

THE LEGAL VIDYA

Open Access Law Journal

This is an Open Access article distributed under the terms of the Creative Commons Attribution- Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

The Legal Vidya
Volume 2 Issue 1, November 2021, Page Nos. 39 to 50

HUMAN TRAFFICKING OF PERSONS: ANALYSIS OF SECTION 370 IPC

MR. YAJUSH TRIPATHI

Student, Gujarat National Law University, Gandhinagar

MS. SAMPADA PANDE

Student, Gujarat National Law University, Gandhinagar

Abstract: This article focuses on the issue of human trafficking prevailing in India by specifically analyzing the most comprehensive legislation of the same, i.e. section 370 of IPC. This article entails an analysis of all the important legislation relating to human trafficking like the Immoral Trafficking (Prevention) Act, 1956, POCSO Act, 2012, etc. It also discusses the causes because of which human trafficking persists in India. It particularly throws light upon section 370 of IPC and also incorporates the significance of it as far as regulating human trafficking is concerned. This article discusses in detail the metamorphosis of section 370, beginning from its background to discussing its lacunae. The relevant case laws are also enshrined in it so that lucidity can be effectuated as far as comprehending the relevance of section 370 of IPC is concerned in the domain of human trafficking. The loopholes which have mentioned in this article are coupled with suggestive changes to fill that. The modifications done through the Criminal Amendment Bill, 2013 are also discussed in this article. Therefore, this article in general discusses the horrors of human trafficking and particularly discusses the role of section 370 in mitigating the horrors of human trafficking in India.

INTRODUCTION

Human Trafficking in general terms means the recruitment, harbouring, transportation, or obtaining of a person to extract labour or services from the person by the use of force, fraud, or coercion by subjecting them to involuntary servitude or slavery.¹ This menace has been prevalent in India since ancient times. It reached its zenith during the colonial time in India and justifiably, the people of the country were not free and were recruited, harboured, by subjecting them to slaves for extracting labour or services from them. But still, it has not been diminished even after the promulgation of a plethora of legislations that actively deal with this menace. The reasons for the same are many such as paedophilia, Brahminical patriarchy, Misogyny, marginalization, etc. Because of these prevalent social evils and the feeling of supremacy that certain communities or people have attributable to their innate qualities such as gender, religion, caste, creed, and color, is one of the major reasons because of which human trafficking is still prevalent. Certain people go to any extent to carry out their business or work and in the process of doing that they involve in human trafficking, there are also others who do not have clarity regarding the concept of consent, as to that consent is immaterial as far as human trafficking is concerned i.e. whether or not the person who has been trafficked has given consent or not, does not matter as still the act of human trafficking is unlawful irrespective of the consent. Therefore, these are some of the important reasons because of which it persists.

So, it is very important to combat this menace as it causes a blatant violation of human rights. There are certain legislations in India that attempts to combat this menace, like the immoral traffic (prevention) Act, 1956, protection of children from sexual offences, 2012(POCSO), etc. Amongst these, one of the most prominent ones is Section 370 of IPC (Criminal amendment act, 2013). Therefore, to combat this menace, the understanding of section 370 of IPC is very important, it is equally important to understand why section 370 of IPC stands apart from the other legislations? And it is also vital to understand the lacunae of section 370 of IPC and as to how it can be filled to decrease the prevalence of human trafficking. Ergo, section 370 of IPC is considered different as it was the very first legislation that discussed this menace, and now, after the amendment of 2013, it has become the most comprehensive legislation as now it discuss what constitute this menace i.e. ingredients of it and also discusses the punishments for the same.

BACKGROUND OF SECTION 370, IPC

Section 370 of IPC is indisputably one of the most important legislations in the context of human trafficking. So, it is vital to understand how this legislation was formed and what were the reasons because of which the nature of provisions is, what it is. Section 370 of IPC was drafted by Lord Macaulay during the colonial era

