

EFFECTUATION OF LAWS IS THE WEAPON AGAINST TRAFFICKING

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Abstract

There are various municipal as well as international laws enacted to combat the malady of human-trafficking. It is very important firstly to realise why it is illegal or crime in order to design a yardstick for its prevention. The contemporary problem one is facing now will be the

effectuation of laws which are already ordained. Human trafficking has taken such mode that it is becoming difficult for one to eradicate it. There are certain unethical professions which are means of trafficking which include prostitution and so on. One has to understand that 'human life', 'dignity' and 'public order' are important essentials of the idea of 'human rights' and trafficking human beings violates the human rights law both local as well as international. There are problems with respect to trans-boundary such as with Bangladesh and Nepal so on where there are loop holes in law which is given a brief view.

The paper aims to bring out various hindrances in the implementation of the various laws enshrined in the Indian Constitution Articles 23 & 24 along with various other legislations such as the Immoral Trafficking Prevention Act, the Bonded Labour Abolition Act and so on. The idea is that there are laws but lack proper and effective implementation. There are various grounds such as the limitations to freedom of expression and profession are high lightened to create a line of distinction between the do's and do not's. It further aims to discuss the several global and regional efforts made towards combating the illness of human trafficking and what is the nature of these efforts, its limitations and the drawbacks restricting to the scope of research. This paper concludes with suggestions, recommendations as well as with certain questions which can be carried forward to adhere to the trouble of human trafficking.

Research Questions:

- 1) Does Slavery still exist in form of human trafficking?

Scope and Research Methodology:

This is a doctrinal research wherein the major premise is based on International Covenants and laws furthermore throwing light on the Indian Constitutional Law having a soupcon of other related laws such as immoral trafficking Act and others Municipal Laws along with the amendments in the recent laws therefore all the data collection will have its bases from texts, law journals, case laws, research papers, encyclopaedias, e-sources etc, and eventually to navigate the conclusions and suggestions on the aforesaid study.

INTRODUCTION

Human Trafficking is a disease in today's world scenario which can be tackled by the weapon of human rights. The need of hour is to look the concept of human trafficking in a very different angle, in a manner that it is a form of slavery. Although there are enactments in force to combat

the problem of human trafficking, they lack implementation of the same. The laws are made by the concerned authority but they lack the channel via which they can be brought in the limelight. The compelling reason to imbibe solutions to the problem of human trafficking is due to its overwhelming tenet to exonerate the scope of the social offenders and thereby to strengthen the aim of justice. The study crucially highlights the grey areas of the various laws enacted for the purpose of prevention of human trafficking. Hence the research would assist different end users including students, academicians, lawyers and the legal fraternity to have caginess and critical understanding of the said topic.

HUMAN TRAFFICKING: A MORAL & LEGAL WRONG.

Trafficking in persons, which is the darkest chapter of population mobility has been now widely considered as a major human security issue. The number is increasing where people from poor families are being forced to this new form of human slavery and the trade of human dignity. The act of human trafficking has been used to denote a wide range of human rights abuses and crimes that include the recruitment, movement and sale of people into an exploitative condition.¹ While acknowledgment of its diligence and blow on society has been greater than before over recent years, it is not a new phenomenon rather it continues as a set of activities and effects that is hard to put a figure on.² Some forms of human trafficking have always been anarchic bone of contention, while others take advantage of opportunities presented by emerging economic niches.³

In recent times, globalization is a critical factor aggravating human trafficking and wherein the ethical dimensions are enormous. There is a review of some of the issues of human trafficking, globalization, and ethics which point to a need to bring in trafficking issues into public administration training, immigration and foreign policies, and media awareness. The United Nations⁴ definition of human trafficking is “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

¹ Revisiting the Human Trafficking Paradigm: The Bangladesh Experience Part I: Trafficking of Adults, 2004 International Organization for Migration (IOM), Geneva, Switzerland: IOM, p.7. See, <http://www.childtrafficking.com>, last viewed on 30/10/2012.

² The counter trafficking framework report: Bangladesh perspective, 2004, Ministry of Women and Children Affairs of the Government of Bangladesh, Dhaka: MWCA, February, p.12. last viewed on 30/10/2012.

³ Combating Trafficking of Women and Children in South Asia, Country Paper: Bangladesh, 2002, Asian Development Bank, Canada: Agriteam Canada Consulting Ltd., July, p.11. Available at: http://www.childtrafficking.com/Docs/adb_2002__trafficking_bangl.pdf, last viewed on 30/10/2012.

