

Analysing Human Trafficking through Rights Based Approach with Special Reference to Gonda Circus Case

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Sadly, trafficking in human beings has taken the shape of an organized transnational crime. As per International Labour Organization (ILO) estimates, human trafficking generates an annual business of more than 150 billion dollars and currently there are 25 million victims of human trafficking around the world. While this is not a new problem, the new dimensions it has reached in recent years illustrate that it is now a crime of epidemic proportions. It is a matter of global concern and no country is immune from it. As an organized crime, human trafficking undermines the sustainable development and the rule of law because illicit profits may be used for corruption, other criminal activities and at times, even for terrorism. Moreover, it hampers the full-fledged development of human skills and personality. Therefore, the issue of trafficking requires all human rights activists to face introspection and self-assessment. It poses a big challenge to the governments and the civil society as well because despite all efforts to curb it, the menace of human trafficking has been flourishing worldwide. In the present era of globalization where the plight of the poor is very common, the time has now come for all stakeholders to move ahead with a rights-based approach as a viable tool for prevention, protection, prosecution with adequate remedy offered to the victims of trafficking. Unless this is effectively implemented, it would not be possible to break the vicious cycle of trafficking in human beings.

Trafficking in human beings is not only confined to sexual exploitation but also takes other forms; for example, children — particularly girls — from minority groups or poor families are trafficked to work as domestic servants in big cities, as labour in hazardous industries, for begging, for public sports (such as camel races),

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entertainment, bonded labour, pornography, involuntary servitude, organ transplant, smuggling, etc.

According to the United Nations¹:

Trafficking in persons is a serious crime and a grave violation of human rights, which threatens national security and undermines sustainable development and the rule of law, as recognised in the Declaration of the High-level Meeting on the Rule of Law.

The most comprehensive definition of human trafficking has been given in the Convention against Transnational Organized Crime's protocol (Article 3(a)) of the Trafficking in Persons Protocol which defines trafficking inclusively as:

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 purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or others form of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²

This was adopted by the UN General Assembly in 2000 and is a widely-accepted definition.

The hypothesis of this paper is that the human trafficking cycle cannot be broken without paying attention to the rights and needs of the trafficked victims. This paper will cover in brief, the magnitude of the problem, the definition of trafficking, its causes, the legislative framework, state measures, prevention, protection, prosecution, root causes of vulnerability with nexus and exploitation linkages. It shall also discuss, in brief, the Gonda Circus Case investigated by a team constituted by the NHRC³ that became a success story in the history of the National Human Rights Commission of India.

The rights-based approach for the survivors of

trafficking is to be adopted according to the 'Limburg Principles' and 'Maastricht Guidelines' focussing on the affirmative action transforming needs in to rightful claims. For the victims of trafficking, it could be made possible by initiating special measures aimed at securing adequate security and facilities. The rights-based approach is an effective tool that tends to justify the functional character of economic, social and cultural rights. It keeps victims at the centre of any action taken. It pays attention to determining state responsibility as a facilitator starting from the systematic conceptual process to the methodological processes. It carries out an analysis of human rights violations based on important indicators such as Realization, Recognition, Entitlements, Assertion, Accessibility and Enjoyment.

In order to explore the problem and its dimensions, it is imperative to examine the causes, factors and circumstances responsible for trafficking in human beings together with the international and the domestic legal framework. Without a proper diagnosis of the problem, the solution cannot be found out. The poor economic and social conditions provide a distinct explanation for the direction and flow of trafficking. Trafficking generally flows from poorer to more prosperous countries. Huge and unaccountable profit drives every aspect of the trafficking industry from the standpoint of the perpetrators of this crime. Resources and money for survival are the central driving force that renders potential victims more vulnerable to deception, coercion and exploitation.⁴ Many unfortunate teenaged children in full bloom are being sold for paltry sum even by their parents who are unable to suitably raise their children due to poverty. Their hopes rest on finding some form of employment for the children, like being engaged either in household duties or manual labour.⁵

The structural factors responsible for trafficking include economic deprivation and vicious circle of poverty, the effect of globalization, aspiration for modernity, attitude to gender, the demand for sex and situations of conflict, while proximate factors include lax national and international legal regimes, poor law enforcement, corruption, organized criminal entrepreneurship, weak education campaigns and lack of coordination between the neighbouring countries.⁶

In most of the countries, only a few cases of missing girls are registered at police stations in relation to the actual number of girls and women who go missing. Cases are either not reported or not registered for many reasons, most of them are associated with poor governance. Poor compliance with the UN conventions and treaties may be considered a push factor for trafficking even though push factors mainly operate at the place of origin. Human trafficking is a global phenomenon that

is driven by demand and fuelled by extreme poverty and unemployment.⁷ Trafficking has flourished due to the patriarchal social structure, gender disparity, illiteracy and lack of awareness, exploitative socio-economic systems in the society, etc. Increasing consumerism and demand of cheap labour markets are other contributing factors.

