



## Immoral Trafficking and Exploitation of Children in India: A Legal Aspect

### KEYWORDS

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**ABSTRACT** *The Immoral Traffic Prevent Act fails to protect the children against commercial and sexual exploitation them. The present study makes an attempt to look into the shortcoming of the existing laws and their implementations. The study also tries to examine the causes of immoral trafficking and exploitation of the children, especially of girl children. The complexities and challenges of the Indian laws in protecting these evil activities have also been studied in this paper. The study suggest the essential restructuring of official/administrative structure and infrastructure for bringing the desired changes the lives of millions*

### INTRODUCTION

The commercial sexual exploitation of Indian children is widely discussed by civil society groups, law enforcement agencies, legislators and other stakeholders working on child rights issues. Despite this, Indian laws and their implementation have not effectively combated the increasingly sophisticated means employed to exploit and abuse children. Most of the previous research works in this area has focused on studying selected laws relevant the commercial sexual exploitation of children and weaknesses in these laws. However, these studies have not holistically reviewed how these laws passed to protect children from commercial sexual exploitation are enforced and implementation of the law by the Government and civil society actors. There is a lack of clear instructions to guide those tasked with implementing the laws. India's laws related to the commercial sexual exploitation of children are piecemeal, and their enforcement procedurally complicated. As a result, children are not adequately protected against commercial sexual exploitation, and their situation is made even worse because children rarely have access to legal counsel that can assist them in making informed decisions about their rights in legal proceedings (Tripathi and Arora, 2006). Indian laws fail to specifically define and prohibit acts that result in child prostitution, child trafficking for sexual purposes, and the possession, creation, display and distribution of child pornographic images. Thus, children entitled to legal protections are not afforded them and child exploiters and abusers are not prosecuted for sexual crimes against Indian children. Indian law also lacks specific procedures for reporting, investigating, and prosecuting cases involving sexual crimes against children. As a result, child victims of sexual crimes are not consistently provided legal assistance and there are no special provisions available to protect children's rights in the course of legal proceedings.

Under this backdrop this paper makes an attempt to

- (i) examine the extent, effectiveness and weaknesses of the existing Indian laws to protect the children against immoral trafficking;
- (ii) to find out the reasons of immoral trafficking;
- (iii) to assess the impact of such trafficking on the victims and
- (iv) to suggest ways to combat these trafficking.

### SURVEY OF EXISTING LAWS

In the Indian legal system, the 'child' has been defined differently in the various laws pertaining to children. According to the Convention on the Rights of the Child, Article 1 defines 'the child' as 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'. Again the Indian Penal Code defines the 'minor' as being 12 years of age, whereas the Indian Traf-

fic Prevention Act, 1956 defines a 'minor' as a person who has completed age of 18 months but not 18 years. Section 376 of IPC, which punishes the perpetrators of the crime of rape, defines the age of consent to be below 16 years of age, whereas Section 82 and 83 of the IPC states that nothing is an offence done by a child under 7 years, and further under 12 years, till he has attained sufficient maturity of understanding the nature of the Act and the consequences of his conduct on that occasion (Gaur, 2001). There are very few sections under the Indian Penal Code that deal with child sexual abuse. So, the following terrible home truths arise:

- a) The laws for women are extended to include minor girls.
- b) The major weakness of these laws is that only penile penetration is considered a grave sexual offence. The crime is considered lesser when it is oral, or through penetration with an object.
- c) Although section 377 of Indian Penal Code (IPC), dealing with unnatural offence, prescribes seven to ten years of imprisonment, such cases can be tried in a magistrates court, which can impose maximum punishment of three years.
- d) If the abuse is repeated several times it affects children more severely, however, as yet there is no law for repeated offences against the one child.

How do we apply section 354 of IPC on outraging the modesty of women, with respect to minor girls? How do we define modesty? The gravity of the offence under section 509 of IPC, dealing with obscene gestures, is less. Yet even in such cases, the minor's psyche may be affected as severely as in a rape.

