

The challenge of legalistic approach to protecting the rights of trafficking victims in South Africa

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1	Introduction.....	183
2	Theoretical foregrounding	185
3	Current protection mechanisms against trafficking in persons in South Africa	187
4	Gaps in current regulations and protection against human trafficking.....	193
5	Traditional practices as complementary approaches	197
6	Conclusion	204

Abstract

This chapter discussed the intractable nature of human trafficking in Africa. Its specific focus is on the weaknesses of a wholly legalistic approach to protecting and assisting trafficking victims, especially in the context of South Africa. It is argued that the persistence of human trafficking in Africa is a serious problem because the crime deprives victims of the right to life, security, and freedom from slavery through coercion, isolation, forced labour and sustained systematic abuses. While South Africa has ratified international treaties relating to human trafficking, the country remains a source, destination and transit hub in the human trafficking flows. The persistence of trafficking in Africa and South Africa is particularly blamed on the deficiencies of a heavy reliance on a legalistic approach to addressing the problem. The identified shortcomings of the legalistic approach highlighted in the chapter are a lack of clear conceptual separation of trafficking victims from illegal migrants and gender-based violence victims. Other deficiencies include inconsistent legal interpretation

and implementation of standard operating procedures for victim identification and referral for protection and necessary assistance by host countries. To strengthen victim protection and assistance, as well as effective prosecution of trafficking offenders, the chapter argues for the necessity of recognising internalised fear of the unknown as the major weakness of the legalistic approach. Fear of the unknown is caused by threats of violence and perceived negative effects of backtracking from secret oaths administered on victims by human trafficking perpetrators before powerful African deities. Fear prevents victims from testifying against suspected human traffickers in courts, thus helping them escape the full weight of the law. Given the shortfalls of relying entirely on legal approach to effectively address human trafficking problem, especially victim protection and assistance; the chapter proposed an integrated approach that complements formal legalistic measures with trado-religious, and socio-cultural practices.

Key words: *human trafficking; legalistic approach; South Africa; victim protection; integrated approach*

1 Introduction

Human trafficking continues to manifest in various forms, especially in Africa, despite legal efforts at national, regional and international levels to combat it. This chapter analyses human trafficking as an intractable human rights problem in Africa, using South Africa as a reference point. Accordingly, victims' recruitment through coercive and deceptive means, isolation and prevention of victims from communicating with family and friends, restriction of movement, forced labour, physical abuse and intimidation, and poor living and working conditions at destination countries constitutes gross human rights violations.¹ Specifically, by subjecting victims to the aforementioned conditions, human traffickers violate victims' rights to life, liberty, security, freedom of movement and freedom from slavery or servitude.² Physical abuse and intimidation

1 United Nations Office of the High Commissioner 'Human rights and human trafficking' (2024).

2 Universal Declaration of Human Rights, 1948.

violate victims' rights to security as well as the right not to be subjected to torture, cruel, inhuman and degrading treatment or punishment.³

In South Africa, the endemic nature of human trafficking is well documented.⁴ Extant literature shows that trafficking in persons in the country is international, domestic and intra-regional in nature.⁵ Intra-regional trafficking involves victims trafficked from one African sub-region to another while international trafficking involves the trafficking of persons from the African region into other parts of the world. International trafficking occurs more frequently than trafficking of victims within African countries. These forms of trafficking involve criminal syndicates from Africa, Europe, Asia and South America, who use African countries such as South Africa as a source, destination or transit route to other countries in the world.⁶ The endemic problem and the need to combat it has resulted in the ratification of international anti-trafficking treaties and the adoption of specific legislation by almost all African states.

The enacting of specific national legislation criminalising trafficking activities demonstrates the significant awareness, acknowledgment and preparedness to combat this phenomenon in South Africa.⁷ However, South Africa is still ranked as a 'Tier 2 country' in the US State Department's annual report on preventing and combating of trafficking in persons.⁸ The ranking implies that South Africa has not fully met the minimum requirements necessary to combat human trafficking.⁹ An examination of South Africa's efforts towards combating human trafficking reveals that the country is falling behind mainly in the areas of assistance and protection of the rights of trafficking victims.

3 International Covenant on Civil and Political Rights (ICCPR), 1966 art 7.

4 US State Department '2023 trafficking in persons report' <https://www.state.gov/reports/2023-trafficking-in-persons-report/> (accessed 27 December 2023); RO Iroanya *Human trafficking and security in Southern Africa: The South African and Mozambican experience* (2018) 1; J Martens and others 'Seduction, sale and slavery: Trafficking in women and children for sexual exploitation in Southern Africa' (2003) *International Organisation for Migration (IOM)* 93.

