

# TRAFFICKING OF WOMEN FOR BODILY ORGANS: A BREEDING GROUND FOR AN AGGRAVATED FORM OF SEX TRAFFICKING OF WOMEN

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## 1. Introduction: How Human Trafficking has Erred the Human Society

Human trafficking is a grave and serious err in an evolutionary society that we constantly try to survive and thrive in because it has been noted that millions of people are trafficked throughout the world.<sup>1</sup> Though we see varying degrees and drastically increasing statistics, we observe a uniformity due to the massive underreporting and the hidden nature of such crime. This uniformity concerns the increasing numbers of such a crimeregularly in which women are the most susceptible. The view as mentioned above has already been emphasised and supported.<sup>2</sup> Every year, in India, multiple students disappear, out of which not all are traced.<sup>3</sup> The inability to trace them stems from the fact that they have been subjected to various forms of human trafficking that goes unseen, ignored, and unreported. This research article shall only deal with Organ Trafficking (hereinafter **OT**) and Sex Trafficking of Women (hereinafter **ST**), all of which are a subset of human trafficking. One of the primary reasons for human trafficking is credited to the victims' position, i.e., vulnerable. In India, this abuse of power is owed to inter-generational exploitation. Subjugators tend to allure the victim or the victim's family in the name of benefits due to the victim's disadvantaged position and/or family.

Thus, considering those mentioned above, *firstly*, this research article shall prove that OT leads to an aggravated form of ST because both of them are interconnected. While doing the same, *secondly*, this research article seeks to analyse the root causes and thought processes behind OT and ST alongside the women victims involved. *Thirdly*, this research article also explores and comments on the various legislations and legal jurisprudence surrounding OT and ST. *Fourthly* and in finality, this research article shall also provide a perspective in the

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<sup>1</sup> Laxmi Kant Pandey v. Union of India, (1984) 2 SCC 244; see also International Labour Organisation (ILO), *Global Estimate of Forced Labour*, (2012), [http://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-declaration/documents/publication/wcms_182004.pdf).

<sup>2</sup> Shankar Sen and P. M. Nair, *Trafficking in Women and Children in India*, (2004), <http://nhrc.nic.in/Documents/ReportonTrafficking.pdf>.

<sup>3</sup> PC Sharma, *Report of the NHRC Committee on Missing Children*, (2007), [http://nhrc.nic.in/Reports\\_misscl.htm](http://nhrc.nic.in/Reports_misscl.htm).

context of COVID–19 and recommendations that can be of quintessence importance in eradicating OT and ST.

## **2. Interface Between OT and ST: A Breeding Ground For ST**

### **2.1. Lack of Definition for OT**

The first point of scrutiny is regarding the definition of OT in India. Much to our surprise, even though the Indian legislators have made indirect efforts to reduce such gruesome and anti-human events,<sup>4</sup> no proper definition has been accorded by them to OT. Thus, for the same purpose, the following international definition shall be utilised:

“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>5</sup>

Although the definition mentioned above is binding on India as it has ratified the same protocol, the conundrum arises is that there is no elaborate definition of OT as it has only been mentioned as a part of a generalised definition of human trafficking. This necessitates the need for a separate and elaborate definition for OT. In 2008, Istanbul had given an elaborate definition to OT as follows:

“Organ trafficking is the recruitment, transport, transfer, harboring or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms

<sup>4</sup> The Transplantation of Human Organs and Tissues Act, 1994 [hereinafter Indian OT Legislation].

<sup>5</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3, cl. (a), Nov. 15, 2000, 2237 U.N.T.S. 319.

of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.”<sup>6</sup>

However, it is pertinent to note that the definition mentioned above is not binding on India as it has been given by a single State, i.e., Istanbul. Thus, the second point of scrutiny is that the aspect found in the Indian OT Legislation regarding OT is that it only talks about the transportation of human organs or tissues or defining the payment made for such transplantation.<sup>7</sup>In other words, no explicit definition has been assigned to OT in its exclusive Indian legislation.

