


The Root Causes of Human Trafficking: A Critical Analysis of the Contemporary Approaches to Human Trafficking

LEWIS NJABULO SIBANDA

Lewis Njabulo Sibanda holds an LLB from the University of South Africa (South Africa) and an LLM completed as a Mandela Scholar at the University of Sussex (UK). He is a registered legal practitioner/attorney in the Zimbabwean superior courts. He has worked as a professional research assistant to the Chief Justice of Zimbabwe and another judge of the Constitutional Court of Zimbabwe. Prior to pursuing his full time PhD studies at The Open University (UK), Lewis was a Law Lecturer at Jindal Global Law School (JGU) in India, where he taught modules on Human Rights Law Theory, Constitutional Law and the International Law of Outer Space. Lewis' PhD research utilizes a critical legal approach, particularly a Marxist lens, to explore the root causes of human trafficking and the meaning of exploitation. The author is grateful to his supervisors Professor Olga Jurasz, Dr Avi Boukli, Professor Simon Lee for their comments on the earlier draft of this paper, and also to Dr Juan Garcia Blesa.

@ lewis.sibanda@open.ac.uk

 0000-0002-1560-6959

ABSTRACT

Contemporary anti-trafficking approaches reflect a reluctance to address the root causes (structural issues) of the human trafficking problem. The article critically analyses the three dominant approaches to combating human trafficking-criminalisation approach, the human-rights based approach and the celebrity humanitarianism approach-and unpacks the political choices inherent in each one of them. It is argued that common to all three approaches is the depoliticisation of the human trafficking problem through conceptualising it as an instance of individual criminals that act outside the boundaries of a liberal society, which is characterised by individual freedom and equality. By so doing, these approaches depoliticise the issue of human trafficking by not viewing the problem as one that emanates from the global political economy. They overlook and perpetuate the inequality and oppression that is inherent in capitalism. Against this background, the article unpacks the various ways that the law, particularly through criminalisation and the international human rights framework, works to insulate and reinforce the systemic injustices at the centre of the trafficking problem. Effectively the current anti-trafficking approaches only serve to produce and excuse violations rather than remedy them. It is argued that to be effective anti-trafficking approaches must focus on the initiating phenomena (the structural issues) that make people vulnerable to trafficking related exploitation.

KEYWORDS

Anti-trafficking; Root Causes; Systemic Injustice; Neoliberalism; Capitalism



EDITORIAL NOTE

This contribution was presented during the “EDELNet+ PhD Conference on Climate Change”, Human Rights and Public Control: Legal Scholarship in the Face of Current Global Challenges that took place online on 13 October 2022 and was led by Prof. Giacomo di Federico, Dr. Juan J. Garcia Blesa and Dr. Michal Stambulski (<http://graduateschool.edelnet.eu>).

This conference paper was subject to a single-blind peer review, in which the anonymity of the reviewer was guaranteed.

TABLE OF CONTENTS

Introduction	219
Problem	219
Methodology - Critical Legal Approach	222
1. Terminology	223
1.1. Capitalism and Neoliberalism (Structural Issues)	223
1.2. Human Trafficking and Modern Slavery	226
2. A Critical Analysis of the Approaches to H.T.	229
2.1. Criminalisation Approach	230
2.1.1. What is a Criminalisation Approach to H.T.	230
2.1.2. Criminalisation Approach and the Prevention of H.T.	231
2.1.3. Marxist Critique of the Criminalisation Approach	234
2.2. The Human Rights Approach	236
2.2.1. What is a Human Rights-based Approach to H.T.?	236
2.2.2. Human Rights Approach and Root Causes	237
2.2.3. Marxist Critique of the Human Rights-based Approach	239
2.3. Celebrity Humanitarianism	241
Conclusion	243

INTRODUCTION

PROBLEM

Human trafficking [hereinafter H.T.] has been described as a process that commodifies human bodies and reduces them to objects of trade that can be bought, exploited and discarded.¹ The problem of H.T. is one that is widespread in the modern world, with almost every country being affected as either States of origin, transit or destination.² Considering the covert nature of H.T., it is methodologically impossible to understand and quantify the exact scale of the problem. The United Nations Office on Drugs and Crime [hereinafter U.N.O.D.C.] is one of the trusted sources for understanding the extent of the problem globally, and it has reported that at least 161 countries are categorically affected as States of origin, transit or destination for H.T. victims.³ Additionally, it is reported that victims from at least 127 countries are being exploited in 137 States.⁴ Reports of the International Labour Organization [hereinafter I.L.O.] have estimated that at any given time traffickers globally earn approximately \$150 billion U.S.D. per year in illegal profits gained from forced labour.⁵ This clearly shows that H.T. has become a global phenomenon which concerns virtually all the countries of the world. With this background in mind, it is important to note that at the heart of H.T. is the accumulation of profit through the exploitation of vulnerable individuals.⁶ Research has shown that “trafficking, whether in people or body parts, typically entails the exploitation of marginalised populations whose bodies are commoditised – generating profits for illicit entrepreneurs [. . .]”.⁷

Consequently, the international community has developed laws that are designed to combat the problem of H.T. What has emerged is that which is labelled the “four Ps” policy in the fight against H.T. and these are: prevention, protection, prosecution and partnership.⁸ These, in turn, form the core of all the anti-trafficking policies and debates worldwide. However, in practice only the prosecution, partnership

¹ See Julia O’Connell Davidson, *Modern Slavery: The Margins of Freedom* 109 (Palgrave Macmillan, 2015).

² See U.N.O.D.C., Factsheet on Human Trafficking <https://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf> last accessed 5 April 2022.

³ See Kristiina Kangaspunta, *Trafficking in Persons: Global Patterns*, UNITED NATIONS, at 2, 5 (June 28-30, 2006), <https://www.un.org/en/development/desa/population/events/pdf/other/turin/KANGASPUNTA.pdf>.

⁴ See U.N.O.D.C., *supra* note 2, at 1.

⁵ See U.N. International Labour Office (ILO), *Profits and Poverty: The Economics of Forced Labour* (May 20, 2014).

⁶ See Jay S. Albanese, *Consent, Coercion, and Fraud in Human Trafficking Relationships*, 8 J. HUM. TRAFFICKING 13, 19 (2022).

⁷ *Id.* at 23.

⁸ See Rochelle Dalla & Donna Sabella, *Routledge International Handbook of Human Trafficking: A Multi-Disciplinary and Applied Approach* 71 (Routledge, 2019).

and protection elements are emphasised in varying degrees. The prevention of H.T., by addressing its root causes, is often paid lip service without much concrete effort being made to conceptualise what such a policy would entail.⁹ Root causes are the initiating phenomena in the chain of causation and are the foundation on which the H.T. problem rests.¹⁰ It is at this level that any intervention aimed at addressing the problem is effective.¹¹ The literature review will analyse three contemporary approaches that have dominated the debates on how to tackle H.T. — that is, the criminalisation/abolitionist, human rights-based and celebrity humanitarianism approaches.¹²

This paper argues that rather than addressing the structural issues, and hence root causes of trafficking-related exploitation, these approaches instead focus on tackling problematic practices such as forced labour, sexual exploitation or organ removal without changing the underlying issues causing these practices.¹³ In other words, they are concerned with treating the symptoms of the problem without fundamentally changing how the society is structured. The underlying structures such as a global economy that relies immensely on the exploitation of underprivileged people for growth and the restrictive immigration policies that make them vulnerable to exploitation remain unchallenged by these approaches.¹⁴

The current approaches to H.T. adopt a reductionist stance in perceiving the issue as one that concerns individual “bad apples” that criminally exploit the vulnerable (criminalisation approach); or that violate the human rights of individual persons (human rights-based approach); or that of people that need to be liberated from bondage through charity or “decaf” capitalism (celebrity humanitarianism).¹⁵ This is despite the fact that liberalism (as a political ideology) and global capitalism (as the political economy) are acknowledged as the context within which H.T. occurs, and are believed to create certain problems such as inequality and poverty.¹⁶ The current approaches to H.T. do not identify them as structural issues from which people need to be rescued. In fact, they reinforce neoliberal interests that maintain the boundaries between the haves and

⁹ See Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 *IND. J. GLOB. LEGAL STUD.* 137, 138 (2006).

¹⁰ See Susan Marks, *Human Rights and Root Causes*, 74 *MOD. L. REV.* 57, 60 (2011).

¹¹ *Id.*

¹² See Kamala Kempadoo, *The Modern-Day White (Wo)Man's Burden: Trends in Anti-Trafficking and Anti-Slavery Campaigns*, 1 *J. HUM. TRAFFICKING* 8 (2015); see also Ian Kapoor, *Celebrity Humanitarianism: The ideology of global charity* (Routledge, 2013); Patrick Twomey, *Europe's other Market: Trafficking in People*, 2 *EUR. J. MIGRATION & L.* 1 (2000).

