora of cases shown its concern towards the welfare of children.

This was particularly highlighted in *Lakshmi Kant Pandey v. Union of India*⁴⁵ wherein the Supreme Court emphasised upon the need of child welfare in the country. In this case, the Court issued guidelines with regard to adoption of Indian children by foreign parents. The Court further emphasised that the primary purpose of giving the child for adoption is to provide a better future to the child and hence great care must be taken in permitting foreigners to adopt Indian children.

Article 45 has provided that the State shall endeavour to provide early childhood care and education for all the children until they complete the age of fourteen years. The directive signifies that it is not only confined to primary education, but extends to free education whatever it may be up to the age of 14 years. Article 45 is supplementary to Article 24 on the ground that when the child is not to be employed before the age of 14 years, he is to be kept occupied in some educational institutions. It is suggested that Article 24 in turn supplements clauses (e) and (f) of Article 39, thus ensuring distributive justice to children in the matter of education.

Virtually Article 45 recognises the importance of dignity and personality of the child and directs the State to provide free and compulsory education for the children up to the age of 14 years.



As per IPC, particularly, Section 82 which says that nothing is an offence which is done by a child under seven years of age. Section 83 says that nothing is an offence which is done by a child above seven years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct.

Sexual abuse of children

The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. A 2007 study by the Ministry of Women and Child Development (MWCD) found that 53.22% of India's children have experienced some form of sexual abuse. Against this background, the lack of specific provisions for child sexual abuse in our criminal law is a serious lacuna.

Sexual abuse of children can occur in a number of different settings. Children can be sexually abused by family members (intrafamilial) or by strangers (extrafamilial). A more precise categorisation of the term for Indian context is made under the Prevention of Offences against the Child Bill, 2009 wherein sexual abuse of children has been classified under various heads, but the Bill is yet to be passed.

The Penal Code defines the child as being 12 years of age. Section 376 IPC, which punishes the perpetrators of the crime of rape, defines the age of consent to be below 16 years of age.

Although Section 377, dealing with unnatural offences, prescribes seven to ten years of imprisonment, such cases can be tried in a Magistrate's Court, which can impose maximum punishment of three years. If the abuse is repeated several times it affects children more severely, however as yet there is no law for repeated offences against one child. Section 509, dealing with word, gesture or act intended to insult the modesty of a woman, extends to minor girls also. The gravity of the offence under Section 509, dealing with obscene gestures, is less. Yet even in such cases, the child's psyche may be affected as severely as in a rape.

The matter had come to the Supreme Court in *Sakshi v. Union of India*⁴⁶, where a PIL was filed with growing concern, the dramatic increase of violence, in particular, sexual violence against women and children as well as the implementation of the provisions of the Penal Code, namely, Sections 377, 375/376 and 354. The Supreme Court gave the following directions;

34. (2) In holding trial of child sex abuse or rape: (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.



Child trafficking

Child trafficking, traditionally associated with only trafficking for commercial sex, is growing fast in India. There are no laws that specifically target child trafficking. Commercial sex-trafficking offences are handled under the Immoral Traffic (Prevention) Act. Labour-trafficking offences are handled under the Child Labour Act for those hazardous industries in which child labour is considered an offence. There is no law prohibiting employment of children in work outside the definition of “hazardous”.

“Child trafficking” can be defined as:

“Sale and purchase of children for gain, within the country (intra-country) and across borders (inter-country), by deceit, fraud or force, resulting in exploitation of the person trafficked.”

Trafficking of children is done for various reasons like sexual exploitation (forced prostitution, socially and religiously sanctified forms of prostitution, sex tourism, pornography), illegal activities (begging, organ trade, drug peddling and smuggling), labour (bonded labour, domestic work, agricultural labour, construction work, carpet industry, garment industry, fish/shrimp export as well as other sites of work in the formal and informal economy), entertainment and sports, adoption, marriage.

From the legal point of view India has been a front-runner in the battle against human trafficking. The criminalisation of trafficking flows from Article 23(1) of the Constitution.

To tackle human trafficking, we have had the necessary legislation in place, principally the Immoral Traffic (Prevention) Act, 1956, in addition to several provisions in labour laws and the Penal Code. These form a composite legal code for the prosecution and punishment of traffickers. In addition to these legislative measures, the Supreme Court of India has touched on this issue in two prominent judgments i.e. *Vishal Jeet v. Union of India*⁴⁷ and in *Gaurav Jain v. Union of India*⁴⁸. These judgments directed the Government of India, among other things, to prepare a “National Plan to Combat Trafficking and Commercial Sexual Exploitation of Women and Children”. As a result of this, a National Plan was drafted in 1998 which lays down suggested measures for prevention, rescue, rehabilitation and reintegration.

In *Vishal Jeet v. Union of India*⁴⁹ the Supreme Court gave the following directions:

- (1) All the State Governments and the Governments of Union Territories should direct their law enforcing authorities concerned to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.
- (2) The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the Secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women’s organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations and associations, etc. the main objects of the Advisory Committee being to make suggestions of:
 - (a) the measures to be taken in eradicating the child prostitution, and



- (b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims, namely, the children and girls rescued either from the brothel houses or from the vices of prostitution.
- (3) All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.
- (4) The Union Government should set up a committee of its own in the line, we have suggested under Direction (2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation, etc. etc. of the young fallen victims, namely, the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.
- (5) The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.
- (6) The Advisory Committee can also go deep into Devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard. (emphasis supplied)

In *Gaurav Jain v. Union of India*⁵⁰ the Supreme Court held that juvenile homes should be used for rehabilitating child prostitutes and neglected children.

Rape of a minor

In *Dhananjoy Chatterjee v. State of W.B.*⁵¹ which involved rape-cum-murder, the trial court, the High Court and the Supreme Court agreed it to be a fit case for imposition of death penalty. The Court pointed out that in recent years, rising crime rate, particularly against women had made judicial sentencing a subject of concern. The object of sentencing should be to see that the criminal does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done.

The sentence of death appears more appropriate where rape and murder is committed by an accused having criminal record.

The emerging inference is that if a girl child is raped and murdered, the probability of death sentence is highest.

Child delinquency and neglected children or juvenile

The Juvenile Justice Act, 1986 (for short “the JJ Act”) was enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of such matter relating to disposition of delinquent juveniles. The Act sought to achieve a uniform legal framework for juvenile justice in the country as a whole so as to ensure that no child, in any circumstance, is lodged in jail and police lock-up. This is being ensured by establishing Juvenile Welfare Boards and Juvenile Courts to deal adequately with the subject.

The object of the Act, therefore, is to provide specialist approach towards the delinquent or neglected juveniles to prevent recurrence of juvenile delinquency in its full range keeping in view the developmental needs of the child found in the situation of



social maladjustment. That aim is secured by establishing observation homes, juvenile houses, juvenile homes or neglected juvenile and special homes for delinquent or neglected juveniles.

As per Indian law, the Juvenile Justice (Care and Protection of Children) Act, 2000 defines a “juvenile” as a person below the age of 18 years. The Act intends to provide care and protection to juveniles, who violate laws in India. The Act intends to settle the issues in the best interest of children and not with an intention to punish them under criminal law. This Act is a comprehensive legislation that provides for proper care, protection and treatment of children in conflict with law and children in need of care and protection by catering to their development needs, and by adopting a child-friendly approach. It conforms to UNCRC and other relevant national and international instruments.

A clear distinction has been made in this Act between the juvenile offender and the neglected child. It also aims to offer a child increased access to justice by establishing Juvenile Justice Boards and Child Welfare Committees. The Act has laid special emphasis on rehabilitation and social integration of the children and has provided for institutional and non-institutional measures for care and protection of children. The non-institutional alternatives include adoption, foster care, sponsorship, and aftercare.

“Neglected juvenile” which is more relevant for the purpose of this case, has been defined in Section 2(1) to mean a juvenile who:

2. (1) (i) is found begging; or
- (ii) is found without having any home or settled place of abode and without any ostensible means of subsistence and is destitute;
- (iii) has a parent or guardian who is unfit or incapacitated to exercise control over the juvenile; or
- (iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life;
- (v) who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain;

In order to understand the JJ Act and how juveniles have to be safeguarded, I request all of you to go through the recent decision of the Supreme Court in *Hari Ram v. State of Rajasthan*⁵².

One of the landmark judgments in the sphere of child and minor welfare is *Sheela Barse v. Union of India*⁵³. In the case, the Supreme Court made an order issuing various directions in regard to physically and mentally retarded children as also abandoned or destitute children who are lodged in various jails in the country for “safe custody”. The Court directed the Director General of Doordarshan as also the Director General of All India Radio to give publicity seeking cooperation of non-governmental social service organisations in the task of rehabilitation of these children. The Court declared that it was, “[e]xtremely pained and anguished that these children should be kept in jail



instead of being properly looked after, given adequate medical treatment and imparted training in various skills which would make them independent and self-reliant”.⁵⁴

Child labour

In India, the Child Labour (Prohibition and Regulation) Act, 1986 does not define the term “child labour”. It defines “child” as a person who has not completed his fourteenth year of age.⁵⁵ Further it prohibits child labour in hazardous occupations and processes as listed in the Schedule of the Act.

Poverty remains the root cause of child labour. All the other causes, though differentiated and made specific, in some way or the other emanates from poverty. People living below poverty line do not get sufficient to sustain themselves. In such situations, it becomes imperative for them to send their children to work. Child labour in turn hampers physical and mental growth of children and deprives them of education. Going to school, instead of betterment, is perceived to be waste of hard earned resources of the family and so parents are unwilling to send their children for education. This hampers their upward social movement and restricts them to the unorganised sector. This keeps them in poverty and they are unable to better their situation and thus the vicious circle of poverty and child labour continues.

This Act has provided certain specific provisions to tackle child labour and has given many concrete provisions for abolition of child labour. It prohibits employment of children below the age of 14 in all hazardous occupations and processes⁵⁶.

Child marriage

Child marriage is the most unfortunate practice followed in India even today. Child marriage is an abuse of children especially girls by their own parents in the form of celebration.

The Prohibition of Child Marriage Act, 2006, as it exists prohibits marriage of women younger than 18 and men under age 21.

Foeticide and infanticide

Foeticide is punishable under Section 315 IPC.



† This article is based on the introductory speech delivered on the subject “Offences relating to Women and Children” during the Refresher Training Programme for District Judge at the Tamil Nadu State Judicial Academy on 27-11-2010.

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4 A. Cracknell v. State of U.P., AIR 1952 All 746.

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6 Thota Sesharathamma v. Thota Manikyamma, (1991) 4 SCC 312.

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8 (2003) 6 SCC 277 : 2003 SCC (L&S) 840.

9 (1995) 1 SCC 14 : 1995 SCC (Cri) 7.



- 10 (1997) 6 SCC 241 : 1997 SCC (Cri) 932.
- 11 Ibid, 242f.
- 12 (1991) 1 SCC 57 : 1991 SCC (Cri) 1.
- 13 Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490 : 1996 SCC (Cri) 133; Railway Board v. Chandrima Das, (2000) 2 SCC 465.
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- 16 State of M.P. v. Pramod Bhartiya, (1993) 1 SCC 539 : 1993 SCC (L&S) 221 : (1993) 23 ATC 657.
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- 31 (2008) 13 SCC 518.
- 32 <<http://www.azadindia.org/social-issues/crime-children.html>>.
- 33 (1997) 10 SCC 549, 553, para 4.
- 34 Article 15(3): Nothing in this Article shall prevent the State from making any special provision for women and children.
- 35 Article 21-A: Right to education.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
- 36 (1982) 3 SCC 235 : 1982 SCC (L&S) 275.
- 37 Ibid, 259-60, para 14.
- 38 <http://www.hrcr.org/safrica/childrens_rights/India.html> last accessed 18-8-2010.
- 39 (1983) 2 SCC 181 : 1983 SCC (L&S) 289.
- 40 (1996) 6 SCC 756 : 1997 SCC (L&S) 49.
- 41 Ibid.
- 42 Supra, n. 33, 207, para 24.