Before delving further, it is noteworthy to mention that there is a severe dearth of statistical data and evidence regarding OT. Furthermore, there is also a lack of legal jurisprudence on the same because, in one of the extremely few Indian cases that was remotely related to OT,<sup>8</sup>the Karnataka High Court failed to define the scope and meaning of OT wherein the Petitioner’s missing son was possibly a victim of OT. In the said case, the Court granted the transfer of investigation to a higher, competent authority. However, it failed to consider the conundrum possibly being faced by the Petitioner as the Petitioner had lucidly expressed his grievance that the previous investigating authority had failed to perform their duties reasonably. As the authority had failed to perform their duties reasonably, the Court could have taken this as an opportunity to define the possible OT victimisation of the Petitioner’s son and also provided the same as one of the grounds of transfer of the case.

Contrary to OT, the definition of ST is already provided by the Indian legislators<sup>9</sup> as follows:

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<sup>6</sup>The Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 2008; *see also* *Experts meet in Vienna to address the trafficking of persons for the removal of organs*, UNODC (Oct. 18, 2020), <https://www.unodc.org/unodc/en/human-trafficking/2010/egm-vienna-organ-trafficking.html#:~:text=Organ%20trafficking%20is%20the%20recruitment,the%20giving%20to%2C%20or%20the>.

<sup>7</sup>Indian OT Legislation, § 2(k)(i).

<sup>8</sup>Ashok Kumar Sinha v. Union of India, (2019) 1 AIR Kant R 728.

<sup>9</sup> The Immoral Traffic (Prevention) Act, 1956 [hereinafter ST Legislation].

“Whoever recruits, transports, transfers, harbours, or receives a person for the purpose of prostitution by means of,—

(a) threat or use of force or coercion, abduction, fraud, deception; or

(b) abuse of power or a position of vulnerability; or

(c) giving or receiving of payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons.

Explanation.—Where any person recruits, transports, transfers, harbours or receives a person for the purposes of prostitution, such person shall, until the contrary is proved, be presumed to have recruited, transported, transferred, harboured or received the person with the intent that the person shall be used for the purpose of prostitution.”<sup>10</sup>

The lack of a definition accorded to OT may prove a cumbersome ordeal because it gives the police authorities leeway to define OT at their whims and fancies wherein they can conduct unwarranted and arbitrary arrests.<sup>11</sup> Furthermore, it also enables the exploiters to stay at bay from the legal teeth. Thus, the definitions mentioned above of OT and ST shall be utilised to define the common ground between both and further to establish that OT leads to an aggravated form of ST.

## 2.2. Root Causes for OT and ST

It has been a wide observing factor that due to the lack of economic dexterity and the ever-crumbling economic condition of the people in the lower strata of the society, OT has become rampant. Even though the Indian OT Legislation was implemented, OT continues to be rampant because people have found different ways to escape the laws’ teeth. In OT, the poor people are Subjugated while the rich people are the Subjugators. The first point of scrutiny is that the average monthly wage of poor people in the rural and semi-urban areas is

<sup>10</sup>*Id.* at § 5A.

<sup>11</sup>Indian OT Legislation, §22.

below the national average,<sup>12</sup> because of which they find themselves glued to a toxic web of a debt trap. They tend to borrow money from unorganised money lenders such as *Zamindars* and other similar money lenders (hereinafter **Subjugators**), who, at a much later date, at the time of repayment, impose heavy interest rates. Even if the factor of interest is subtracted from the equation, the poor people tend to find difficulty in repaying the principal loan amount majorly because they were initially unable to earn as much wherein, they took the loan in the hopes and faulty assumption that at a later point in time, things would get better for them and they will be able to repay it. However, due to this faulty assumption they find themselves wound up in, it becomes the primary root cause for their setbacks.