⁴ 24th October 1945, See www.un.org, last viewed on 27/10/2012.

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"⁵. One can justly say that, human trafficking is modern-day slavery.

It is shocking for many people to accept this hard fact that slavery still exist after all the hard knocks for freedom all over the world. This malady is nevertheless remains in a disguised manner not only in undeveloped nations but all around the world. The International Labour Organization (ILO) estimates that there are 12.3 million people held against their will in servitude at any given point in time. There are other such organizations which estimate the number to be as high as 27 million. Observance showcases that, the victims of human trafficking are those who are the most vulnerable and weak, young women and children. As per one of the U.S. Government-sponsored research activity conducted in 2006, 600,000 to 800,000 persons are trafficked across international borders annually. Disturbingly, the research also shows that 80% of trafficked persons were women and girls, and 50% of the victims were minors⁶.

Human Trafficking should be viewed in wider context of actions and outcomes that involve several stages ranging from the organization of the supply of people vulnerable to exploitation and harm, further the process of movement to the demand for the service or labour of trafficked person.⁷ It is the process which is a systematic, well-organized economic phenomenon for traffickers, involving the displacement and movement of persons solely to profit directly or indirectly from the exploitation of the trafficked person's labour.⁸ The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons defines trafficking as follows:

*" 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."*⁹

On the South Asian regional level, trafficking has also been defined as *" 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"*.¹⁰

⁵ Source: www.unodc.org, last viewed on 27/10/2012.

⁶ Source: www.raifoundation.org, last viewed on 28/10/2012.

⁷Revisiting the Human Trafficking Paradigm: The Bangladesh Experience Part I: Trafficking of Adults, 2004.

⁸Combating Trafficking of Women and Children in South Asia, Country Paper: Bangladesh, 2002.

⁹Article 3 of the United Nations Protocol. Article 5 of the TIP Protocol requires States parties to criminalize trafficking in persons as defined in Article 3

¹⁰SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

The modish view given to the issue of human trafficking is viewing it as a matter of security threat. Trafficking in persons has been a cause of deep anxiety and concern for individuals, societies and economies alike. One can say leaving apart the traditional notions of security, 'trafficking in persons' has become one of the non-traditional security issues in the recent decades, mostly due to the unprecedented scale of this phenomenon.

Human trafficking is though not considered a traditional state security issue, in its place it can be viewed as combination of national security (widener's approach) in the form of transnational crime, corruption, and women's rights and human security threatening individuals' survival, dignity, and livelihood. To justify this human security classification of trafficking is intended to protect individual human being from critical and persistent threats and situations, building on their strengths and aspirations and to integrate human development concerns (such as economic agency, freedom from fear and want and gender equality) with other state security threats.¹¹

RIGHT AGAINST HUMAN TRAFFICKING: HUMAN RIGHT

Human Trafficking is to be considered as a kind of modern slavery. It makes people predominantly women and children vulnerable to be sold like commodities and to be consumed infracting their rights and freedoms. The very fact of human dignity¹² for which the civilization of today is fighting is under strain because of this slave trade. It denies the fundamental rights of people and their basic needs violating ample number of human rights. Trafficked people are forced to live like service animal where their vulnerabilities are nothing but things of others profit and enjoyment basically their exploitation.

Human Rights are referred to those set of inalienable rights which are available to individuals from their birth and they can also be called as 'right since breath'. There are various components of such right which primarily include right to life¹³, liberty¹⁴, freedom to speech¹⁵, equality¹⁶ and include all those rights which is the essence of life.

'Right to life' enshrines the right to live with human dignity and does not include 'Right to die' which clearly shows the threat to one's own life from his own right. So, Human Rights give an idea that the obligations to protect others human right and at the moment one violates this he cannot seek protection under the same aspect. For inference, a wrong doer cannot claim

¹¹ Source: www.nato.int, last viewed on 01/11/2012.

¹² Source: www.scholarship.law.georgetown.edu, last viewed on 01/11/2012.

¹³ Source: www.unhchr.ch, last viewed on 30/10/2012.

¹⁴ *Ibid.*,

¹⁵ Source: www.law.cornell.edu, last viewed on 31/10/2012.

¹⁶ Source: www.mittendrindaussenvor.de/fileadmin/bilder/0304.pdf, last viewed on 29/10/2012.

protection of the rights violated by him¹⁷. It is the states duty to protect the human rights of its citizens as they are under moral as well as legal obligation to do so. One has to understand that a right can only be enjoyed when the person is secured, if something threatens their very existence be it their own right it is not justifiable and completely irrational.

