

● COMPARATIVE ANALYSIS BETWEEN HUMAN TRAFFICKING AND MIGRANT SMUGGLING: INDIAN PERSPECTIVE



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Abstract

Human trafficking is one of the severe & horrendous offence where blatant violation of basic civil rights is inherent in nature. There are many reports which indicate that hundreds of male, female and children become prey of such crime either in their own nations or different nations. It is quite obvious that such crime-based traffickers are professional in nature and quite acquainted with transport formalities. The acts of commercialized sexual abuse are one of the important basis for trafficking of children and women. Less conviction rate further aggravates the trafficking trade of children & women which is profitable in nature. These particular victims doesn't go brothels by their own, in fact they are taken to such places by organized nexus of trafficking groups who are involved in human sale of trading for many years and further exploitation in the form of sex tourism. This brutish and ruthless nexus of misplaced minors and trafficking of women have to be checked and inhibited through strategic action plans. So it is important to analyze current criminal law regime and assess how so far it can tackle the issue of human trafficking in more sincere & appropriate way. Similarly, Migrant smuggling is also one of serious problem, which has many legal implications. It is understood as the migration of people beyond the political territory of any country through illegal means.

Key words

Human Trafficking, human smuggling, illegal migration, sex trafficking.

INTRODUCTION

The word trafficking itself means those, which are not subject matter of trading, now it has been commercialized & transacted illegally¹. The trafficking as commercial practice varies from state to state because of its illegal demand & supply and its unhindered leeway. Its amplitude exists under various categories like arms, drugs, human (women & children), cattle, etc.

Human trafficking is undoubtedly a very profitable enterprise. It is very difficult to enumerate the exact data of number of trafficking victims throughout the world though some rough standard form of data has been compiled by United Nation and various countries through its respective national crime report bureau (NCRB) at national level. Since it is global phenomenon because of its secretive practice, it is not easy to identify & locate trafficking victims. Another important issue, which is clearly noticed that

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¹See Dictionary.com

vulnerable categories of women & children are prime sufferers of trafficking. Their exploitation whether it sexual or non-sexual depends upon two obvious reasons namely, criminal practice & specific category of human trafficking profession to get illicit money, secondly, choice & specific demand of final purchaser or trader for inevitable exploitation. It is undeniable fact that this kind of degrading act is violative of fundamental human rights. These victims are also deprived off completely from basic amenities like education, livelihood, autonomy, and self-reliance. Consistent infliction of different sort of physical & mental suffering, inhumane behavior and gross manipulations are very prevalent. Traffickers are often accomplished in capturing their preys by seduction, inducement, menace or even by abduction. The major issue that needs to be tackled whether push & pull theory for understanding root cause of human trafficking is universal or not.

FACET OF HUMAN TRAFFICKING

There is a need for comprehensive analysis to understand commercial hardship and compelling circumstances. Social and economic inequalities may have ruinous consequences like human trafficking and human smuggling. Condition of destitution, extreme deprivation of necessary amenities, illiteracy, impecuniosities due to lack of economic opportunities, grave gender partisanship, socio-economic discrimination and unemployment of victim, parents, spouse are the main reasons of trafficking. Overlapping strategy and inequitable accessibility of social security against marginalized section of society and vulnerable class of women and children. Political instability and lack of stringent legislation that prevent human trafficking and protect victim's rights also give undue opportunity to traffickers to proceed in their action without any hesitation. This apathy also encourages trafficker groups to adopt various types of deceptive practice either without knowledge of government officials (including law-enforcement agencies) or by bribing government officials. This is further added and supported by another harsh reality that trafficking is generally stimulated and encouraged by poor parents, sibling & relatives of trafficking victim for the monetary as well as non-monetary benefits.