- 43 Article 39(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;
- 44 Article 39(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.
- 45 (1984) 2 SCC 244.
- 46 (2004) 5 SCC 518, 545, para 34 : 2004 SCC (Cri) 1645.
- 47 (1990) 3 SCC 318 : 1990 SCC (Cri) 482.
- 48 (1997) 8 SCC 114 : 1998 SCC (Cri) 25.
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- 50 Supra, n. 48.
- 51 (1994) 2 SCC 220 : 1994 SCC (Cri) 358.
- 52 (2009) 13 SCC 211 : (2010) 1 SCC (Cri) 987.
- 53 (1986) 3 SCC 596 : 1986 SCC (Cri) 337.
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- 55 Section 2(ii), Child Labour (Prohibition and Regulation) Act, 1986.
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*“The battle for freedom and justice is never hopeless, but it is never finally won.
Every morning, we must wake up ready to fight it again.”*

- Kofi Annan



2005 PL WebJour 1

Trafficking of Women and Children: A Culture of Silence

by
Divya Malhotra*

Introduction

In the past decade the volume of human trafficking has increased to the extent that today it is the third largest form of transnational illegal trade after arms and drugs. The objective of such trafficking of women and girls is the commercial sexual exploitation. Indeed trafficking involves worst forms of human rights abuses including emotional, physical and sexual violence with bleak possibilities of rescue or reintegration.

Present situation

Though there is no concrete study or data on the number of women and children who are victims of sexual exploitation for commercial purposes and trafficking, it is estimated to be over one million in India alone. Research done on child prostitution² reveals that:

- Incidence of child prostitution through abduction is estimated 40%.
- The percentage of Devdasis in Mumbai brothels is 15-20%, in Nagpur, Delhi and Hyderabad 10%, in Pune 50%, in urban centres around Belgaum district up to 80%.
- About 50% of children come into prostitution after incidence of rape.
- About 10% are children of prostitutes.
- About 5% are children of dalit and tribal families where prostitution is a cultural and customary practice.
- About 5% to 10% girls are married off and sold in prostitution.
- 5% come from broken homes, desertion by husband or family.
- 2% because of natural disasters.

The problem of trafficking of women and children for the purpose of sexual exploitation is prevalent at various levels — local, inter-district, inter-State and cross-border. Commercial exploitation of women and children takes place in various forms including brothel-based prostitution, sex tourism, entertainment industry and pornography in print and electronic media. Trafficking for commercial exploitation of women and children has resulted not only in violation of right, but also has adverse physical, psychological and moral consequences for the victims.

In a study commissioned by the Government of India and UNICEF, in 1998, researchers found that 83% of sex workers came from regions with “low developmental indicators, limited economic opportunities and ineffective developmental interventions”. Trafficking is a multidimensional problem encompassing a whole range of economical, social and cultural issues, which are varied and highly complex. Most of the victims have been trafficked with promises of jobs, better career prospects and marriage. Some are abducted forcibly. Some girls are often sold by friends or relatives, sometimes even



by their own parents out of greed or desperation. Although parents' complicity in this degrading occupation is difficult to understand, cultural indoctrination and financial desperation are clear motivating factors as apart from trafficking, certain other forms of prostitution are prevalent e.g. Joginis, Mathammas, Dommaras and Basavis.

Indian law

The right against exploitation is a fundamental right guaranteed by the Constitution of India under Article 23, traffic in human beings, "begar" and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law, Article 39 specifically obligates the State to protect children from exploitation. The provisions of both of these articles have been incorporated into the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) and the Immoral Traffic in Persons (Prevention) Act of 1986 (ITPA), an amendment to SITA. ITPA supplemented by the Indian Penal Code (IPC) prohibits trafficking in human beings including children and lays down severe penalties. The Juvenile Justice Act, 1986 provides for care, protection, treatment and rehabilitation of neglected and delinquent juveniles including girls. The enforcement of ITPA, IPC and the Juvenile Justice Act is the responsibility of the State Government.

Abuse and non-implementation of law

There has been a failure to implement the aforesaid legislation, which has caused and continues to cause severe injury and prejudice to the victims of prostitution. The legislative deficit is coupled by callousness displayed by the State authorities having failed and neglected to accept responsibility and discharge their duty as mandated by law.

In this context, while commenting on the existing legislation, Justice V.R. Krishna Iyer had said³:

"The police officer cannot be moral guardian of the Indian citizen, that judges trying this class of cases, unless specially trained or put through courses, prove to be judicial obstacles rather than social justice vehicles. The masculine lethargy at every stage is writ large."

Justice Iyer advocates active involvement of social welfare organisations in justice-delivery mechanism.

"Active participation in the very legal process will go a long way in socialising the legislation without isolating as a purely police-magistrate esoterica."⁴

He also advocates for a radical reform of the existing law. In this context he says:

"Khaki is ill-equipped and the robes too unrealistic. New tools must be fashioned if the law is meant to be more than a paper tiger."⁵

In *Vishal Jeet v. Union of India*⁶ there was a PIL against forced prostitution of girls, Devdasis and Joginis, and for their rehabilitation. The Supreme Court held that despite stringent and rehabilitative provisions under the various Acts, results were not as desired and, therefore, called for evaluation of the measures by the Central and State Governments to ensure their implementation. The Court called for severe and speedy legal action against exploiters such as pimps, brokers and brothel owners. Several directives were issued by the Court, which, inter alia, included setting up of a separate



Zonal Advisory Committees, providing rehabilitative homes, effectively dealing with the Devdasi system, Jogin tradition, etc.

In *Gaurav Jain v. Union of India*⁷ the Supreme Court passed an order, directing inter alia, the constitution of a committee to make an in-depth study of the problem of prostitution, child prostitutes and children of prostitutes, and to evolve suitable schemes for their rescue and rehabilitation. Taking note of the fact that “children of prostitutes should, however, not be permitted to live in the inferno and the undesirable surroundings of prostitute homes” (SCC p. 119, para 1), the Apex Court issued directions to ensure the protection of human rights of such persons. The Court also desired that the ground realities should be tapped with meaningful action imperatives, apart from the administrative action which aims at arresting immoral traffic of women under the ITP Act through inter-State or Interpol arrangements and nodal agency like CBI is charged to investigate and prevent such crimes.

In 1998 the Central Government, pursuant to the directions issued by this Court in *Gaurav Jain case*⁸ constituted “Committee on Prostitution, Child Prostitutes and Children of Prostitutes and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children”. In 1998 in a report containing an action plan⁸, which highlighted the problems in addressing issues of commercial sexual exploitation, detailed recommendations were made with a view to arrest the systematic problem, including issues relating to law enforcement and legal reforms.

Most of the components of the Action Plan have to be implemented at the district level, constituting districtlevel Committees. The District Committees shall set up an anti-trafficking squad in every district headed by an officer not below the rank of Deputy Superintendent of Police. They shall protect the rights of trafficked persons by providing them with an effective legal remedy, legal protection, non-discriminatory treatment, and restitution, compensation and recovery.

Anti-trafficking measures must not, in the name of “protecting” all women from harm, deprive any women of any of her human rights as the principles of non-discrimination and the universality of human rights are fundamental and non-derogatory. The abovestated provisions, as well as others, are intended to ensure that trafficked persons are not treated as criminals but as victims of crime who have suffered serious human rights abuse. Unfortunately, most Governments continue to treat trafficked persons as illegal migrants and criminals, thereby further victimising the victims.

As regards the judiciary, a recent publication of UN says⁹:

“The judiciary is one of the most important sectors that need to be sensitized on gender issues and violations of rights of women due to trafficking. An analysis of the attitude of judges reveals a protectionist approach in their judgment of criminal cases against trafficking.”

The sensitive judges and trial magistrates have ensured victim-friendly ambience in the court, to the extent possible. The proceedings in the court need to be monitored so that even the defence does not indulge in revictimisation and traumatising of the victims. It is important to note that even when the matter reaches courts witnesses generally turn hostile making it very difficult for the prosecution and the victims to avail justice¹⁰.



The report of DWCD¹¹ mentions:

“The judiciary is accused of playing a role in secondary victimization, by its mode of questioning during court procedures, the long tedious legal processes and legal system is seen to be forbidding for victims who seek justice rather than deterring those who commit injustice.”

International law

Over the years, trafficking in human beings has become a global phenomenon. It has reached epidemic proportions, leaving no country immune to it. The International Organisation for Migration estimates that the global trafficking industry generates up to US \$ 8 billion every year.

A variety of international instruments, which address this problem, already exist. This includes the “Convention on Suppression of Trafficking in Persons and the Prostitution of others”, “Convention on the Elimination of All Forms of Discrimination against Women”, “Convention on the Rights of the Child”, “the Platform for Action of the Fourth World Conference on Women and the Beijing Platform of Action, 1995”, “the Declaration and Agenda for Action Adopted by World Congress Against Commercial Sexual Exploitation of Children” held at Stockholm in 1996 which focused the attention of national governments, international media, parliamentarians, NGOs and others to serious threat to the life of poor women and girls in all the countries of the world. The Government of India has initiated several steps as a follow-up of these conventions and declarations. Five years after the First World Congress at Stockholm, a Second World Congress against Commercial Sexual Exploitation of Children was held at Yokohama, Japan from 17 to 20 December, 2001. Its aim was to review developments as a follow-up process to strengthen the commitment to protect children from sexual exploitation and abuse. Asian Development Bank (ADB) recently completed its project, in consultation with the Governments of India, Bangladesh and Nepal, to assess the magnitude of the problem and to devise methods to combat trafficking in women and children in South Asia¹².

In December 2002, India became a signatory to the “UN Convention against Transnational Organised Crime (UNTOC)”, which includes the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. By becoming a participant in the convention, a global instrument which advocates international and national action against organised crime, the Government of India has given a clear mandate to confront the evils of trafficking of women and children¹³.

International human rights instruments impose duty upon the States to respect and ensure respect for human rights law, including the duty to prevent and investigate violations, to take appropriate actions against the violators and to afford remedies and recovery to those who have been injured as a consequence of such violations. Nonetheless, as yet, few States have fulfilled their obligation to implement these commitments or to provide adequate human rights protection to trafficked persons. States have a responsibility to provide protection to trafficked persons pursuant to the Universal Declaration of Human Rights (UDHR) and through ratification or accession to numerous other international and regional instruments.



According to Article 1 of the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others (the Trafficking Convention), India is obligated to any person who:

- “(1) procures, entices or leads away, for the purpose of prostitution, another person, even with consent of that person;
- (2) exploits the prostitution of another person, even with the consent of that person.”

Article 2 calls for the punishment of any person who “keeps or manages, or knowingly finances or takes part in the financing of a brothel”.

The Government of India has incorporated most of the standards of international law into its domestic law but it still needs improvement in order to comply with international conventions. However, the deficiency lies not so much in the absence of a good law but in its lack of implementation and susceptibility to cultural manipulation.

Conclusion

A perusal of India’s domestic legislation leaves one with the impression that the problem of sexual exploitation is well addressed, but since trafficking requires multilateral responses, State must deploy multidisciplinary and multilevel strategies to combat the sophisticated networks operating throughout the world. States and non-governmental organisations must work together to ensure that traffickers are never able to find a “safe haven” anywhere in the world. Without such concerted and coordinated efforts, trafficking will never be stopped or even minimised. Though many critics will argue that the society needs to do its duty in enacting sound legislations but unless and until citizens sensitise themselves, little can be done about it.

So far whatever measures have been taken have not been effective to the vision envisaged in most of the legislations. The Government of India’s action plan of 1998 to combat trafficking and commercial sexual exploitation of women and children has not delivered the desired results, the plight of victims calls for strong legal action against traffickers, clients, brothel owners and all other exploiters. Programmes should be planned and executed after taking into account reliable and relevant database on the trends and dimensions in supply zones, destinations, high-risk groups, etc. It is essential that prevention strategies be targeted at both supply and demand areas. Unless the demand is contained, trafficking cannot be stopped.