5 RO Iroanya and others 'Human trafficking and illicit financial flows in Africa' (2019) 25 *Journal of Namibian Studies* 47.

6 Martens and other (n 4) 93.

7 Iroanya and others (n 5) 209; Southern Africa Development Community (SADC) 'Trafficking in persons in the SADC region: A baseline Report' (2016) SADC 11.

8 US State Department 2022 'Trafficking in persons report', <https://www.state.gov/reports/2022-trafficking-in-persons-report> (accessed 23 December 2023).

9 As above.

The protection of victims' rights is a cardinal pillar of the United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000 (Palermo Protocol).¹⁰ The international instrument, domesticated in South Africa, provides for the protection of the fundamental human rights of trafficking victims and their referral to specialised care structures and reintegration into society.¹¹ While relative progress has been made with respect to arrests, criminal prosecution and conviction of trafficking offenders based on national legislation, South Africa remains challenged with respect to protection of the rights of trafficking victims. Consequently, in recent times, individuals reasonably suspected to be victims of trafficking have been detained and deported instead of being referred to care services and shelters in different parts of South Africa.¹² These challenges indicate that a predominantly legalistic intervention to prevent and combat crime in the form of trafficking in persons is not sufficient to comprehensively address the problem and protect the fundamental rights and human dignity of victims. The persistence of trafficking in persons and consequent breach of the rights of victims indicate a deficiency in the predominantly legalistic approach. It evokes the need for an integrated approach involving socio-cultural and traditional approaches.

Accordingly, this chapter addresses the deficiencies of a predominantly legal approach to solving the problem and proposes formal legal approaches that consider, to a large extent, contexts such as socio-cultural practices.

2 Theoretical foregrounding

An analysis of the inherent deficiencies in a predominantly legalistic approach to protect the rights of trafficking victims in South Africa and the need for integrating socio-cultural practices to it requires the foregrounding of this discussion on the theoretical insights of Pierre Bourdieu. Bourdieu provides a relevant framework for studying and understanding how societies through *habitus* reproduce themselves:¹³

10 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000 (Palermo Protocol) sec 3(b).

11 As above.

12 US State Department (n 4).

13 P Bourdieu *Outline of a theory of practice* (1977).

Habitus is conceptualised as institutionalised and intersubjective ways and means through which people understand, identify and relate to the social world they live in. Differently stated, *habitus* refers to collective views, attitudes, values, and ways of reasoning and behaving acquired through experience either consciously or unconsciously.

While *habitus* is characterised by internalisation, transposability and changeability, its application in this chapter focuses on two of these characteristics, namely, internalisation and transposability. *Habitus* internalises in people within particular social worlds a belief system by defining or conferring values upon material and immaterial things. Accordingly, valued materials and immaterial things constitute cultural capital and the possession of cultural capital determine how social and cultural relations in the society are conducted. Thus, much value is intersubjectively placed on traditional oath swearing, administered by priests of powerful deities in different African societies, making agreements and relationships unbreakable by the parties involved. In the African *habitus*, the traditional oath is revered, and breaking an oath carries severe eternal consequences.¹⁴ This belief system is internalised and respected by all irrespective of social status, educational attainment and religious orientations.

The transposability of the African *habitus* anchored on traditional oath taking is described by its institutionalisation and resilience across time and space. Thus, beliefs, values, thoughts and feelings that direct people's actions and decisions in different African societies are transferable from one generation to another. This means that the African *habitus* produces and reproduces not only itself but its subjects as well through social institutions such as families, age grades and educational institutions. These critical institutions of socialisation enable the reproduction socio-cultural conditions that determine how people relate with one another in society.¹⁵

Through internalisation and transposability, traditional beliefs in rituals such as oath taking before powerful deities legitimise and preserve systems of oppression, exploitation and

¹⁴ NH Msuya 'Tradition and culture in Africa: Practices that facilitate trafficking of women and children' (2017) 2 *Dignity: A Journal on Sexual Exploitation and Violence* 1.

¹⁵ Bourdieu (n 13).

inequality inherent in the trafficking in persons. These processes distort and obscure the lines between naturally acquired forms of behaviour such as honouring of agreements, respecting authorities and those developed as a result of fear of the consequences of disobedience of traffickers and over-dependence on them.