India is a 'democratic' 'republic' which enshrines human rights in the Indian Constitution (1950) in the disguise of fundamental rights. Now, one has to keep in mind that all fundamental rights can be human rights but not all human rights can be fundamental rights. The primarily focus is laid down on Articles 23 & 24¹⁸ of the Constitution of India from which many other laws such as Immoral trafficking Act, Abolishment of Bonded Labour Act and so on. Although it cannot be forgotten that the international agreements signed by India and other countries is as important as the principles followed via its Constitution and appropriate local and municipal laws need to be enacted.

It has widely been accepted in modern times that trafficking entails a human rights dimension. In addressing trafficking in human rights terms it is possible to relay on existing human rights instruments, as mentioned. There is a wide range of instruments both at a regional and international level, which can be applicable to trafficking.¹⁹

¹⁷“PLAINTIFF THE WRONG DOER “ in terms of civil law stating that one commits is prohibited by law. And Also Art. 300 of Constitution of India which define that the Union and the State legislature is the Jurist Person for the purpose of suit or proceedings. , Source: www.articlesbase.com, last viewed on 14/08/2012.

¹⁸**Indian Constitution, 1950 Article 23-** Prohibition of traffic in human beings and forced labour (1) Traffic in human beings and begging and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law; (2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24- Prohibition of employment of children in factories, etc No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment Provided that nothing in this sub clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of clause (7); or such person is detained in accordance with the provisions of any law made by Parliament under sub clauses (a) and (b) of clause.

¹⁹ The European Union has adopted the Charter of Fundamental Rights of the European Union 2000, Article 5(3) of which provides for the prohibition of trafficking in human beings;

The African Charter of Human and People's Rights (Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa concerns the rights to life, integrity and security of the person. Paragraph 2 (g) of that Article states that States parties shall take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.);

The European Convention on Human Rights, The American Convention on Human Rights; Article 6 of this Convention, entitled “Freedom from slavery”, states: 1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. 2. No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.);

The Arab Charter on Human Rights (The Arab Charter on Human Rights was adopted by the Council of the League of Arab States in 1995 and revised in 2004. Article 10 of the revised Charter prohibits trafficking in persons. That article reads: 1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances. 2. Forced labour,

Both the Universal Declaration of Human Rights of 1948, Art. 4 and the International Covenant on Civil and Political Rights of 1966, art. 8(2) state that no person shall be held in servitude, but neither of them defines the term. Servitude has been interpreted to be broader than slavery. An early draft of the Protocol (7th revised draft) defined servitude in the context of trafficking as: "The condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic service and debt-bondage." The Travaux Préparatoires to the ICCPR Art. 8 on slavery and servitude clarifies that while slavery was narrowly defined servitude was considered to be applicable to all conceivable forms of dominance and degradation of human beings by human beings.²⁰

ROLE OF LAWS IN PREVENTING HUMAN TRAFFICKING

International law is a powerful weapon for combating human trafficking. The most highly regarded and recent instruments of international law that have set the path for how to define, prevent, and prosecute human trafficking are the United Nations Convention against Transnational Organized Crime²¹ and its two related protocols: the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and the United Nations Protocol against the Smuggling of Migrants by Land, Sea, and Air, which entered into force in 2003-2004. The United Nations Office on Drugs and Crime (UNODC) created these conventions, which have supported international law's ability to combat human trafficking. In support of enforcing these instruments, the UNODC established the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) in 2007. The Instruments that have dealt with

trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited. Article 9 of the Charter states that "trafficking in human organs is prohibited in all circumstances"; The Convention on Preventing and Combating Trafficking in Women and Children for prostitution (The SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia is a commitment to enhance the welfare of children in the region. Article IV, paragraph 3 (a) of this Convention commits States parties to ensure that there are appropriate legal and administrative mechanisms and social safety nets in place to protect children from, among other things, trafficking.);

The African Charter on the Rights and Welfare of the Child (The African Charter on the Rights and Welfare of the Child entered into force on 29 November 1999. Article 29 of this Charter states that States parties shall take appropriate measures to prevent: (a) The abduction, the sale of, or trafficking of children for any purpose or in any form, by any person, including parents or legal guardians of the child; (b) The use of children in all forms of begging.), the Convention on the Elimination of All Forms of Discrimination against Women (mentioned elsewhere in this paper), The Convention on the Rights of the Child (treated elsewhere in this paper).

