



## India - Gita Mittal

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### Remarks

#### **Justice Gita Mittal, Acting Chief Justice, Delhi High Court, India**

Right at the outset, I would like to thank Pope Francis as well as Mr. Marcelo Sanchez Sorondo, Chancellor of this wonderful academy, for organizing this important symposium and for giving me the opportunity to address this august gathering of eminent Judges and Prosecutors.

#### **Human Trafficking – An overview**

Human trafficking, quite broadly, is the indulgence in the trade of humans, which includes transportation of humans for varied activities such as: commercial sexual exploitation, begging, organ trading, military conflicts, drug peddling and smuggling, exploitative labour, adoption, entertainment and sport. A more comprehensive definition to Human Trafficking has been adopted by the United Nations in Article 3 of the *Trafficking in Persons* protocol.

The modus of a human trafficking operation is inherently similar worldwide. Many a times these operations are intricately organized and involve crossing national borders. It is an organized crime that exploits the vulnerability of human beings, making them objects of financial transactions through the use of force, duress or deception or by simply extending payment to persons in control of the victim. Being a vice of the organized crime sector, the incidents of exploitation are not isolated. Entire segments of minor girls from villages, for instance, are forcefully recruited and relocated to be pushed into denigration. According to UNODC, trafficking is the third most lucrative crime in the world.

In the Indian context, 80% of human trafficking cases are of commercial sexual exploitation. According to the data available with the Ministry of Women and Child Development, Government of India, 19,223 cases of trafficking in women and children were reported in the year 2016. India, being one of the largest countries in South Asia, has emerged as the hub for influx of trafficked persons from neighboring Nepal and Bangladesh. The prime reasons of increased exploitation in the Indian sub-continent are acute poverty, low employment prospects, marginalization, the caste system, as well as a patriarchal society which gives low priority to women's rights.

#### **Legal Framework in India**

Article 23(1) of the Constitution of India affords to all human beings, and not only to Indian Citizens, a fundamental right against exploitation. It expressly prohibits trafficking. Article 21 of the Constitution of India ensures the right to life to every person. By way of judicial activism, the scope of this Article has been expanded, time and again and has come to include *the right to live life with dignity*. This article is, therefore, the lynchpin and the source of all authority to all domestic legislation, under the umbrella of the Indian Constitution, which prohibits human exploitation in any manner.

The Indian Penal Code, after its path breaking amendment in 2013, has endeavored to bring Section 370 of the Code, pertaining to human trafficking, in conformity with the UN Trafficking Protocol. Although the amendment has considerably bridged the gap between the domestic laws and the International Protocol, some points of divergence still remain which are sought to be addressed by the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016. As the current statutory regime does not envision an effective system to facilitate reintegration of the victims into the mainstream society, the proposed Bill envisages the creation of Schemes in this regard by the Government. With the enactment of this Bill it is hoped that the legal framework in India would fully operate in consonance with internationally accepted norms.

On a microanalysis, it is imperative to note that the Indian Parliament has enacted the Bonded Labour System (Abolition) Act, 1976 and the Child Labour (Prohibition and Regulation) Act, 1986 for curbing bonded labour. A comprehensive piece of legislation, called the Immoral Traffic (Prevention) Act, 1956 has been enacted to criminalize forms of sex trafficking. Therefore, there is a multitude of domestic legislation which exists even today and with effective enforcement and prosecutions, it is only a matter of time that the Indian subcontinent will emerge free from the vice of human trafficking.

#### **Case Studies and Experiences**

I would like to share the story of Tara (*name changed*), belonging to the Rohingya Muslim community originally from Myanmar. She was rescued by a police team from a hotel in Mumbai. She disclosed that she was from Bangladesh. The process of her repatriation hit a roadblock when she could not provide any legal documents to prove her Bangladeshi identity. Subsequently, with some intervention, she was finally repatriated to Bangladesh where she reunited with her family.

There is another ordeal of a young woman who was trafficked from Bangladesh to Maharashtra. The traffickers threatened to cut off her breasts if she refused to indulge in prostitution. When she still resisted, they beat her brutally and left her for dead. When she was found, she could barely speak. Her case went to the Supreme Court, which ordered her 3 lakhs as compensation from the State and her repatriation to Bangladesh within 10 days.

My experience of dealing with such cases shows that the major challenges faced during trial of such cases is ensuring speedy trial by courts; protection of the victim from threats and inducements from the traffickers; provision for video conferencing of the witness to prevent them from turning hostile and; need for persistent effective training of all stakeholders. Another issue is ensuring that the custody of the trafficked child goes to the right person, so that the child is not re-trafficked. Also there is a need to reconcile interpretation of multiple legislations operating in the same field and existing legislations with international protocols with the object to protect the best interest of the trafficked victim.