¹³ See Anne T. Gallagher, *What's Wrong with the Global Slavery Index?*, 8 *ANTI-TRAFFICKING REV.* 90 (2017).

¹⁴ *Id.* at 11.

¹⁵ See Kempadoo, *supra* note 12.

¹⁶ See John Hilary, *The Poverty of Capitalism: Economic Meltdown and the Struggle for What Comes Next* 2, 7, 15-16 (Pluto Press ed., 2013); see also Kempadoo, *supra* note 12, at 16.

the have-nots by depoliticising and disavowing the dark side of the neoliberal order such as its tendencies to promote inequality, exploitation and imperialism.¹⁷

Furthermore, the current approaches to H.T. unquestionably accept the liberal construction of exploitation in H.T. legal instruments which support the ideological narrative that people can consent to exploitation – if there is no coercion or other improper means that negate consent.¹⁸ This promotes the fiction of “free” labour in exploitative working conditions which is a construct of liberal ideology that conceals the lived experiences of oppression under capitalism.¹⁹ By not contending with the politics of such a proposition and by accepting this position at face value, these approaches fail to recognise that liberal legalism obscures the oppression of the wage labourer in the fiction of consent under the general theory of contract.²⁰ Hence, by not questioning the exclusion of “consented” exploitation in the definition of H.T., as provided for in legal instruments such as the U.N. Trafficking Protocol,²¹ the literature ignores the role of the law in making exploitation appear “free, natural and rational”. This is something which is essential for the pervasive coercion of capitalism.²²

This naturalisation of neoliberal interests and fictions of free labour is the work of ideology. Ideology is defined as a system of beliefs that naturalises social relations; particularly those of oppression or domination.²³ This naturalisation of legal liberalism and neoliberal interests in modern or current H.T. requires a nuanced approach that deconstructs this false consciousness through ideology critique as propounded by Žižek.²⁴ By lifting the veil of liberal ideology, the paper will critique how the current approaches depoliticise H.T. and, in turn, lead to the adoption of ineffective measures to address the problem.

¹⁷ See Kapoor, *supra* note 12, at 2.

¹⁸ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, adopted Nov. 15, 2000, 2237 U.N.T.S. 319.

¹⁹ See Mary Stokes, *Company Law and Legal Theory*, in *A READER ON THE LAW OF THE BUSINESS ENTERPRISE: SELECTED ESSAYS* 90 (Sally Wheeler ed., 1994).

²⁰ See Jairus Banaji, *The Fictions of Free Labour: Contract, Coercion, and So-Called Unfree Labour*, 11 *HIST. MATERIALISM* 69-70 (2003).

²¹ See Kara Abramson, *Beyond Consent, toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 *HARV. INT’L L.J.* 473, 477 (2003). Problematises the issue as follows:

if an act is not carried out by way 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* (emphasis added) of a person, even if such an act is paired with an intent to exploit, then the act is not trafficking.

See also Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18, at art. 3.

²² Banaji, *supra* note 20, at 76.

²³ *Id.* at 73.

²⁴ See Slavoj Žižek, *Mapping Ideology* (Verso ed., 1994).

METHODOLOGY - CRITICAL LEGAL APPROACH

Critical legal theory [hereinafter C.L.T] is the theoretical framework utilised by the article to critique the current approaches to H.T. A central theme in critical studies is the achievement of human emancipation, a condition that is denied to H.T. victims by the current anti-trafficking approaches. Employing a critical legal perspective on the issue will be useful in understanding how the law functions in giving effect to and/or legitimising certain forms of oppression and power relations.²⁵ The target of C.L.T. is the core of the orthodox approach to law which is “legal liberalism” or “liberal legalism”.²⁶ Legalism views the law as constituting authoritative texts that can be applied in a value-free manner through the application of logic.²⁷ This is rejected by critical scholars who view the law as political and reflecting the values of those legislating (being their dominant social values).²⁸ Thus, the law is best described as a site of political contestation and a platform on which hegemonic values are presented as universal.²⁹ Such an approach is essential in deconstructing how the law functions in giving effect to and/or legitimising certain forms of exploitation and power relations. For example, the emphasis on construing the trafficking problem as an instance of bad individuals that exploit vulnerable people overlooks and silences alternative constructions of the root causes of H.T., different conceptions of exploitation and the possible solutions to the problem. This works to depoliticise the issue by ignoring and insulating the relationship between meaning and power in the construction of H.T. under international law. This has an effect of international law perpetuating the very problems that it aims to alleviate.

The “liberalism” concept, on the other hand, emphasises the law’s role in maximising individual freedom and equality.³⁰ This too is rejected by critical scholars who view liberalism as an ideological exercise that naturalises relations of social domination.³¹ The “freedom” and “equality” to which liberalism adheres to are only formal and not substantive.³² It ignores the social reality of inequality and the unfreedom that results from workers dependence on selling their labour power for

²⁵ See Donald Nicolson, *Critical Approaches*, in AN INTRODUCTION TO THE STUDY OF LAW 43-44 (W. Green ed., 2012).

²⁶ *Id.* at 43.

²⁷ *Id.*

²⁸ *Id.*; see also Judith Wagner DeCew, *Critical Legal Studies and Liberalism: Understanding the Similarities and Differences*, 18 PHIL. TOPICS 41, 44 (1990).

²⁹ See Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT’L AFF. 197, 200 (2004); see also Martti Koskenniemi, *The Politics of International Law - 20 Years Later*, 20 EUR. J. INT’L L. 7, 11 (2009).

³⁰ Nicolson, *supra* note 25, at 43-44.

³¹ See, e.g., Alan Hunt, *Problems of the State: Law, State and Class Struggle*, 20 MARXISM TODAY 176, 184 (1976).

³² *Id.*: “that is individuals are regarded as free if there is no legal bar to them entering into a contract, and are therefore deemed to be equal”.

survival.³³ Employing a critical legal perspective to the issue will, therefore, be useful in understanding how the law naturalises relations of exploitation and conceptualises H.T. in a manner that ignores the structural issues.

Under critical legal theory the paper will utilise a Marxist lens in its analysis of the approaches adopted to deal with H.T. The relevance of a Marxist analysis of the law lies in the fact that it critiques the law based on the very same values that it purports to advance and also examines whether particular policies adopted advance those values.³⁴ Marxism is primarily a theory of history which asserts that in order to understand how a society functions it is essential to look at the economic structure of the relevant society.³⁵ Thus, employing a Marxist legal analysis will assist in understanding the root causes of H.T. and the exploitation that comes with it. The engagement with this approach will make an original contribution to the H.T. issue as Marxist studies of the law are rare especially in international law.³⁶ Therefore, this study will have an original theoretical contribution in the application of Marxist legal perspectives to the international law on the trafficking of human beings — particularly regarding the limitations of the current approaches and their conceptualisation of H.T.

1. TERMINOLOGY

1.1. CAPITALISM AND NEOLIBERALISM (STRUCTURAL ISSUES)

The concepts “capitalism” and “neoliberalism” have been marred by assertions that they contribute to inequalities and to the violation of human rights, particularly labour rights. This Section will attempt to define these concepts and briefly discuss how they can be construed as structural issues in the H.T. phenomenon. The aim of this Section is to lay a foundation for the understanding of capitalism and neoliberalism which informs the discussion in the subsequent Sections that highlight the limitations of the three dominant approaches to H.T.

Capitalism is a concept that is often used in practice with its meaning being largely considered to be self-evident. As to the origins of the word, it is commonplace for one

³³ *Id.* at 184.

³⁴ Brad R. Roth, *Marxian Insights for the Human Rights Project*, in *INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES* 221 (Susan Marks ed., 2008).

³⁵ Nicolson, *supra* note 25, at 44.

³⁶ See Robert Knox, *Marxist Approaches to International Law*, in *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* 306 (Anne Orford & Florian Hoffmann eds., 2016).

to assume that the word comes from Karl Marx as he referred to its variations (capital, capitalist and the capitalist mode of production) in the *Capital, Volume I*.³⁷ The term was, however, coined by the English novelist Thackeray, but Weber is the one who proffered a famous paper on the definition of capitalism. The Weberian definition of capitalism entails the provision of human needs through private businesses with the aim of making profit.³⁸ While profit-seeking is as old as trade itself, continuous and generalised accumulation of surplus value through production is unique to capitalist societies.³⁹ These societies not only require that those who control production seek to make profit, but also that they are able to adapt the production process to ensure the maximisation of output.⁴⁰ Thus, at the heart of capitalism is the accumulation of profit through the manipulation of labour power.