The fact that the rights to development and to life with dignity are fundamental human rights has to be driven home and appreciated not just by the legal and executive agencies but by the society as well.



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"To ignore evil is to become accomplice to it"
- Martin Luther King



Combating Human Trafficking: A Legal Perspective with Special Reference to India

*Eira Mishra**

Abstract Trafficking of human beings is a global phenomenon which has gained momentum in recent years. It is the modern-day equivalent of slavery. Trafficking in persons is the third largest form of organised crime after trafficking in arms and drugs (UNODC, 2000). Even though the crime of human trafficking for any purpose is both under-recorded and under-reported, the 2004 Trafficking in Persons (TIP) report estimated at least 600,000 to 800,000 women and children being trafficked across international borders every year, the majority being trafficked into commercial sexual exploitation (US DHHS, 2004). This paper seeks to provide an analytical framework for designing more effective laws against human trafficking. The paper in first place, examines human trafficking operations in India and the efforts of the Indian government, non-governmental organizations, and various international organisations to put a stop to trafficking by prosecution of traffickers and providing assistance to survivors of trafficking. The second section investigates the causes of human trafficking which make India both a source and a destination of trafficking in persons, as it continues to grow globally. In the final section of the paper viable solutions to effectively reduce India's tolerance to human trafficking and to secure people from being trafficked internally and to various countries are worked out. The legal arrangements for the protection of human rights and the dignity of women and children in the Indian context and the efforts which the government ought to take in order to eradicate this evil are suggested. This paper is a piece of pure theoretical work and consists of a simple research aimed at finding a particular statement of law or a more complex and in-depth analysis of legal reasoning.

Keywords Human trafficking, India, Poverty, Gender violence, Rescue and Rehabilitation

the recruitment, transportation, transfer, harbouring [sic] or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of person having control over another person, for the purpose of exploitation.

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1. Introduction

Trafficking in persons is an activity of the informal sector and hence is not accounted for. This makes it difficult to correctly estimate the magnitude of trafficking and identifying the victims as these acts are sometimes not even seen as acts of gross violation of human rights. Estimates show that 2.4 million of the 12.4 million forced labour victims were trafficked (ILO, 2008,1). Of these, 6% are in Asia and the Pacific, 10% in Latin America and the Caribbean, 9.2% in the Middle East and Northern Africa, 5.2% are in sub-Saharan countries, 10.8% are in industrialized countries, 8% are in countries facing political transition. 161 countries are reported to be involved in trafficking by either participating as the country of source, of transit, or of destination. People are reported to be sourced to be trafficked from 127 countries to be exploited in 137 countries. Human Trafficking is a violation of human rights in the worst form, the impacts of which are far-reaching. 95% of trafficking victims experience physical and sexual violence. Many victims experience post-traumatic stress disorders, anxiety, depression and disorientation. Inadequate legislation and law enforcement, lack of knowledge and awareness about legislation are challenging issues. There is also an urgent need for the amendment of legislation to ensure that victims of human trafficking are not prosecuted. Trafficking of girls for marriage is prevalent, particularly in the states of Punjab and Haryana. Studies reveal a well-established market in Uttar Pradesh for 'purchased' Bangladeshi wives. The definition of trafficking is provided by several organisations. These show similarity in interpretation of who is identified as a victim of trafficking. United Nations Office on Drugs and Crime[1] defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring [sic] or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of person having control over another person, for the purpose of exploitation.

A separate definition of child trafficking is provided by the UN Convention against Transnational Organised Crimes[2] which states that child trafficking is the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation. A child as per UN Convention on the Rights of the Child[3] is anyone under the age of 18 years. Children may be trafficked for the purpose of labour or for sexual exploitation. Trafficking in persons for sex, however, forms another category of trafficking. According to the United States Trafficking Victims Protection Act (TVPA)[4], sex trafficking is a practice "in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age". Trafficking in human beings is a crime where the exploitation of an individual is the central aspect. The other form of trafficking is one for organ trade. Trafficking in human beings for the purpose of organ removal can only be committed if organs are removed from living donors. Organ trafficking is defined by the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[5] as:



the recruitment, transport, transfer, harbouring, or receipt of living or deceased persons or their organs 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 to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.

The discussion of organ trafficking of deceased person does not fall under the ambit of this paper.

International laws, like the Convention for Elimination of all Forms of Discrimination against Women (CEDAW), Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others[6], have brought a positive change in the definition of prostitution. Prostitution, now, is 'sexual exploitation or abuse of persons for commercial purposes'. Thus, hiring the body of any person is not considered as an offence but only the exploitation of it. If a woman puts her own body for hire, for promiscuous sexual relationship and another person exploits her, she is not a prostitute. The person who exploits her is engaged in prostitution. However, due to aberration caused due to the inadvertence in not amending the corresponding provisions of the act, has caused a commotion, even in judicial interpretations.

Under the Immoral Traffic (Prevention) Act, 1956 (ITPA), prostitution is legal. Women can use their bodies for materialistic gains but a broker is not allowed to take advantage of her. The Supreme Court recently asked the Central Government as to why prostitution should not be legalised[7]. Legalisation gives the government and police authorities more control over the brothels activities; it may be possible to ensure that unwilling women are not forced into prostitution, and they receive payment without being exploited or physically abused. Also, women who have been forced into the trade need to be rescued and rehabilitated. Prostitution violates most basic human rights of women to sexual autonomy and integrity. UDHR (1948, 1993), CEDAW (1979, 1980, 1985) and the Vienna Convention (1993) have taken many steps but are still struggling to eradicate the problem from its roots.

The countries are classified into three categories based on the type of role they play in trafficking in persons. The countries from which the persons are supplied from are called the country of source and usually comprise of nations with high levels of poverty and low levels of opportunity available to citizens. Supply factors include poverty, lure of employment, sham marriages, displacement due to natural disasters, political disturbances such as civil war[8], culturally subordinate position of women, migration, etc. The destination countries are those where the victim is finally taken and is exploited for various purposes. Demand for trafficked persons arises on account of desire for cheap/free labour, domestic servitude, sex trafficking/tourism demand for organs, participation in organised crime generating high profits and low risk for traffickers. The country of transit is used to transport trafficking victims from the country of source to the country of destination.



2. Research Aim

This paper seeks to provide an analytical framework for designing more effective laws against human trafficking. Trafficking is a modern-day equivalent to slavery. It is a phenomenon which is gaining momentum and is now the third largest form of organised crime after trafficking in arms and drugs[9]. Even though the crime of human trafficking for any purpose is both under-recorded and under-reported, the 2004 Trafficking in Persons (TIP) report estimated at least 600,000 to 800,000 women and children are trafficked across international borders every year, the majority being trafficked into commercial sexual exploitation[10].

The article investigates into the root causes of human trafficking making India, both a source and a destination of trafficking in persons as it continues to grow globally. Humans are trafficked for various services such as forced labour, bonded labour, organ harvesting and sex. Women and children have been described to be the most vulnerable to this curse mainly due to ignorance, harmful traditional and cultural practices, greed, poverty and discrimination. The Ministry of Women and Child Development estimates that 3 million women have been trafficked in India, 40% of which are minors[11]. 60% of people trafficked into sex work in the country are adolescent girls between ages 12 to 16. In the final section of the paper viable solutions to effectively reduce India's tolerance to human trafficking and secure people for being trafficked internally and to various countries are worked out.

NCRB (National Crime records Bureau) data of India shows high incidence of trafficking in the states of Tamil Nadu, Andhra Pradesh, Karnataka, Maharashtra, Kerala and New Delhi. This paper studies the inter-relationship between human rights and laws and attempts to understand jurisprudential aspect of human rights in India where there is disparity at every step. The legal arrangements for the protection of human rights and the dignity of women and children in the Indian context and the efforts which the government ought to take in order to eradicate this evil are suggested. This paper is a piece of empirical research aimed at in-depth analysis of trafficking and the legal perspectives to it.

3. Contributing Factors and Effects

Trafficking in humans is done, primarily, to fulfil the purposes of forced labour, bonded labour, sex work and organs trafficking. Of these, human trafficking for sexual purposes, known as sex trafficking, is the largest subset[12]. Trafficking in persons, a global phenomenon thrives on the weakness and vulnerability of persons. Vulnerability arises due to poor economic condition, existence of gender-based violence and political instability (wars, internal disturbances, et al.). Conflict-ridden areas which have actual war or the mere presence of military bases create demand. These areas are characterised by the presence of sex workers and child soldiers[13]. Government power in such areas is limited. Economic and social conditions like poverty and the social and cultural exclusion that poverty can cause, is a major problem

In most of the areas of origin of trafficked persons, 50-60% of the population lives on US\$1 a day. Income poverty, unemployment, hunger, disease and illiteracy are widespread and rampant. Employment, education, vocational training and economic opportunities are in chronic shortage. As a result, unemployed youths and school



dropouts are reduced to vulnerability and thereby become easy targets to human traffickers. More vulnerable are those who migrate from rural areas, where opportunities are even rarer, to urban areas in search of employment and other opportunities[14].

The increased globalisation of the world economy means that high volumes of people, goods and services are crossing international borders, both legally and illegally. Operatives of organised crimes, internationally, have positioned themselves to exploit such situations. People want to migrate for different reasons (to seek refuge or better employment opportunities) but are restricted for various reasons as immigration procedures have become more stringent. The decision to illegally immigrate puts them at an increased risk of being exploited. Therefore, the causes may be divided into three categories: economic, socio-cultural and legal and political.

Economic strength of persons is an important factor in deciding their vulnerability of persons to trafficking. It is seen that victims of trafficking are usually sourced from poor countries where lack of employment opportunities and perpetual poverty are critical issues. These people can be easily convinced that they are being given an opportunity to advance in life. Another cause of human trafficking is the removal of human organs; or cheap labour being used in plantations. Lack of literacy and awareness renders it impossible for victims to reasonably assess what they are consenting to. Several reports show that girls from poor economic backgrounds are brought to Mumbai to be forced into sex work. There are recent reports where it is shown that tea plantation workers in Assam, who live on meagre 12 paise a day (almost \$0.0024), are being targeted by traffickers. Girls here are sold for as low as 1000 rupees (\$16)[15]. Another case seen is the surge in the instances of trafficking of women in Goa. Girls from Nepal, Bangladesh, Russia and many parts of India are forced into sex trade to serve tourists[16].

Bonded labour is a treacherous way of capturing free labour. A debt or a bond is used to command poor into working and to keep them in service. The work is initiated for the repayment of such bond. Thus, the worker is not paid any remuneration for a very long period of time. The definition is given under Section 2(g) of the Bonded Labour System (Abolition) Act, 1976 as service arising out of loan/debt/advance. The labourer's sustenance depends on the employer who captures him. The concept of debt inheritance comes into play. If a worker is unable to pay his debts his children are forced into working to the creditor for repayment. Thus, children are born into debt and grow up only to repay such debt. There is no opportunity for them to escape as most of them are uneducated and unaware of their rights and rescue agencies. They believe it to be their customary obligation to serve the upper caste landlords/ employers. Such servitude goes on for generations. Physical and sexual abuses are common ways of threatening the workers and forcing them to continue working. Wealthier persons are usually perpetrators of such atrocities. Children are most susceptible to bonded labour as they have no means of escape. Particularly troubling is the fact that some children are voluntarily sold by their own parents due to poverty and hunger. Despite the Bonded Labour System (Abolition) Act, 1976, it is seen that there have been negligible convictions under the Act[17]. The fine imposed under the act is a paltry Rs. 2000 (\$31) which by no means would act as a deterrent.



The societal preference of boys over girls and the general view of men being superior to women lead to exploitation of women. The deficiency of satisfactory legislation, properly functioning administrative machinery and an effective judiciary are the most obvious causes of human trafficking. Many countries lack both relevant legislation and explicit policies on human trafficking. Where such policies do exist, they are often neither implemented nor followed up properly. In some countries where human trafficking or similar activities are criminal offences, punishment on conviction may be comparatively lenient. Those mentioned factors are the main obstacles for ending human trafficking.