Also the two Covenants on Civil, Political and on Economic, Social and Cultural Rights touch upon trafficking aspects and rights of victims even if not mentioning particularly trafficking. The International Convention on the Rights of All Migrant Workers and Members of their Families.

²⁰ Scarpa, S.: Trafficking in Human Beings – modern slavery. p. 87.

²¹ Source: www.unodc.org, last viewed on 28/10/2012.

human trafficking are as old as period of abolishment of slavery. They include provisions within the Slavery Convention (1926) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

Aspects in trafficking:

It is also observed that any subsequent agreement between the parties or practices in the application of the treaty, establishing the agreement of the parties regarding its interpretation, shall also be taken into consideration. Supplementary means of interpretation shall also be considered when interpreting a Treaty, including the preparatory works and the circumstances at its conclusion.²² The early drafts of the Protocol made specific references to specific forms of trafficking such

As:

1. Forced marriage
2. Marriage of convenience
3. Illegal adoption
4. Sex tourism
5. Forced domestic labour
6. Pornography

These specific forms may be addressed and may fall within the current purposes of trafficking, as stated in the Protocol. For example, pornography can be considered as another form of sexual exploitation. Similarly, domestic service could be either considered a form of trafficking for labour or services or a form of servitude. According to the UN Working Group on Contemporary Forms of Slavery²³, early and forced marriage is contemporary forms of slavery and in many cases they are not related to trafficking, but they may be.

The Supplementary Convention on slavery also defines forced marriage as a practice of slavery²⁴ and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage provides for minimum rules on the entering into marriage – voluntarily. Besides, the state Parties may further add other forms of exploitation since the Protocol's definition only covers these forms of trafficking "as a minimum."²⁵

²² Vienna Convention on the Law of Treaties Art. 31.1.

²³ UN DOC E/CN.4/Sub.2/2003/31 para. 5.

²⁴ Article 1.1.c Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of consideration in money or in kind to her parents, guardian, family or any other person or groups; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person.

²⁵ Mattar, M.: The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons,

According to the International Labour Organisation guidelines on Human Trafficking and Forced Labour Exploitation legislatures and law enforcement have to take into account that the seemingly “voluntary offer” of a worker/victim may have been manipulated or was not based on an informed decision. The ILO notes that a forced labour situation is determined according to the nature of the relationship between a person and an “employer” and not by the type of activity performed. The legality or illegality of the activity under national law is irrelevant to its determination as forced labour.²⁶

In *Prosecutor v. Kunarac*²⁷ the ICTY elaborated on the meaning of slavery and enslavement noting that a mere ability, among others, to buy, sell or trade people, although an important factor to be taken into consideration, is in itself insufficient in determining whether or not the enslavement is committed.²⁸ Trafficking may then be treated as slavery simultaneously mainly when people are exploited afterwards by the traffickers themselves – or the same organisation – as this ensures the continuous exercise of the right of ownership.²⁹

Trafficking and smuggling are criminal law issues. They affect territorial integrity because they involve the facilitation of crossing of borders and remaining in a State in violation of national criminal and immigration laws. Trafficking and smuggling also undermine the rule of law and political foundation of States, because traffickers and smugglers such as organised criminal groups resort to violence and corruption as means to advance their business.³⁰ The usual response at the national level has been crime and immigration control in order to prosecute

Especially Women and Children: Reflections After Five Years. Concord Center Annual Conference on Disposable People: Trafficking in Persons. Tel Aviv, Israel December 22, 2005.

²⁶ Plant, R.: the Labour Dimension of Human Trafficking. Alliance against trafficking in persons, Vienna, ILO, 2004.

²⁷ *Prosecutor v. Kunarac*, IT-96-23, Trial Judgment, 22 Feb. 2001.

²⁸ *Kunarac*, para 543.

²⁹ Obokata, T.: Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach. p. 20.