There is other numerous factors where demand & requirement of trafficking victim are different and commercial in nature. Trafficking victims are required for cheap labour or bonded labour, early marriage, prostitution, sex slavery, etc. Overall, there is possibility that trafficking victims can be transited/ deported from one country to another country. It has been understood that cross border trafficking usually involve two or three types of countries:

1. Outset / source countries- Trafficking victims belong to these countries and the very derivation & genesis of human trafficking initiate here. It is also possible that human trafficking can be pervasive within different states, cities in the country due to lack of stringent mechanism.²

²Sarasu Esther Thomas, Introduction, Global Concerns on Trafficking, Cooperation to Combat Cross Border Trafficking: India-Nepal- Bangladesh, WISCOMP Perspective, WISCOMP Foundation for Universal Responsibility, available at: Sarasu Esther Thomas, Introduction, Global Concerns on Trafficking, Cooperation to Combat Cross Border Trafficking: India-Nepal- Bangladesh, WISCOMP Perspective, WISCOMP Foundation for Universal Responsibility.



2. Shipment countries- It is also feasible that trafficking victims are deported from one country to many different countries. Sometimes, these victims are kept in a temporary abode in these countries during en route to final destination.
3. Terminal countries - These are the same countries where trafficking victims are transported and exploited finally.

So, it has been realized that human trafficking exists in two ways namely internal trafficking and cross-border trafficking. Victims are trapped and shoved into different kind of illicit & immoral activities. The transnational character shows that acts of human trafficking are executed by organized criminal group and thus become a type of transnational organized crime. India has become a hub of human trafficking due to lack of efficient border control with neighbouring countries like Nepal and Bangladesh. As a result of which traffickers are generally succeeded in getting illegal access in the form of infiltration and illegal portal from the other side with the help of touts/ brokers in the absence of valid papers.

The foundation of global jurisprudence on trafficking issue is the Palermo Protocol, 2000. This protocol has a main aspiration to contend & thwart against trafficking in the interest of safety & security of women and children. Its pursuit is in elevation and inter-state alliance for synergic approach and robust investigation at global level.³

There are three facet of trafficking as described in the protocol namely⁴,

- (i) A sort of induction & engagement of vulnerable category of persons for most disparaging acts executed by professional trafficker.
- (ii) Illegal displacement & migration purposefully executed by scrupulous and covertly manner
- (iii) Procurement of trafficked victims through illegal demand & supply at both ends perpetuated by facilitators and conspirators of the crime

The definition included the practice of treachery, improbity and deceit that is supplemented with the exchange of kickbacks. The nature of complexity, multitude is inherent in this illicit design of depravity. As a result of which human trafficking is enacted with different tactics including intimidation, inflexible subjection, captivity and hostage for the illegal financial trade.

Smuggling of migrant is a concept where one or two persons allow illegal access of migrants to a foreign country for illicit financial advantage. This kind of ingression is generally done by some middleman or tout in coordination with border patrol by facilitating graft. Now the main question is whether the victimization & exploitation remains the same just like in matter of person based trafficking or not. It is explicit that the person smuggled is not subject matter of exploitation because he is voluntarily involved in the illegal en route to another country. State and society become subject

³Preamble, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, OHCHR(Nov.,15, 2000), <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>.

⁴Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime§ 3(a) (2000).

matter of adversity and economic disadvantage due to this crime, not migrant unlike the case of human trafficking.⁵

The modus operandi of smuggling gangs is different from network of human trafficking. Though both type of criminal organization have more or less organizational structure, but push & pull theory won't be exactly helpful in understanding the main causes of human smuggling. The push factors like illiteracy, poor position of native country and unemployment in the country may be few of the compelling reasons through which migrants went for illegal access to another country. The practice of artifice and subterfuge may not be same in the case migrant smuggling like human trafficking where victims are exploited. The relationship between illegal migrants and border smugglers ends there only when illegal access is accomplished. So, it is clear that these smugglers find this illegal business a profitable venture and convenient due to weak security legislation. As per interpretation of Smuggling of migrants protocol, origin of illicit revenue lies in the mode of passing persons across international boundary in which migrant has to pay graft to smugglers for facilitating the same.