¹22 U.S.C. § 7102(9)

of British. It was drafted during colonial era so as to protect the majority of population as during that era, this menace was berserk as Indians were not free and in turn Britishers used them as slaves by recruiting or harboring them to extract services out of them for their benefit. So, originally, section 370 of IPC reads as- Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. This section was followed even after independence and eventually, it became clear that this section has become obsolete and needs restructuring, which happened through the "Criminal amendment bill, 2013". The provisions of which were framed per the suggestions of a committee named "Justice Verma committee", which was formed just after the aftermath of the Nirbhaya rape case, 2012 to improve the process of the criminal justice system and also to provide stricter punishments for the persons who indulge in exploitation especially sexual exploitation.² The national network of sex workers submitted a formal deposition to get changes in the prescribed punishments of sexual acts, but later on, it extended its scope from demanding changes in punishments of sexual violence to violence in general and also demanded to examine the issues and the prescribed punishments of the violence that results not only from sexual acts against women and children but also results from the trafficking done against women and children.³ The demand of this network was incorporated by the Verma commission in its draft through a chapter which discussed trafficking and most importantly amended section 370 of IPC in a way that would ensure greater protection for women and children against human trafficking as it has widened the ambit of human trafficking and has also incorporated punishment clauses in the section itself according to the offenders and the victims of the human trafficking. This amended section would now also help to differentiate between women who are trafficked for sexual acts non-consensually and who do that through their own will.⁴ Therefore, because of the Verma committee, the whole content and language of section 370 got amended and become more detailed so that this menace gets diminished. Ergo, it was because of the Verma commission which was formed aftermath of the Nirbhaya incident, the original section 370 of IPC got amended through the criminal amendment act of, 2013, and the new section 370 was formed. So, this is the background of section 370 of IPC.i.e. because of which it is incepted and because of which the nature of provisions is such.

BRIEF ANALYSIS OF SECTION 370

Section 370 is divided into seven clauses. The first clause is the longest and also it is the only sub-clause which deals with substantive offense and two to seven clauses deal with punishment laws. The language of the first clause is very clear, it states whoever for exploitation; recruits, transports, harbours or receive any person and

²Aarthi Pai, CASAM, Sangli, Section 370, Indian Penal Code Amendments and advocacy to prevent conflation of trafficking and sex work, National Network of sex workers 2013 <http://sangram.org/resources/Amending-section-370-IPC-verma-commission-clarifies-intention-behind-legislation.pdf>.

³*Id.*

⁴*SUPRA* at 2.

if done by resorting to any one of the six following methods, i.e. by using threat, by using force, by abduction, by deceit, by abuse of power or by using inducement which is done by providing payment or by providing benefit to gain consent. These methods are resorted against the person who has been recruited, transported, harboured, or received for exploitation, then said person is said to be trafficked.⁵ Before, explaining two to seven clauses in the section, the section explains the meaning of exploitation and also explains as to what is the relevance of consent in the case of human trafficking. The first explanation is about exploitation which states that any act of physical or sexual exploitation, slavery, servitude, or practices similar to servitude or forced removal of organs, all these acts come within the ambit of the term “exploitation”. The punishment of the act of sexual exploitation is mentioned in section 370 (a) , and the punishment for it is three to five years of rigorous imprisonment. The second explanation is about the relevance of consent in the case of human trafficking, and it is stated in the explanation that the consent of the victim is immaterial in the determination of the offense of trafficking.

In the remaining clauses, punishments have been enshrined against the persons who commit human trafficking. The nature of punishments that have been enshrined in these clauses is rigorous. Clause 2 states that any person who commits the offense of human trafficking shall be punished with imprisonment of seven years which can extend to ten years depending upon the facts and circumstances of the case he may also liable for a fine. The above clause enshrines in it the general principle of punishment for the offense of human trafficking. The remaining clauses include punishments for aggravated forms of human trafficking. Clause 3 states that any person who commits the offense of human trafficking of more than one person shall be punishable with imprisonment of not less than 10 years which may extend to life imprisonment and may also be liable to a fine. The clause 4, 5 and 6 involves around the trafficking of minor.⁶ Clause 4 states that the Offence of trafficking committed against a minor would be punishable with the imprisonment of at least 10 years which can be extended up to life imprisonment and may also be liable for a fine. Clause 5 deals with the trafficking of more than one minor which is punishable with imprisonment of not less than 14 years and can be extended even to life imprisonment and the offender may also be liable for a fine. Clause 6 states that if a person commits the offense of trafficking on a minor more than once, then he shall be punishable with imprisonment of life and may also be liable for a fine. Clause 7 states if a public servant is involved in the offense of trafficking, then he shall be liable for life imprisonment and may also be liable for a fine.

Therefore, it can be inferred according to section 370 that human trafficking is a cognizable and non-bailable offense.