³⁰ Various issues and approaches to trafficking also have implications for rule of law. Trafficking in human beings is a multinational crime problem of ever-growing proportions, increasingly perpetrated by organized and sophisticated criminal enterprises. These criminal activities and the official corruption linked to trafficking undermine democratic institutions and challenge the principle of rule of law. Weak institutions and inadequate legislation limit the capacity of governments to suppress criminal activity and to prosecute offenders. Efforts to prosecute trafficking raise numerous legal issues relating to both legislation and law enforcement. Prohibition of trafficking and smuggling of human beings through criminal law is one obligation imposed upon States under international human rights law. In relation to trafficking, some of the existing human rights instruments explicitly require States to prohibit the act. They include the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949 (1949 Convention), the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), the Convention on the Rights of the Child 1989 (CRC), and its Optional Protocol on Sales of Children, Child Prostitution and Child Pornography 2000. Regionally, the Charter of Fundamental Rights of the European Union 2000, Council of Europe Convention on Action against Trafficking in Human Beings 2005, the American Convention on Human Rights 1969 (ACHR), and the Inter-American Convention on International Traffic in Minors 1994 are also pertinent.

and punish traffickers/smugglers and reduce the flow of trafficked/smuggled people. Within the international legal system, trafficking and smuggling of human beings have been dealt with by what is known as “trans-national criminal law.” Unlike international criminal law, which gives rise to direct control of crimes by international tribunals, trans-national criminal law promotes “the indirect suppression by international law, through domestic penal law, of criminal activities that have actual or potential trans-boundary effects.”³¹

IMPLEMENTATION OF LAWS IS THE NEED OF THE HOUR

India has ratified the following Conventions³²:

- **The Forced Labour Convention of The International Labour Organization, 1930**

The convention defines the suppression of “forced or compulsory work” in all its forms and ‘forced labour’ here is defined as all work or services which is exacted from any person under the menace of any penalty and for which they said person has not offered him voluntarily. India has ratified the convention in 1954 and has incorporated many of its definitions in its natural labour laws.

- **Convention for the Suppression of the Traffic in person of the exploitation of the prostitution of others, 1949³³**

This convention declares that the enslavement of women and children subjected to commercial sexual exploitation is incompatible with the dignity and fundamental rights of the human person. The states that signed and ratified this convention should prevent prostitution by education and improvement of the role of women in the society, and should curb the pornography industry and its trade through criminalization and punishment of all kinds of procurement.

- **Supplementary Convention on Abolition of Slavery, Slave Trade, And Institutions And Practices Similar To Slavery, 1956³⁴**

³¹ Obokata, T.: Trafficking and Smuggling of Refugees from a Human Rights Perspective. Paper presented to the International Conference on Refugees and International Law: The Challenge of Protection (15-16 December 2006, Refugee Studies Centre, University of Oxford). p. 2.

³² UNODC, Government of India. (2008). *Resource Book on the Legal Framework on Anti Human Trafficking* (p.137).

³³ Entered into force on July 25, 1951, Articles 1, 2, 4, 16, 17 and 20. Source: www.unicri.it, last viewed on 28/10/2012.

³⁴ Entered into force on April 30, 1957 Articles: 1, 3, 6, 7. Source: www.unicri.it, last viewed on 26/10/2012.

This convention resulted in an update of the 1926 convention to suppress the slave trade and slavery preceded it. The updated document included the criminalization of debt bondage, serfdom, servile marriage, and child servitude.

- **The International Covenant for Civil and Political Rights (ICCPR), 1996³⁵**

The Covenant recognizes the all people self- determination and includes Articles focusing on rights to physical integrity, liberty and security of persons, protection measures for children. It also bans on slavery and slave trade.

- **The International Covenant for Economic, Social, and Cultural Rights, (ICESR), 1966³⁶**

The International Covenant on Economic, Social, and Cultural Rights makes up the international Bill of Human Rights, by recognizing that the idea of human being to be free can be achieved only if conditions are created whereby everyone may enjoy his civil rights and political rights, as well as his economic, social, and cultural rights.

Article 103 states that *“special measures of protection and assistance should be taken on behalf of all children and young person without any discrimination for reasons of parentage or other conditions.”*

Herein, the children and young person should be protected from economic and social exploitation. Their employment in work harmful to their morals or health, or dangerous to life, or likely to hamper their normal development should be punishable by law. It is also said that states should also set age limit below which the paid employment of child labour should be prohibited and punishable by law”.

- **The Convention Elimination of All Forms of Discrimination against Women (CEDAW), 1979³⁷.**

The Convention is often described as the bills of women’s rights and the Convention provides “the basis for realizing equality between women and men through ensuring women’s equal access to, and equal opportunities in, political and public life – including the right to vote

³⁵ Entered into force on March 23, 1976. Articles 8, 24. Source: www.unicri.it, last viewed on 28/10/2012.

³⁶ Entered into force on January 3, 1976. Article 10.3. Source: www.unicri.it, last viewed on 27/10/2012.