Exercise of network theory is another possibility where migrant smuggling become pervasive in the society. This action is conceptualized in the form social association, interdependence, interconnection between migrants living in domestic country & international country. It depends on the level of camaraderie, syndication, common lineage and nationality. Their ethnic, cultural, linguistic & religious groupism also form a tendency to adopt same or similar kind of profession in the informal labour sector.

Surprisingly, the legal framework related to human trafficking and migrant smuggling has adopted a very sluggish & inefficient development. The immoral Traffic (Prevention) Act, 1956 didn't cover complete substantive portion of definition including definition of trafficking. A bill was introduced in relation to the legislation in year 2006 by Lok Sabha having definition and strict punitive measures, but it was expired eventually. Finally trafficking is legally defined and got its substantive insight & annotation over stages of trafficking and its nefarious character in the form sexual abuse via amendment brought in IPC in the form of section 370.

Even, Ministry of Women & Child Development introduced a far-reaching & exhaustive draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018. The bill is targeted towards fulfillment of social, economic security to victims of trafficking.⁶

Certain task force like safety homes and state anti-trafficking committee are created for institutional purpose. But there are some conspicuous lapses, which need to be tackled carefully. For example, the bill doesn't cover explicit categorization of victims. It mainly deals with victims of sex trafficking and drug trafficking, but not victims of bonded labour, domestic labour, children working in industries, etc. The bill doesn't cover specific functions to be performed by anti-trafficking committee/board at district level,

⁵Gabriella Sanchez, *Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research*, JMHS Vol.5 11 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/233150241700500102>.

⁶Mayank Mohanti, *As Parliament Readies to Discuss Anti-Trafficking Bill, Here's Why it Should be Passed at the Earliest*, News 18(Mar 11,2019, 12.59 PM), <https://www.news18.com/news/india/as-parliament-readies-to-discuss-anti-trafficking-bill-heres-why-it-should-be-passed-at-the-earliest-1820081.html>.



state level & central level. It is important to maintain accountability of these institutional bodies so that their supervision can be done properly for better performance. It is also not clear as to why and how anti-trafficking fund will be utilized. It has become important now to devise proper mechanism for purpose related to rehabilitative practices and welfare of victims. There is even no scope of resettlement of such victims who suffered from adverse physical & psychological factors as to their livelihood, employment after leaving such protection homes or placement agencies. It is also important that specific targets & functions are to be assigned to investigating officer for preventing such offences. The officer should be properly trained to deal with difficult situation related to cross-border trafficking (secretive character) as well because the major challenge is in the form of feasibility & procedural technicalities in relation to identification of trafficking victims within & around the borders of the country.

There is a need for pertinent contemplation for legislative aspect related to human smuggling. It is necessary because there is no specific legislation which consider human smuggling as offence. So there is always a doubt over application human trafficking law in cases related migrant smuggling against touts/smugglers. It has reported that migrant smuggling is common in area of Gojadanga border near Bangladesh for the purpose of employment, accessible medical facility, etc.⁷ Somehow these migrants are either involved or engaged themselves in various illegal activities.

SCOPE OF FOREIGNER ACT 1946

There is no doubt about the fact that the issue of illegal migration while going inside or outside country creates multi-dimensional problem. It raises a major threat to the whole egalitarian society where socio-economic security is adversely affected. The Foreigners Act is such an important legislation that legitimized & entrusted a responsibility on Central Government to make rules related entry & departure of foreigners. It further explains that foreigner can't make entry or departure from India without having proper travel documents.⁸

One of the peculiar features of the legislation is availability of reverse of burden of proof on the part of the suspect person to substantiate & prove his nationality on the basis of complete valid documents.⁹ Even, the legislation criminalizes illegal stay of foreigner in the absence authentic travel documents.¹⁰ Specific penalty is also imposed against those foreigners who reside in India more than exceeding time period as mentioned in their visa.¹¹

There is also a possibility that illegal migrants arrange & use forged passport or passport through false & duplicate documents with the help of touts or travel agents for getting entrance illegally. Therefore, the Foreigners Act, 1946 criminalizes those people for

⁷Meha Dixit, Transit at Gojadanga, The Hindu(Sept.13, 2016,00.43 AM), <http://www.thehindu.com/opinion/op-ed/Transit-at-Gojadanga/article14634931.ece>.