⁵Section 370, Labour Exploitation accountability Hub 2020
Human%20Trafficking,%20forced%20labour%20&%20slavery%20corporate%20accountability%20database.html.
⁶*Id.*

IMPORTANT LEGISLATIONS TO COMBAT HUMAN TRAFFICKING IN INDIA

ARTICLE 23(1) OF THE INDIAN CONSTITUTION.⁷

Article 23(1) of the Indian Constitution states that “*Traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law*,” A landmark judgement was given by Supreme Court under this Article in the case of *Peoples Union for Democratic Rights v. Union of India*, AIR 1982 SC1943. In this case the Honourable Supreme Court elucidated the scope of Article 23 thereby pronouncing that the word **force** has a very wide connotation. It not only includes physical force but also other legal and economic factors which compel a person to provide labour. Thus, if a person is obliged to provide labour for less than the minimum wage owing to his poverty, hunger or other needs it will come under forced labour. Court also clarified that not just beggar but forced labour in any form is prohibited.

CRIMINAL LAW (AMENDMENT) ACT 2013.⁸

This act was brought to fill the gaps in the existing criminal laws relating to sexual offences. In order to implement the recommendations of Justice Verma's Committee report, the Criminal Law (Amendment) Act, was enforced which attempted to fill the gap in the existing laws. This act consolidated the definition of “*Human Trafficking*” under Section 370, IPC.⁹ Under this Act Section 370, IPC was substituted by Section 370 and Section 370A of IPC was substituted to prevent exploitation in any form.

THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956 (PITA).¹⁰

The government after the ratification of International Convention for the Suppression of Immoral Traffic in Persons in the year 1950 passed the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). This was later changed to Immoral Traffic Prevention Act also known as PITA in 1986. However, this act only talks about relation between trafficking and prostitution and fails to discuss trafficking for domestic work, organ harvesting or for some other purposes. If a child is found in brothel and later after medical examination it is found that the child is sexually abused then it will be considered that the child was detained for prostitution. Any person who commits any prostitution

⁷INDIA CONST. art. 23, cl. 1.

⁸Criminal Law Amendment Act, §8, No.13, Acts of Parliament, 2013 (India).

⁹ The Indian Penal Code, 1860 (Act 45 of 1860).

¹⁰The Immoral Traffic (Prevention) Act, No. 104, Acts of Parliament, 1956(India).

with a child will be liable for seven-year life imprisonment or a term which may extend to ten year and also a maximum fine of one lakh rupees.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) ACT, 2012.¹¹

This act clearly defines all sorts of sexual exploitations, pornography and penetrative or non-penetrative sexual abuses. It defines child as any person below the age of 18 years. The distinction made under this act between a child and an adult makes it distinct from other IPC provisions. This act provides for severe punishments for various offences depending on their gravity.

THE TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) BILL, 2018.¹²

8,132 human trafficking cases were reported in India in the year 2016 as per the National Crime Records Bureau under Indian Penal Code, 1860.¹³ Thus, a need was felt to investigate into trafficking cases and for the rescue and rehabilitation of the trafficked persons. This Bill provides for funds which will be used for constructing rehabilitation centers and imposes penalties for various crimes.

CAUSES OF HUMAN TRAFFICKING

As per International Labor Organization currently there are 25 million victims of child labor around the world. There could be various reasons as to why human trafficking is pertinent in our country even today. Some of them are listed below:

¹¹Protection of Children from Sexual offences (POCSO) Act, No.32, Acts of Parliament, 2012(India).

¹²The Trafficking of Persons (Prevention, Protection and Rehabilitation Bill, No.89-C, Acts of Parliament, 2018 (India).

¹³HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/8132-cases-of-human-trafficking-reported-in-2016-average-63-victims-rescued-a-day/story-OguqzIq50jiFZrvq51hrmL.html> (last visited Nov. 3, 2020).

HUMAN TRAFFICKING GENERATES A HUGE PROFIT



Human trafficking industry creates profit of around \$150 billion per year. Two-thirds of which is generated from commercial sexual exploitation and remaining from forced economic exploitation. This industry is the only one in which the supply and the demand are there. Supply is one and same that is human beings. Since, people demand the sale of people. Increasing demand escalates the profit generated. The recent upsurge in commercial sex has boosted the profit generation

for strip clubs, brothels etc. thereby increasing the number of trafficked victims.