3 Current protection mechanisms against trafficking in persons in South Africa

The Palermo Protocol mandates member states to enact and implement specific national anti-human trafficking legislation. Before the adoption of a specific national anti-human trafficking legislation, South Africa prosecuted human trafficking offenders under the Children's Act, which aims to protect the rights of children as provided for in the South African Constitution and to combat trafficking in children and the Criminal Law (Sexual Offences and Related Matters) which criminalises sexual abuse or exploitation and all conducts constituting trafficking in persons for sexual exploitation. The general nature and incomprehensiveness of these pieces of legislation to address the problem of human trafficking in South Africa necessitated the adoption of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (PACOTIP) in 2013. The adoption of PACOTIP, modelled on the Palermo Protocol, fulfilled South Africa's obligation by criminalising all forms of trafficking in persons.¹⁶ Therefore, the coming into effect of the national anti-trafficking legislation supplemented by related legislation such as the Children's Act of 2005 and the Criminal Law (Sexual Offences and Related Matters) of 2007 provides sufficient legal instruments to combat human trafficking in South Africa.

PACOTIP demonstrated the South African government's commitment and determination to address the problem of trafficking in persons. However, empirical evidence shows that despite sufficient legal instruments, South Africa has not achieved appreciable level of success in combating trafficking in persons problem to improve its rating by the

¹⁶ The Prevention and Combating of Trafficking in Persons Act (PACOTIP) ch 2 secs 4(1), (2), (3), (4), (5), (6), (7), (8) & (9).

United States (US) Department of State's ranking of countries' efforts.¹⁷ South Africa's major deficiencies, as previously alluded to, relate to victim protection and assistance. Accordingly, a brief review of South African government's efforts in the areas of victim protection and assistance in subsequent parts is necessary.

3.1 Legal approach toward protecting victims in South Africa

The South African approach to combating trafficking in persons is predominantly legalistic and anchored on the Palermo Protocol. South Africa signed the Palermo Protocol in December 2000 and in August 2004 ratified the international legal instrument. Ratification of the Protocol obliged South Africa to enact national anti-trafficking legislation and to comply with other obligations of the Palermo Protocol under article 5, which it did in August 2013. Before the enactment and adoption of its specific national anti-trafficking legislation, the country relied on certain legal instruments to prosecute trafficking cases. These instruments included the Children's Act 38 of 2005 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The Children's Act (chapter 18, sections 281-291) is based on the principles of the Universal Declaration of Human Rights (1948) (Universal Declaration), which guarantees children's right to special care and assistance as well the rights of children as found in South Africa's 1996 Constitution. The suitability of the Children's Act in prosecuting trafficking cases was derived from its description of trafficking (chapter 18, sections 281-291) and other relevant provisions closely related to those of the Palermo Protocol. Based on this, it is argued that the Act gave partial effect to the Palermo Protocol.¹⁸ For example, the Children's Act described and prohibited trafficking activities, including sexual exploitation and abuse of custodianship of victims, close contact and abandonment of victims as well as deliberate neglect of a child by persons

¹⁷ US State Department 'Trafficking in persons report: South Africa' (2024); PO Bello 'Long-term criminal justice response to human trafficking in South Africa: An impossible mission' (2018) 21 *Contemporary Justice Review* 474; S Yesufu 'Human trafficking: A South African perspective' (2020) 17 *Journal of Social Sciences and Humanities* 103.

¹⁸ Iroanya (n 5) 209; M van der Watt 'Child trafficking and children in South Africa's sex trade: Evidence, undercounting and obfuscations' (2020) 12 *Child Abuse Research: A South African Journal* 58.

charged with parental responsibilities.¹⁹ Importantly and relevant to anti-trafficking efforts is the non-recognition by the Act of consent of a child, parent or guardian to trafficking as an excuse to the crime. Other critical aspects of anti-trafficking efforts addressed in the Act include the proscription of the harbouring of trafficked children; the advertisement, publication or broadcasting of information relating to trafficking through outlets such as the print and electronic media, particularly the internet. Operators of internet sites were required by law to report to the police websites that advertised or promoted trafficking activities.

With respect to protection and assistance of trafficking victims, the Children's Act provides under chapter 18 section 290 for the safe return to South Africa of children trafficked from South Africa to other countries who showed proof of South African citizenship or permanent residency. The state is required to fully cover costs incurred in facilitating the safe return of child victims of trafficking. State functionaries such as immigration officials, police officials, social workers, health practitioners or nurses are required in the Act to refer trafficked children to approved care centres. Similarly, the state is to ensure the safe return of foreign children trafficked into South Africa to their countries of origin. Public officials are mandated to ensure that trafficked foreign children are provided with necessary assistance they may need such as referral to certified social workers, placement in temporary shelters and appearance before a children's court. Foreign child victims of trafficking are to remain in South Africa pending determination by the children's court whether the children need care and protection or are to be returned to their countries of origin if necessary measures have been taken to guarantee their safety. Upon sufficient evidence of the involvement of parents, guardians or persons with parental responsibilities in the trafficking of a child, the Act provides for the suspension of such person's parental responsibilities and rights and the placement of the child in temporary care.