In *Delhi High Court Legal Services Committee v. Union of India*,<sup>[1]</sup> a case before me, two young trafficked girls – ‘A’ aged 14 and ‘B’ (names withheld to protect identity) aged 16 years – were rescued by the Police from a prostitution racket. They both came from extremely poor families in West Bengal and were fraudulently lured to Delhi, sold and compelled into prostitution till they were rescued. After their rescue they were produced before the Child Welfare Committee – a body constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 (in short JJ Act). One person claiming to be the father of ‘B’ filed an application before the Metropolitan Magistrate seeking her custody. The Metropolitan Magistrate, without proper scrutiny of the identity of the person claiming himself to be the father, passed the order for handing over custody to him under Section 17 A of the Immoral Traffic (Prevention) Act, 1956 (*hereafter referred to as the ITP Act*). The Delhi High Court Legal Services Committee filed a petition challenging the Magistrate’s order *inter alia* on the ground that the matter was to be examined in the light of the JJ Act, and not under Section 17A of the ITP Act, 1956 since only the Child Welfare Committee under the JJ Act would have jurisdiction to rule on the issue about competence of the claim for custody. In the meantime, another application for custody was filed by a lady claiming to be the mother of ‘B’. The court was faced with the dilemma how has it to proceed in a matter where the persons recovered by the police in a raid under Section 15 or 16 of the ITP Act, 1956, are under 18 years of age – are the authorities required to proceed against them under the ITP Act or in accordance with the provisions of the JJ Act? Both Acts appeared to be operating in the same field with overlap in some areas. Also, the issue was if the JJ Act would prevail then whether such victims are to be treated as a ‘*child in conflict with law*’ or ‘*child in need of care and protection*’. It was held that since as per provisions of the JJ Act which was a special subsequent enactment, the Child Welfare Committee had final authority in respect of custody and restoration of a child victim, so if a minor is rescued by police under the ITP Act and produced before the Magistrate, then the minor must be transferred to the Child Welfare Committee which was a specialized body and that such a victim is a ‘*child in need of care and protection*’ and not a ‘*child in conflict with law*’.

### **Indian Best Practices**

In cases of cross-border trafficking, the victims may enjoy physical freedom but are psychologically captive because of the fear of the law that they themselves would be seen as criminals. The Indian judiciary has looked at consent beyond confinement behind closed doors and also at psychological conditions that create helpless surrender where girls do not dare escape.<sup>[2]</sup> Consent must also be interpreted from the context, the balance of power between the victim and offender and not merely based on victim statements.<sup>[3]</sup> The Government of India has directed that cross-border victims should be treated as victims of trafficking rather than offenders, if they crossed the border without their consent.<sup>[4]</sup> Indian law also denies bail to offenders who traffic children, even if they deny knowledge of minority of victims.<sup>[5]</sup>

In Delhi we have special courts set up under the Protection of Children from Sexual Offences Act, 2012 and Special Fast Track Courts which are dealing with cases of children and women trafficked for sex work. The Delhi Judicial Academy under the Delhi High Court is conducting training and sensitization courses for stakeholders in the system which is, in turn, encouraging problem-sharing and a movement towards a concerted approach to tackle this organized crime.

The Delhi Legal Services Authority under its Victim Compensation Scheme is ensuring interim and final compensation to victims of trafficking to enable their rehabilitation. We are also undertaking a robust follow-up of fate of the victims post release of compensation, as part of the Delhi Legal Services Authority's working.

I had an opportunity to spearhead an innovation of the Indian judicial system by the institution of Vulnerable Witness Court Rooms in the Trial Courts of New Delhi, wherein the witness is placed in an adjacent room to testify via live video stream to the courtroom, so as to prevent secondary traumatization. Since the victim does not come in contact with the accused and deposes fearlessly, the quality of evidence has improved significantly. The Indian Supreme Court has recognized this innovation as the model and has desired that it be replicated in other courts around the country.

### **Way forward**

We therefore need to contemplate the course which must be adopted to eradicate this problem in its entirety. Some of my suggestions are:

*On Policing and Enforcement:* Coordination and Information dissemination between law enforcement agencies worldwide through a coordinating agency like the INTERPOL to bust international Organized Crime syndicates would be essential. *On Judging:* Applying and furthering the mandate, spirit and intendment of the UN Trafficking Protocol to its fullest in the domestic plateau with the aid of existing laws, as well as in light of international guidance and *best practices*. *On Prosecutions:* Effective prosecutions of the kingpins and not only the delinquents at the lower level to ensure that the network of organized crime is eradicated. This can also be effected by following the trail of money and using enforcement as well as prosecution under the Money Laundering laws. *On NGOs:* To focus on improving reintegration into the community and support them along the way as they rebuild their lives. *On combating demand:* Children and women are forced, defrauded, induced because there is demand for them. Trafficking, therefore, is demand-driven. The Nordic model may be worth looking at which criminalizes customers of sex trafficking thereby driving down demand. This hits at the root of trafficking operations. *On breaking supply:* Another way to address trafficking would be to hit at properties and the trail of money, which is the backbone of every organized crime operation. Indian money-laundering laws apply to trafficking crimes as also provide for closure of premises used in trafficking (*Prevention of Money Laundering Act, 2002*). *On legislation:* Traffickers benefit from jurisdictional asymmetries and countries must work together to align their laws on trafficking. *Investigation and prosecution:* The need of the hour is therefore to build an international task force to unearth the organized operations of trafficking as well as to aid coordination with the domestic law enforcements, train prosecutors for vigorous prosecutions and edify judging accordingly.

### **Conclusions**

Pope Francis, the current Pope of the Catholic Church has said and, I quote, "*Human Trafficking is a crime against humanity. We must unite our efforts to free victims and stop this crime that's become ever more aggressive, that threatens not just individuals, but the foundational values of society*".

To conclude, I would only echo the Pope's call and add that trafficking exists not because a few thousand people commit it, but because millions of people stay silent about it. I would urge all countries to work together in this respect to address these critical issues, which deserve immediate attention.

### **END NOTES**

[1] (2014) 214 DLT1 : 2015 Cri LJ 2054.

[2] *Mst. Bano Alias Chidi Bano v. State of Rajasthan*, 1986 WLN UC 701.

[3] *Nilofar v. State*, 2004/MANU/Guj/0656.

[4] Home Ministry Order No. 14051/14/2011-F.V1.

[5] *Guria v. State*, 2009 MANU SC 1345 and *Shaikh Jaffar v. State*, 2008 (1) BCR (Cri) 216.