DESTITUTION AND LONGING FOR BETTER LIVING CONDITIONS

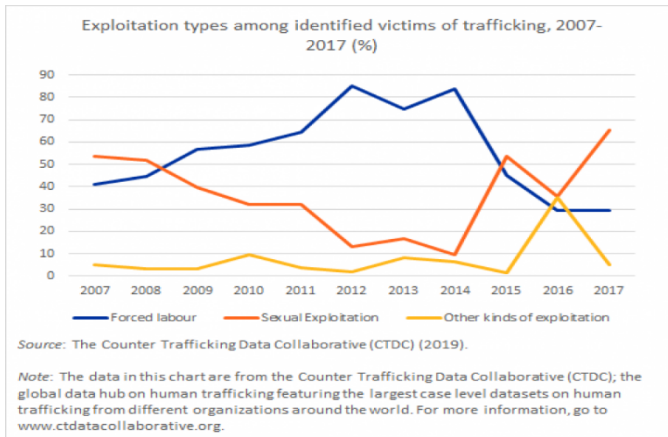
Most of the victims sell their bodies due to the dearth of money, food or other commodities essential for survival. Extreme poverty, lack of education, violence, conflict, etc. all these factors coerce people to make themselves the subject to abuse through trafficking. The displacement and decentralization of people also makes people vulnerable to forced labor and trafficking.

HUMAN TRAFFICKING CASES ARE NOT EASILY IDENTIFIABLE

The cases related to human trafficking are difficult to identify mainly because it becomes very difficult to retain information from a traumatized victim. Further, most of the times they themselves are aware of the consequences and that trafficking is illegal before engaging into it. Thus, to protect themselves from any legal consequences they choose to stay silent and thus these cases go unreported or unidentified.

REASONS FOR WOMEN AND CHILDREN BEING THE MOST VULNERABLE TARGETS

The misogynistic approach, patriarchal society, early marriages, lack of birth registration and customary practices have all contributed towards making women the major targets of human



trafficking. The statistics here indicate that there has been a gradual increase in the sexual exploitation of trafficked victims when compared to other forms of trafficking. As per the UNODC report, "The vast majority of

[Source: Counter Trafficking Data Collaborative](#)

detected victims of trafficking for sexual exploitation and 35 per cent of those trafficked for

forced labour are female"¹⁴. Reason being that women are always subjugated and oppressed by men and are never considered equal to them. Not just the women but According to a report by the National Human Rights Commission of India, 40,000 children are abducted each year, leaving 11,000 untraced. Thus, even children constitute a vast majority of trafficked population due to the fact that there is an increasing demand for cheap labor across the world and children can easily be manipulated as the employer's needs.

RELEVANT CASE LAWS RELATED TO SECTION 370 IN INDIA

LAXMI KANT PANDEY VS UNION OF INDIA (1984) 2 SCC 244.¹⁵

In this case the honorable Supreme Court laid down procedures to surveil inter country adoptions to prevent child trafficking. The Court held that before giving a child to adoption to foreign parents certain amount of care has to be administered to avert abandoning of the child. The child might also be subjected to forced labor or sexual abuse and thus certain procedures need to be followed before inter country adoptions.

BANDHUA MUKTI MORCHA VS. UNION OF INDIA AND OTHERS AIR 1984

SUPREME COURT 802.¹⁶

¹⁴Kangaspunta, Kristiina, "Global Report on Trafficking in Persons 2018." (2018).

¹⁵ Laxmi Kant Pandey vs Union of India (1984) 2 SCC 244.

¹⁶ Bandhua Mukti Morcha Vs. Union of India and others AIR 1984 Supreme Court 802.

The Supreme Court in this case issued directions to the Central and State governments to enforce the labor laws strictly and to impose stringent punishment in case the laws are not adhered by the people. Further, proper working conditions must be provided to those who are exposed to heavily dust-laden polluted air, foul drinking water etc.

VISHAL JEET V. UNION OF INDIA, (1990) 3 SCC 318.¹⁷

In this case the Honorable Supreme Court was of the opinion that the issue of trafficking is not only social but also socio-economical. The Court believed that despite having certain legal provisions, acts and laws there is no halt to these cases. The only way forward is severe and speedy trial by the law enforcement bodies against pimps, brothel keepers and whosoever is engaged in trafficking of persons. Further, the Central government and the State governments must take the responsibility of safeguarding the interests of people.

MUNNI VS STATE OF MAHRASHTRA – CRIMINAL WRIT PETITION NO. 227/2011(BOMBAY HIGH COURT).¹⁸

Here, the Court held that the protection of the trafficked child is of paramount importance. It must be the duty of the Central and the State governments to ensure the protection of minor girls from sexual exploitation to prevent them from social, emotional and psychological insecurities. This can be best done by the Child Welfare Committees constituted under the Act. Thus, in this case the SC held that the decision of the Child Welfare Committees must be final and binding in cases of child care, protection, and rehabilitation.