Women are considered culturally subordinate to men in certain societies. This is the root cause of derogatory treatment of women as men use culture as a tool to prove their superiority to oppress and exploit women. Many countries show huge disparities in the level of literacy, educational opportunities, employment opportunities, inheritance and poverty. Such educational and economic disabilities make women vulnerable to exploitation. Conflicts, wars and the resultant displacement of people put them at greater risk. Vulnerability also raises when political systems collapse and extended periods of political, social and economic transition ensue: with the collapse of communist rule in Eastern Europe, for example, space opened up for criminal networks to operate and flourish in [18]. The fast growth of commercial sex industry is seen as a key factor for the increased trafficking in women. It is held liable for increased demand of women and girls and forcing them work against their will and under terrible living and working conditions.

Vulnerability of persons to sex trafficking arises due to poverty, lack of employment opportunity, hunger, displacement, political instability and natural disasters. Vulnerability is directly related to susceptibility and increased risk of being trafficked. Victims who are forced into sex trafficking by their own families usually have histories of childhood sexual abuse, substance abuse by guardian, death of parents/guardians, violence, running away from home, homelessness, school failure, etc. Gay, lesbian, bisexual and transgendered persons are particularly susceptible. Many researchers have shown that most victims of trafficking have had disturbed childhoods where they had been physically and sexually abused. Childhood abuse is seen as a root cause of many problems as an individual grows up, such as attempted suicide, tolerance to domestic violence, drug addiction, alcohol abuse, and many other physical and mental health issues. Seen in this light, sex trafficking is also a manifestation of the problems continued during adulthood due to childhood maltreatment.

Trafficking in women for sex can be better understood by application of Marxist feminism [19] to the phenomenon. Marxist feminism follows the beliefs of Karl Marx. Marx believed that a society is constituted of several groups which, in a bid to overpower each other, are in constant conflict with each other. Reorganization and redistribution of goods, labour and consequently power helps solve these conflicts. The continuous change leads to creation of new social systems like capitalism. Capitalism creates two groups, the class who owns the means of production i.e. the bourgeoisie and the class who sell their labour, the proletariat. The bourgeoisie are constantly exploiting the proletariat by keeping them dependent on them for wages that are low in comparison to the profits they gain from their work. The proletariat continue to work because they believe that eventually they'd move up this well-organised societal



structure which forms the basis of their exploitation. This same system of oppression is used to marginalise and control women. They are restricted to domestic work which is not valued as it does not lead to creation of capital. They lack ownership of property. Their economic movement is also restricted by the process of reproduction which forces women to take time off work, while men do not have such obligations and still profit from having children (preferably sons) who will eventually join their labour force. Therefore, men are able to oppress women in society, not only because of capitalism, but because they hold power of production and creation of wealth proving themselves to be superior. This renders in them the ability to create cultural standards which women are forced to follow due to their dependency. Therefore when it comes to issues like sex trafficking and prostitution women are once again oppressed and controlled by men to help them gain capital. Men purchase women in the same way they purchase property or labour, owning and controlling them every day. Violation of rights of others is seen as a minor opportunity cost to help oneself climb the social ladder. Those women who receive money or accommodation for their work in the sex industry, the consideration provided is paltry to what traffickers make. The damage it causes to women's health, physically, emotionally and psychologically is tremendous. The constant creation of false consciousness among women by exploitation and control makes them believe that they have no other choices or self-worth. They are mentally exhausted, humiliated and afraid and lack the self-identity required to disobey their trafficker and escape victimization.

Trafficking of children is a phenomenon affecting children, both male and female, worldwide. Poverty is the single most common factor which pushes children into child labour and makes them vulnerable to trafficking. Their weak economic backgrounds limit their options and heighten the desire to find any work to sustain them. Hence, they are easily lured by traffickers with the promise of a better and more prosperous life. Many are kidnapped and sold. Studies suggest that increased economic pressure is directly related to child labour. Child trafficking and labour denies children the right to grow up in a healthy family atmosphere and exposes them to a range of dangers such as violence and sexual assault.

In India, a large number of children are trafficked not only for the sex 'trade' but also for other forms of non-sex based exploitation that includes servitude of diverse kinds, as industrial labour, domestic labour, agricultural labour, organ trade begging, and false marriage. Trafficking in children is on rise, and nearly 60% of the victims of trafficking are below 18 years of age[20].

Trafficking in humans from organs differs from trafficking in organs as in the case of trafficking in humans, the exploitation of individual being trafficked is the focal issue. However, in trafficking in organs, the source of organs being trafficked is irrelevant. Trafficking in persons only occurs when organs are removed from a live donor.

Organ transplants are a boon of modern-science. They help make available properly functioning organs to critical patients, thus, helping them survive and living a healthy life. However, there is a very high shortage of organs to be supplied. For various reasons, many countries have not enacted policies and legislations which would make them self-sufficient in organs for medical purposes and transplants. This causes a discrepancy in the supply and demand of organs for transplant. A very serious consequence here is the creation of an opportunity for the traffickers to intervene



and provide organs by forcing persons to donate. The immense scarcity distressing the supply of organs and the mounting demand for organs and tissues produce circumstances in which trafficking in human beings to obtain organs can flourish. This is sometimes referred to as 'transplant tourism'[21].

Such severe economic disparities and desperate need for organs encourage rich to shorten the wait for organs by exploiting the distressful economic condition of the poorest classes. Lack of organs and desire to survive cause people to look for alternate solutions to ensure availability of organs. Criminal groups take advantage of this situation and source poor persons into organ donation without their consent. Poor persons find it hard to not participate in such criminal activity and a false consent is given. They usually do not have knowledge of the procedures involved, the subsequent effects and often believe them to be the only way to help their dire economic condition. All these factors form the origin for the development of the practice of trafficking in persons for organ donation, a modern horror. Several survivors of the December 2006 tsunami which hit the East-coast of India were forced into organ trade to pay their families' debts[22]. Such exploitation of persons for organs may not be exclusive of other kinds of exploitation such as sexual and forced labour.

It is, thus, understood that the section of people most vulnerable to human trafficking are the poor, marginalised and uneducated persons who are least aware that there is the danger of being trafficked at all. Many people simply have no access to information and have not been made aware of the phenomenon. These persons have limited or no access to information and technology. People do not know how complex, specialised and organised the crime of trafficking in persons is. They are also not aware of their rights and the various laws available to protect them. They therefore do not know whom to approach and where to go when the problem surfaces.

4. Potential Effects on the Economy

The economic impact of trafficking on a country is measured by looking at the impact it has on society. A nation invests money on prevention of trafficking, treatment and support of victims, the apprehension of traffickers and their subsequent prosecution. The cost of police, investigation and rescue operations, rehabilitation of victims, prosecution services, cost of prison and other related costs have to be borne by the state. The lost productivity of the traffickers and the victims is another loss to the economy. Rehabilitation of victims and other health services also demand state investment. Another significant economic burden for some "source countries" is the cost of immigration, repatriation, customs process and subsequent assistance in housing and rehabilitation. The public health impact of trafficking is potentially very costly.

India occurs on Tier 2 of the Watch List of the United States lists of occurrence of human trafficking. Countries that are relegated to Tier 3 Watch List face possible economic sanctions from the government of the United States of America. This should serve as a warning signal. In addition, the Trafficking in Persons Report (2012) of the U.S. states that "governments subject to sanctions would also face U.S. opposition to assistance from international financial institutions such as the International Monetary Fund and the World Bank". This should serve as a word of warning as such international sanctions like these would severely impact an already dwindling Indian economy. The financial ramifications cannot be ignored. Employment opportunities are hampered



due to availability of such cheap and even free labour. This subsequently reduces the per capita income of the nation.

5. Law to Combat Trafficking

In the September of 2006, the Indian government created an anti-trafficking law enforcement “nodal cell”. It is a central department comprising two officials responsible for accumulating and analysing data relating to trafficking in persons in the country. Its duty also includes the action taken by the central and state governments to combat the evil of trafficking. In 2007, three state governments established anti-trafficking police units, the first of this kind in the India. The Central Government, in 2007, banned the employment of child labour in domestic work.

The Constitution of India, the supreme law of the land from which all laws originate, guarantees equality and freedom to all citizens by virtue of fundamental rights vested in them. Trafficking is explicitly forbidden as it is opposed to these basic tenants of the Constitution. Article 23 (1) of the Indian Constitution explicitly forbids traffic in human beings, begar (a form of forced labour) and all other forms of forced labour. Also, Article 24 prohibits employment of children below 14 years of age in factories, mines or other hazardous jobs. These constitutional safeguards have been implemented by way of several central as well as state legislations.

The Immoral Traffic (Prevention) Act, 1956 (ITPA)[23], originally enacted as the ‘Suppression of Immoral Traffic in Women and Girls Act, 1956, is the most important legislative instrument for the prevention and combat of trafficking in human beings in India. However, till date, its key object has been to inhibit/abolish traffic in women and girls with the intention to force them into prostitution as means of earning their livelihood. It The provisions of ITPA criminalize the persons who procure, traffic and profit from the trade but fails to provide a clear definition of ‘trafficking’ per se in human beings.

India enacted the Immoral Traffic (Prevention) Act (ITPA) in 1956, upon ratification of the Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of others (signed at New York on 9th May, 1950). Prior to ITPA, several state legislations existed which were, however, neither sufficient nor uniform in their approach to TIP. Therefore, a need for a strict central law, uniform in nature, arose. The ITPA provisions provide penalty for immoral trafficking, punish traffickers, punish persons keeping a brothel (Section 3), Punish persons who live off the earnings of a woman (Section 4), and provides welfare measures focussed towards rehabilitation of sex workers. The emphasis is on punishment for the clients/pimps/brothel owners etc. and not the commercial sex workers. It needs to be noted that in the case of *Sushila v. State of Tamil Nadu*[24] the Madras High Court held that “a solitary instance of prostitution in a place does not make a place a ‘brothel’”.

However, the Act has been criticised on various accounts. It provides a measly amount of Rs. 20,000 (\$320) as compensation to victim. Such amount is not enough to rehabilitate the victim or to provide such a person with alternate means of livelihood. There is a grave danger of the rescued persons falling back into the traps of the traffickers. Also, the punishment provided to the trafficker under Section 3 of the Act is only three years. Such punishment does not act as a deterrent to offenders. There have been very few instances of conviction under the Act indicating its failure in curbing trafficking.



The Justice Verma Committee (2013) was formed to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The Report[25], submitted in January 2013, pointed out the shortcomings of ITPA. It says that the act only criminalizes trafficking with the objective of prostitution but ignores other aspects of trafficking.

The significance of deterrence of trafficking is indisputable, but in some way, the entire focal point of ITPA seems to be on elimination of prostitution instead of prevention of trafficking in persons. An imperative observation is that the continuum of anti-trafficking initiatives, law formulation and enforcement is roughly limited to the part of raid, rescue, and repatriation and to some degree, the rehabilitation aspect. There is a noticeable lack of any model guideline for intervention or law enforcement in preventing the occurrence of trafficking. However, in the case of *Gaurav Jain v. Union of India*[26], the Supreme Court exercised its extraordinary writ jurisdiction making power under Article 145 and 142 of the Constitution and laid down a comprehensive scheme to rescue and rehabilitate victims of sexual exploitation.

The Criminal Law (Amendment) Bill 2013[27], was passed by both houses of Parliament in March, 2013. It provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure on laws related to sexual offences. It adds Section 370A to the Indian Penal Code which criminalizes human trafficking. The definition provided under the new section is not restricted to prostitution but also includes other forms of trafficking. This is evident from the use of the word “exploitation” instead of “prostitution” in the section. Thus, the scope of the section had been broadened. Stricter punishment has been given under the amendment. An offence of trafficking shall be punished with rigorous imprisonment for a term of at least seven years, but which may extend to ten years, and shall also be liable to fine. Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine. Similar provisions show enhanced punishments for the perpetrators of human trafficking and exploitation. The amendment further excludes consent of victim, obtained by inducement, etc., as a factor to absolve the trafficker of liability under the new section. Repressive and empowerment techniques, used in combination, can be help address the current problem of trafficking.