Historically, capitalism has been associated with the gravest situations of human exploitation such as slavery.⁴¹ It is widely considered that the cruelty and violence that are often associated with chattel slavery were caused by the slave owner's unquenchable thirst for profit.⁴² Beckert states that although people have grown to associate capitalism with contracts and markets, early capitalism was based on violence and bodily coercion.⁴³ This is an assertion that finds support in Marx's *Capital I* where he stated that capitalism came into this world "dripping from head to foot, from every pore, with blood and dirt".⁴⁴ Thus, the history of capitalism shows that it has always been associated with labour regimes that are exploitative in nature by virtue of its emphasis on profit accumulation at all costs.

Having established what capitalism is, it is fitting to establish the relationship that it has with neoliberalism. In doing so, it is apposite to define what is meant by the term "neoliberalism" in the first instance. The term "neoliberalism" is now widely acknowledged as a controversial and crisis-ridden term.⁴⁵ It is often invoked in critical literature, but remains ill-defined with a meaning that appears to change from paper to paper.⁴⁶ In order to get a clearer picture of the meaning and scope of the term it is,

³⁷ Karl Marx, *Capital: A Critique of Political Economy*. VOLUME I: THE PROCESS OF CAPITALIST PRODUCTION (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Progress Publishers, 1887).

³⁸ See Randall Collins, *Weber's Last Theory of Capitalism: A Systematization*, 45 AMERICAN SOCIOLOGICAL REVIEW 925 (1980), <https://doi.org/10.2307/2094910>.

³⁹ See Angus Maddison, *Contours of the World Economy, 1–2030 AD* (Oxford University Press ed., 2007).

⁴⁰ See John J. Clegg, *Capitalism and Slavery*, 2 CRITICAL HISTORICAL STUDIES 281 (2015), <https://doi.org/10.1086/683036>.

⁴¹ See Sven Beckert, *Slavery and Capitalism*, THE CHRONICLE OF HIGHER EDUCATION (Dec. 12, 2014), https://www.chronicle.com/article/slavery-and-capitalism/?emailConfirmed=true&email=l.sibanda%40sussex.ac.uk&success=false&bc_nonce=k5179074tlaiapx8sd45i&cid=gen_sign_in.

⁴² Clegg, *supra* note 40, at 290.

⁴³ Beckert, *supra* note 41.

⁴⁴ Marx, *supra* note 37, at 538.

⁴⁵ See Rajesh Venugopal, *Neoliberalism as a Concept*, 44 ECONOMY AND SOCIETY 165, 166 (2015).

⁴⁶ *Id.*

therefore, important to define the concept as present in the real world through its spheres of operation and historical development. For instance, scholars have noted that neoliberalism developed as a counter-revolution political project “carried out by the corporate capitalist class” to limit the power of labour.⁴⁷ Thus, the neoliberal project developed as an assault on organised labour which was viewed as a threat to the expansion of capital and a cause for market rigidity.⁴⁸ Consequently, its sphere of influence can be seen through policies aimed at advancing the neoliberal agenda of: “free” trade and capital mobility; the adoption of austerity measures; the “flexibilization of labour markets” through labour and business deregulation; the repression of wage demands and the “workfarist” restructuring of the welfare state.⁴⁹ A look at these characteristics of neoliberalism reflects the liberal, rational choice-based foundations of the project which advocate for the reduced role of the government in regulating economic activity.⁵⁰ However, it should be noted that there are other variations of neoliberalism that attempt to bridge the gap between the polar opposites of unbridled capitalism and state control as seen in the “ordoliberalism”.⁵¹

Aside from neoliberalism being a political project, it is also an ideological tool.⁵² Ideology is defined by Žižek as a “composite set of ideas, beliefs, concepts” that are meant to convince the society of its inherent truth while underhandedly serving some power interest.⁵³ Neoliberalism, naturally, is the most pro-capitalist ideology as it advocates for policies that are aimed at dismantling barriers to global trade and capital as well as the deregulation of labour.

The impact of these neoliberal policies has been a subject of debate with those who are pro-market liberalisation, arguing that it results in economic growth and development.⁵⁴ Conversely, those who argue against liberalisation state that it results in “a race to the bottom as governments, in their pursuit of economic competitiveness and foreign capital, competitively lower labour, environmental and other social welfare

⁴⁷ Bastiaan van Apeldoorn & Henk Overbeek, *Introduction: The Life Course of the Neoliberal Project and the Global Crisis*, in *NEOLIBERALISM IN CRISIS* 1, 4 (Henk Overbeek & Bastiaan van Apeldoorn eds., 2012); Bjarke Skærlund Risager, *Neoliberalism Is a Political Project: An Interview with David Harvey*, *ACADEMIA* 2-3 (July 23, 2016), https://www.academia.edu/27261868/Neoliberalism_Is_a_Political_Project_An_Interview_with_David_Harvey?auto=citations&from=cover_page.

⁴⁸ See Christoph Hermann, *Neoliberalism in the European Union*, 79 *STUDIES IN POLITICAL ECONOMY* 61, 64 (2007).

⁴⁹ *Id.* at 62, 68; Robert Blanton & Dursun Peksen, *Economic Liberalisation, Market Institutions and Labour Rights*, 55 *EUROPEAN JOURNAL OF POLITICAL RESEARCH* 474, 475 (2016).

⁵⁰ Venugopal, *supra* note 45, at 172.

⁵¹ *Id.* at 168.

⁵² See Risager, *supra* note 47, at 3-4; Hermann, *supra* note 48, at 62.

⁵³ Žižek, *supra* note 24.

⁵⁴ See Alice Amsden, *Taiwan's Economic History: A Case of Etatism and a Challenge to Dependency Theory* (1979), in *THE GLOBALIZATION AND DEVELOPMENT READER: PERSPECTIVES ON DEVELOPMENT AND GLOBAL CHANGE* 159 (Timmons Roberts, Amy Hite & Nitsan Chorev eds., 2nd ed. 2015).

standards”.⁵⁵ Such policies, aiming to increase economic competitiveness through lowering of labour standards, are essentially grounded in the neoliberal assumption that the respect for worker rights is hostile to economic growth. Through deregulation, this ideological position seeks to promote the accumulation of profit by businesses even at the expense of worker rights. This, coupled with the idea of reduced government intervention (minimal state), results in a government that is not well equipped to protect positive rights such as workers’ rights.⁵⁶ Thus, there is a correlation between neoliberal policies and the exploitation of workers for the sake of profit accumulation.

1.2. HUMAN TRAFFICKING AND MODERN SLAVERY

The first internationally accepted definition of H.T. is found in the 2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [hereinafter the Protocol].⁵⁷ Article 3 of the Protocol defines H.T. as entailing some form of action such as the recruitment, transportation, transfer, harbouring or receiving of another human being through “unlawful” methods for the purpose of exploiting the person.

H.T. has three elements that need to be satisfied: an act, a means and a purpose. The “act” element of the H.T. definition relates to the control of a person by another by virtue of the enumerated actions, for instance, harbouring or recruitment. The second element, “means”, points to the involuntary aspect of the relationship between the person and the entities who are exercising control over the trafficked person. This is illustrated by words such as coercion, deception or abuse of power to describe the relationship.⁵⁸ Last, but not least, is the element of exploitation of the person.⁵⁹ This element requires that perpetrators recruit, harbour, transfer or receive another person for the purpose of obtaining some benefit at the expense of the trafficked person. This could be for the purpose of financial gain, free/cheap labour services or obtaining the benefit of an organ donation.⁶⁰

⁵⁵ Blanton & Peksen, *supra* note 49, at 475.

⁵⁶ See Robert Blanton & Dursun Peksen, *The Dark Side of Economic Freedom: Neoliberalism has Deleterious Effects on Labor Rights*, LSE PHELAN US CENTRE (Aug. 20, 2016), <https://blogs.lse.ac.uk/usappblog/2016/08/20/the-dark-side-of-economic-freedom-neoliberalism-has-deleterious-effects-on-labor-rights/>.

⁵⁷ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18.

⁵⁸ *Id.* at art. 3(a).

⁵⁹ See Janne Mende, *The Concept of Modern Slavery: Definition, Critique, and the Human Rights Frame*, 20 HUMAN RIGHTS REVIEW 229, 233 (2019).

⁶⁰ See IOM, *Counter-trafficking: Training Modules*, IOM IRELAND 8 (2008), <http://iomireland.ie/wp-content/uploads/2016/04/Train-the-Trainer-Manual-Original.pdf>.