³⁷ Entered into force on September 3, 1981. Articles: 1, 3, 5, 6, 10, 11. Source: www.unicri.it, last viewed on 28/10/2012.

and to stand for election – as well as education, health and employment.” The States that have ratified or acceded to the Convention are legally bound to put its provisions into practice.

- **The Convention on the Rights of the Child, 1989³⁸**

This Convention provides rights to protect children from “neglect, exploitation and abuse.” It was just before and shortly after ratifying the Convention on the Rights of the Child, States are required to bring their national legislation into line with its provisions except where the national standards are already higher. India agreed to “progressively” promote the banning of child labour over time.

- **The Optional Protocol to the Convention on the Right of the Child on the State of Children, Child Prostitution, and Child Pornography, 2000**

The recent protocol criminalizes specific acts relating to the sale of children, child prostitution and child pornography, including attempt and complicity. It also lays down minimum standards for protecting child victims in criminal justice processes and recognizes the right of victims to seek compensation.

- **U.N Protocol to Prevent Suppress, and Punish Trafficking in Person, Especially Women and Children (Palermo), 2000**

This is more commonly referred to as the “Palermo Protocol,” as it was signed there. It provides the most internationally accepted definition of trafficking in persons and calls upon states to implement legislation to fight trafficking and protect its victims.

- **The U.S Trafficking Victims Protection Act, 2000**

This law sets out minimum standards government must follow to fight trafficking. While sanctions from part of the retaliation against underperformers, political considerations have prevented sanctions from being applied to India.

Regional & Municipal Laws in relation to India

- **South Asian Association for Regional Corporation (SAARC) Convention on Preventing and Combating Trafficking In Women and Children for Prostitution, 2002**

³⁸ Entered into force on September 2, 1990. Articles: 1, 11, 19, 32.1, 34, 35,36. Ratified by all UN countries except Somalia and The United States of America. Source: www.unicri.it, last viewed on 29/10/2012.

The scope of the first convention is the further strengthening of existing arrangements on the protection of the rights of women and children in South Asia, and bringing to an end the illegal smuggling of women and children and commercial sexual exploitation in this region, to promote cooperation amongst Member States to effectively deal with various aspects of prevention, interdiction, suppression of trafficking in women and children, repatriation and rehabilitation of victims of trafficking, and preventing the use of women and children in international commercial sexual exploitation networks, particularly where the SAARC Member Countries are the countries of origin, transit, and destinations. However, this convention is limited only to trafficking of women children for commercial sexual exploitation and not covers the other forms of trafficking or trafficking of men.

- **South Asian Association for Regional Corporation (SAARC) Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 2002**

The Convention focuses on child priority in national and regional programs of SAARC member states. The Convention also it aims to instigate regional cooperation on facilitating the safe development of children by understanding the rights of the South Asian child and creating appropriate arrangement for protecting them.

- **The Indian Constitution 1950 and other local Legislations.**

The basic provisions of the Constitution of India which are relevant for consideration of its interaction and inter-relationship with International Law are; (1) Article 51³⁹ (2) Article 73⁴⁰ (4) Article 253 (5) VII schedule – entries 10 to 21.

In **Magnabhai Ishwarbhai Patel v. Union of India**,⁴¹ the Constitution Bench of Supreme Court of India observed that;

“ The effect of Art 253 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of state legislature, the parliament alone has notwithstanding Article

³⁹ **Article 51 Promotion of International Peace and Security;** The state shall endeavour to – a) promote international peace and security, b) maintain just and honourable relations between nations, c) foster respect for International Law and Treaty obligations in the dealings of organized people with one another; and d) encourage settlement of International dispute by arbitration.

⁴⁰ **Article 73; Extent of executive power of the Union;** “Subject to the provisions of this Constitution, the executive power of the Union shall extend- a) to the matters with respect to which Parliament has power to make laws, and b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement

⁴¹ AIR 1969 SC 783 at para 25;

246(3) the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body."

Recently, yet again the Constitution Bench of the Supreme Court in **State of West Bengal V. Kesoram Industries Ltd⁴²**, observed that;

"A treaty entered in to by India cannot become law of the land and it cannot be implemented unless parliament passes a law as required under Article 253. The executive in India can enter in to any treaty be it bilateral or multilateral with any other country or countries".

The single importance of putting Article 253 in the Constitution over and above the entries in List I of the Seventh Schedule was to clarify beyond doubt that for implementation of an international treaty, agreement or covenant or to give effect to a decision taken at an international forum, the Union Parliament could make any law irrespective of some items in the State List being attracted. Thus, the distribution of legislative powers between the Union and the States under the Constitution cannot come in the way of international law obligations being implemented through parliamentary law. The fact however is that the parliament has not so far made any law on treaty making powers and until that is done, the power of the executive in the matter of treaty-making shall remain unfettered.