⁸The Foreigners Act§ 3(1946).

⁹Id; Section 9.

¹⁰The Foreigners(Amendment) Act§14A(2004).

¹¹Supra note 8; Section 14.

utilizing forged passport/travel documents with imprisonment of two to eight years as per seriousness of case.¹²

But the Foreigners Act 1946 has certain limitation as it has no clear position about illegal migrants in the capacity of trafficking victims. Even specific punishment is mentioned for crime associate in the form abetment only.¹³

In addition to the Foreigners Act, 1946, Passport Act, 1967 also criminalize the action of using forged/ fabricated passport, dispensation/ provision of distorted, fraudulent and disguising substantial information in order to get approved passport. Procurement & arrangement of spurious passport through aiding & abetting practice and unauthorized usage of other's passport illegally with malice intention also has been penalized in the legislation.¹⁴

The critical issue in both legislations is that there is not proper explanation regarding the type, nature of abetting factor because whereabouts of identification of real problem, role of active participant in this organized offence needs to be deciphered systematically.

As far as criminal liability of transporter or travel agent is concerned, The Immigration (Carrier's Liability) Act, 2000 has imposed penalty of one lakh rupees on any carrier who committed an illegal act of transporting a foreigner without having valid papers in breach of Passport (Entry into India) Act, 1920.¹⁵ This legislation also has serious limitation, which can adversely affect the process of immigration/ migration. First of all, the definition of carrier itself leaves an ambiguity. It doesn't include the wide ambit of someone who can also execute the process of recruitment, transfer migrants by either means. Even the criminal liability as mentioned in the legislation doesn't have deterrence effect and robust mechanism. There is complete absence of strict imprisonment for carrier who is responsible for unauthorized access of migrants within India and other security official without whom the whole criminal act won't be accomplished properly (criminal liability of such official is not mentioned anywhere in the legislation).

While going through legislative history, The Illegal Migrants (Determination by Tribunals) Act was passed in the year 1983 to determine & identify illegal migrants in the country so that they are evacuated from the country by the Central Government. Interestingly, the act only applies in the state of Assam but extension of illegal migration affected many northeast states in the country. Supreme Court struck down The Illegal Migrants (Determination by Tribunals) Act and held it is unconstitutional because of its ambiguous provision, which may create a great hurdle in the procedure of deportation. The court also emphasized the fact that large-scale illegal & undocumented migration is detrimental to the social & economic interest of the country.¹⁶

¹²Supra note 10; Section 14B.

¹³Id; Section 14C.

¹⁴Offences and Penalties, Passport Act § 12 (1967).

¹⁵The Immigration (Carrier's Liability) Act § 3 (2000).

¹⁶Sarbananda Sonowal v. Union Of India, SC WP 117 (2006).



The weak point in the legislation is that tribunal has to produce evidences of illegal migration against accused and its procedural aspect is very technical.¹⁷ Police has to play important in identifying and collecting evidence against accused, which itself a tedious task. It is contrary to the basic interpretation of section 9 of the Foreigner Act, 1946 that says that the concerned person has to prove that he is not a foreigner. In fact the 1983 legislation didn't provide explicit power to investigating officers for search & seizing sensitive documents. Accordingly, the legislation didn't have substantive impact on identification & prevention of illegal migration.