The second point of scrutiny is regarding their source of livelihood. It is imperative to note that they face the aforementioned repayment conundrum because of their source of livelihood. They earn in mere pennies because they work as labourers (that earn a daily wage), workers in factories, servants to Subjugators, and alike systems wherein they get paid as per the piece wage system. In the system mentioned above, they do not have a set payment for the entire month. On one day, they might be paid more as they were able to work or produce more. On another day, they might not be paid as much because, on the other day, they did not work or produce as required. In simple terms, they earn as much as they work or produce.

The third point of scrutiny is regarding the conundrum of social status activities such as the marriage of children, delivery of dowry, conducting of functions that relate to familial ties and ceremonies, exorbitant expenses on alcohol, food, clothes, child's private school education, and other similar activities.<sup>13</sup> As trivial as these expenses may seem, rural people cannot forego these activities as it helps them live an existence that is not mere animal-like existence.<sup>14</sup> Such activities enable them to live in the falsely created notion of status, grandeur, and nobility wherein they attach such activities to be luxurious that are quintessential to maintaining a higher position in the disgruntled social construct. Herein, the problem of power and status arrives wherein rural families, especially tribes, find themselves involved in the practice of bride price.<sup>15</sup> In such a practice, the young daughter of the house is sold to another male's family for a specific price. The way the daughter is selected is entirely

<sup>12</sup>Debra A. Budiani-Saberi et al., *Human Trafficking for Organ Removal in India: A Victim-Centred, Evidence-Based Report*, TRANSPLANTATION 1, 2-5 (2013).

<sup>13</sup>*Id.*

<sup>14</sup>A.K. Bindal v. Union of India, (2003) 5 SCC 163.

<sup>15</sup> Maya Unnithan-Kumar, *Gender and 'Tribal' Identity in Western India*, 26(17) ECON. & POL. WKLY. WS36, WS36-WS39 (1991).

erroneous and discriminatory because such a selection is based on her physique and looks, alongside the social status of the daughter's family in the community. If the bride selling family occupies a higher social status in the community, they tend to receive a higher price for the daughter. Alongside higher price, they also receive other non-monetary benefits like new-founded respect and other similar non-monetary benefits. However, the practice mentioned above is just one of the many examples of maintaining a position in the social strata that such types of people find themselves involved in.

### ***2.2.1. Degree of Fault of the Subjugated People and the Subjugator's Conundrum of Exploitation***

Before delving into the Subjugator's conundrum of exploitation, at this point, it is pertinent to note that the already-available literature focuses and glorifies the poor people wherein they are given good riddance from their entire liability. However, this research article begs to differ from all of the available literature by establishing that even the Subjugated are at fault up to a certain extent. This extent is defined by the fact that they had reasonable control over their lives' controllable factors. For example, as social status problems are controllable, the subjugated choose not to control the same but consciously choose to fall into its trap.

However, the Subjugator's conundrum is not a minor issue either. People who occupy a higher economic position in the social construct usually find such rural and poor people at their feet, begging and loitering for economic support. However, for their whims and fancies, such higher economic positioned people, i.e., the Subjugators, tend to exploit the poor. They may do the same because they live under the impression that as these people are poor and need socio-economic support, they lose their ability to protest and rebel. It essentially means that the Subjugators exploit the fact that the poor people have no agency to get the appropriate remedy for their exploitation. This lack of agency may be because of a lack of awareness of human rights, governmental support schemes, and their inability to seek legal recourse due to the lack of economic support. Thus, the Subjugators exploit the Subjugated for their benefits and satisfaction. In the author's opinion, the same Subjugation is a matter and exercise of power dynamics wherein the intrinsic need to feel superior to others arises.