The combined reading of Articles 51(c), 73, 253 read with entries 10 to 21 of Seventh Schedule and 372 and judicial interpretation reveal that, unless and until Parliament enacts a law implementing international treaty (treaties involving conferring or curtailing private rights, cession of territory), such treaty provisions cannot be enforced per se in India. Further if such treaty provisions are consistent with Indian law or there is void in the domestic legal system then they can be read into, to do justice, and if there is conflict between the two then domestic laws prevail over international law. Further customary rules of International law are part of Indian Legal System. But there are hardly any instances of such enforcement in India.

But unfortunately what is to be noted here is that, the language used in Article 51 and its place under Part IV of the Constitution reveals that the framers of the Constitution have given little importance to the status of International Law under the Indian Legal System and the successive Governments are unmindful of this fact. Even after sixty years of coming in to force of the Constitution, sincere attempts have not been made to clarify the status of international law and its application under the Indian legal system. This is important in the context of domestic

⁴² AIR 2005 SC 1644 at para 4;

implementation of international human rights treaties. Otherwise International Laws including Human Rights Covenants Conventions, Treaties remain bare promises.⁴³

In accordance to the Indian Constitution Article 23 and Article 24⁴⁴ under the Part III which enshrines the fundamental rights that prohibit trafficking of human beings in the territory of India. There are furthermore in about 20 provisions⁴⁵ in the Indian Penal Code 1860 which deal with various aspects of human trafficking. But, despite all this, there is an inexplicable apathy in the approach of law enforcement agencies when it comes to dealing with human trafficking.⁴⁶

There are many municipal laws as well enacted by the parliament in reference to the provisions enshrined in the Indian Constitution and to respect the ratifications of international agreements. These include the legislations prohibiting child marriage⁴⁷, preventing immoral trafficking⁴⁸, preventing bonded labour⁴⁹, child labour⁵⁰, prevention of atrocities on scheduled castes and scheduled tribes⁵¹, barring the transplant of human organs⁵², furthermore the Juvenile Act⁵³ for securing rights of children and finally the prevention of illegal transport of human beings in countries by the Immigration Act⁵⁴.

STUDYING SITUATIONS IN BANGLADESH AND NEPAL

Trafficking in women, girls and children is easy along the 1740 mile long open border between India & Nepal. Trafficking in Nepalese girls is less risky than smuggling narcotics and electronic equipments and arms into India. Traffickers ferry girls without the hassle of paper work or threats of police checks. Bought for as little as Nepali Rupees 5000, girls have been

⁴³ The Status of International Law under the Constitution of India. Source: www.legalindia.in

⁴⁴ *Supra* note 23.

⁴⁵ For instance some of the provisions are such : Displacement from her community, which is tantamount to kidnapping/abduction (Sections 361, 362, 365, 366 IPC may apply); Procured illegally (S. 366 A IPC); Sold by somebody (S. 372 IPC); Bought by somebody (S. 373 IPC); Imported from a foreign country (if she hails from a foreign country, or even from J&K State, and is under 21 years of age (366 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); Outrage of her modesty (S 354 IPC); Subjected to preserve sexual exploitation ('unnatural offences') (S. 377 IPC); Defamed (S 499 IPC); Subjected to unlawful compulsory labour (S. 374 IPC).

⁴⁶ Policy Proposals for India, "Human Trafficking in India" Source available at www.policyproposalsforindia.com

⁴⁷ The Prohibition of Child Marriage Act, 2006, section 12 and section 16.

⁴⁸ The Immoral Trafficking Prevention Act 1956, section 8.

⁴⁹ The Bonded Labor Act 1976.

⁵⁰ The Child Labor (Prohibition and Regulation Act) 1986.

⁵¹ The Scheduled Castes and Schedule Tribes (Prevention of Atrocities Act) 1999.