The Children's Act was complemented by the Sexual Offences Act (the Amendment Act) in addressing trafficking in persons before the adoption of specific national anti-legislation in 2013. The relevance

19 RO Iroanya 'Human trafficking with specific reference to South African and Mozambican counter-trafficking legislation' (2014) 27 *Acta Criminologica: Southern African Journal of Criminology* 102.

of the Sexual Offences Act (Amendment Act 32) to combating and preventing trafficking in persons is centred on its provisions relating to the description of trafficking in persons in line with but broader than the Palermo Protocol's definition. The amended Act expanded the definition of trafficking in persons by including terms such as 'supply', 'sale', 'disposal' or 'receiving of a person' and 'threat of harm'.

Equally significant to the anti-trafficking effort was its criminalisation of trafficking in persons for sexual purposes against the consent of the victims. The Amendment Act detailed activities that constitute trafficking and provided for the liability of the commission of these activities to criminal prosecution (Amendment Act, section 70(2)(b)). The Amendment Act defined consent and stated the conditions under which a victim may be coerced or forced into trafficking for sexual purposes (Amendment Act, section 70(2)(b)). Victims of trafficking were also not prosecuted for criminal and immigration offences that they might have committed as a result of being trafficked. However, it criminalised the bringing into South Africa or the removing of moving out of South Africa through land, air or sea of undocumented persons by commercial carriers. Upon conviction by a competent court, commercial carriers were liable to pay for the trafficked persons' care, safekeeping and return costs which will be ordered by the court upon conviction (Amendment Act sections 71(6)(a), (b), (c) and (d)). Trafficking in persons cases that were not covered in the two Acts described were prosecuted under general statutory or common law offences. Successful trafficking cases were prosecuted under this legislation.²⁰

The incompleteness and inadequacy of the Children's Act and Sexual Offences Act (the Amendment Act) and others in holistically addressing trafficking in persons offences and giving effect to the Palermo Protocol, prompted the enactment and adoption of PACOTIP, which came into effect in August 2013. The comprehensive legislation (PACOTIP) gave effect to the Palermo Protocol. Its main provisions can be summarised as criminalisation, judicial cooperation, victim protection and assistance.

With specific reference to the protection and assistance of victims, PACOTIP gives effect to South Africa's obligations in terms of

20 HB Kruger & H Oosthuizen 'South Africa – Safe haven for human traffickers? Employing the arsenal of existing law to combat human trafficking' (2012) 15 *Potchefstroom Electronic Law Journal* 283.

international agreements and the return of victims to their countries of origin. Furthermore, PACOTIP makes provision under chapter 2, sections 4-12 for offences linked to trafficking and the penalties (sections 13(a)-(e)) that may be imposed in respect of the offences upon conviction by the court. Other measures to protect and assist victims of trafficking in persons, as well as for coordinated implementation, application and administration of the legislation, are also covered in chapters 6, 7, 8 and 9 of the legislation.

3.2 National programmes

Besides providing sufficient legal instruments to fight trafficking in persons, the South African authorities introduced several programmes, such as *Tsireledzani* in line with the provisions of PACOTIP to address trafficking in persons.²¹ The country's approach recognises the multifaceted and transnational nature of the problem of trafficking in persons and the need for concerted effort at national, provincial and municipal levels of governance in South Africa. Thus, South Africa launched the Prevention and Combating of Trafficking in Persons (TIP), National Policy Framework on 25 April 2019.

At the strategic level, the policy framework provides for the creation of the National Inter-Sectoral Committee on Trafficking in Persons (NICTIP), chaired by the Department of Justice and Constitutional Development, which coordinates efforts towards combating trafficking in persons at the national level. This Committee is comprised of participants from the Department of Home Affairs, the Department of Social Development, South African Police Services (SAPS), the National Prosecuting Authority (NPA), the Department of Health, the Department of Employment and Labour, the Department of International Relations and Cooperation and civil society organisations, among others. Among other responsibilities of NICTIP are the examination and proposing of amendments to the ant-trafficking legislation and the creation of awareness, making and dissemination of information on

21 Iroanya (n 19) 102.

trafficking in persons as well as supporting anti-trafficking organisations and non-governmental Organisations (NGOs).²²

The National Rapid Response Team, which operates at the national level and coordinates anti-trafficking activities, investigation, identification of victims, provision of referrals, counselling and rehabilitation of victims. These functions are replicated at the provincial level by the Provincial Rapid Response Teams which regularly meet with NICTIP in order to ensure proper coordination.

3.3 Victim protection and assistance

Article 6 of the Palermo Protocol provides that trafficked persons should not be criminalised but rather regarded as victims of the crime of trafficking, entitled to human rights protections. In this regard, state parties to this protocol are obliged to provide human trafficking victims with a temporary resident permit, shelter, medical and psycho-social services, access to justice, and, to the extent allowed by law, compensation or restitution for their victimisation.