Trafficking in women has been universally accepted as an act of violence against women, there is global consensus about it.⁸ At the fourth world conference on women in Beijing in 1995, combating this form of violence against women was a concern strongly shared by all, added to this, the issue of trafficking has been dealt with in various international human rights instruments. A large number of international and national instruments for prohibiting trafficking have been developed in 21st century as human trafficking has become a serious human rights issue.

In Article 6 of the Convention on Elimination of All forms of Discrimination against Women (CEDAW) says: "*state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women*".⁹

Likewise, there are many international mechanisms to control trafficking, such as Slavery Convention, International Covenant on Civil and Political Rights, Child Rights Convention and other instruments as well. The OHCHR has also issued 11 guidelines¹⁰ with emphasis on rights based approach which are the obligations of the state parties to ensure protection and promotion of the human rights of trafficked persons. These guidelines include: promotion and protection of human rights; identification of trafficked persons and traffickers; research, analysis, evaluation and dissemination; ensuring an adequate legal framework; ensuring an adequate law enforcement response; protection and support for trafficked persons; preventing trafficking; special measures for the protection and support of child victims of trafficking; access to remedies; obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel and cooperation and coordination between States and regions. However, in the absence of effective enforcement mechanisms, these guidelines have not been translated into action.

The principles and guidelines developed take into consideration the ground realities and serve as a framework and reference point for the work needed on this issue. The stakeholders must be encouraged to make use of such principles and guidelines in their own efforts to prevent trafficking and to protect the rights of trafficked persons¹¹ with human rights of the victims at the central place.

Similarly, the UN convention for the suppression of trafficking in persons and of the exploitation and prostitution of others, describes in article 1 that the state parties to this convention are obliged to:

“punish any person who, to gratify the passions of another”, “procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person, ‘or’ exploits the prostitution of another person, even with the consent of that person”.¹²

It is to be noted that Article 9 of the UN Trafficking Protocol contains a set of prevention and cooperation measures. According to this article, state parties shall establish policies, programmes and other measures aimed at preventing human trafficking and at protecting the victims to avoid their future re-victimization. Bilateral and multilateral cooperation between state parties is envisaged as a way to address the root cause of trafficking in persons, namely, poverty, underdevelopment and lack of equal opportunities.¹³

The three Ps approach comprising measures to prevent the phenomena and prosecute the traffickers and protect the victims¹⁴ is required to be implemented effectively and efficiently. It is to be understood that the problem of trafficking is not only a social but also a socio-economic therefore; measures to be taken by the state should be more preventive rather than punitive.¹⁵ The trafficked person’s ability to escape is obstructed by lack of financial resources and their linguistic and cultural isolation, separation from family and relatives/friends, and dreaded fear of local authorities in destination countries. If governments are serious about combating this menace, a new approach is required by addressing the push factors of economic instability, poverty and inequality in countries of origin so that the pressure on migration could be reduced over the long term and this could be a worthy goal in its own right.

The support and help mechanisms should include legal services and other resources as trafficking victims often arrive in a country without legitimate identification papers/ travel documents, unable to speak the language, and forced into an illegal trade. The rescue services are to be equipped with the impending problems, including the HIV/AIDS crisis and special needs of trafficked children. State-level measures together with those at the centre should include activating social change, public awareness and education, potential private sector allies, rescue and data analysis, NGO networks and alliances, economic opportunity and justice.¹⁶ Traffickers often take benefit of gaps in labour law enforcement in destination countries as trafficked person normally work in informal sectors with weak labour protections, such as domestic service, agriculture and illegal sex work. The fact is that there are no victim-friendly laws, law enforcement mechanisms, and regional cooperation in terms of treaties, laws to prevent the victim from acquiring the status of an illegal immigrant.¹⁷

The rights-based approach is seriously concerned with

the fact that the criminal sanction paradigm has resulted in sufferings of the victims rather than of the traffickers. The rights-based approach, therefore, leads to a situation where rights of the victim are respected and protected all along, so that the victims are not subjected to retaliation or re-victimization by the law enforcement agencies, including the judiciary during all the processes connected thereto.