### Meaning of Commercial Sexual Exploitation of Minor Girls in India:

The term commercial sexual exploitation of minor girls refers to 'criminal practices that demean, degrade and threaten the physical and psychosocial integrity of minor girls, in particular, sexual abuse by an adult and remuneration in cash or kind to a minor girl or third person(s)'. There are three primary and interrelated forms of commercial sexual exploitation of minor girl: prostitution, pornography, and trafficking for sexual purposes. Other forms of commercial sexual exploitation of minor girl include, but are not limited to, child sex tourism, and child marriages. As in many parts of the world, minor girl in India are being forced into prostitution, trafficked for sexual purposes, and forced into creating pornographic images in a complex number of ways. And this becomes a great concern of the society as the number of minor girls who are commercially sexually exploited has increased, while the age of these minor girls had decreased. According to Department of Women and Children' Report (1998), children constituted more than 40 per cent of the persons trafficked into com-

mercial sexual exploitation in India. At any given time, 25 to 40 per cent of the persons trafficked are minors who are subjected to multiple rapes every day.

#### Definition of Trafficking:

The term 'trafficking' is defined in several ways by the different constitutional bodies in the context of global society. Following the article 3 of the United Nations Protocol to 'Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Minor Girls, supplementing the UN Convention against Transnational Organized Crime, 2000', trafficking may be defined as:

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

Again the article 1 (3), SAARC Convention on Preventing and Combating Trafficking in Women and Minor Girls for Prostitution, signed by India on January 5, 2002, states: "Trafficking means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking."

Further, article 1 (4) of the SAARC Convention also defines "Traffickers" as: "Traffickers" means persons, agencies or institutions engaged in any form of trafficking.

In India, the Immoral Traffic (Prevention) Act, 1956 (ITPA) does not specifically define "trafficking". However, the ingredients of trafficking, such as sexual exploitation and abuse of persons, running of a brothel, living on the earnings of a prostitute: procuring, inducing or taking a person for the sake of prostitution, detaining a person for prostitution, etc. are contained in Sections 3,4,5,6 and 8 of the Act.

In the ITPA, which is subsequently amended in 1978 and 1986, even then didn't defined "trafficking" in accordance with the United Nations Protocol. However, to prevent, suppress, and punish trafficking in persons, especially women and minor girls, supplementing the United Nations Convention against trans-national organized crime or as per the SAARC convention on preventing and combating trafficking in women and minor girls for prostitution, the essential ingredients of trafficking are covered in the provisions contained in the ITPA and the Indian Penal Code (IPC), viz. Sections 2(f), 3, 4, 5, 6, and 9 of the ITPA, and Sections 366, 366A, 367, 370, 371, 372 and 373 of the IPC. Most importantly, trafficking of persons is an offence, the prohibition of which flow out of the Constitution of India (Article 23), and not merely through legislation. Article 23(1) of the Constitution of India prohibits trafficking in human beings and forced labour. Accordingly, traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

## DISCUSSION

### Why Does Trafficking Occur?

Trafficking in human beings for variety of reasons. India has gone truly international and global in the post liberalization period. In recent years it has been growing in proportions and magnitude and hardly any section of the society is left untouched. New dimensions of employment, migration, right of the individual to make informed decisions etc. had further complicated the issue. Multitudes of factors directly force or circumstantially compel the individuals to become a victim of gross, inhuman, unethical and unsociable exploitation and abuse. The compelling factors like poverty, want

of material resources or a desire to improve the luxuries of the life may be real or perception. Growing preference for materialistic mode of life is generating a rat race competition, making more and more people perception poor and whole atmosphere of the society completely vulnerable. It provides an opportunity to traffickers to establish their networks and flourish and automatically, majority of the less privileged or of tender age or of innocent understanding becomes unsafe and vulnerable to both brutal and refined form of abuse and exploitation.

Thus, it can be seen that there are numerous factors that lead to trafficking of women and minor girls or cause them to become victims of trafficking. These factors can be broadly classified into two categories: (A) Supply Factors and (B) Demand Factors.

If we look into the supply factors, the following reasons can be identified as the main factors responsible for these trafficking.