A good example is that of exercise of consumeristic power and dominance by customers on prostitutes.<sup>16</sup>Such superiority may be due to the systematic brainwashing of the common strata wherein they accord superiority with a better and happier life. Slight to their knowledge, in such a rut of superiority, they find themselves lost and absorbed in power wherein their tendency to lose their moral values and beliefs is high. Thus, due to this loss of moral values and beliefs, the Subjugated, especially and majorly women, find themselves involved in either selling their body for sexual intercourse or their organs at the promise of being paid a handsome amount. However, again, little to their knowledge due to the disadvantageous position they are in, they involve themselves in another toxic yet major cycle of social subjugation highlighted as follows.

### 2.3. OT – The Leading Tail for Aggravated ST of Women

As daily wage jobs fail to earn a handsome amount of money, the Subjugated tend to resort to measures that enable them to rapidly earn money, such as being involved in OT and ST. In OT, the Subjugated are lured with the promise of a high amount of money.<sup>17</sup> It is pertinent to note that the people who are involved in donating their organs are majorly women.<sup>18</sup> This can be attributed to the fact that as the husband is a mere midland, who earns nothing and instead becomes a liability of the family, it comes down to the women to earn and survive for their kids and themselves. Thus, they accept the offer of the organ solicitor, who is primarily a man.<sup>19</sup>

The first point of scrutiny to be noted herein is that, according to the Indian OT Legislation, the selling of organs for monetary benefits is not allowed and is punishable with imprisonment and/or a fine.<sup>20</sup> Even though such a donation has not been commercialised in India because it is based on the emotional aspect of the bond between the Donor and Donnee, illegal OT continues to be rampant and thriving in Indi, wherein foreign tourists and domestic nationals are involved.<sup>21</sup> As the Indian OT Legislation mandates the need for an existing bond of “near relative,” it becomes cumbersome for one stranger to donate to another stranger even if it is for helping the other person. The rationale behind such a mandatory requirement is

<sup>16</sup>Jean D’Cunha, *Prostitution Laws: Ideological Dimensions and Enforcement Practices*, 27(17) ECON.& POL. WKLY. 34, 36 (1992).

<sup>17</sup>Mathew Abraham, *Human Trafficking: Issues beyond Criminalization*, THE PONTIFICAL ACADEMY OF SOCIAL SCIENCES 1, 2-8 (2015).

<sup>18</sup>Budiani-Saberi et al., *supra* note 11.

<sup>19</sup>Budiani-Saberi et al., *supra* note 11.

<sup>20</sup>Indian OT Legislation, § 19 and 19A.

<sup>21</sup>K.V.K. Santhy, *A Critique of the Human Organs Transplantation Act in India*, P.L 7, 8-17 (2010).

understandable to a certain degree. If such requirement is removed and replaced with humanitarian relief, then the probability of the Subjugator exploiting the Subjugated exponentially rises wherein the Subjugated will be at the behest of the Subjugator. The Subjugator may ask the Subjugated women for sexual favours as an aggravated way of exploiting them. The Subjugated will be coerced to give the reasoning — for such a donation — as helping the needy. However, this mandatory requirement fails to consider genuine cases, and due to such lack of consideration, the mandatory requirement must be replaced.

The second point of scrutiny is that there is an absence of a “near relative” bond between the Donor and Donnee. When such a bond is absent, they are under a legal requirement to get beforehand authorisation from a Committee.<sup>22</sup> The problem arises because it has been found that such a committee is favouring the Subjugators and not working as per the set standards wherein permission is not granted because of the extreme stringency or lack of any sort of proof or a significant time delay in granting of such permission that may arrive at the cost of the Subjugated’s economic condition further debilitating.<sup>23</sup> Thus, this leads us to the analysis that even if the Subjugated women were to go through the legal routes of performing the act of donating their organ, then it is highly likely that they will not be able to obtain the necessary recourse because of the structural and administrative deficiencies in the committee. Such deficiencies will prove to be a hindrance for the Subjugated women wherein they will not receive the opportunity to enhance their economic condition and be forced to resort to OT. On an alternative note, it can be affirmatively assumed that in many cases — due to the lack of awareness of the law and legal rights — the Subjugated women resort to OT because they may not know that a legal path is available for them.