The question of whether a prescribed act and method must subsequently lead to exploitation for a case to be classified as H.T. is one that is subject to debate. One view is that all three elements must be present in any given case for it to be considered H.T. In other words, subsequent exploitation is an indispensable requirement.⁶¹ This is a restrictive interpretation of the provision in the Protocol requiring where the utilisation of the conduct and method(s) prescribed must be for the *purpose* of exploitation.⁶² A more literal interpretation of the provision contends that subsequent exploitation is to be treated as a sufficient but not a necessary element of H.T.⁶³ This is said to be in line with the ordinary and grammatical meaning of the provision which speaks to the “purpose” of exploitation; hence, referring to an intention to exploit.⁶⁴ The practical difference between the two interpretations can be seen once one takes into account the fact that not all trafficked persons are subsequently exploited. There may be cases where a person has been recruited, transported, or harboured through the use of coercion, and has suffered human rights violations in the process, but is rescued before they are exploited. In the restricted interpretation of Article 3 of the Protocol, such a person would not be considered a victim of H.T. Whereas in the literal interpretation of the provision, such a person would be a victim of H.T. and would consequently be entitled to all the necessary protection.

The exploitation of H.T. victims is characterised by an absence of autonomy or freedom on their part – mirroring the ancient practice of slavery. Hence, renewed attention has been given to the old phenomenon of slavery, although now focusing on modern slavery practices. Definitional problems are inherent in the discussions on “modern slavery”, as no international instrument has given a definition of the concept.⁶⁵ While terms such as H.T. have been comprehensively covered in international legal instruments,⁶⁶ modern slavery is one term that eludes precise definition. This lack of a universally accepted definition of what modern slavery entails means that the term is often used to mean different things in different contexts.⁶⁷ Some scholars have used the term modern slavery or slavery-like conditions to refer to situations that are less

⁶¹ See Ryszard Piotrowicz, *European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers*, 14 INTERNATIONAL JOURNAL OF REFUGEE LAW 263, 266 (2002).

⁶² Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18, at art. 3(a).

⁶³ See Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* 20 (Martinus Nijhoff Publishers ed., 2006).

⁶⁴ *Id.*

⁶⁵ See U.N., *International Day for the Abolition of Slavery*, U.N. (2021), <https://www.un.org/en/observances/slavery-abolition-day>.

⁶⁶ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18; Convention on Action Against Trafficking in Human Beings, adopted May 16, 2005, C.E.T.S. 197.

⁶⁷ See Ronald Weitzer, *Modern slavery and Human Trafficking*, GREAT DECISIONS 42 (Jan., 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691649.

dehumanising than outright slavery. For instance, the term is often used to describe circumstances where a person is subjected to any one of the following: harsh working conditions, restricted freedom, presence of a debt bondage, or even when they receive paltry remuneration.⁶⁸

Slavery is understood as the “. . . status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.⁶⁹ Central to the definition of slavery is the idea that the slave lacks legal personality and is owned by the master. This ownership is life-long and more permanent in the case of slavery. This is not the case in modern slavery cases, as the victim still retains their legal personality.⁷⁰ In the context of modern slavery, it is the intention to subsequently exploit the victim that categorises it as slavery. In some instances, however, the traffickers may exercise continuous control over the victim for a long period and that would *de facto* amount to exercising the right to ownership (slavery).⁷¹ A fundamental similarity between slavery and modern slavery is that in both instances the victim’s rights and personal freedoms are restricted by the perpetrator. For example, in both cases, the victim’s right to freedom of movement, liberty, property and dignity are restricted by the person exercising control over them. This is what justifies these practices being labelled as modern slavery or slavery-like.

However, it must be acknowledged that the term ‘modern slavery’ has been subject to severe criticism. The argument behind this critique is that the use of the term only serves to “de-historicise” and spectacularise the people to whom it refers.⁷² What this means is that the use of the term “modern slave” has the effect of unifying the experiences of all victims, and eclipses their contextual and material conditions. The term then only serves to create grand narratives of what it means to be a contemporary slave while not considering the individual experiences of the victims themselves. Therefore, distancing ourselves from these narratives inherent in the term “modern slave” will allow for an understanding of violence as an everyday practice that intersects with other life experiences.⁷³ This will, in practice, allow for the recognition of problematic relations that are less visible in the modern slavery paradigm.⁷⁴ It has, furthermore, been contended that the term “modern slavery” has become a movement for the “deep-pocketed, high profile and increasingly glamorous “anti-modern slavery”

⁶⁸ *Id.*

⁶⁹ See Convention to Suppress the Slave Trade and Slavery, adopted Mar. 7, 1927, 60 L.N.T.S. 253.

⁷⁰ Obokata, *supra* note 63, at 19.

⁷¹ *Id.* at 20.

⁷² See Ella Parry-Davies, Modern Heroes, *Modern Slaves? Listening to Migrant Domestic Workers Everyday Temporalities*, 15 ANTI-TRAFFICKING REVIEW 63, 68 (2020).

⁷³ *Id.* at 74.

⁷⁴ *Id.*

club, that counts movie stars and presidents amongst its members” — all of which conveniently view forced labour as an issue of individual bad people — doing bad things to good people — while ignoring the deeper structural causes.⁷⁵

While taking cognisance of the above criticisms, this paper will use the terms modern slavery and H.T. interchangeably. The decision to use the highly criticised term — (that is, modern slavery) is motivated by the fact that it has become a very powerful tool for the mobilisation of action against all forms of exploitation sustained through threats, coercion, abuse of power, violence or deception. Virtually all state and non-state actors use the term to refer to these instances of exploitation. The United Nations has dealt with modern slavery through its various organs and procedures. For instance, through the special procedure mechanism, the U.N. has created a mandate for the Special Rapporteur on Contemporary forms of Slavery. Contemporary is a synonym for “modern” and the mandate of the special rapporteur includes all issues associated with modern slavery such as forced labour, domestic servitude, and slavery-like conditions among others.⁷⁶ The United Nations Office on Drugs and Crime and the I.L.O. have dealt extensively with modern slavery as a broad concept that includes different situations of H.T.⁷⁷ On the regional level, the Organization for Security and Cooperation in Europe [hereinafter O.S.C.E.] has also dealt with H.T. as a massive phenomenon of modern-day slavery in its policy documents.⁷⁸

2. A CRITICAL ANALYSIS OF THE APPROACHES TO H.T.

This Section will analyse the three main approaches that can be identified in the literature on combating H.T. The literature review identifies international and regional legal frameworks as key determinants of anti-trafficking efforts and consequently, academic discussions have been centred on the effectiveness of these efforts.⁷⁹ Anti-trafficking efforts in the literature can be divided into three broad categories: the

⁷⁵ See Anne Gallagher, *What’s Wrong with the Global Slavery Index?*, 8 ANTI-TRAFFICKING REVIEW 90-112 (2017), <https://www.antitraffickingreview.org/index.php/atrjournal/article/view/228/215>.

⁷⁶ See U.N. Office of the High Commissioner of Human Rights (OHCHR), Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, U.N. Doc. A/77/163 (July 14, 2022).

⁷⁷ See U.N.O.D.C., Global Report on Trafficking in Persons, at 6 (Feb. 2009); U.N. International Labour Office (ILO), Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, at 21 (Sep. 19, 2017).

⁷⁸ See Ryszard Piotrowicz et al., *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, O.S.C.E. (June 25, 2013), <https://www.osce.org/files/f/documents/6/6/101002.pdf>.

⁷⁹ See Jean-Pierre Gauci & Noemi Magugliani, *Final Report: Determinants of Anti-trafficking Efforts*, BIICL 67 (June, 2022), https://www.biicl.org/documents/154_determinants_of_anti-trafficking_efforts_final_report.pdf.

criminalisation/abolitionist approach, the human rights based approach and the celebrity humanitarianism approach. The review shows that each of them has assumptions on how to eliminate the problematic manifestations of H.T. such as forced labour, and criminal and sexual exploitation (among other forms of exploitation) with a focal point that is highly influenced by their respective actors, agendas, and politics. Consequently, all the approaches are reactive to the problem and do not seek to address its causes. What is striking about these approaches, as different as they may be, is their tacit legitimisation of the liberal political economy by focusing on the immediate crisis and tackling the symptoms of the H.T. problem rather than addressing the root causes. By not interrogating the pervasive exploitation essential to the survival of global capitalism and perpetuated by neoliberal policies, the approaches depoliticise the problem and, in turn, lead to the adoption of ineffective measures to combat H.T. It will be shown that, in order to combat H.T., it is essential for strategies to target the structural issues that are contributing to making individuals vulnerable.