#### (A) Supply Factors for trafficking:

- (i) Abject poverty sometimes forces parents to sell their minor girls to traffickers.
- (ii) Harmful cultural practices often make women and minor girls extremely vulnerable. Child marriage is sometimes the route for a minor to be trafficked for sexual purposes. The stigma attached to single, widowed, and abandoned women, or second wives through bigamous marriages, causes such women to be abandoned by society. They become easy targets for traffickers.
- (iii) Female illiteracy and lack of access to education by girls.
- (iv) Male unemployment and loss of family income puts pressure on women to earn and support the family and subsequently they become the victims of such trafficking.
- (v) Natural calamities and poor rehabilitation of disaster victims puts pressure on women to earn and support the family.
- (vi) Dysfunctional families or families that have difficulty functioning and communicating in emotionally healthy ways; a family that has a negative environment, which contributes little to the personal development and growth of family member.
- (vii) Desertion by one of the parent uncared for or abandoned minor girls.
- (viii) Traditional practices give social legitimacy to trafficking. These include the Devadasi and Jogin traditions where Devadasis are often trafficked and sexually exploited. This is equally applicable to other communities such as the Nats, Kanjars, and Bedias where traditionally girls are made to earn through prostitution.
- (ix) Porous borders. Weak law enforcement and inefficient and corrupt policing of the borders ensure that women and minor girls from neighbouring countries are brought into India and forced into prostitution in different towns.
- (x) Clandestine nature of the crime and weak law enforcement. The crime does not come to light very often because of its clandestine nature. Victims are unable to access justice and even when they attempt to do so, weak law enforcement enables the traffickers to escape.
- (xi) Many women and girl are either lured by false promises of jobs in urban areas or they voluntarily migrate to urban areas on hearing about the opportunities in cities from their neighbours and friends.

When a woman and minor girl is pushed into prostitution due to these causes, the issue of consent of the trafficked person is not relevant. Even if a woman knows that she is being trafficked and gives her full consent, it does not absolve the trafficker of guilt. Trafficking is an offence irrespective of the women's consent (Sections 5 and 6 of the Immoral Traffic (Prevention) Act, 1956). Let us now look into the demand side factors which give rise to trafficking in India.

#### (B) Demand factors for trafficking.

- (i) Rising male migration to urban areas and demand for commercial sex. With the rapid urbanization, the male

migration from rural to urban has increased comparatively at a higher rate than female migration. The rising male migration to urban areas leaving the female members in their native places, has also directly become a factor for commercial sex and this in turn causing source of trafficking of women and girl.

- (ii) In the context of globalization tourism inflows to India has increased significantly. Huge inflow of foreign and domestic tourists has also initiated the problem of trafficking through sex tourism.
- (iii) Scare of HIV/AIDS and prevalent myths on sexuality and STDs (Sexually Transmitted Diseases) leads to greater demand for newer and younger girls. The number of trafficked girls thus increases and their age decreases.

The above discussed demand and supply factors are mainly concerned with the trafficking for the purpose of using them in commercial sexual exploitation. However, apart from these factors there are still certain areas where trafficking occurs to a great extent. These factors can be considered both as demand and supply side reasons for trafficking simultaneously. These are mentioned below:

- (i) Forced labour, including bonded child labour, in the carpet, garment, and other industries/factories/work-sites (The Child Labour (Prohibition and Regulation) Act. 1986).
- (ii) Forced or bonded domestic work may be bought and sold or forced to work in inhuman and violent conditions that include sexual abuse (The Bonded Labour System (Abolition) Act 1976).
- (iii) Forced labour in construction sites with little or no wages (For Women – The Minimum Wages Act 1948 For Children – The Child labour (prohibition & regulation)..
- (iv) Forced employment in the entertainment industry, including bars, massage parlours, and similar establishments. In addition to poor or no pay and bad living conditions, sexual harassment is common (The Immoral Traffic (Prevention) Act 1956) & The Indian Penal Code (IPC).
- (v) Children are sometimes trafficked for begging.
- (vi) Organ trade such as sale of kidneys (The transplantation of human Organs Act 1994).
- (vii) Camel jockeying often involves the sale of young children who are tied on a camel's back for racing. Children are often badly hurt or killed in such races.
- (viii) Purchases and sale of babies for adoption, both within the country and abroad, against established laws and procedures for adoption.

#### Challenges and Complexities:

Combating trafficking in India is especially challenging due to its myriad complexities and variations. The initial challenge lies in changing the mind-sets of the key protagonists, such as civil society, enforcement agencies, and the judiciary that sometimes trivialize trafficking and perceive it as prostitution, "the oldest profession". The root cause of trafficking in India is poverty that leads to the inherent vulnerability of victims. Poverty, compounded by illiteracy, lack of skills, and few livelihood options, makes women and children easy targets of organized criminal networks that exploit this vulnerability through fraud and deception, promising jobs and a better life. The matter becomes more complex when trafficking for prostitution is a traditional cultural practice and has the tacit support of family and society, such as in the Devadasi and Jogin traditions still prevalent in some parts of India. Although these traditions have been declared as illegal by the government and comprehensive preventive and rehabilitative programmes have been initiated for them, they still persist in certain patches. The multi-casual nature of trafficking, and the size and cultural diversity of India's population, demand multiple customisations for addressing each form of trafficking. The clandestine nature of trafficking and the resultant paucity of data add to the challenge. The erosion of border barriers by globalization, technology, and improved communication has inadvertently facilitated the trafficking networks. Further, the ambivalent attitude of society towards trafficking results in a complacent response from the influential sections of society, rural or urban. The tendency to equate trafficking