There is no central legislation on human smuggling in India rightnow. It is difficult to include perspective of human smuggling within the interpretation of The Foreigners Act, 1946 and Immigration (Carrier's Liability) Act, 2000. Though there is one legislation in the state of Punjab related to Punjab Prevention of Human Smuggling Act 2012 which is now renamed as Punjab Travel Professional's Regulation Act, 2012 in the year 2014.¹⁸ The main objective of the Punjab Prevention of Human Smuggling Act, 2012 is to regulate the functions & business of travel agents so as to check & prevent spurious practices engaged with others in an organized human smuggling in the Punjab state.¹⁹

The substantive portion of the legislation covers two important definitions of human smuggling and travel agent. But definition of human smuggling has very narrow interpretation. It covers an illegal practice of transporting/sending person out of India with the presence of illegal consideration, though the execution of such an act can involve any element of inducement or dishonest practice.²⁰

The definition doesn't cover the element of illegal migration & entry of a foreigner within India in the absence of valid travel documents where travel agent play substantial role in finalizing the same with the direct or indirect help of other associates including government officials. The legislation provide standardization of licensing system for travel agent. Their license can be cancelled or suspended when their action is prejudicial to socio-economic interest of India.²¹ Even the offence of human trafficking is penalized with imprisonment of 3 to 7 years and five of 5 lakhs.²²

Supreme Court gave its verdict in the year 2014 on the basis of three writ petition filed by Assam Sanmilita Mahasangha & Ors., Assam public Works and All Asaam Ahom Association & Others on the issue of prevention of illegal migration across border. Supreme Court emphasized that proper physical security arrangement must be re-scrutinized and directed Central Government to ensure that fencing must be done

¹⁷The Illegal Migrants (Determination by Tribunals) Act§ 12 (1983).

¹⁸Notification No. G.S.R.49/P.A.2/2013/S.18/ Amd.(1)/2014, dated the 16th September, 2014, containing amendment in the Punjab Prevention of Human Smuggling Rules, 2013, In the Punjab Prevention of Human Smuggling Rules, 2013, in sub-rule (1), in the title, for the words, "Prevention of Human Smuggling", the words "Travel Professionals' Regulation" shall be substituted, Part III, Punjab Government Gazette(Extra), September 2014(BHDR 26, 1936 SAKA), Department of Home Affairs and Justice, Government of Punjab.

¹⁹The Punjab Prevention of Human Smuggling Act, 2012(Punjab Act No.2 of 2013), Department of Legal and Legislative Affairs, Punjab, Part-I, Punjab Govt. Gaz.(Extra), January 04, 2013.

²⁰The Punjab Prevention of Human Smuggling Act§ 2(2012).

²¹Id; Section 6.

²²Id; Section 13.

throughout the plain area near the border from village to village for preventing physical intrusion & infiltration. It was also instructed that border security forces should do consistent supervision by establishing check posts within reasonable distance & inspection.²³ The major issue is whether creation of physical fencing near border will absolutely prevent illegal migration in the form of human smuggling? What kind of safety & alternate arrangement can be made when entire border area can't fenced due to marsh or hilly area and especially with emergence of different kind of obstacles like environmental issues and indigenous people living near border?

In the judgment of *Neerja Chaudhary v State of Madhya Pradesh*²⁴, Supreme Court of India criticized the insensitive behaviour and practice of state authorities in recognizing, reinstating and restoring basic rights of bonded labourers in the country. The Court has reminded the state regarding obligations to bring serious attention on the rights of female labourers. Vulnerability of female labourers has to be introspected with the regard to social justice. The Court has further emphasized that state authorities should check activities of many crime syndicates which are responsible for extortion, other coercive practice related to forced labour or bonded labour.

In another case of *Gaurav Jain v. Union of India*²⁵, it was emphasized by Supreme Court that women involved in the prostitution or illegal human trade for sexual acts, should be treated as victim of crime rather than principal offender or accessory to crime. The court has directed state authorities to adopt unswerving responsibility towards emancipation, redemption, vindication of trafficking victims in the society leads to a dignified life. There is no doubt that necessary process of rehabilitation of victims for their social development is difficult task to accomplish but, sincere effort should be made by State and voluntary organisations so as to remove sign of social stigma due to multiple entanglement and entrapment. Court has further directed state to create a mechanism through which victim can have liberty to choose any alternative profession or old profession like prostitution without any social restriction especially in the absence of societal acceptance and lack of economic opportunities. The landmark decision also raised other pertinent issue where it has been emphasised that diligent surveillance and investigation should be done by bodies like CBI in the matters of cross-border trafficking for various purpose. These bodies must look for inter-state inspection based mechanism to expedite the fact-finding mission. Another genuine concern was raised to provide explicit protection & shield to the victims of the crime by state authorities against all possible kind of intimidation for the purpose of successful prosecution.