Repressive strategies aim at suppressing crime and are primarily used by law enforcement agencies. Empowerment techniques are a tool of NGOs and rehabilitation agencies which aim to support victims, strengthen them and help them re-adjust in society so that they do not fall prey to re-trafficking. The Ministry of labour rightly stated that there is an urgent need for check on working conditions, occupational health, safety measures and ensuring minimum payment for work done.

Buying and selling of minors for the purposes of prostitution i.e. trafficking, is a grave offence, under the Indian Penal Code (IPC), sections 372 (Selling of minors for prostitution, etc.) and 373 (buying of minors for prostitution), and merits maximum punishment of 10 years. The same quantum of punishment is awarded under Section 366 which deals with kidnapping a woman to compel her to marry or is forced to illicit intercourse. Sections 342, 352, 360, 362, 365 368 and 506 deal with punishment for wrongful confinement, punishment for assault or criminal force otherwise than



on grave provocation, kidnapping from India, kidnapping from lawful guardianship, abduction, kidnapping or abducting with intent secretly and wrongfully to confine person, wrongfully hiding or keeping in confinement, kidnapped or abducted person and punishment for criminal intimidation respectively and can be invoked in cases of trafficking in persons. The 2013 Amendment provides for increased punishment in case of minors. When a minor is a victim, the trafficker shall face of rigorous imprisonment of at least ten years to life imprisonment. If there were more victims than one, the punishment shall be rigorous imprisonment which is not less than fourteen years and may extend for life.

The other relevant Acts which address the issue of trafficking in India are; the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006; Andhra Pradesh Devdasi (Prohibiting Dedication) Act, 1989; the Karnataka Devdasi (Prohibition of Dedication) Act, 1982; the Child Labour (Prohibition and Regulation) Act, 1986; Information Technology Act, 2000; and the Goa Children's Act, 2003. Beside these, there are some other collateral laws which are relevant to trafficking. These are the Indian Evidence Act, 1872; Young Persons (Harmful Publications) Act, 1956; Bonded Labour System (Abolition) Act, 1976; Child Marriage Restraint Act, 1929; Probation of Offenders Act, 1958; Criminal Procedure Code, 1973; Indecent Representation of Women (Prohibition) Act, 1986; and the Transplantation of Human Organs Act, 1994.

In the case of *Prerana v. State of Maharashtra*[28], the Bombay High Court stated that cases relating to sex trafficking should be disposed off expeditiously. Trial Courts ought to take victim's statement within one month and complete the trial within six months of the charge sheet being filed. India has a fairly wide range of laws prohibiting and protecting against trafficking. Some of these are enumerated below.

- Article 21 of the Indian Constitution guarantees the right to live with dignity.
- Article 23 of the Constitution guarantees the right against exploitation. It prohibits traffic in human beings and forced labour and makes such practise punishable under law.
- Article 24 of the Constitution prohibits employment of children below 14 years of age in factories, mines or other hazardous employment.
- Under the Indian Penal Code, twenty five provisions relate to trafficking. Significant amongst these are:
 - o Section 366A: procurement of a minor girl (below 18 years of age) from one part of the country to another is punishable.
 - o Section 366B: importation of a girl below 21 years of age is punishable.
 - o Section 374: provides punishment for compelling any person to labour against his will.

The state, NGOs and the society in general needs to make an effort to combat the menace of trafficking in the country. The possible solutions can be summarised as under:

- Effective policy implementation.



- Sensitisation and awareness programmes for law enforcing agencies.
- Frequent raids to track trafficked persons.
- Alert border security forces to prevent trafficking out of the country.
- Public awareness programmes to alert people and to help them identify any such activity around them.
- Post-rescue rehabilitation programmes to ensure that victims are not forced to revert to sex work due to lack of reasonable alternatives.
- Training programmes to make rescued persons economically independent.
- Provide for protective homes for homeless persons and orphaned children as they are most vulnerable.
- Separate institutions to be set up for minors, women and persons above 18 years of age (major).
- Collective effort must be made by the Police and NGOs to locate addresses for repatriation of the victims.
- Counselling should be given to the families of survivors, for sensitisation, to facilitate easy acceptance of the repatriated survivors.
- Legal mechanisms should be clear and uncomplicated to guarantee prompt repatriation of survivors.

6. Conclusion

Prevention of trafficking involves interventions at various levels to combat the initiation of trafficking. Prevention has to be a combined effort of both governmental and non-governmental agencies. It has to be a strategy to make the public aware of trafficking in persons as a mode of modern-day slavery and to sensitize them about it. The policies must be directed, particularly, to those sections of population who form the source and are most vulnerable to trafficking.

The Government must make certain that good quality education, opportunities of employment and income generation programmes are put into operation to provide good quality life to highly susceptible persons. It should carry out routine programmes to educate and sensitize parents, teachers, and community workers about trafficking. Government should include gender centred education curricula in schools and introduce subjects of child sexual abuse and trafficking. Police advocacy is an important intervention that has to be fine-tuned. Awareness is the magnanimity and prevalence of the problem has to be done at the level of National Planning Commission, politicians and bureaucrats too. Their attention is to be drawn to this pertinent problem to invite policy changes. More stringent laws and better implementation are required to curb the problem. Stricter punishments shall act as a deterrent to other traffickers. Policies are required to be framed in the direction of creation of rehabilitation facilities for victims rescued. Victims need special medical and psychological care to move past the physical cruelty inflicted and trauma suffered.

NGOs can contribute by spreading awareness in community members about the prevalence of trafficking in humans. Awareness at the local level, in the community through workshops, songs, drama, meetings, leaflets and posters especially in the rural



areas is also required. They should also remain vigilant and report missing persons who may be victims of trafficking. This can be helpful in identifying traffickers and their hideouts. NGOs working in rural area may carry out workshops to ensure that people are aware of safe migration practises and report inconsistent migration offers. Training programmes and activities highlighting the importance of gender equity can be organised to promote gender sensitization. Awareness is the key to prevention.

The use of media helps garner attention of several hundred thousand viewers. This is an excellent medium of sensitization of people. Media can be used to transmit appropriate message to victims that legal and social help is available to them to get out of the slavery they are subjected to. Victims can be made aware of places and institutions where they can seek help. Media can help provide information to widespread viewer base about penal provisions against trafficking the modus operandi of the traffickers through radio, television etc. Media campaigns have proven to be a powerful tool to draw attention of both the government and the people to specific issues in the past. This power can be harnessed to create awareness about the inappropriate and illegal nature of the act and the cruel consequences thereof.

The phenomenon of trafficking in humans is widespread across the country. It is a socio-economic offence and greatly affects the society. It makes people question their safety and the efficacy of the state machinery. It is the combined duty of the state and society to fight trafficking and protect the vulnerable groups. Awareness of occurrence of such crimes, effective criminal justice system and vigilant citizens can help check trafficking.

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*"Freedom cannot be achieved unless the women have been emancipated
from all forms of oppression."*

- Nelson Mandela



Trafficking in Indian Constitution and Laws*

The Constitution of India expressly prohibits traffic in human beings.

- Article 14 provides for equality in general.
- Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth.
- Article 15 (3) provides for special protective discrimination in favour of women and child relieving them from the moribund of formal equality. It states that, “nothing in this article shall prevent the State from making any special provision for women and children”.
- Article 16 (1) covers equality of opportunity in matters of public employment.
- **Article 23 prohibits traffic in human beings (in any form and for any exploitation) and forced labour.**
- Article 24 prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age.
- Article 38 enjoins the State to secure and protect as effectively as it may a social order in which justice – social, economic and political – shall inform all the institutions of national life.
- Article 39 provides that the State should direct its policy towards securing, among other things, a right to adequate means of livelihood for men and women equally and equal pay for equal work their age or strength.
- Article 39 (f) provides that children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that childhood should be protected against exploitation.
- Article 42 protects against inhumane working conditions.
- Article 45 makes provision for free and compulsory education for children, which is now well settled as a fundamental right of children.
- Article 46 directs that the state to promote the educational and economic interests of the women and weaker sections of the people and that it shall protect them from social injustice and all forms of exploitation.

For further discussion refer Resource Book on Legal Framework on Anti Human Trafficking, UNODC, 2008.

Trafficking offences under the Indian Penal Code

The Indian Penal Code, 1860 prohibits trafficking, purchase and sale of minors. In addition, existing rape, assault, and abduction laws can be used to address the systematic abuse of women and girls in brothels.

Relevant provisions of significance under the Indian Penal Code are:

Sections 359-368 which deal with kidnapping, abduction, and wrongful confinement. Section 359, Section 361, Section 362, Section 363, Section 365,

* Source : Training Manual for Prosecutors on Confronting Human Trafficking - UNODC



Section 366, and Section 366A, which makes procurement of a minor girl (below the age of 18 years) from one part of India to another punishable.

Section 366B, which makes importation of a girl below the age of twenty-one years punishable. Section 367, which mandates imprisonment of up to ten years for the procurement or import of minors for the purposes of illicit intercourse, kidnapping and abduction leading to grievous hurt, slavery or subjection to “unnatural lust”.

Section 370, Section 371, Section 372, Section 373, Section 374 makes selling, letting to hire, or otherwise disposes of any person under the age of eighteen (18) 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 criminal.

Section 375, Section 376(1), Section 376B criminalizes rape. Rape laws are applicable to both brothel staff and customers.

If at the time of a raid pornographic CD's are also seized Sections 292 and 293 can be used.

In addition, **Criminal Procedure Code, 1973** with Sections 51(2), 53(2), 98, 160, 327(2) and 357 and Sections 114 A and 151 of **The Indian Evidence Act, 1872** are relevant in this context.

Source: Trafficking Women and Children for Sexual Exploitation: Handbook for Law Enforcement Agencies in India, Nair, P.M. 2007, UNODC.

An illustrative list of Sections under IPC to be used in the case of a trafficked girl

Displacement from her community, which amounts to kidnapping/abduction/confinement	Sections 361, 362, 365, 366 IPC may apply
Procured illegally	S. 366A IPC
Sold by somebody	S. 372 IPC
Bought by somebody	S. 373 IPC
Imported from a foreign country or hails from J&K	S. 366B IPC
Wrongfully restrained	S. 339 IPC
Wrongfully confined	S. 340 IPC
Physically tortured/injured	S. 327, 329 IPC
Subject to criminal force	S. 350 IPC
Mentally tortured/harassed/assaulted	S. 351 IPC
Criminally intimidated	S. 506 IPC
Outraged of her modesty	S. 354 IPC
Raped/gang raped/repeatedly raped	S. 375 IPC
Subject to perverse sexual exploitation (unnatural offences)	S. 377 IPC
Defamed	S. 499 IPC
Subject to unlawful compulsory labour	S. 374 IPC
Victim of criminal conspiracy	S. 120B IPC



Other Special laws, which deal with trafficking related crimes, are:

1. The Prohibition of Child Marriage Act, 2006
2. Bonded Labour System (Abolition) Act, 1976
3. Child Labour (Prohibition and Regulation) Act, 1986
4. Children (Pledging of Labour) Act, 1933
5. Maharashtra Control of Organized Crime Act, 1999
6. Goa Children's Act, 2003
7. Information Technology Act, 2000 (Sec. 67 - if the trafficked victim is exploited to develop pornographic material and that porn is circulated electronically).
8. Juvenile Justice Act (Care and Protection of Children) Act, 2000

The offence of trafficking has the following ingredients:

Exploitation of the trafficked person	The displacement can be from one country, state, village, community or home to another or from one situation to another. e.g.: When a daughter of a woman in prostitution is also pulled into prostitution by the brothel keeper, she is considered trafficked as she has been displaced from the safety of her mother's community to the brothel community, though geographically it may happen in the same room.
Displacement (physical or situational)	The exploitation may be manifest as in a brothel or latent as in massage parlours, dance bars or beer bars.
Commercialization of the exploitation	The exploiter generates revenue in cash or kind from the exploitation even if the victim gets a share of the revenue. The trafficked victim can never be treated as an accomplice, even if she gets a share of the income.