The foregoing analysis demonstrates that South Africa employs a multi-stakeholder approach to combating human trafficking. Multiple-stakeholder approaches take into consideration the complexity, transnational and multidimensional nature of the crime. Thus, this approach involves trained police officials as well as accredited NGOs, international organisations such as the International Organisation for Migration (IOM), labour unions, labour inspectors, social workers, health professionals, school teachers and workers at juvenile facilities. Through this approach, South Africa investigated 29 cases of trafficking in persons, initiated prosecution of 15 investigated cases and the arrest of 74 suspected traffickers in 2022.²³

The innovative, multiple-stakeholder approach is not working as efficiently as was intended, especially with respect to victim identification. Poor or inefficient identification procedures have implications for protection and rendering of necessary assistance to victims. In principle, the South African approach emphasises assisting victims and enabling

22 Department of Justice and Constitutional Development 'Prevention and combating of trafficking in persons national policy framework' 2019.

23 US State Department (n 4).

them to access available opportunities and resources necessary to regaining their human dignity and meaningfully participating in the economic and social life in South Africa. State institutions partner and collaborate with international organisations such as IOM, NGOs and community-based organisations in providing necessary services to trafficking victims. These services include, but are not necessarily limited to, temporary emergency shelter, food, legal assistance, interpreters, specialised medical care, psychosocial support and transportation. Presently, approximately 18 accredited NGO-run multipurpose shelters and NGO-run safe houses provide shelter and protection to trafficking victims in South Africa.²⁴

Whereas noticeable improvement is reported with respect to arrest, investigation, referral and provision of temporary shelter to trafficking victims, South Africa still lack behind in the area of the return/repatriation of human trafficking victims to their countries of origin. The decision to return or be repatriated home is left as a voluntary measure that takes into consideration the agency of the victims. The system of protection and assistance requires that the South African Department of Home Affairs provide suspected victims of trafficking and other vulnerable migrant populations with immigration documentation to enable them to stay in South Africa pending the finalisation of their cases.²⁵

4 Gaps in current regulations and protection against human trafficking

The predominantly legalistic approach has several deficiencies. These deficiencies are both intended and unintended. A noticeable gap in the South African approach to protection and rendering of assistance to trafficking victims is the determination of immigration status of victims as provided in its anti-trafficking legislation. Several reports show that Home Affairs officials tend to confuse or lob human trafficking victims

24 As above.

25 J Mofokeng & O Adewale 'Expert reflections on challenges experienced to address human trafficking in South Africa prior to the implementation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013' (2014) 1 *Criminologica: Southern African Journal of Criminology* 114.

with illegal migrants. The consequence of this confusion is the denying of access to immigration services to foreign trafficking victims.²⁶

The challenge stems from the laws being read or interpreted literally. Legal interpretation is complicated by the fact that laws are written in general terms and intended to apply to several people in a variety of circumstances and these terms are limited in their meanings.²⁷ The difficulty in the interpretation of the law makes the law a 'game with manipulative rules'.²⁸ This difficulty explains why regulations for implementing the immigration provisions found in sections 15, 16 and 31(2)(b)(ii) of PACOTIP have not been promulgated.²⁹ Thus, critical aspects of the law relating to the provision of assistance and protection to victims have not yet been activated. Differential interpretation of legal provisions also informs differential understanding and inconsistency in using standard operating procedures for identification, investigation and referral of suspected trafficking victims. The standard operating procedures were developed and intended to be used by all stakeholders, namely, SAPS, the Department of Social Development, NPA and the Department of Justice and Constitutional Development, in identifying and referring trafficking victims to care services, in accordance with the provisions of the anti-trafficking legislation.

However, reports show that agencies and provinces implement the standard operating procedures inconsistently.³⁰ Differential interpretation and implementation of the standard operating procedures result in serious problems such as re-trafficking as well as the conflation and misidentification of gender-based violence (GBV) victims and trafficking in persons victims.³¹ These two different groups are often lobbed together and accommodated in multi-purpose shelters with resultant misunderstanding regarding the immigration status of trafficking victims as well as delays in the implementation of regulations on the immigration provisions under sections 15, 16, and 31(2)(b)(ii) of

26 US State Department (n 4).

27 K Pistor & C Xu 'Incomplete law' (2003) 35 *New York University Journal of International Law and Politics* 931.

28 P Ewick & S Silbey *The common place of law: Stories from everyday life* (1998).

29 US State Department (n 4).

30 As above.

31 'Trafficking of Nigerian girls to Italy: Report of field survey in Edo State, Nigeria (2003), <https://www.corteidh.or.cr/tabcas/23515.pdf> (accessed 23 December 2023).