Similarly, *Prerana v. State of Maharashtra*²⁶ also substantiate the point that vulnerabilities of child victim involved in trafficking needs to be understood in such way that he should be treated as child who is in need of reasonable care and safety within the interpretation of Juvenile Justice Act, 2000.

²³Assam Sanmilita Mahasangha & Ors v. Union Of India, SC WP 562 (2012).

²⁴Neerja Chaudhary v. State of Madhya Pradesh SC AIR 1099 (1984).

²⁵Gaurav Jain v. Union of India SC AIR 3021(1997).

²⁶Prerana v. State of Maharashtra 2 MLJ 105(2003).



Supreme Court of India directed government to prepare procedural issues related to rescue in the case of *Prajwala v. Union of India & Others*²⁷. The Court raised grave concerns related to cross-border trafficking like problems related to jurisdiction, different legislations & policies in domestic countries and lack of proper border control. Legislation related to labour, prostitution, victim protection, illegal sale of women/girls are not efficient enough to include the element of trafficking.

Since the mode & approach of human trafficking and smuggling are already acknowledged, it is equally important to understand its practical modus operandi. The main problem lies in both issues is deep-rooted corruption without which an organised crime like human trafficking and human smuggling won't be completed. Corruption here is generally a dishonest act which is inclusive of bribery, impersonation, documents misrepresentation, forgery of travel documents, illicit money circulation among security forces. These corrupt practices have obviously eventual outcome in the form of actual illegal entry of foreigner across international border and forged travel documents.

Though the coercive & corrupt practices by border security forces are highly discouraged & criminalized as per The Border Security Force Act, 1968, whereby penalty is imposed for such an offence of maximum imprisonment upto 10 years as convicted by Security Force Court.²⁸ Surprisingly, the legislation doesn't cover different modes of corrupt practices, its definitive character and purpose. It has been universally accepted fact that countries should manage border control systematically to check & abolish human smuggling. Strict administration over border control operation can only be possible with the help of strong inter-state cooperation by designing proper plan of action & proper communication.²⁹

It is the prime responsibility of the states to provide certified quality to travel documents so that it can have character of unassailable security after issuance against any kind of unauthorised usage. State has to develop a efficient mechanism for the same purpose.³⁰

CONCLUSION

It is an established fact that there is substantial difference between human trafficking and migrant smuggling and its difference needs to be shown in the legal texts and explicitly followed in practice by investigating officers and judiciary. Now it needs to be understood that corruption and different aspects of organized crime are the common linkage for the aggravation and surreptitious nature of human trafficking and migrant smuggling. So, if this kind of systematic and well-designed plan is executed by these criminals, it is very essential that investigation teams (anti-human trafficking units & anti-human smuggling units) have to adopt all modern tools of search & inspection (forensic science & efficient computer surveillance, etc) for identification of victim (human trafficking), principal offenders including guilty associates and collection

²⁷*Prajwala v Union of India & Others* 12 SCC 136(2005).

²⁸The Border Security Force Act § 31(1968).

²⁹Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime § 11(2000).

³⁰Id; Article 12.

of evidence against them. But the multi-dimensional problem of trafficking & smuggling can be resolved properly by adopting executive approach as well as legislative approach. So, draft of the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016 needs to be updated further so as to include specific functions of state anti-trafficking committee, district anti-trafficking committee and protection homes (with regard to rehabilitative practices) and accountability of these institutions. Similarly, a central legislation needs to be introduced on the sound lines of Punjab Travel Professionals' Regulation Act 2012 with further increase in the ambit of human smuggling, definitive character of organized crime, action against corrupt practices done by public officials and travel agents. It is equally important for the government to institutionalize capacity building programme among border security forces, registered travel agents, immigration officers against corrupt practices to end trafficking & smuggling.