Procedural laws:

TO ENSURE PROPER CONVICTION OF TRAFFICKER AND EXPLOITERS AN UNDERTSANDING OF PROCEDURAL LAWS (Criminal Procedure Code ie. Cr.PC, The Indian Evidence Act, etc.) is of paramount importance. Preventive sections of the Cr.PC are also very necessary.

Extra Case Laws

1. **Sakshi vs Union of India= AIR 2004 SC 3566**

Highlight

Expanded the circumstances where in-camera trials should be used

Established procedures that would help child victims to testify at ease in court

Synopsis

Sakshi vs. Union of India has drawn the attention of the Supreme Court to the fact that the laws relating to rape are not adequate to cover various sexual atrocities against women, or child sexual abuse. Sakshi, a voluntary organization for the welfare of women



and children, proposed a draft amendment to the provisions in the Indian Penal Code and the same came up for examination by the Law Commission at the instance of the apex court.

Previously, the Delhi High Court found that an eight-year-old child penetrated in three orifices by her father is neither a rape nor an unnatural offence. Instead it is a mere “hurt”, an outrage of modesty. This motivated an appeal to the Supreme Court of India. Sakshi filed this petition urging the court to seriously consider an interpretation of rape which could finally alter a status quo view of life, by altering the general perception of it. In its petition filed in 1997, Sakshi had contended that the scope of sections 375/376 IPC (rape) be enlarged to include other forms of sexual assault intended to humiliate, violate and degrade a woman or child, sexually which adversely affect the sexual integrity and autonomy of women and children, thereby violating Article 21 of the Constitution.

Recognizing the sensitivity of cases of child sexual abuse and rape, the Supreme Court directed that the child victims be kept away from the accused during trial by means of a screen or similar arrangement separating them. Questions directly relating to the incident put in cross-examination on behalf of the accused should be given in writing to the trial judge, who may put them to the victim or witnesses in a clear language, and sufficient breaks should be allowed while giving testimony.

Till this judgment was passed, it was only mandatory to hold in camera proceedings in cases relating to rape. This judgment held that proceedings should be in camera even in cases which do not have penile penetration.

2. Sheba Abidi vs. State(NCT) of Delhi & Anr. =113(2004) DLT 125

Highlight

Established that child victims can testify outside the court environment

Child victims are entitled to get a support person during trial

Synopsis

Soon after the judgment was passed in the case of Sakshi, the Delhi High Court passed a judgment wherein it laid down further parameters with respect to the conduct of a case in child sexual abuse.

This is a case relating to a four year old boy who was sexually abused by his teacher. A complaint was filed, registered, and the trial began. The child was scared of the perpetrator, and was very uncomfortable to come face to face with him. The mother of the child made an application before the trial court stating these difficulties. In her application she had attached the opinion/report of a reputed psychiatrist who had a chance to interact with the child, and had endorsed the child’s apprehension. However, the trial court did not accede the mother’s request that the evidence should be recorded elsewhere.

Aggrieved by this order, the mother filed a petition before the Delhi High Court. After hearing the case at length, the High Court passed a judgment, wherein it held that in cases of child sexual abuse, the Courts should strive towards ensuring that the child was not traumatised further. It further held that the child could give evidence in an environment outside the Court if he/she was uncomfortable going to the Court. It



further held that in all these cases, the child would be entitled to get a support person with him/her during the trial, and this support person could be also be the parent of the child.

3. Prerana vs. State of Maharashtra= 2003 (2) Mah LJ 105

Care and protection of child must be dealt with keeping in mind possibility of their reformation and rehabilitation as per Section 2 (1) and 2 (d) (vi) of the Juvenile Justice (Care and Protection of Children) Act, 2000 – The High Court issued directions to prevent recurrence of the crime.

Highlights

- Children rescued from brothels should be treated as “children in need of care and protection” under the Juvenile Justice (Care and Protection of Children) Act, 2000;
- A lawyer representing the accused should not represent the victims;
- Drew parallels between the Immoral (Traffic) Prevention Act and the Juvenile Justice (Care and Protection of Children) Act, 2000;

This is a judgment from the High Court of Bombay. This petition came to be filed following the release of minor girls to the custody of certain persons, pretending to be legal guardians of the rescued victims but represented in Court by the same lawyers representing the accused in the same case. Following a raid and rescue operation from a red light area, several young girls and children were rescued, and the perpetrators were arrested. During the pendency of these proceedings, the girls who were found to be under 18 years of age were kept in an observation home. A lawyer filed an application stating that these children should be released on the ground that they had not committed any offence and therefore could not be detained. This lawyer was also the lawyer for the accused.

On his application, the children were released. Prerana, a NGO working with rescued victims/survivors of prostitution, filed a petition in the High Court as they apprehended that these children would be handed over to the accused and also that there was a clear case of conflict of interest as far as the lawyer was concerned. In this background, the High Court passed an order in which it gave the following directions:

- No Magistrate can exercise jurisdiction over any person under 18 years of age irrespective of the fact whether that person is a juvenile in conflict with the law or a child in need of care and protection, as defined by Sections 2(1) and 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000. At the first possible instance, the Magistrates must take steps to ascertain the age of a person who seems to be under 18 years of age. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with the law, or to the Child Welfare Committee if such a person is a child in need of care and protection.
- A Magistrate before whom either persons rescued under the Immoral Traffic (Prevention) Act, 1956 or having been found soliciting in a public place are produced, should, under Section 17(2) of the said Act, have their ages ascertained the very first time they are produced before him. When



such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a Juvenile in conflict with law, or to the Child Welfare Committee if such person is a child in need of care and protection.

- Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the Probation Officer.
- The said juvenile should be released only to the care and custody of a parent/guardian after such parent/guardian has been found fit by the Child Welfare Committee to have the care and custody of the rescued juvenile.
- If the parent/guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be followed for the rehabilitation of the rescued child.
- No advocate can appear before the Child Welfare Committee on behalf of a juvenile produced before the Child Welfare Committee after being rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place. Only the parents/guardian of such juvenile should be permitted to make representations before the Child Welfare Committee through themselves or through an advocate appointed for such purpose.
- An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (Prevention) Act, 1956.

Immoral (Traffic) Prevention Act and related punishments are tabled below:

COMMERCIAL SEXUAL EXPLOITATION		
Sections	Provisions	Punishment
3	Section 3 of the ITPA provides for punishment for keeping a brothel or allowing premises to be used as a brothel.	Rigorous imprisonment for 1 to 3 years along with a fine, which may extend to Rs. 2000. For subsequent offence imprisonment for 2 to 5 years along with a fine, which may extend to Rs. 2000.
3 (2)	provides for punishment of any person who is a tenant and allows any person to use, such premises or any part thereof as a brothel, or is the owner and lets the premises to be used as a brothel.	Rigorous imprisonment for 2 years along with a fine, which may extend to Rs. 2000.



	<p>In <i>Kamalabai Jethamal Vs. The State of Maharashtra</i>, it was held that though the search and investigation was not conducted according to the provisions of Cr P.C and not in good spirit, but still the fact that money was found with the appellant and it was used for prostitution, therefore the accused should be convicted under Section 3(2) and 4(1) of SITA.</p> <p>Though the above mentioned section 3 (2) of the Act provides for prosecution of landlords or lessors who rents out or lets out any premises for prostitution, the landlords and lessors rarely get prosecuted for the simple reason that for an offence to be established under section 3 (2) of the Act it is important to establish that it was within the knowledge of the landlords or the lessors that the premises was used as a brothel and sexual exploitation of persons was carried on in the premises for gain or profit. The element of knowledge at times becomes difficult to prove and therefore the landlords and lessors are rarely prosecuted or convicted.</p> <p>Delhi High Court in Mumtaj @ Behri Vs. The State (Govt. of NCT of Delhi) had held that it is obvious that for proving an offence under Section 3 of the Act some specific instances of prosecution must be proved and then it must further be proved that the accused was managing / keeping the place with the intention and knowledge that same is being used for the purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes.</p>	<p>For subsequent offence imprisonment up to 5 years along with a fine, which may extend to Rs. 2000.</p>
4	<p>This section penalizes any person over the age of 18 years if knowingly lives on the earnings of a prostitute.</p>	<p>Imprisonment up to 2 years along with a fine, which may extend to Rs. 1000 or both.</p>



4 (2)	<p>This section makes the punishment more stringent if a person lives on the earnings of a minor</p> <p>Cases where the earnings relate to prostitution of a child or a minor, then there is an enhanced punishment of imprisonment, which may extend to 7 to 10 years.</p> <p>This section provides that any person over the age of 18 years habitually lives with a prostitute or aids, abets or compels a person for prostitution or acts as a tout or pimp on behalf of a prostitute shall be presumed to be living on the earnings of prostitution.</p> <p>In Smt. Ram Devi Vs. State and Others, it was held that as the ITPA itself does not punish or make liable for action a woman who carries on prostitution for her own gain as long as she does not violate the prohibition of soliciting or seducing in a public place, section 4 of ITPA is clearly applicable only to a person living on the earnings of prostitution of another person. It is a Section meant to punish the people living on her earnings only.</p>	<p>Imprisonment up to 7 – 10 years.</p>
5	<p>This section provides for punishment in case any person, who procures, induces or takes a person from one place to another for purpose. In Cherian Vs. Kerala, it was held that any person including a client shall be liable under section 5 (1) (d) of the ITPA who induces or causes any person to carry on prostitution u/s 7(1).</p>	<p>Rigorous imprisonment for 3 – 7 years alongwith a fine amount of Rs. 2000 or both.</p> <p>If offence committed against the will of the person induced or procured then punishment for 7 to 14 years.</p> <p>If the offence is committed against the child then rigorous imprisonment of 7 years to life.</p> <p>If the offence is committed against a minor then rigorous imprisonment of 7 to 14 years.</p>



6	Section 6 of ITPA provides that any person who detains any other person in any brothel, or any premises for sexual intercourse is shall be an offender an liable to be punished under the Act.	Imprisonment for 7 years which may extend to life or may extend to ten years and shall also be liable for fine.
6 (2)	This provides that where any person is found with a child in a brothel, it shall be presumed that he has detained that child for sexual intercourse.	Imprisonment for 7 years to life or may extend to seven years and shall also be liable for fine.
6(2)(A)	Where a child or a minor is found in a brothel and has been detected of being sexually abused then it shall be presumed that the child or minor has been detained for the purposes of prostitution. In Harnam Singh Vs. Emperor , it was held that for prosecuting a person under section 6 (2) of ITPA, something in the nature of control or influence and some kind of persuasion is sufficient proof.	First conviction, imprisonment for 3 months and fine of Rs. 200. Second conviction, imprisonment for 6 months and fine of Rs. 200. If the public place includes any hotel then the license of such hotel shall be suspended for a period of 3 months to one year. In case the offence under this is committed with respect to a child then the license of such hotel shall be liable to be cancelled.
6 (3)	It shall be a case of detention if any women or girl is detained for sexual intercourse with any other person other than her husband if she is detained either through inducement, withholding her jewellery / personal belongings or through threat of legal proceedings. In such cases no suit / proceedings shall lie in any Court against the woman at the instance of the detainee for recovery of jewellery, apparel, money or any other property.	
9	Any person who makes any other person seduce or abets in the seduction for the purpose of prostitution shall be liable for punishment if he has the custody of the other person or exercises control, charge or authority. Against Public Morality	Imprisonment for 7 years to life or may extend to seven years and shall also be liable for fine.