The innovative steps taken by the judiciary in Delhi by constituting ‘Women-Courts’ manned by women exclusively could be implemented. In-camera trials could be held where the victim can depose without any fear. Further, the judiciary should supervise the remand homes to prevent exploitation and monitor rehabilitative programmes.¹⁸ While quoting Justice A.S. Anand, it has been stated that ‘a socially sensitised Judge is better statutory armour in cases of crime against women than long clauses of penal provisions containing complex exceptions and provisos’¹⁹. The apex court in India in the landmark judgements in Vishal Jeet v. Union of India and Gaurav Jain v. Union of India has played a constructive role aimed at not only prevention of the crime and curbing the menace of trafficking but also rehabilitation of the victims.²⁰

While looking at the Indian scenario, the anti-trafficking law, the Immoral Trafficking (Prevention) Act aims at combating the commercialization of the flesh trade, however, in practice, the Indian Penal Code is invoked to charge sex workers with crimes such as public indecency or public nuisance and without looking into the root cause of the problem²¹ as the trafficked victim fears the ordeal of a complaint and prosecution process that may in fact put her on trial. Therefore, the crime control approach criminalizes the victim. The prime motive here is stopping the crime rather than stopping the violation and exploitation. It considers the victims approach secondary, re-victimizing them and creating fear of detecting them, forcing them to live underground.²² There has to be a change in the mindset that the girls involved in trafficking are not the perpetrators of crime but the victims.²³

Traffickers, when prosecuted, are typically charged with crimes related to immigration violations and not human rights abuses and victims. Therefore, they receive little or nothing in terms of assistance or justice and even if they are charged, they make payments to families for not to pursue the case. The victims surrender retreating into silence and submitting their bodies owing to their poor socio-economic and cultural condition. They should, therefore, be rescued and rehabilitated and reintegrated. Therefore, it is necessary that the crime of human trafficking must be seen from human rights perspective as well.

There is an urgent need of increased efforts to

investigate and punish traffickers, with penalties that reflect the gravity of the offence. And such efforts will not be possible and successful until officials provide victims with the assistance and protection needed to gain their trust and cooperation as informants and witnesses. The problem of trafficking can be suppressed and eradicated only if the law enforcement authorities take very severe and speedy legal action against all the delinquent persons, including pimps, brokers and brothel keepers. The judiciary is required to be more proactive and sensitive in dealing with trafficking cases. In such cases, speedy trial is very much important as it could be helpful in restoring the lost self-confidence of the survivor.

In most of the developing and underdeveloped countries, laws are weak without conceptual clarity. States often lack suitable criminal justice policies which are weighed down by cumbersome procedures, lack of effective mechanism for obtaining and testing evidence, unavailability of evidence and of witnesses for testimonials, all leads to higher rate of prosecution failure, subjecting the victim in high degree of vulnerability of revenge by perpetrators. The issue of compensation is still not addressed. The victim is devoid of free access to criminal justice system and is still in need of privacy during the trial.

Often there is no comprehensive regional framework and as such the domestic laws are often conflicting and contradictory. The law enforcement officials are hardly aware of laws of receiving countries. Political instability, lack of human rights culture, good governance, widespread gender and caste discrimination makes any regional cooperation difficult. Ironically, India treats this menace in the form of illegal migration, social and security problems. The victims, at times, are treated as violators of immigration laws. The lack of sensitization leads to secondary victimization of the victims. The anti-trafficking legal frameworks and criminal justice system are not friendly to victims. They are often arrested and prosecuted instead of the traffickers. The victim support and social rehabilitation services are not visible. There is an urgent need for harmonization of legal framework; policies, programmes and cooperation at regional level so that the rights-based approach become a reality.

It is to be kept in mind that the child victims should be dealt with separately from adults in terms of laws, policies, programmes and interventions. It is quite known that once children have been trafficked, it is difficult to break the cycle of abuse. They are at high risks of being successively criminalized and of being exposed to further abuses and the risk of potential re-traumatization by police and judicial practices. Sometimes, families may refuse to take them back because of the stigma attached and, therefore, becomes vulnerable for re-trafficking.²⁴

Sometimes they are added to this human trafficking network.

Now in order to understand the nexus between the root causes of vulnerability and consequences, let us move with our eyes set on the most possible potential hazard in the form of dreaded disease, the HIV-AIDS. It's a matter of concern that about 2.7 million people are getting infected by HIV-AIDS across the globe every year²⁵ and the stigma is as bad as the physical condition. The efforts being made by the state authorities are like cleaning the room with tap open. The impact of vulnerability is visible in the form of physical impact wherein the victims are subjected to torture and rape not only in brothels but also on the way to destination, hitting and burning of private parts with cigarette, beating, gang raping, denial of wages, forced labour, several life threatening diseases (TB, HIV-AIDS). Official estimates have state that about 60 per cent of the sex workers contract HIV/AIDS, unwanted pregnancies, frequent abortions and are exposed to hazardous industries. The trafficked victim enters a cycle so vicious that it is next to impossible to come out of it. An easy target for HIV-AIDS and other diseases, even repatriation brings no relief. They become the target of further human rights abuses.