with prostitution keeps respectable option leaders away and prevents them from exerting their power. It is often difficult to get witnesses to prosecute traffickers. Enforcement agencies, if not in complicity with traffickers, sometimes remain indifferent, equating trafficking with a 'petty offence' in contrast to crimes such as murder or theft. As the very concept of 'trafficking' and 'trafficked victim' is questioned in legal proceedings, traffickers exploit this grey area and the loopholes it throws up to escape punitive action.

However, the question of trafficking of women and minor girls has of late been receiving serious attention by the National Human Rights Commission (NHRC), Department of Women and Child Development (DWCD), Government of India and United Nations Children's Fund (UNICEF). These agencies have undertaken several activities to study the problem in greater depth, so that more effective steps can be taken to prevent the problem and curb it at source, protect the victims more meaningfully, and provide them sustainable rehabilitation.

During the several discussions and consultations among the NHRC, UNICEF, government counterparts, and NGOs, a recurring complaint that came up was the callousness and lack of sympathy of various functionaries who play a statutory role in the prosecution and punishment of the traffickers. With reference to the district and taluq (block) level judiciary, the main problems expressed were long adjournments, easy bail for the trafficker, harassment and humiliation of the victim, and the case with which the trafficker, who is undoubtedly more powerful than the victim, exploits the legal system. It was also commonly felt that the implementation of the Immoral Traffic (Prevention) Act, 1956 (ITPA) clearly revealed that its provisions were being interpreted mechanically and not used against the traffickers but against the trafficked victims, which was against the very intent and spirit of the Act. It was felt necessary that the prevailing procedures and interpretations of the ITPA that tilt the balance heavily against the victim should be replaced by a sensitive and humane interpretation of the law and exercise of discretion as provided in several Sections of the Cr. P.C so as to not further victimize the victim.

#### CONCLUSION

In India ITPA, makes commercial sex illegal and provides punishment for anyone who lines on the earning of such activities or forces any one into it. But the Act failed to address the causes, which leads to such victimization. At large the Act remains restrictive and punitive but not progressive and reformative. It also remained unbalanced in the sense that where it attempted to restrict the supply it failed to address the forces those create demand. To a certain extent the reformative and rehabilitative part was left unattended in the Act due to limitation of resources, which was felt at the time of enactment. The Act also remained discriminatory by criminalizing the victim under the misconceived and little understood notion that victims were into it by culture, tradition or well-informed choice.

Fifty years back the Act would not have been so obsolete and misfit as it had become in the light of changed international view upon human and individual Rights. Our lawmakers and enforcers failed to perceive the required and much wanted change as well as the need for effective and consensual rehabilitation. Also the law did nothing to remove the stigma from the exploited; rather it stigmatized the victim and therefore, failed to bring the required change in society which is an integral part of reintegration. Most of the subjects required to address the multitude of the causes belong to 'Directive Principles of the State Policy' of our constitution, which due to some very obvious reasons are not enforceable as a matter of right. Due to this very reason 'Directive Principles' have remained one of the most neglected part of our constitution in terms of implementation true to the words and spirit. Taking proactive steps Indian judiciary has been making efforts to bring various subjects of this part within the ambit of the 'Fundamental Rights'. Equality, equal opportunity, non-dis-

crimination, prohibition on bonded labour and child labour etc. were already guaranteed in the constitution and by judicial activism compulsory education, Right to nutrition, right to meaningful life having opportunities for development, right to healthy atmosphere etc. have been declared 'Fundamental Rights' by the Courts. Given constitutional provisions and various legal instruments legislated accordingly, fighting and combating trafficking would not have been a major problem if there would have been a will, sincere efforts and concern for the rights of the individuals on the part of our ruling and

administrative class. But under the deep rooted corruption, bureaucratic red-tapism, prevalent disregards towards duty and vested interests of the political, ruling and influential class, non-implementation of the constitutional and legal instruments, of existing schemes, plans and policies is one of the most serious problems in our country. Even before the legal instruments are implemented in words and spirit, it requires the essential official/administrative structure and infrastructure to be put in place, lack of which again has been a major bottleneck in bringing the desired changes the lives of millions.

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