2.1. CRIMINALISATION APPROACH

2.1.1. WHAT IS A CRIMINALISATION APPROACH TO H.T.

A review of the literature dealing with combating H.T. shows that one of the tactics that have been adopted to deal with the issue is the liberal abolitionist approach; commonly referred to as the criminalisation approach. This approach fundamentally views the issue of H.T. from the perspective of the state and as a violation of the laws of the state.⁸⁰ It fundamentally adopts a reductionist lens that attempts to understand a complex phenomenon such as H.T. from the study of distinct features of the system such as perpetrators, victims and the patterns of operation.⁸¹ Consequently, emphasis is placed on utilising the law and the criminal justice system to punish trafficking perpetrators through the criminalisation of H.T. and various offences related thereto. Such related offences are prostitution and violations of labour and immigration law.⁸²

⁸⁰ See Navid Pourmokhtari, *Global Human Trafficking Unmasked: A Feminist Rights-Based Approach*, 1 JOURNAL OF HUMAN TRAFFICKING 156, 159 (2015).

⁸¹ See Marcel van der Watt & Amanda van der Westhuizen, *(Re)configuring the criminal justice response to human trafficking: a complex-systems perspective*, 18 POLICE PRACTICE AND RESEARCH 218, 224-5 (2017).

⁸² Pourmokhtari, *supra* note 80, at 159.

Central to this approach is the distinction between perpetrators and victims – with it being argued that the latter should not be punished for criminal acts arising out of their situation as H.T. victims.⁸³ While this approach has certain strengths, such as deterring perpetrators from committing the offence, it also fails to provide a holistic approach that addresses the root causes of the problem.⁸⁴

2.1.2. CRIMINALISATION APPROACH AND THE PREVENTION OF H.T.

While assessing the successes and shortcomings associated with this method of combating H.T., Kangaspunta argues that the criminalisation of the phenomenon has been a crucial step in sending a message to the would-be traffickers that the commission of the offence will not be accepted internationally or domestically.⁸⁵ The contention is that it brings the problem of H.T. under the official purview of the criminal justice system allowing for an allocation of the resources to ensure the proper investigation of the crime and prosecution of offenders.⁸⁶ Rogers, while speaking generally in terms of the functions of criminal law, notes that the creation of an offence can make a prohibited conduct more susceptible to prevention through general deterrence.⁸⁷ This is because it sends a clear message to potential offenders that they will be prosecuted, convicted and punished. Stoyanova adds to this discussion by arguing that criminalisation also provides for specific deterrence against repetition of the offence by individual offenders and protects the victim from further victimisation.⁸⁸

Despite these strengths, there has been a growing realisation among academics that H.T. cannot be adequately prevented through criminalisation (legislation).⁸⁹ Kangaspunta asserts that the criminalisation of H.T. remains largely symbolic due to the lack of implementation, and the low numbers of convictions despite the widespread

⁸³ See Ryszard Wilson Piotrowicz & Liliana Sorrentino, *Human Trafficking and the Emergence of the Non-Punishment Principle*, 16 HUMAN RIGHTS LAW REVIEW 669, 673 (2016); U.N. Secretary-General, *Trafficking in Women and Girls*, ¶ 62, U.N. Doc A/63/215, para 62, (Aug. 4, 2008).

⁸⁴ See Paul Oluwatosin Bello & Adewale Olutola, *Effective Response to Human Trafficking in South Africa: Law as a Toothless Bulldog*, 12 SAGE OPEN 1-14 (2022), <https://doi.org/10.1177/21582440211069379> (last visited Sept. 27, 2022); Vladislava Stoyanova, *Article 4 of the ECHR and The Obligation of Criminalising Slavery, Servitude, Forced Labour And Human Trafficking*, 3 CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 407, 414 (2014).

⁸⁵ See Kristiina Kangaspunta, *Was Trafficking in Persons Really Criminalised?*, 4 ANTI-TRAFFICKING REVIEW 80-97 (2015).

⁸⁶ *Id.*

⁸⁷ See Jonathan Rogers, *Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings*, 2003 CRIMINAL LAW REVIEW 690-708 (2003).

⁸⁸ Stoyanova, *supra* note 84, at 414.

⁸⁹ Chuang, *supra* note 9, at 156; Nina Mollema, *Combating Human Trafficking in South Africa: A comparative legal study* 75 (2013) (D.Phil. thesis, University of South Africa); van der Watt & van der Westhuizen, *supra* note 81, at 218.

criminalisation.⁹⁰ The low number of convictions is attributed to the hidden and coercive nature of the phenomenon as well as the problems of victim (self-)identification due to the complex nature of H.T.⁹¹ Where convictions are secured, they are often more focused on sexual exploitation grounds than labour exploitation – thus neglecting a key part of trafficking related exploitation.⁹² Chuang states that this is because sex trafficking falls neatly within the scope of the criminal justice system.⁹³ However, labour trafficking in practice is less likely to attract a criminal justice response due to the greater moral tolerance that society has with regard to labour exploitation.⁹⁴ This raises a fundamental question on whether criminalisation performs the function of prevention by deterrence with regard to labour trafficking.

Less attention is afforded to labour trafficking despite recent global estimates that approximately twenty-eight million people are trapped in forced labour.⁹⁵ While H.T. and forced labour are different concepts, there is a significant overlap between them.⁹⁶ In analysing the definition of forced labour as found in the 1930 Forced Labour Convention,⁹⁷ Morehouse notes that “. . . all victims of forced labour can *potentially* (emphasis added) be considered victims of human trafficking”,⁹⁸ In fact, an argument is made that the I.L.O. posits H.T. as a subset of forced labour.⁹⁹ The overlap between H.T. and forced labour is not complete. There are a few instances where forced labour does not amount to H.T.¹⁰⁰ Unfortunately, the Protocol itself does not offer a clear basis for resolving the exact relationship and boundaries between forced labour and H.T.¹⁰¹ Mbah notes that “forced labour is the most common form or practice of trafficking . . . [and] the most common practice of exploitation because it is a lucrative business that generates a significant amount of revenue for the perpetrators”.¹⁰² Therefore, an

⁹⁰ Kangaspunta, *supra* note 85.

⁹¹ Anne Gallagher & Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking Lessons from the Front Line*, 18 INTERNATIONAL CRIMINAL JUSTICE REVIEW 318, 329 (2008); Kangaspunta, *supra* note 85.

⁹² Gauci and Magugliani, *supra* note 79, at 38-40.

⁹³ Chuang, *supra* note 9, at 154.

⁹⁴ *Id.*

⁹⁵ International Labour Organization, Walk Free & International Organization for Migration, *Global estimates of modern slavery: forced labour and forced marriage* 22 (Sept. 28, 2022), https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-ipec/documents/publication/wcms_854733.pdf.

⁹⁶ *Chowdury and Others v. Greece*, App. No. 21884/15, (Mar. 30, 2017), <https://tinyurl.com/3fjsshfk>.

⁹⁷ Convention Concerning Forced or Compulsory Labour art. 2(1), Jun. 28 1930, 39 U.N.T.S. 55.

⁹⁸ Christal Morehouse, *Combating Human Trafficking Policy Gaps and Hidden Political Agendas in the U.S.A. and Germany* 76-77 (VS Verlag für Sozialwissenschaften ed., 2009).

⁹⁹ *Id.* at 76.

¹⁰⁰ *Id.* at 78 states: “Only three of the [I.L.O.]’s 2005 criteria for identifying forced labor do not apply strictly to human trafficking. These are: “dismissal from current employment under the menace of penalty”, the ‘exclusion from future employment through menace of penalty’ and ‘physical confinement in prison’”.

¹⁰¹ Chuang Janie, *Exploitation Creep and The Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 630 (2014).

¹⁰² Miriam U Mbah, *Addressing Human Trafficking through Public Procurement: An Examination of US and Australian Federal Procurement Frameworks* 61 (2020) (D.Phil. thesis, Bangor University).

over-emphasis on sex trafficking as found in the criminalisation approach overlooks a vital element of trafficking-related exploitation (i.e., labour trafficking).