BACHPAN BACHAO ANDOLAN V. UNION OF INDIA, (2010) 12 SCC 180.¹⁹

In this case the Court suggested for the creation of National Commission for Protection of Child Rights (NCPCR) for the proper implementation of the Juvenile Justice (Care and Protection of Children) Act 2000. The SC further ordered that this Commission has become imperative to direct various States to abide by the provisions of the Act.

¹⁷ Vishal Jeet v. Union of India, (1990) 3 SCC 318.

¹⁸ Munni vs State of Maharashtra – Criminal Writ Petition No. 227/2011(Bombay High Court).

¹⁹ Bachpan Bachao Andolan v. Union of India, (2010) 12 SCC 180.

NEERJA CHAUDHARY V. STATE OF MADHYA PRADESH AIR 1984 SUPREME COURT 1099.²⁰

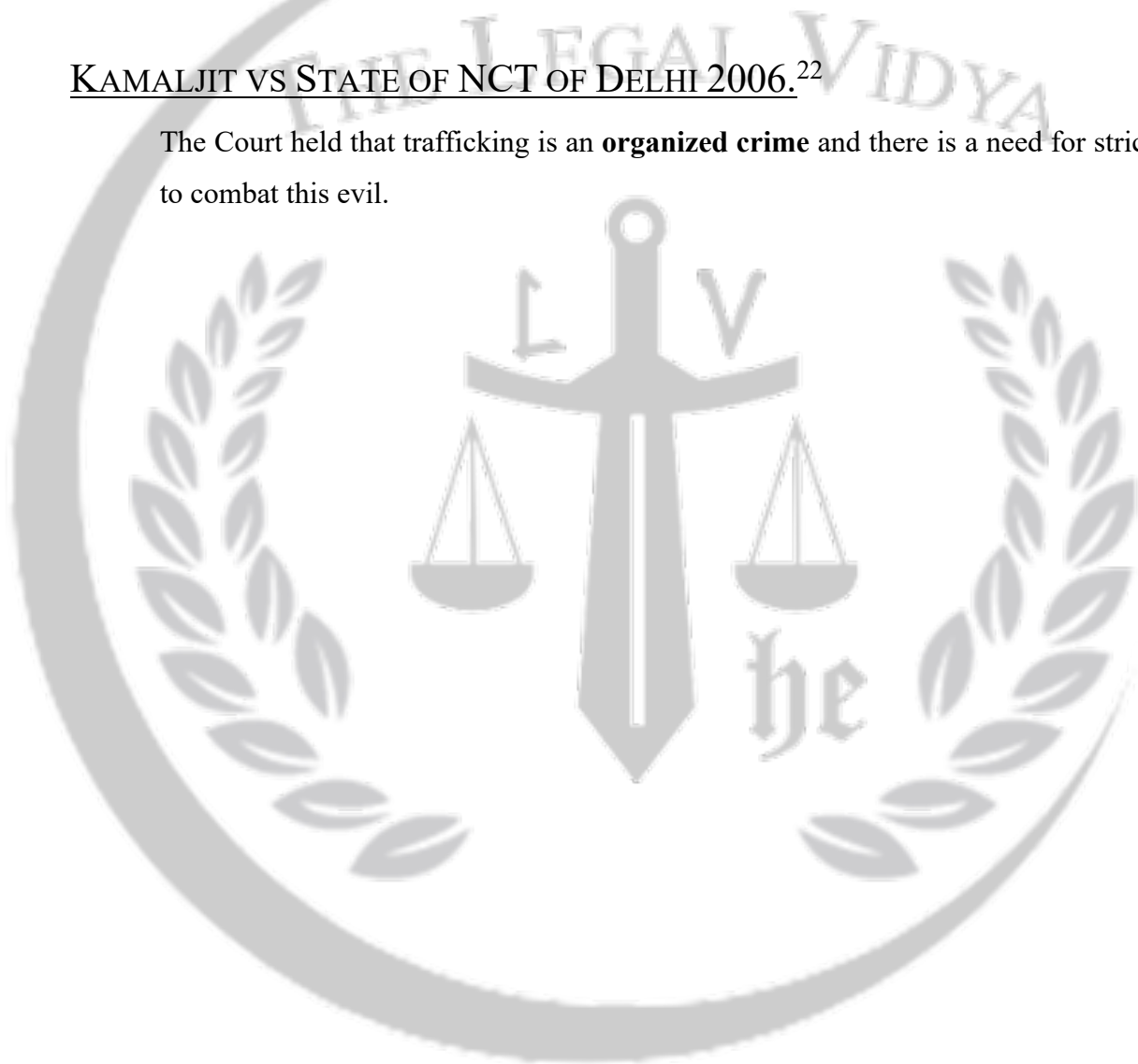
The Supreme Court under this case laid down principals for the rehabilitation of bonded labors.