Another aspect to this problem is that the victims of trafficking, often on return, face the age-old women problem, the loss of chastity degrading a woman making her permanently "damaged good", unfit for marriage or even acceptance back into her family.²⁶ Even if the victims have not contracted HIV/AIDS, others presume that they are infected and hence end up being neglected by families and societies. Another root cause of vulnerability is the patriarchal myth in several cultures is that sex with a young virgin restores and invigorates adult male libido. A related myth holds that a man can be cured of a sexually transmitted disease by having sex with a young virgin.²⁷

The impact of trafficking is visible in the form of psycho-social consequences wherein the victims face high level of stigma and have no courage to face family and society. It leads to re-trafficking due to lack of reintegration as the society considers them as pollutant to other girls and therefore they are not welcomed back. They suffer humiliation, sadness, depression, anger, and fear. The issue of vulnerability from the perspective of emotional aspect is visible in the form of constant fear of arrest, isolation, deprivation of family life, social support system, humiliation and abuse. 'Child labour' is a paradox, because when labour begins, the child ceases to be²⁸. The victims are not aware of their rights to be free from torture and to enjoy their freedom of movement. Often, there are long delays in repatriation and also lack of access to legal remedies forming the chain of re-victimization.²⁹

Success Story of Gonda30 Circus Case

The famous Gonda Circus Case dealt with by the National Human Rights Commission (NHRC) of India is an eye-opener on the issue of human trafficking. The testimonies of Nepalese girls, mostly minors, rescued by the NHRC team shocked the conscience of mankind.³¹ It explains how the organised network of traffickers is operating between Nepal and India. The case is a textbook example of how the girls are trafficked, confined, kept in bondage and exploited both physically and mentally. Poor parents were lured by the traffickers with a paltry sum paid in advance, and were made to sign a contract forcing their children to work in the Circus in violation of labour laws and the Juvenile Justice Act. Even after years of service, the children were not returned to their parents on the pretext of bondage debt. The success of the case lies in the fact that the victims were restored to their parents; the offenders were arrested and prosecuted. The case was prominently highlighted by print and electronic media resulting in creating awareness in both the countries.

The fallout of the case is that the Honourable High Court of Allahabad had put the circus industry under the category of hazardous one and very recently, the Supreme Court of India banned employment of children below 14 years of age in the circus industry.

The aforementioned case reveals the major stakeholders, the major two being the trafficked girls and the traffickers; however, this crime could not have reached to its current proportions without the involvement of others. Other perpetrators to the problem are the victims' families and other members of the community. These cohorts must have a direct or indirect relationship to debtors in order to survive due to their extreme poverty. However, not so obvious is the influence of the media and modernization itself.

From the traffickers' side, the most obvious stakeholders are the business owners seeking to procure sex workers for their brothels, or other cheap labour to inflate their profit margins. Without the extent of the demand for these workers, the problem could not have escalated to its current status.

Other stakeholders involved are law enforcement bodies (in this case also the NHRC of India) and government bodies from both India and Nepal. In the broader sense, it is imperative that the international community, including the United Nations, Human Rights Commissions and other treaties take into consideration the involvement of all parties; not just the traffickers and their victims.

The concern that *"the trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked"* is expressed in the Recommended

Guidelines on Human Rights and Human Trafficking by the High Commissioner for Human Rights. It is, therefore, important that appropriate protection and support should be extended to all trafficked persons without discrimination. To ensure this, there is an urgent need for cooperation between all stakeholders to ensure adequate shelter to the victims outside immigration detention, access to health care and counselling, access to diplomatic and counsellor representatives, legal and other assistance and protection from harm, threats, or intimidation by offenders. The identity of the victims and their privacy should always be respected and protected. It is to be ensured that the victims who do return to their country of origin are provided with due assistance in support facilitating their social integration to prevent re-trafficking. Adequate measures should be taken to ensure proper physical and psychological health care, housing, educational and employment services for returned trafficking victims.

In conclusion, it can be argued that by adopting the 'rights-based' approach this vicious circle of human trafficking can be broken. For this, proper execution of prevention, protection and prosecution mechanisms together with state measures having human rights at the centre is needed. Added to this, fulfilling needs of the victims up to the final stage of re-integration in empowering the victims is also required. It has also been argued that in the process of rendering assistance to the victim and addressing the vulnerability factors, there is an urgent need for better modalities based on coordination and cooperation among all the stakeholders within and outside the country. It is a crime that needs to be addressed on both levels, the global as well as local.

Notes

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