Another practical limitation of the criminalisation approach stems from its reductionist lens as it problematises the H.T. issue in a linear and simplistic manner. Marcel van der Watt and Amanda van der Westhuizen describe the criminalisation approach as a systematic process of connecting evidence in a linear fashion with the aim of identifying, apprehending, and convicting perpetrators.¹⁰³ While this method is well suited for single event crimes such as murder and/or rape that take place within a specific context often characterised by a perpetrator, a victim, a crime scene and a possible witness, it does not adequately address complex crimes such as H.T. which are often made up of complicated non-linear relationships between various actors and context(s).¹⁰⁴ Morgan argues that reductionism cannot keep up with a complex way of life – and when employed will only serve to treat symptoms of the problem while ignoring its causes.¹⁰⁵ Such interventions will only serve to make things better in the short term and worse in the long run as the root causes of the problem are left intact.¹⁰⁶

Thus, a reductionist method of dealing with H.T. inevitably leads to policies that are “micro-smart” and “macro-dumb”.¹⁰⁷ It is therefore important to conceptualise how the nonlinear relationships found in the H.T. phenomenon interact in order to fashion policies that can adequately address the macro forces at play in H.T. systems. Newman and Cameron argue that for one to understand H.T. it is important to look at its broad social, economic, and political context (structural factors).¹⁰⁸ The argument is that understanding H.T. requires an appreciation of the interaction of various factors that contribute to making people vulnerable to trafficking-related exploitation.¹⁰⁹ Hence, an analysis of the structural factors, contributing to making people vulnerable, will contribute to “addressing the problem at both the site of origin and the destination, as well as at the international level”.¹¹⁰

¹⁰³ Van der Watt & van der Westhuizen, *supra* note 81, at 221.

¹⁰⁴ *Id.*

¹⁰⁵ Peter Morgan, *The idea and practice of systems thinking and their relevance for capacity development*, ECDPM 6 (2005), <https://ecdpm.org/application/files/2716/5547/2830/2005-Idea-Practice-Systems-Thinking-Relevance-Capacity-Development.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Edward Newman & Sally Cameron, *Trafficking in Human Beings: Social, Cultural and Political Dimensions 1* (United Nations University Press ed., 2008).

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.* at 7.

2.1.3. MARXIST CRITIQUE OF THE CRIMINALISATION APPROACH

On a theoretical level, the criminalisation approach to H.T. seeks to align itself with the liberal ideology by viewing the issue as an instance of individual criminals who act outside the boundaries of the liberal society.¹¹¹ In doing so, this approach depoliticises the issue of H.T. by not viewing the problem as one that emanates from the global political economy or one that is inherently structural.¹¹²

The tacit assumption of this approach is that the labour market or global political economy is an environment that is characterised by free exchange between individuals that are equal and who rationally contract to their mutual advantage.¹¹³ Hence, there is a liberal-individualistic supposition of labour as being essentially free under the current political economy with labour being based on the consent of the individual worker.¹¹⁴ From this background, H.T., which is the epitome of unfree labour, is considered as encroaching upon individual autonomy; and therefore, warranting criminalisation. Consequently, this approach embraces neoliberalism and upholds the capitalist political economy by effectively placing the blame outside of the economic structure (capitalism). Bernstein accurately captures the limitation of this current approach as follows:

For modern-day abolitionists, the dichotomy between slavery and freedom poses a way of addressing the ravages of neoliberalism that effectively locates all social harm outside of the institutions of corporate capitalism and the state apparatus. In this way, the masculinist institutions of big business, the state, and the police are reconfigured as allies and saviors, rather than enemies, of unskilled migrant workers, and the responsibility for slavery is shifted from structural factors and dominant institutions onto individual, deviant men: foreign brown men (as in the White Slave trade of centuries past) or even more remarkably, African American men living in the inner city [. . .].¹¹⁵

Therefore, the criminalisation approach places blame on “bad” individuals and corporations that violate laws. By virtue of this, abolitionists place emphasis on the adoption of more laws that are designed to bring these “deviant” entities in compliance

¹¹¹ See Judy Fudge, *Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization*, 27 *SOCIAL & LEGAL STUDIES* 414, 418 (2018).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Banaji, *supra* note 20, at 74.

¹¹⁵ Elizabeth Bernstein, *The Sexual Politics of the New Abolitionism*, 18 *DIFFERENCES* 128, 144 (2007).

with the dominant western liberal ideals and values. Naturally, this leads to the criminalisation of greater areas of human life such as migration and the intensification of surveillance to combat H.T.¹¹⁶ Ironically, this approach leaves intact the structural issues (root causes) that are in fact causing H.T., which are conveniently ignored for a more superficial approach.

Furthermore, the liberal approach to the problematisation of H.T. fails to appreciate the extent to which the law itself, especially contract law under capitalism, is an institutional process through which domination and oppression is naturalised.¹¹⁷ On this point, it is useful to refer to Marx's renowned critique of contract law under legal liberalism in *Capital I*. He describes the wage labourer as bound to the employer by invisible threads through the legal fiction of a contract — with an appearance of independence sustained by an ability to change employers.¹¹⁸ This “free” contract between the capitalist and the worker is said to be an illusion. Kessler contends as follows in this regard: “Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms”.¹¹⁹

Thus, there is a need for a more nuanced approach to H.T. that reconceptualises exploitation to include those instances where consent is involved. This will reflect the fact that in contemporary capitalism the boundary between free and unfree labour has become blurred — casting doubt on liberal legalism's emphasis on a freely concluded contract as truly signifying the will of the parties.¹²⁰ The I.L.O. has recognised that in the course of employment there are some “relationships in which the element of free choice by the worker begins at least to be mitigated or constrained, and can eventually be cast into doubt”.¹²¹ This necessitates an approach to H.T. that recognises that freedom or unfreedom in employment situations is no longer binary and exists on a continuum. This concept of a continuum of unfreedom is useful in understanding that exploitation can occur even in legally sanctioned relationships where there is a denial of rights. This is not accounted for in the current liberal approach to H.T. as seen in the criminalisation approach. The effect of such a gap is that the conceptualisation of H.T. under the law

¹¹⁶ Kempadoo, *supra* note 12, at 16.

¹¹⁷ Marc Steinberg, *England Great Transformation: Law, Labour, and the Industrial Revolution* 32 (University of Chicago Press ed., 2016).

¹¹⁸ Marx, *supra* note 37, at 405.

¹¹⁹ Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, 43 COLUM. L. REV. 629, 640 (1943).

¹²⁰ Sandro Mezzadra & Brett Neilson, *Border as a Method, or, the Multiplication of Labor* 100 (2013).

¹²¹ International Labour Organization (ILO) Conference (98th Session), Report I(B): *The Cost of Coercion: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights to Work*, at 8-9 (May 12, 2009).

does not accurately reflect the lived experiences of H.T. victims. The illusion of freedom under the liberal abolitionist approach naturalises exploitation that does not fall neatly within the scope of the H.T. definition.

2.2. THE HUMAN RIGHTS APPROACH

2.2.1. WHAT IS A HUMAN RIGHTS-BASED APPROACH TO H.T.?

A human rights-based approach has emerged owing to the limitations of the criminalisation approach in supporting and protecting victims of H.T. Therefore, instead of placing emphasis on the prosecution of traffickers, this approach focuses more on individuals based on their status as victims of human rights violations. It is contended that this approach is the only way of maintaining focus on H.T. victims and their interests in order to avoid the issue from being simply reduced to a public order, migration or transnational crime problem.¹²² As a result, there has been a trend towards the utilisation of a human rights approach to H.T. by the international community.¹²³ Also, since the structural issues associated with H.T. are socio-economic (e.g., poverty), there has been a call for them to be addressed by reference to the international human rights law [hereinafter I.H.R.L.] system.¹²⁴ Chuang avers that framing the problem of addressing the root causes of H.T. as a human rights issue would promote a proactive approach that is aimed at tackling the problems.¹²⁵ This Section will critically analyse the literature on the merits of utilising the I.H.R.L. system as a conceptual framework for addressing the root causes of H.T.

Due to the centrality of exploitation in H.T. situations, it is generally accepted that the phenomenon is one that concerns human rights violations. Some of the most recognisable violations pertain to the right to liberty, security of the person, non-discrimination, and the right to personal and physical integrity.¹²⁶ These rights cover a wide range of activities in the social reproduction of life, and are encroached upon through the various stages of the H.T. process such as recruitment, harbouring, transportation and exploitation. A human rights approach to H.T. is a conceptual

¹²² C.R.J.J. Rijken, *A Human Rights Based Approach to Trafficking in Human Beings*, 20 *SEC. & HUM. RTS.* 212, 215 (2009).

¹²³ UNCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36 7-8, (2014).

¹²⁴ See Chuang, *supra* note 9, at 157; The Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18, at article 9(4) obliges states to “take or strengthen measures. . . to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.

¹²⁵ Chuang, *supra* note 9, at 157.