⁵² The Transplantation of human Organs Act 1994, sections 11 &19;

⁵³ The Juvenile Justice Act 2000;

⁵⁴ The Immigration (Carriers Liability) Act 2000;

known to fetch up to Indian Rupees 100000 in later transactions. Girls may not leave the brothels until they have repaid their debt, at which time they are sick, with HIV&/or Tuberculosis and often have children of their own.⁵⁵ As of February 1998, it is reported that there were 200 Bangladeshi children and women awaiting repatriation in different Indian shelters.⁵⁶ In cross border trafficking, India is a sending, receiving and transit nation. Receiving children from Bangladesh and Nepal and sending women and children to Middle Eastern nations is a daily occurrence.⁵⁷ It was also reported that more than 40% of 484 prostituted girls rescued during major raids of brothels in Bombay in 1996 were from Nepal.⁵⁸

Approximately 50,000, or half of the women in prostitution in Bombay, are trafficked from Nepal.⁵⁹ Calcutta is one of the important transit points for the traffickers for Bombay and to Pakistan. 99% women are trafficked out of Bangladesh through land routes along the border areas of Bangladesh and India, such as Jessore, Satkhira, and Rajshahi.⁶⁰

Now, one can say that it is well known that trafficking of girls & children from Nepal and Bangladesh to India and from the villages and interiors of various parts in India to a city like Mumbai has become a major problem. Rescuing these girls from brothels where they are subjected to mental & physical torture to force them to prostitute is a task requiring tremendous courage and deep personal will.

Due to a rampant, deep rooted social stigma in our country, there are very few NGOs attempting to rescue girls from brothels. There are no official statistics available for the victims of human trafficking but the practical observation and judgment clarifies that there are thousands of girls trafficked from Nepal, Bangladesh and other parts of India forced for prostitution.⁶¹

CONCLUSION

There are various measures by countries taken all over the world as well as India in combating this menace of human trafficking. The need of the hour is the implementation of these various laws which are enacted. Now, implementation here refers to various modes such as

⁵⁵ Rescue Foundation: Human Trafficking. Source available at www.rescuefoundation.net

⁵⁶ "Boys, rescued in India while being smuggled to become jockeys in camel races," www.elsiglo.com, 19 February 1998.

⁵⁷ Executive Director of SANLAAP, Indrani Sinha, Paper on "Globaliation and Human Rights".

⁵⁸ Masako Iijima, "S. Asia urged to unite against child prostitution," *Reuters*, 19 June 1998

⁵⁹ Robert I. Freidman, "India's Shame: Sexual Slavery and Political Corruption Are Leading to An AIDS Catastrophe," *The Nation*, 8 April 1996

⁶⁰ *Trafficking in Women and Children: The Cases of Bangladesh*, pp.18 & 19, UBINIG, 1995. Also available at www.pakistanthinktank.org, "Factbook on Global Sexual Exploitation".

⁶¹ Rescue Foundation: Human Trafficking. Source available at www.rescuefoundation.net

constructing rules guidelines and so on for the very purpose. The Government has its own constraints because of its administrative system setup and its own limitations. There are many commissions being setup by the government for achieving the prevention of human trafficking and also many NGO's who are working for the cause. These institutions face the problem of finance, human resource, proper networking and the pressure caused by the criminal groups who promote human trafficking and so on. The criminal groups have been complicating the problem of trafficking as they view it as an economical business.

The various plans and government policies which are formulated in order to prevent and combat human trafficking lack clarity and with regard to human trafficking. The existing laws have not been properly and accurately defined which give rise to several loopholes in them as the perpetrators of human trafficking escape from being punished.⁶² Several short-term and long term measures are needed to be taken up at all levels. There is an urgent need to create awareness among the public about human trafficking via media. Media can play a very effective role here. The Poverty alleviation measures will also help in combating it in the long run as it will develop the economical status. Since India is also a transit point for human trafficking, the government should take speedy measures to secure India's borders by completing its fencing and ensuring strict vigil.⁶³

There is a grave need to develop an institutionalized system of co-ordination between the law enforcing agencies and non-governmental organizations that sometimes prove to be more effective than government agencies in exposing human trafficking networks. There is a need to have greater co-ordination between different states in India as trafficking has a long trail from the source point to the destination with several transit points in between. Investigation in the cases involving human trafficking should be carried out with the aim to destroy this long trail. Increased co-ordination between government departments like police, public welfare and health, women and child is required to ensure an effective response.⁶⁴ Lastly, the government and NGO's should work together post rescue rehabilitation of the victims in term of providing them health care, education and other employment opportunities.

⁶² Policy Proposals for India, "Human Trafficking in India" Source available at www.policyproposalsforindia.com

⁶³ Key Foundation Society: Humanism & Social Awareness. Source: www.ken-foundation.blogspot.in

⁶⁴ Key Foundation Society: Humanism & Social Awareness. Source: www.ken-foundation.blogspot.in