7	Section 7 prohibits prostitution in public place and within a distance of two hundred meters of any public place. An offence under this section is punishable.	Imprisonment for 3 months
7(1)(A)	<p>Section 7(A) of the Act provides that where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with more stringent punishment.</p> <p>In re Ratnamala AIR 1962 Mad 31 laid down that, sections 7 and 8 are the exception to the general object of SITA which is to prevent trafficking for prostitution, but section 7 undoubtedly inhibits the woman (prostitute) herself from the practice of her profession in contravention of its terms, and to that extent renders prostitution a penal offence.</p> <p>In Bai Shanta Vs. State of Gujrat, it was held by the Madras High Court that it is not necessary that the customer must have been found having sexual intercourse with the woman and it is enough if the circumstances suggest an inference about her having offered her body for immoral purposes on receipt of any money so as to be liable under section 7(1) of the Act. However to establish liability under section 7(1), offence must be shown to have been committed in premises within the prohibited area. Though for holding that a woman carries on prostitution, plural and indiscriminate sexuality on her part has got to be established, that doesn't necessary require that the evidence of more than one customer of the prostitute must be adduced and it is enough if the facts proved entitle the court to raise an inference to hold that she carries on prostitution as contemplated under section 7(1) of the Act.</p>	Imprisonment for 7 years to life or can extend to 10 years and shall also be liable for fine.
7(2)	Any keeper of a public place, tenant, occupier, landlord or his agent of a public place shall be liable for punishment if he knowingly permits prostitutes for the purpose of prostitution	

1. Prerana vs. State of Maharashtra = 2003 (2) Mah LJ 105
2. Sheba Abidi vs. State(NCT) of Delhi & Anr. = 113(2004) DLT 125
3. Cherian vs State of Kerala = 1973 CrLJ 839 (Ker.)
4. Kamalabai Jethamal = 1962 Supp. (2) SCR 632
5. Harnam Singh vs Emperor = AIR 1939 Lah 295
6. Smt. Ram Devi=2003 CrLJ 533
7. Sakshi vs Union of India = AIR 2004 SC 3566
8. Bai Shanta vs. State of Gujarat = AIR 1967 Guj 211





HUMAN TRAFFICKING LAW IN INDIA:AN OVERVIEW

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INTRODUCTION

Of all the organized crimes across the world, the human trafficking is perhaps the most serious one as its prime target always remain women and children who are trafficked for various illegal purposes such as prostitution, slavery, sexual abuse, forced labour and possibly for all kind of violence and abuse that one can imagine and contemplate against women and children. The seriousness of the crime lies in the fact that these women and children who are from lower strata of society and who are highly oppressed and exploited are the victims, with no one to help them out and secondly, the sophisticated and organized manner in which the crime syndicate works across inter-state, inter-regional and international borders throughout the world which makes the respective Governments helpless in dealing with the crime. The problem in India is all the more severe not only because India is a poor country with around 35% of India's population live below the poverty line but also because India is surrounded by poor countries such as Nepal and Bangladesh wherein there is an easy availability of victims. The fact that we have open border with Nepal is a boon for traffickers and the lack of strict vigil on Indo Bangladesh border further aggravates the problem. This paper aims to look at the various legal provisions and enforcement mechanisms in India to prevent and penalize the crime of human trafficking.

HUMAN TRAFFICKING IN INDIA

In India the crime of human trafficking has acquired a dangerous proportion in the last few decades; the reason being that India is a source, transit and destination for the crime. Bordering alongside Nepal and Bangladesh, India is a fit place for the traffickers. The abundance of poor population in the country is the boon for traffickers. The poor law enforcement machineries further aggravates the situation. In India, the trafficking is done for all most all illegal and immoral purposes such as sexual abuse, pornography, forced labour and slavery. The root cause of the problem is poverty, unemployment and underemployment and hence problem is social as well as legal. The Government has failed to address the issue of poverty effectively. Widespread corruption in the anti-poverty and development programmes has made the situation worst. What is more worry some is that some of the religious places in India and tourist destinations are getting affected by sex tourism and prostitution. The victims include women and children who work in India's brick kilns, rice mills, farms, embroidery factories, mines, stone quarries, and as domestic workers, beggars, agricultural workers, carpet weavers and are also sexually exploited in various forms. No doubt India is a source, destination and transit for men, women and children who are trafficked for commercial sex exploitation. Indian women are also trafficked to Middle East for commercial sex purposes. The areas of the greatest concern are poverty stricken areas such as Andhra Pradesh, Bihar, Karnataka, Uttar Pradesh, Maharashtra, Madhya Pradesh Rajasthan, Orissa and West Bengal. Only 10% of human trafficking in India is international while almost 90% is inter-State. According a report by the National Human Rights Commission of India, nearly 40,000 children are abducted every year of which 11000 remain untraced and possibly fell prey into the hand of traffickers.



HUMAN TRAFFICKING AND INDIAN LAW CONSTITUTIONAL PROVISIONS

To start with, the Indian Constitution which is a basic political document providing legal framework for the governance of the country, provides in Article 23 that trafficking in human being, beggar and other form of forced labour prohibited. The importance of Article 23 lies in the fact that it comes under Part III of the Constitution which deals with the Fundamental Rights. Thus, any person who is a victim of human trafficking can claim that his fundamental rights are being violated. The fundamental rights are distinguished from other legal rights in the sense that former are fundamental to the dignity of the human beings and are basic to all human beings and denial of it threatens every existence of a person as human being whereas the latter are ordinary legal rights of the person. The right to life under Article 21, as we all know, includes right to live with human dignity. Article 15(3) provides that the State shall make special provision for women and children. Article 39(e), which comes under Directive Principles of State Policy provides 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. Similarly, Article 39(f) provides that the 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. Article 42 provides that the State shall make provision for securing just and humane conditions of work and for maternity relief. Article 38 provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform the institutions of the national life.

INDIAN PENAL CODE

Section 370 of the Indian Penal Code provides that whoever imports, exports, removes, buys, sells or disposes of any person as a slave or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Section 371 provides that whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with imprisonment for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine. Section 372 provides that whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall 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 purposes, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Section 373 provides that whoever buys, hires or otherwise obtains possession of any person under the age of 18 years with the intent that such person shall be employed or used for the purpose of prostitution or illicit intercourse with any person or for any immoral or unlawful purpose knowing fully well that such person shall be used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Section 374 provides that whoever unlawfully compels any person to labour against



the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with both.

SUPPRESSION OF IMMORAL TRAFFICKING ACT, 1956 AND IMMORAL TRAFFICKING PREVENTION ACT, 1986

In the year 1950 the Government of India ratified the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others and in the year 1956, India passed the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). This Act was further amended and changed in 1986, resulting in the immoral Traffic Prevention Act also known as PITA. The aim of the 1986 Act was to criminalize various aspects of sex work. However, the Act has not been very successful in curbing the menace of trafficking of women and children for the purpose of prostitution as the problem of trafficking has acquired dangerous proportion. The weakest area has been its implementation. The enforcement mechanisms under the Act also proved to be very ineffective.

OTHER LEGAL PROVISIONS

Some other laws which prohibit trafficking, indirectly or directly, for various unlawful or immoral purposes include Bonded Labour Abolition Act, 1976, Child Labour Abolition Act, 1986; Prohibition of Child Marriage Act, 2006, Human Organs Transplantation (Amendment) Act, 2011 (It has provisions for stringent punishment for illegal human organ and tissue transplantation. It provides for an increase in jail term from five years to ten and fine of Rs.20 lakhs extendable to Rs. 1 crore for those indulging in illegal activities of human organ transplantation). Since trafficking is an organized crime, it also comes under the purview of various States legislations such as Maharashtra Control of Organized Crime Act, 1999 and Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

AN INTERNATIONAL LEVEL

In June 2011, Government of India ratified the United Nations Convention against Transnational Organized Crime (UNTOC) and one of its three protocols includes the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, which supplemented the 2000 UN Convention against Transnational Organized Crime. The signatory States to the Protocol are required to criminalize all forms of trafficking defined in terms of recruitment, harboring, or transportation by means of force, fraud, coercion, or abuse of position of vulnerability for purposes of exploitation. Exploitation, although undefined under the Protocol, includes, at a minimum, forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs. The USA in 2000 enacted the Victims of Trafficking and Violence Protection Act. In 2001, the US Department of States has ranked national Governments receiving US aid on their performance in preventing trafficking, prosecuting traffickers and protecting victims of trafficking. The Countries with poor performance fall within Tier 3 of the annual Trafficking in Persons (TIP) ranking with withholding of USA aid on non-trade related foreign assistance. Between 2001 and 2003, India figured in Tier Two of the TIP Report and afterwards demoted into Tier three Watch List. It is only when India ratified UN protocol in the year 2011; it was once again promoted into Tier Two list.



LAW ENFORCEMENT MACHINERIES

MINISTRY OF HOME AFFAIRS

The Government of India in the Ministry of Home Affairs in association to the United Nations Office on Drugs and Crime (UNODC) has initiated a two years project for training of Law Enforcement officers on human trafficking in four States, namely, Maharashtra, Goa, West Bengal and Andhra Pradesh. A Project Steering Committee has been constituted for steering guiding and monitoring of the project. Through a series of training programmes, the project will raise the awareness of Law Enforcement Officers (police and prosecutors) on the problem of human trafficking and further build up their capacity to better investigate the crime and prosecute the offenders who are perpetuating such crimes. A few Anti Human Trafficking Units (AHTUs) are also proposed to be developed or strengthened at the State level in the selected States under this project. The primary role of an Anti Human Trafficking Unit (AHTU) would be law enforcement and it would liaise with other concerned agencies for care & rehabilitation of victims. The Ministry of Home Affairs has set up an Anti Human Trafficking Cell for dealing with matters relating to trafficking in human beings. The Cell is responsible for collecting and analyzing the data related to trafficking from the State Governments/ UT Administrations, identifying problem areas and analyzing causes for their being source/transit/destination areas, monitoring action taken by the State Governments/ UT/Administrations for combating the crime and organizing co-ordination meetings with the nodal Police Officers of States/UTs.

ADVISORY NO-15011/27/2011 ON HUMAN TRAFFICKING AS ORGANIZED CRIME

The Ministry of Home Affairs has come out with the Advisory No.15011/27/2011 for the purpose of strengthening anti-human trafficking law enforcement machineries in India. As per the Advisory, the Central Bureau of Investigation (CBI) is the National Nodal Authority to receive and respond to all requests for all inter-State and cross border assistance as a single point of contact and to act as liaison between the Ministry of External Affairs and other State parties on matters relating to the Convention as well as the Protocols. One unit in Special Crime Division of CBI has been designated as Anti Human Trafficking Unit to provide specialized assistance in the area of Human Trafficking of child and women for the purpose of begging, prostitution, pornography, forced labour in industries & other forms of exploitation.

The Advisory provides that the following key action points need to be addressed by States/UTs for effectively dealing with the organized crime aspect of human trafficking.

- a) **Anti Human Trafficking Units (AHTUs) :** All States are urged to utilize the AHTUs as a key machinery to deal with the crimes of HT in a holistic manner. Police officers in the AHTU should collect/disseminate/ utilize intelligence on offenders; maintain database of offenders as well as their hierarchical structure, place of operation, segments of supply chain and allied places of exploitation; partner with NGOs and local communities to unearth information relating to HT and above all carry out a professional investigation.



- b) **Sensitization of Law Enforcement Agencies** : Police/Border Guards/Railway Police/Immigration officers, Prosecutors and Judiciary may be sensitized through training/seminars and workshops for the effective implementation of the ITPA, the IPC (Sections 3A, 107-117, 120A, 120B, 551), the Prevention of Corruption Act, 1988, (Sections 7-11, 13, 17, 20) and other relevant State legislations. This should be with the specific purpose of dealing with the organized aspect of trafficking.
- c) **Special Police Officer (SPO)** : U/S. 13 of the ITPA, the State Government may appoint SPOs and 'Non-official advisory bodies' to advise the SPOs for dealing with offences under the ITPA.
- d) **Local Intelligence Units (LIUs)** : State Governments may consider setting up LIUs in all districts against organized crime to gather intelligence and ensure that it is disseminated. Priority should be given to the database on traffickers and their networks. Their profiling and surveillance can be an effective tool for intelligence collection and for prevention of trafficking.
- e) **Helplines** : State police agencies may set up helplines and special desks in the police stations and control rooms to address this issue on a real time basis.
- f) **Standard Operating Procedures** : The protocol on Inter-State rescue and Post-Rescue activities and Standard Operating Procedures for Investigation etc. developed jointly by the MHA and UNODC for conducting joint investigations and operations which also facilitate exchange of information about traffickers and their mode of operation, routes etc. should be implemented. These resource materials should be translated and re-printed by the States into local languages for wider use and dissemination.