¹²⁶ Rijken, *supra* note 122, at 215.

framework that deals with the H.T. problem normatively, based on I.H.R.L. standards, and which is also designed to protect these rights.¹²⁷ Here too, liberal values such as the rule of law, liberty, universality and equality are echoed – which will be critiqued later on in the analysis of the merits of this approach.¹²⁸ These values are said to give guidance to the human rights-based approach to H.T. It is argued that this framework has the potential of offering a legal and political space for vulnerable persons in the society to claim these rights and establish state responsibility.¹²⁹ From this background, the use of I.H.R.L. is proposed as a conceptual framework for addressing the root causes of H.T. The discussion below will critically analyse the value of such an approach.

2.2.2. HUMAN RIGHTS APPROACH AND ROOT CAUSES

Various scholars have identified “poverty” as a root cause for trafficking-related exploitation.¹³⁰ It is broadly accepted that socio-economic circumstances play a vital role in the trafficking process and that those vulnerable to victimisation disproportionately occupy a lower socio-economic status in society.¹³¹ Such persons are often desperate to find employment and, in that process, overlook the hazards associated with a job offer. Kumar argues that “a family in desperate need of money is inclined to say yes even without knowing the full nature and circumstances of the work”,¹³² Cameron and Newman agree with this assertion and are of the view that poverty acts as a catalyst for H.T. as it places people in circumstances where they have few alternatives.¹³³ This desperation increases their vulnerability to deception and coercion.¹³⁴ It also decreases their chances of removing themselves from exploitative situations, as doing so would deprive them of a source of livelihood. In other words, their only choice is to either remain in the exploitative situation or face starvation as a “free” person.

Those who advocate for a human rights approach to poverty reduction argue that this conceptual framework will lead to the empowerment of poor people and

¹²⁷ *Id.* UNCHR, *supra* note 123, at 8.

¹²⁸ Rijken, *supra* note 122, at 215.

¹²⁹ Chuang, *supra* note 9, at 157.

¹³⁰ Cameron & Newman, *supra* note 108, at 22; Laura Gauer Bermudez, *No Experience Necessary: The Internal Trafficking of Persons in South Africa*, IOM 12 (2008), https://pdf.usaid.gov/pdf_docs/pnado562.pdf; Natalia Ollus & Matti Joutsen, *International Policies To Combat Human Trafficking*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF HUMAN TRAFFICKING A MULTI-DISCIPLINARY AND APPLIED APPROACH* 72 (Rochelle Dalla & Donna Sabella eds., 1st ed. 2019).

¹³¹ Bermudez, *supra* note 130, at 12.

¹³² Bal Kumar KC et al., *Nepal Trafficking in Girls with Special Reference to Prostitution: A Rapid Assessment*, ILO 24 (2001), https://s3.eu-west-3.amazonaws.com/observatoirebdd/2001_Trafficking_girls_prost_Nepal_ILO.pdf.

¹³³ Cameron & Newman, *supra* note 130, at 22.

¹³⁴ *Id.*

expand their freedom of choice.¹³⁵ It is asserted that human rights empower victims by granting them rights that are enforceable against others and remove the powerlessness associated with poverty. Narayan and Petesch are, however, of the view that poor people are usually aware of their rights and encroachments pertaining to conditions of employment, but are often powerless to enforce them.¹³⁶ This is because of their financial dependence on the traffickers and the fact that demanding their rights will likely endanger their livelihoods as they are labelled troublemakers.¹³⁷ The apparent limitation of the I.H.R.L. conceptual framework is that it is grounded in the liberal legal tradition, which assumes individual liberty on the basis of legal recognition.¹³⁸ However, poverty challenges the liberal notions of individual liberty as it compels people to enter and stay in exploitative working conditions.¹³⁹

Furthermore, while such an approach might be instrumental in protecting the rights of H.T. victims after the fact, it has been criticised for being reactive to individual instances of exploitation.¹⁴⁰ In other words it fails to deal with the root causes of poverty itself (capitalism and neoliberalism) by dealing with workers as individual victims and “employers” as individual “bad apples”.¹⁴¹ Marks, after having analysed the human rights movement’s investigation of root causes to rights abuses offered a useful critique. She observed a tendency in the movement to halt the investigation of causes too soon before identifying the actual root causes.¹⁴² For instance, this is demonstrated through attention being directed at human rights abuses themselves without addressing the vulnerabilities that make people prone to such abuses.¹⁴³ Where vulnerabilities are discussed, the analysis does not go far enough to interrogate the “conditions that engender and sustain those vulnerabilities”.¹⁴⁴ In a few instances where the conditions (e.g., poverty) are highlighted, the discussion ignores the larger framework within which those conditions are systemically reproduced.¹⁴⁵ The consequence of such an approach is that it ends up treating symptoms of the problem as root causes.¹⁴⁶ The result is that

¹³⁵ U.N. OHCHR, *Human Rights and Poverty Reduction a Conceptual Framework*, at 14, (2004).

¹³⁶ Deepa Narayan et al., *Voice of the Poor from Many Lands* 492 (Deepa Narayan & Patti Patesch eds., 1st. ed. 2002).

¹³⁷ *Id.*

¹³⁸ See Catherine Renshaw, *What Is a Classical Liberal Approach to Human Rights*, THE CONVERSATION, (Mar. 18, 2014), <https://theconversation.com/what-is-a-classical-liberal-approach-to-human-rights-24452>.

¹³⁹ See Kathmandu Gaushala et al., *Cross Border Trafficking of Boys* 18 (2002).

¹⁴⁰ See Katie Cruz, *Beyond Liberalism: Marxist Feminism, Migrant Sex Work, and Labour Unfreedom*, 26 FEM LEGSTUD 65, 84 (2018).

¹⁴¹ See Hilary, *supra* note 16, at 17-19; Cruz, *supra* note 140, at 84; Marx, *supra* note 37, at 496 states that: “. . . the production relations in which the bourgeoisie moves have not a simple, uniform character, but a dual character; that in the selfsame relations in which wealth is produced, poverty is produced also”.

¹⁴² Marks, *supra* note 10, at 71.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 72.

the human rights approach inadvertently overlooks and/or discourages engagement with the systemic character of abuses and only treats symptoms of the problem. By treating effects as causes depoliticises the problem leading to ineffective responses as it shall be discussed below.

2.2.3. MARXIST CRITIQUE OF THE HUMAN RIGHTS-BASED APPROACH

The practical implication of an approach that focuses on abuses, and treats symptoms as root causes, is that it focuses more on formal and procedural justice contained in the rule of law — while the substantial systemic injustice that is causing the H.T. phenomenon is ignored.

This reflects the role that the law plays as an ideology. While the human rights approach formally announces and guarantees every person's liberty, it simultaneously masks and sustains the inequality and oppression that is a characteristic of a capitalist society.¹⁴⁷ In theorising capitalism, Weber stated that it requires a “free” labour force that is able to move from employer to employer to satisfy demand.¹⁴⁸ The key to sustaining such a supply of labour is grounded in *inequality*: that is, the presence of a “propertyless stratum” that sells its labour power “under the compulsion of the whip of hunger”.¹⁴⁹ This, of course, necessitates the private appropriation of the means of production, which is to be controlled by the dominant class. Thus, for capitalism to survive the “labour power withdrawn from the market by wear and tear and death, it must be continually replaced by, at the very least, an equal amount of fresh labour-power”,¹⁵⁰ Capital does not care about the health or working conditions of the worker as experience has shown that, due to the propertyless class, there is always excess labour available. Marx states that this excess is “made up of generations of human beings stunted, short-lived, swiftly replacing each other, plucked, so to say, before maturity”.¹⁵¹

Therefore, despite its role in sustaining the capitalist relations of production and safeguarding the capitalist's interests, the law presents itself as universal and representing the interests of all the people in the community.¹⁵² Marks highlights that “universalisation” is one of the strategies that ideology employs, which operates by making the law appear “impartial, inclusory and rooted in considerations of mutual

¹⁴⁷ See Marie-Bénédicte Dembour, *Critiques*, in INTERNATIONAL HUMAN RIGHTS LAW 49 (Moeckli et al. eds., 2018).

¹⁴⁸ See Collins, *supra* note 38, at 928.

¹⁴⁹ *Id.*

¹⁵⁰ Marx, *supra* note 37, at 121.

¹⁵¹ *Id.* at 181.

¹⁵² Nicolson, *supra* note 25, at 45.

interest.”¹⁵³ The idea is that the law protects *every person* from any unlawful interference with their individual autonomy and property. It treats equally the employer’s capital and the worker’s human rights.¹⁵⁴ Hence, when it protects the interests of the capitalist it presents them as the interests of everyone.¹⁵⁵ In such a way, the law’s universal form works to depoliticise its practical application.