PACOTIP.³² These unintended consequences result in trafficking victims being considered illegal migrants and treated as such by institutions that are supposed to provide them the necessary assistance.³³ Increasing cases of re-trafficking in South Africa are also largely blamed on a lack of clarity on the immigration status of trafficking victims.³⁴

Disagreements over interpretations of certain provisions of PACOTIP among stakeholders and frequency of re-trafficking explains why some have consistently called for training and re-training of law enforcement agents on victim re-traumatisation and implementation of provisions of the anti-trafficking legislation.³⁵ The calls for training and re-training are also premised on the fact that a reasonable number of law enforcement agents, critical to the fight against trafficking in persons, lack the necessary training in the first place to prevent victim re-traumatisation, largely due to retirement and resignations, recruitment and the introduction of new members.³⁶ The lack of training among new members in identifying, referring and certifying trafficking victims' results in poor coordination and the inability of victims to access emergency services.

The law (PACOTIP) recognises the differential roles of agencies/stakeholders involved in the fight against trafficking in persons and defines their powers and functions. Although the legal authority or mandate of agencies is intended to serve a positive purpose, it often produces unintended consequences. The legal support of roles makes agents of stakeholders or institutions do everything within their powers to protect/defend their legal roles or functions in ways that often impede efficient implementation of victim protection and assistance programmes. In this regard, it is reported that a persistent complain of people at forefront of preventing and combating of trafficking in persons is poor coordination and communication between different institutions at national and provincial levels as well as between NGOs, SAPS and the Department of Social Development. Other challenges are related to limited capacity in terms of skilled personnel in institutions

32 CH Vhumbunu 'Combating human trafficking in the Southern African Development Community: Strategies, challenges, and opportunities' (2020) 42 *The Strategic Review for Southern Africa* 179.

33 Bello (n 17) 474.

34 US State Department (n 4).

35 Bello (n 17).

36 SADC (n 7).

such as SAPS (investigation and prosecution) as well as a lack of proper coordination among those responsible for identifying, referring and certifying trafficking victims. In many cases, these limitations result in delay on the part of SAPS to investigate reported cases of trafficking in persons and victims being denied to access emergency services.

Another problematic aspect is the inherently incomplete nature of the law.³⁷ It is this nature of the law that makes it difficult for one to make accurate predictions regarding the outcome of court cases as well as preventing out-of-court settlement of disputes. A critical analysis of new laws reveals certain weaknesses or loopholes that can be taken advantage of by legal minds.³⁸ In the context of South Africa, certain interested parties have already seen a loophole in the immigration provisions of the anti-trafficking legislation. Thus, the Department of Home Affairs is currently inundated by applications for various immigration permits. This has forced Home Affairs not to accord priority to perceived victims of trafficking.³⁹ It is also feared that foreigners illegally residing in the country might exploit the immigration provisions of PACOTIP to remain in the country for extended periods of time.

The rigidity, conservativeness, formalism and complexity of the law makes it necessary for the prosecution of trafficking victims to be evidence-based. Evidence in this context may be testimonial or physical. Whereas, physical evidence, as the name suggests, refers to tangible substances or objects which are relevant to the crime of trafficking, testimonial evidence refers to statements made by witnesses (*prima facie* evidence) showing that a suspect had directly committed the crime for which he or she is being prosecuted.⁴⁰ The prosecution of suspected traffickers in persons is heavily dependent on testimonial evidence. Prosecutors strongly rely on the testimony of trafficking victims to convict suspected traffickers in persons.⁴¹ This is especially because in most cases prosecutors cannot find enough physical evidence to prove their case in a court of law. Experience in the South African context has

37 Pistor & Xu (n 27).

38 JM Balkin 'Understanding legal understanding: The legal subject and the problem of legal coherence' (1993) 103 *Yale Law Journal* 105.

39 US State Department (n 4).

40 Pistor & Xu (n 27).

41 SA Demeke 'Human rights-based approach for effective criminal justice response to human trafficking' (2024) 9 *International Journal of Humanitarian Action* 1.

shown that victims of trafficking hardly testify against their traffickers in court even though the law provides for victims to voluntarily testify against traffickers in court.