The third point of scrutiny is regarding the economic conditions of the Subjugated women. It has been found that the Subjugated people who are involved in OT are promised exorbitant amounts of money. However, in practicality, none of these promises may come true wherein the chances of these Subjugated people receiving their total payment is meagre.<sup>24</sup> Alternatively, the Subjugated people may only receive a partial payment that is

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<sup>22</sup>Indian OT Legislation, § 9 read with § 15.

<sup>23</sup>J. Amalorpavanathan, *Transplantation of Human Organs Bill: Curate’s Egg*, 30(12) ECON. & POL. WKLY. 611, 611-612 (1995).

<sup>24</sup>Budiani-Saberi et al., *supra* note 11.



inadequate to survive,<sup>25</sup> or they may not receive any payment wherein the solicitor disappears after the organ transplant procedure is completed.<sup>26</sup>

The fourth point of scrutiny is that most of the Subjugated women involved in OT get the surgery done from a local practitioner and not from a well-equipped facility. Due to such a practice, they do not get many follow-up visits with the doctors, which leads to severe complications.<sup>27</sup> The OT victims have suffered from anxiety, abdominal pain, emptiness, and other health complications. These complications were coupled with social embarrassment.<sup>28</sup> The long-term side-effects of such an act (of donating organs) are so severe that little to no money may be available for the medicines and post-surgery treatment. The Subjugated women, unfortunately, overlook these two factors because of their desperate need for money. Amid this desperation, rather than their economic condition improving and being resolved, it further debilitates because they fail to consider the implications and consequences of organ transplant.

The fifth point of scrutiny is that they cannot return to heavy-lifting work due to the complications mentioned above, such as being alabourer or a servant. Due to this loss, they will be forced to resort to ST to earn their daily livelihood. In ST, it is vivid that the pimp usually exploits the Subjugated women. He generally does not pay them adequate wages, makes them work for extra hours, does not ensure proper health check-ups, prompts them to have sexual intercourse without contraceptives as the customers prefer that way by paying a higher amount.<sup>29</sup> These Subjugated women are also exploited by other authorities such as the Police and Solicitors who lure them, again, on the promise of monetary benefits.<sup>30</sup> However, these Subjugated women are entrapped in brothels and find no chance or motivation to escape because the lives of their family are at stake.

It is pertinent to note that as OT leads to ST, ST comes in an aggravated form because the Subjugated women now involved in ST have a specific part of their body removed due to which, higher degree of pain, cruelty, agony and pressure is bound to be caused to them. In

<sup>25</sup>Budiani-Saberi et al., *supra* note 11.

<sup>26</sup>Budiani-Saberi et al., *supra* note 11.

<sup>27</sup>Santhy, *supra* note 20.

<sup>28</sup>Budiani-Saberi et al., *supra* note 11.

<sup>29</sup>Human Rights Watch/Asia, *Rape for Profit: Trafficking of Nepali Girls and Women India's Brothels*, 53 (Oct. 9, 2020), <http://hrw.org/reports/pdfs/c/crd/india957.pdf>.

<sup>30</sup>*Id.* at 54.

the web of such complications, the health condition of such Subjugated women is bound to deteriorate, wherein the cost of treatment and medicines becomes unaffordable.