PRERNA V. STATE OF MAHARASHTRA: 2003 (2) MAH.L. J. 105.²¹

The division bench of the Bombay High Court under this case laid down certain guidelines for the care and Protection of Trafficked Children.

KAMALJIT VS STATE OF NCT OF DELHI 2006.²²

The Court held that trafficking is an **organized crime** and there is a need for strict provisions to combat this evil.



²⁰ Neerja Chaudhary v. State of Madhya Pradesh AIR 1984 Supreme Court 1099.

²¹ Prerna v. State of Maharashtra: 2003 (2) Mah.L. J. 105.

²² Kamaljit vs State of NCT of Delhi 2006.

LOOPHOLES OF THIS SECTION IN THE CONTEXT OF TODAY'S HAPPENINGS

Section 370 of IPC is considered to be one of the most comprehensive laws existing in the country dealing with human trafficking. This section explains what constitutes the offense of human trafficking in excruciating detail and also enshrines in itself all the punishments related to human trafficking and aggravated forms of human trafficking. But like any law, this law also results in some collateral damage that means that are certain lacunae that needs to be filled. But these lacunae are not too grave, as IPC is a well-crafted code, but still, there are certain things in the section which can be moulded by observing the current happenings. These lacunae are-

EXPLANATION 2 OF THIS SECTION

This clause states that the consent of the person who has been trafficked is immaterial. This clause ensures the safety of the person who gets trafficked, but it results in collateral damage for the persons recruiting people for hard labour. It states the consent of the victim but does not specify the age, so it is becoming easy for the person who is alleged to have been trafficked to give consent initially for the job and then say to the contrary. This clause assumes that deceit was resorted to taking the consent and this seems a wrong assumption because that jeopardizes the position of the person who genuinely recruits or employs the person for hard labour. As he may fear that the person at any time can claim that he never consented and he may get into jeopardy, as the initial consent he gave is of no relevance to the court of the law as this explanation states that consent is immaterial. Therefore, this clause may be considered as a loophole in this section.

EXPLANATION 1 OF THIS SECTION

This clause defines the meaning of exploitation, but there are certain elements which this definition does not incorporate which can be classified as loopholes. It incorporates physical and mental exploitation but does not entail in it mental exploitation, so a person who would suffer from mental exploitation would not be considered to be a victim of trafficking. This clause uses the phrase practices similar to slavery, which seems very vague as there is no formal definition of practices similar to slavery, so different persons can interpret differently, so it can cause ambiguity. Therefore, these are the loopholes contained in this clause.

SUGGESTIVE CHANGES TO FILL THE LACUNAE

The above-mentioned lacunae that have been mentioned in the explanation clauses can be filled by adding or subtracting some points in the clauses. In the 1st explanation, physical and sexual acts are considered to be within the ambit of exploitation, but it should also include mental exploitation in the definition of the term exploitation. So, the mental aspect should also be incorporated in this clause. Also in the same clause, the phrase practices similar to slavery should be getting away with or should be replaced by something more concrete, i.e. they should have mentioned the practices which are similar to slavery. There could also be a change in clause 6, i.e, the nature of imprisonment should be mentioned in the clause. As the clause entails punishment for trafficking a minor on more than one occasion, so the nature of punishment should be mentioned because similarly the clause 4 also discusses the trafficking of the minor but there the nature of punishment has been mentioned, viz, rigorous. Therefore, in clause 6 the nature of punishment should be added, and most probably nature should be rigorous following the principle of Eiusdem Generis.

Therefore, these are some of the important suggestive changes that section 370 should incorporate so that it becomes more lucid and comprehensible.

CONCLUSION

Human trafficking is an evil that has been prevailing in our society for long. It imperils the dignity and security of trafficked victims and violates their human rights. Strong legislation and proper implementation of policies is the need of the hour. By advertising through popular media and by organising awareness programmes this problem can be reduced. Appropriate measures must be taken to eradicate discrimination against women, especially when it comes to employment. By taking appropriate measures and by working together we as a society can fight this evil and can create a healthy society for everyone.