Iroanya has demonstrated that the unwillingness of most rescued victims to testify against their traffickers is borne out of intimidation and threat of physical harm and fear of reprisals.⁴² Most importantly, the unwillingness of victims to testify against suspected traffickers is linked to traditional oaths taking before the shrine of powerful deities.⁴³ Extant literature show that traffickers make victims swear oaths of secrecy not to reveal their identities or work with the police to investigate and prosecute them. The repercussions for victims who retract their oaths are severe. It ranges from insanity to death, either of victims or direct family members.⁴⁴ The unwillingness of victims to cooperate with the police in investigating and prosecuting traffickers implies that the state would be unable to continue with trafficking cases, and suspected traffickers often go free. This reality is a major weakness of a predominantly legalistic approach to preventing and combating trafficking in persons. This weakness makes it necessary for the state to consider incorporating certain socio-cultural practices as complementary to legalistic approach in the fight against trafficking in persons. The inclusion is mostly needed in victim protection and assistance.

5 Traditional practices as complementary approaches

Both international and national anti-trafficking legislation provides for the protection of victims of trafficking from intimidation and threats by suspected traffickers facing trial. With specific reference to South Africa's PACOTIP, the state is mandated to take necessary measures to protect witnesses from intimidation as a result of their willingness to cooperate with law enforcement agencies and national prosecuting authorities in the investigation and prosecution of traffickers.⁴⁵ Accepting to cooperate with the state is rewarded by the issuing of a three-months visitor's visa

42 Iroanya (n 5).

43 CS Baarda 'Human trafficking for sexual exploitation from Nigeria into Western Europe: The role of voodoo rituals in the functioning of a criminal network' (2016) 13 *European Journal of Criminology* 259.

44 As above.

45 Sec 15(2)(3) PACOTIP (n 16).

which can be extended for another three months provided the victims are cooperating with the police and the national prosecuting authorities. A victim who has cooperated with the police and national prosecuting authorities may also apply for the rights of permanent residence in South Africa according to section 17 of PACOTIP.

These measures are geared towards providing assurance of physical and psychological protection of victims who have agreed to cooperate with the police and national prosecuting authorities as witnesses in criminal proceedings. From the foregoing, it is deducible that the South Africa's mechanisms for victim protection and assistance primarily focus on safeguarding against physical harm and on the possibility of remaining in the country. Threats of physical harm are direct but are not what trafficking victims fear the most. Victims of trafficking fear psychological threats emanating from traditional oath swearing the most. This accounts for why despite assurances of protection against physical and emotional harm and promises of reintegration into society, victims of trafficking in persons still refuse to cooperate with law enforcement and prosecuting authorities in investigating and prosecuting traffickers.

Accordingly, Millett-Barrett describes traditional oath swearing or 'juju' rituals as a powerful control mechanism used by traffickers on their victims.⁴⁶ Traditionally, oath swearing, which is taken at shrines of different deities and administered by traditional priests, serves as a form of covenant between the deities and parties to the agreement or relationship, for instance, marriage or business ventures recognised in traditional justice systems.⁴⁷ It is an integral part of the traditional belief system and takes a variety of forms and practices across different regions, peoples and cultures in Africa.⁴⁸ According to traditional belief system, oath swearing is limited neither by time nor space and is respected by all irrespective of social status, educational attainment and religious orientations.⁴⁹ It is comprised of several rituals involving, in some cases, blood sacrifices, carried out by people who claim direct priesthood of

46 J Millett-Barrett 'Bound by silence: Psychological effects of the traditional oath ceremony used in the sex trafficking of Nigerian women and girls' (2019) 4 *Dignity: A Journal of Analysis of Exploitation and Violence* 1.

47 M Ikeora 'The role of African traditional religion and 'juju' in human trafficking; Implications for anti-trafficking' (2016) 17 *Journal of International Women's Studies* 1.

48 Msuya (n 14) 1.

49 Msuya (n 14) 138.

powerful deities known to parties involved and purposefully aimed at preventing parties from turning away from an agreement even when things go wrong or they discover the agreement is not in their favour. The significance of traditional oath swearing lies in its acceptance among the people in places where formal legal processes play little role or no role in regulating and managing relationships among people.⁵⁰ Whereas in common law, the drafters of formal agreements make provisions for when, how and the means by which agreements can be terminated or cancelled, traditional oath swearing do not make such provisions. Thus, parties to it are bound to fulfil agreed obligations.