In a 2020 case,<sup>31</sup> the Bombay High Court held that Prostitution is not an offence if a woman above the age of 18 chooses to indulge herself in the same out of her own choice. The major flaw in this judgment is two-fold. *Firstly*, if a woman is prosecuted for prostitution, then she can always take the defence of personal choice. The problem with this is that this defence may come at the cost of her being a victim of sexual exploitation and ST, wherein she will be forced to conceal her real motives. If she reveals that she is a prostitute due to her being a victim of sexual exploitation and ST, she may be punished, which will lead to her daily livelihood and her family's economic condition being compromised. This loophole essentially gives leeway to the Subjugators to Subjugate the women further. *Secondly*, even though the Courts are attempting to normalise prostitution in India, their efforts are far from bearing fruit because of the traditionalist and conservative social and emotional understanding of the Indian society coupled with its hindered development. In other words, it is the inability of the people to move away from the *status quo* and normalise prostitution. When it comes to addressing the complications mentioned above that the Subjugated women may face by being involved in the aggravated form of ST, it is pertinent to note that even the Supreme Court has not given a practical solution for punishing the Subjugators because no redressal mechanisms were suggested by it. However, programs and procedures that look good only on paper — but are practically ineffective and inefficient due to the corruption at the Executive level<sup>32</sup> — were prescribed. Thus, the deterrence effect to be caused is blurry.<sup>33</sup>

### 3. Conclusion: Catharsis to the Subjugated and the COVID-19 perspective

In this myriad of dreams, we find that the Subjugated women involved in ST and OT have nowhere else to go. Lack of active governmental aid, never-ending corruption at the Executive level, the Penury trap, and the constant taboo attached have been the driving factors since time immemorial that marginalise such subjugated women from the mainstream thought process. This subjugation is even more intensified during COVID-19 because we comprehend that in such pandemic times, the health of these people is more vulnerable as the need for money rises exponentially. There is a rise in the need for money because it is lucidly

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<sup>31</sup>Kajal Mukesh Singh v. State of Maharashtra, 2020 SCC OnLine Bom 954.

<sup>32</sup>*supra* note 29.

<sup>33</sup> Gaurav Jain v. Union of India, (1997) 8 SCC 114.

evident that the pandemic has severely hit the daily wages of such people, severing them from the economic loop. Furthermore, their health becomes vulnerable because now, these people will be forced to resort to OT and ST, wherein the probability of contracting COVID-19 is substantially high due to the increased desperation and survival instincts. This is accentuated by the poor working conditions in the brothels and the unprofessional and unsanitary means and methods adopted for OT. These inhumane conditions, in turn, render the lives of such subjugated people even more difficult. However, come as it may, they are the true messiahs who continue to thrive in this constantly criticist society that never fails to put them down. Even though they make desperate attempts to survive in this cut-throat social construct, they are pulled down by the Subjugators filled with abundantly toxic and adverse power bank, due to which the subjugation of such women continues to persist.

Due to this existence of toxic and adverse power bank, positive fundamental and grass root level disruptions are quintessential in creating a discourse of active change. *Firstly*, a strict monitoring system must be engaged to track the real-time performance – not paper-level – of the Executive. *Secondly*, even if education is imparted, it needs to be qualitative wherein progressive, open ideologies and values are imparted that do not restrict but instead open the students' minds. This will, in turn, enable them to be able to bring a butterfly effect. *Thirdly*, mindset changes in the current generation and the future generations to come are quintessential for enhancing our socio-economic and cultural conditions. If the focus is moved towards a community-building and healthy self-dependency motive, it will be the most productive wherein people will be able to support each other better comparatively and build themselves at the same point in time. *Fourthly*, the accountability factor of the Subjugated needs to be ramped up wherein a stringent monitoring system is implemented on them as well. Frequent field visits by the area's collector or the concerned authority, and other similar measures, if adopted, shall prove to be extremely helpful. *Fifthly*, the alternative employment schemes such as training the Subjugated in vocational skills to help them in being occupied in modern-day jobs shall prove to be the future course of aid. Thus, the point that needs comprehension is that when the fundamentals and the foundations are positively changed, the factors that may arrive in the distant future will not have the power to influence negatively. Therefore, in our paradigm of Subjugators and Subjugated, the gap between them is of fundamentality and rationality that has an immense amount of potential to be curbed.