As regards defeating organized gangs, the Advisory laid down the following guidelines

DEFEATING ORGANIZED CRIMES

- a) A clear plan of action should be chalked out to collect relevant evidence to prove existence of a gang, the identities and activities of its gang members, nexus with other gangs and public officials, if any and identify the trail of illegal and ill-gotten money (proceeds of crime).
- b) Deciphering the communication linkages through link analysis.
- c) Specific and general 'intelligence' about a gang should be developed to make a prima facie assessment about the lines of investigation with respect to the activities of a gang.
- d) Relevant 'surveillance' methods may be employed to develop specific information including the identity, the activities and the level of complicity of gang members in the case and otherwise.
- e) The case history of every crime committed by every gang member should be collected from the concerned districts to prepare a dossier of the gang to be used to book a gang under relevant laws such as the UP Gangster Act.



PARELLEL FINANCIAL INVESTIGATION INTO MONEY LAUNDERING

It would be virtually impossible to establish and manage an organized HT network without creating audit trails such as advertising, rentals, transportation, communication, mapping of exploiter profits and financial transactions. Any of the following four aspects relating to money laundering need to be established during the course of investigation.

Assistance of financial experts should be taken:

- a) Conversion or transfer of crime proceeds for the purpose of concealing their illicit origin;
- b) Concealment or disguise of crime proceeds;
- c) Acquisition possession or use of crime proceeds;
- d) Contributing indirectly to the commission of the offences outlined above, including participation in and conspiring or attempting to commit the offences in question.

Efforts should be made to identify each and every movable and immovable asset of a gang and each of its members including benami properties by verifying documents and analyzing the source of funds. Each business or establishment run by gang members should be scrutinized to assess the investment made into the business/establishment, its source of funding, profits made and utilization/re-investment of profits, possible tax evasion, violation of financial rules and regulations including the ones relating to foreign exchange.

CONFISCATION OF PROCEEDS :

As regards confiscation of proceeds, the Advisory provides that

It will be essential to deprive the criminal gangs of their ill gotten wealth. The laws relating to confiscation of proceeds of crime are available in several statutes. As per the facts of the case being investigated the relevant law is to be invoked.

- a) Sections 102, 105 and 462 of Cr.P.C.
- b) Sections 111 to 121 of the Customs Act, 1962;
- c) Chapter V A of the Narcotic Drugs and Psychotropic Substances Act, 1985;
- d) The Criminal Law [Amendment] Ordinance, 1944 (Ordinance XXXVIII of 1994)
- e) Foreign Exchange Regulation Act, 1973 (Section 63); and
- f) Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.
- g) Unlawful Activities (Prevention) Act, 1967
- h) Invoke provisions of ITPA along with IPC, ITPA with MCOCA (wherever in force), ITPA with Goa Children's Act, 2003 (applicable in Goa) etc.
- i) Action be initiated under the provisions of the Prevention of Money Laundering Act, 2002 for offences committed u/Ss. 5, 6, 8 and 9 of ITPA; The Enforcement Directorate is to be informed during the investigation of the predicate offences.



The Ministry has issued, other advisories also such as Advisory on preventing and combating human trafficking in India-dealing with foreign nationals, Advisory on missing children and others with the primary aim to prevent human trafficking. The Ministry role is commendable in this regard.

ROLE OF NATIONAL HUMAN RIGHTS COMMISSION

The National Human Rights Commission is the premiere organization in India entrusted with the responsibility of protecting human rights of all the persons (Citizens as well as non Citizens) in the country and is established under the Protection of Human Rights Act, 1993. In view of the existing trafficking scenario and at the request of the UN High Commissioner for Human Rights as well as on the recommendations of the Asia Pacific Forum of National Human Rights Institutions, the National Human Rights Commission nominated one of its Members to serve as a Focal Point on Human Rights of Women, including Trafficking in 2001. Among the activities initiated by the Focal Point was an Action Research on Trafficking in Women and Children in India in the year 2002 in collaboration with UNIFEM (United Nations Development Funds for Women) and the Institute of Social Sciences, a research institute in New Delhi. The main focus of the Action Research was to find out the trends, dimensions, factors and responses related to trafficking in women and children in India. Besides, it looked into various other facets of trafficking, viz., the routes of trafficking, transit points, the role of law enforcement agencies; NGOs and other stakeholders in detecting and curbing trafficking. It also reviewed the existent laws at the national, regional and international level. The Action Research was completed in July 2004 and its Report was released to the public in August 2004. The recommendations and suggestions that emerged out of the Action Research were forwarded to all concerned in the Central Government, States/ Union Territories for effective implementation. They were also requested to send an action taken report on the steps taken by them. In order that the recommendations and suggestions of the Action Research were implemented in true spirit, the Commission subsequently devised a comprehensive Plan of Action to Prevent and End Trafficking in Women and Children in India and disseminated the same to all concerned.

Before commencing the Action Research, an Information Kit on Preventing and Combating Trafficking in Women and Children was also published by the Focal Point. The main aim of the Information Kit was to inform the society about the various aspects of Trafficking - its forms, the estimates, the causes, the consequences, the modus operandi and the role of the Commission in preventing and combating trafficking. Prior to the establishment of the Focal Point, the Commission with the help of UNICEF and other organizations had carried out a campaign of Public Awareness on the problem of Child Prostitution and Sexual Abuse of Children in 1998.

Pained with the plight of children who were victims of trafficking, the Commission and the Prasar Bharati, with support from UNICEF, collectively prepared a Guidebook for the Media on Sexual Violence Against Children. The main objective of the guidebook is to encourage media professionals to address the issue of sexual violence against children in a consistent, sensitive and effective manner, consonant with the rights and best interests of children. Further, to prevent cross-border trafficking, the National Human Rights Commission requested the Directors General of Police of Uttar Pradesh, Bihar and West Bengal to be vigilant about the issue.



To spread awareness on prevention of sex tourism and trafficking, the Commission in collaboration with the UNIFEM and an NGO organized a one-day Sensitization Programme on Prevention of Sex Tourism and Trafficking in the year 2003. The main objective of the programme was to sensitize senior representatives of the hotel and tourism industry on various issues relating to sex tourism and trafficking. A National Workshop to Review the Implementation of Laws and Policies Related to Trafficking was also organized in 2004 in collaboration with PRAYAS, A Field Action Project of the Tata Institute of Social Sciences, Mumbai to work towards an effective rescue and post-rescue strategy. Now, the NHRC has become more active in combating the menace of trafficking.

NATIONAL COMMISSION FOR WOMEN

The National Commission for Women is also dealing with the problem of trafficking in women and children. In late 90s, it undertook two studies entitled 'The Lost Childhood' and 'Velvet Blouse-Sexual Exploitation of Children'. In 2001, it undertook another study entitled 'Trafficking-A Socio-Legal Study'. Later in 2004, a study on 'Coastal Sex Tourism' was carried out by it. Along with these research studies, it has organized various seminars, training programmes and conferences on the subject of trafficking. Based on the above, it suggested amendments to ITPA in order to have a comprehensive law of trafficking. Now a day, the National Commission for Women has become very active in dealing with matters relating to trafficking and has suggested number of recommendations for rehabilitation of trafficked victims.

INTEGRATED APPROACH OF MINISTRY OF HOME AFFAIRS, NATIONAL HUMAN RIGHTS COMMISSION AND NATIONAL COMMISSION FOR WOMEN INTEGRATED PLAN OF ACTION TO COMBAT HUMAN TRAFFICKING

In order that these recommendations/Plans of Action are properly acted upon, the Ministry of Women and Child Development, Ministry of Home Affairs, National Human Rights Commission and National Commission for Women have decided to work in unison and draw up an Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women.

The Integrated Plan of Action, in short, aims at

- Ensuring Human Rights Perspective for the Victims of Trafficking
- Preventing Trafficking
- Emerging Areas of Concern in Trafficking - Their Patterns and Trends
- Identification of Traffickers and Trafficked Victims
- Special Measures for Identification and Protection of Trafficked Child Victims
- Rescue of Trafficked Victims Especially in Brothel-Based and Street-Based Prostitution with Special Focus on Child Victims
- Rehabilitation, Reintegration and Repatriation of Trafficked Victims with Special Focus Child Victims
- Cross-Border Trafficking: National and Regional Co-operation and Co-ordination
- Legal Framework and Law Enforcement
- Witness Protection and Support to Victims



- Training, Sensitization, Education and Awareness
- Methodology for Translating the Action Points into Action

The ultimate objective of the Integrated Plan of Action is to mainstream and reintegrate all victims of trafficking in society.

SUPREME COURT ON HUMAN TRAFFICKING

The Honourable Supreme Court in *Vishal Jeet v. Union of India*^{*} directed that every State Government should set up a State Advisory Committee for Preventing and Combating Trafficking of Women and Children for Commercial Sexual Exploitation. Ministry of Women & Child Development (MWCD) has already issued an advisory in this regard, to all the State Governments.

The Honorable Court in *Vishal Jeet v. Union of India* explained the pathetic situation of the victims:

“No denying the fact that prostitution always remains as a running sore in the body of civilization and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large.

It is highly deplorable and heart-rending to note that many poverty stricken children and girls in the prime of youth are taken to ‘flesh market’ and forcibly pushed into the ‘flesh trade’ which is being carried on in utter violation of all canons of morality, decency and dignity of humankind. There cannot be two opinions-indeed there is none-that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps.”

The Honorable Supreme Court *Vishal Jeet v. Union of India* laid down guidelines for eradication of the malady;

“This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Courts in such cases have to always take a serious view of this matter and inflict consign punishment on proof of such offences. Apart from legal action, both the Central and the State Government who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction. Bhagwati, J. (as he then was) in *Lakshmi Kant Pandey v. Union of India*^{**}, while emphasizing the importance of children has expressed his view thus: “It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, is growth and development, depend on the health and well-being of its children. Children are a ‘supremely important national asset’ and the future well-being of the nation depends on how its children grow and develop.”

* 1990 AIR SC 1412

** AIR 1984 SC 469



CONCLUSION

As the human trafficking network is highly organized and sophisticated, combating them requires active co-operation between different State police forces with CBI as the nodal agency. Further, constant and active co-operation between NGOs working in this area and law enforcement agencies is also required. Hence there is a need to develop institutionalized system of co-ordination between all the agencies and the NGOs. Specialized training of the Law enforcement agencies also requires considerable attention and the Government has given attention to this aspect in the recent past. It must be remembered that if we are able to curb the menace of human trafficking, then we will be able to curb a lot of evils in our society such as child labour, bonded labour, begging, sexual and physical abuse of trafficked women and children, child prostitution, forced organ transplantation etc. However, as we all know that since it is the poverty and hunger that pushes millions of people into the net of traffickers in India; it is this poverty which needs to be addressed through ensuring better implementation of all anti-poverty programmes and development programmes. Thus, vigorous implementation of anti-poverty programmes coupled with strict enforcement of anti-trafficking laws and speedy prosecutions of culprits as well as better rehabilitation programmes for the victims will go a long way in curbing the menace of human trafficking. The Government needs to work on the triple strategy of Prevention, Protection and Prosecution (PPP). The Government should provide counselling and support services such as shelters, educational and vocational training, and financial assistance for women and children who have been victims of trafficking, especially those involved in prostitution. The child and women protection homes and rehabilitation centres need better infrastructure facilities in our country. Unfortunately, the rehabilitation has been the most neglected area in the entire issue of human trafficking.



"You may choose to look the other way but you can never say again that you did not know"

- Martin Luther King