Since human rights law is grounded in the liberal legal tradition, Marxists have long questioned whether it can truly lead to true human emancipation.¹⁵⁶ Kennedy has argued that I.H.R.L. “does more to produce and excuse violations than to prevent and remedy them.”¹⁵⁷ This is because human rights remedies “treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself.”¹⁵⁸ This is the case for instance when poverty (a symptom of capitalism)¹⁵⁹ is sought to be addressed by reference to a human rights based approach that promotes socio-economic rights.¹⁶⁰ By construing both the problem and solution very narrowly, human rights discourse insulates the political economy that is responsible for bringing about the problem.¹⁶¹

By aligning itself with the liberal political economy, the human rights-based approach largely fails to bring about true human emancipation to H.T. victims. Marx’s *On the Jewish Question* distinguishes between political emancipation and human emancipation.¹⁶² Political emancipation is achieved through the human rights approach as it entails the formal recognition of rights of the individual. While political emancipation is a step forward in the fight against H.T., it is not the final form of human emancipation.¹⁶³ Human emancipation is substantive and can be achieved when divisions (inequalities) between members of the society are eliminated.¹⁶⁴

¹⁵³ See Susan Marks, *Big Brother is Bleeping- With the Message that Ideology Doesn’t Matter*, 12 EUR. J. INT’L L. 109, 112 (2001).

¹⁵⁴ Nicolson, *supra* note 25, at 45.

¹⁵⁵ *Id.*

¹⁵⁶ See Talal Asad, *What Do Human Rights Do? An Anthropological Enquiry*, 4 THEORY & EVENT (2000), <https://muse.jhu.edu/article/32601> (last visited Sept. 29, 2022). (Asad urges people to “examine critically the assumption that. . . human rights always lead in an emancipatory direction, that they enable subjects to move beyond controlling power into the realm of freedom”.)

¹⁵⁷ See David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARVARD HUMAN RIGHTS JOURNAL 101, 118 (2002).

¹⁵⁸ *Id.*

¹⁵⁹ Hilary, *supra* note 16.

¹⁶⁰ See Chuang, *supra* note 9, at 161.

¹⁶¹ Kennedy, *supra* note 157, at 109.

¹⁶² See Karl Marx, *Bruno Bauer, The Jewish Question, Braunschweig*, in DEUTSCH-FRANZÖSISCHE JAHRBÜCHER 15 (1844), <https://www.marxists.org/archive/marx/works/download/pdf/On%20The%20Jewish%20Question.pdf> (last visited Sept. 29, 2022).

¹⁶³ *Id.* at 7.

¹⁶⁴ *Id.* at 15.

Therefore, by treating symptoms as root causes – the human rights approach does not adequately investigate the causes of the H.T. problem. Instead of providing remedies to the problem, the I.H.R.L. framework contributes to the naturalisation of exploitation by insulating the systemic issues at the heart of the H.T. phenomenon.

2.3. CELEBRITY HUMANITARIANISM

While celebrity humanitarianism is not a traditional approach that can be equated with the previous two approaches, it plays an important role in legitimising an emerging anti-trafficking consensus driven by abolitionism and/or anti-sex work politics.¹⁶⁵ A recent study has highlighted that this approach has been influential in “legitimising troubling legislative, policing, and security interventions, and generating an anti-trafficking common sense that is increasingly difficult to challenge.”¹⁶⁶ It is from this background that it deserves to be analysed as a distinct approach contributing to the wider debate on H.T. approaches.

Celebrity humanitarianism is a more recent approach to the H.T. problem, which is characterised by charity and philanthropy by entertainment personalities, billionaires and Non Governmental Organizations (N.G.O.s).¹⁶⁷ These entities have in recent times selected H.T. and modern slavery as social ills to speak against and to be actively involved in the “rescue” of victims.¹⁶⁸ This approach to H.T. is materialised through “mediatized events (concerts, awareness campaigns . . . travel to crisis areas), personal charity (donations . . . child adoption), or lobbying . . .”¹⁶⁹ The main focus of such celebrity campaigns and activism is directed at “rescuing” women and young girls while borrowing, largely, terms such as modern slavery and sex trafficking from the abolitionist approach.

One of the most highly publicised celebrity campaigns is that of the DNA Foundation, which launched the “Real Men Don’t Buy Girls” campaign enlisting Hollywood personalities to advocate against sex trafficking through adverts and social media videos.¹⁷⁰ The role played by these celebrities in raising awareness of H.T. issues has increased through extensive use of social media platforms where they have a huge

¹⁶⁵ See Robert Heynen & Emily van der Meulen, *Anti-trafficking saviors: Celebrity, slavery, and branded activism*, 18 CRIME MEDIA CULTURE 301 (2022).

¹⁶⁶ *Id.* at 303.

¹⁶⁷ Kapoor, *supra* note 121, at 1.

¹⁶⁸ Kempadoo, *supra* note 12, at 11.

¹⁶⁹ Kapoor, *supra* note 12, at 13.

¹⁷⁰ See Cordelia Hebblethwaite, *By BBC Trending: #RealMenDontBuyGirls and the #BringBackOurGirls campaign*, BBC (May 8, 2014), <https://www.bbc.co.uk/news/blogs-trending-27328414>.

following; and hence, are able to influence the masses. What is concerning is that these celebrities have been able to reach “expert-advocate” status in such crucial matters by reason of the trust placed in them by the public without, however, understanding the complexities inherent in H.T. issues.¹⁷¹ As a result, they have managed to reduce “the complexity of both the problem and its potential solutions to sound bites, leading the public to believe that doing something-anything at all- is better than doing nothing, when the opposite may well be true.”¹⁷² This explains the approach adopted by the DNA Foundation in the “Real Men Don’t Buy Girls” campaign where they made simplistic videos poking fun at things that “real men” are not supposed to do like grilling a cheese sandwich on an iron, or driving while blindfolded in a bid to dissuade men from buying sex. Such approaches, while amusing, only serve to contribute to the precarity regarding victims when pushing for anti-prostitution ideologies, more surveillance on the sex trade, the criminalisation of migrants and the adoption of more immigration restrictions against people from less wealthy parts of the world often referred to as States of origin.

More importantly, these celebrity humanitarian campaigns contribute to the reproduction of existing ideals and the depoliticisation of H.T. issues. A cursory look at the “real men” campaign will show that emphasis is placed on advocating for individual interventions through, say, stopping individuals from buying sex. Such a focus on individual responsibility as a solution to the problem disavows the need to explore structural solutions to the H.T. problem.¹⁷³ Thus, by adopting this approach to H.T., the actual system that is making victims vulnerable through poverty and the reproduction of inequalities is not called into question. It is from this background that Kapoor argues that celebrity humanitarianism tends to be ideological in nature through sustaining and upholding capitalism even if it causes inequalities.¹⁷⁴ For instance, charity work is ideological to the core as it not only masks the inequalities but profits from them. In fact, the very emergence of celebrity charity work is linked to the development of capitalism – which promotes philanthropy as a remedy for structural problems.¹⁷⁵ This philanthropy in effect serves to soothe the harms and trauma caused by capitalism and neoliberalism – consequently masking the contradictions inherent in the political economy. This is the strategic function of ideology which naturalises the perception of

¹⁷¹ See Alexandra Fanghanel et al., *Sex and Crime* 145 (SAGE Publications Ltd ed., 2021).

¹⁷² See Dina Haynes, *The Celebrityization of Human Trafficking*, 653 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 25, 40 (2014).

¹⁷³ See Samantha Majic, *Real men set norms? Anti-trafficking campaigns and the limits of celebrity norm entrepreneurship*, 14 *CRIME MEDIA CULTURE* 289, 290-297 (2018).

¹⁷⁴ Kapoor, *supra* note 12, at 33.

¹⁷⁵ *Id.*

capital as the saviour in the fight against H.T. — conveniently ignoring that capitalism itself produces the problematic manifestations that campaigners are seeking to combat.

CONCLUSION

The article has critically analysed the three prevalent approaches to H.T., and it has been shown that they all lack the conceptual depth required to tackle a complex phenomenon such as H.T. All three approaches are simplistic and offer a narrow lens in the problematisation of H.T. As a result, they lead to the adoption of policies that only address the symptoms of the H.T. problem, such as, labour, criminal and sexual exploitation. They ignore the structural issues that are making people vulnerable to trafficking related exploitation. There is, therefore, a need for further research that re-conceptualises the H.T. problem with reference to philosophical perspectives that can adequately grasp the full picture of the problem. This is necessary for the understanding of the root causes to H.T. and the ultimate success of efforts designed to prevent it.

*THE ROOT CAUSES OF HUMAN TRAFFICKING: A CRITICAL ANALYSIS OF THE CONTEMPORARY
APPROACHES TO HUMAN TRAFFICKING*