Traffickers in persons who often come from similar socio-cultural backgrounds as trafficking victims take advantage of this cultural practice to control, oppress and exploit victims. Rather than being used to regulate relations on a mutually beneficial basis, traditional oath swearing is instrumentalised by traffickers as an effective oppressive, exploitative and psychological control mechanism. The constant invoking of the consequences of renegeing on sworn oaths is aimed at perpetually keeping victims intimidated and spiritually bound.⁵¹ The practice, therefore, forms an integral part of the recruitment strategy of traffickers in persons. Traffickers are assured that expenses incurred by trafficking victims to their final destinations are not only paid in full but traffickers remain perpetually bound to serve them. They are also bound to remain silent about their ordeal and to protect the identities of traffickers and never to cooperate with the police in the event of arrest, investigation and prosecution of traffickers. The knowledge or belief that going back on oaths sworn at the shrine of a deity have severe physical and mental consequences is what keeps victims perpetually bound to traffickers.⁵²

Invariably, victims are cajoled into believing that they would face a variety of consequences ranging from insanity to death.⁵³ Traffickers take advantage of not only victims' desperation to travel abroad and make

50 As above.

51 Iroanya (n 5) 70.

52 As above.

53 M van der Watt & B Kruger 'Exploring 'juju' and human trafficking: Towards a demystified perspective and response' (2017) 48 *South African Review of Sociology* 70; S Ellis and others *This present darkness: A history of Nigerian organised crime* (2016) 77.

money but also their gullibility regarding the efficacy and desirability of oath swearing in criminal activities.⁵⁴ Okojie and Osaghae note that victims fear the potency of traditional oath swearing and other rituals because these are conducted at the shrine of a powerful deity and involve the use of victims' body parts such as hair, fingernails, blood, saliva and clothes. Exaggerated powers of deities and consequences of backtracking from promises made before them amplifies psychological fears of trafficking victims forces them to remain submissive to traffickers. Victims are not only concerned about their own safety, but also that of their direct family members. Therefore, they equally fear spiritual consequences of going back on their sworn oaths for direct members of their families.

The foregoing shows why traditional oath swearing has been recognised nationally, regionally and globally as a stumbling block to the effective prevention and combating of trafficking in persons.⁵⁵ The psychological fears it engrains on trafficking victims prevent them from taking appropriate actions and decisions such as cooperating with the police and national prosecuting authorities, which can liberate themselves from the bondage of trafficking. More so, victims make little or no progress in terms of rehabilitation and reintegration into host societies as well as societies from which they were uprooted. Psychological fears ensure that anxieties over failure, rejection, disconnection and commitment are intensified in them. The unwillingness to cooperate with law enforcement and prosecuting authorities frustrates efforts at preventing and combating trafficking in persons.

5.1 A case for the involvement of traditional priests

The mesmerising grip of traditional oath swearing on victims is often neglected or dismissed for lack of logical reasoning or mystical by law enforcement and prosecuting agencies. Some scholars, however, have recognised it as a serious challenge to the investigation of trafficking cases by law enforcement officers as well as national prosecuting authorities in countries such as South Africa.⁵⁶ Unfortunately, legalistic forms of

⁵⁴ O Okojie & V Osaghae 'Trafficking of Nigerian girls to Italy: Report of field study in Edo State, Nigeria' Master's dissertation, University of Benin, Nigeria, 2003 17.

⁵⁵ Van der Watt & Kruger (n 53) 70.

⁵⁶ As above.

protection provided to victims of trafficking have little or no solution to psychological intimidation and threats posed by traditional oath swearing.

Most often, law enforcement and prosecuting authorities eager for quick results display impatient dispositions towards trafficking victims due to their delays and uncooperating attitudes when asked to testify against their traffickers without necessarily finding out the underlying reasons.⁵⁷ Thus, in their impatience, victims who require assistance from state authorities are rejected, and subjected to non-extension of visitor's visas, investigations and deportation. The psychological fear hook on victims as a result of traditional oath swearing is hardly taken into consideration by authorities in making these decisions. Traditional belief system which holds that deities mete out instantaneous punishments on those who violate oaths made at their shrines is never seen as reason behind delay, refusal and unwillingness on the part of victims to testify against traffickers. These findings reasonably correlate with the conclusions of Ewick and Silbey regarding the relationship between legal formalism and an individual's legal consciousness. Ewick and Silbey show three distinct perspectives in which individuals view the law. First, the law is seen as authoritative (magisterial) and far removed (remote) from daily experiences people and in this sense fail to account or explain the reluctance of trafficking victims to testify against their traffickers. Second, the law is seen as a game with manipulative rules. Thus, culprits with good legal teams often take advantage of loopholes in the law to deny justice to those deserving justice. Third, the law is seen as an arbitrary power, not limited by rules or procedures and dependent on the will and discretion of individuals such as judges and prosecutors.

The strong influence of traditional oath swearing on victims who may be ardent believers in traditional belief systems relaxes the minds of traffickers and builds a level of trust in them that victims will never turn against them. This state of mind is believed to make traffickers refrain from physically abusing victims who had taken oaths, thereby creating the impression of honouring their part of the oath or agreement⁵⁸. The strong influence of oath swearing on trafficking victim to the

57 A Warria 'Challenges in assistance provision to child victims of transnational trafficking in South Africa' (2017) 21 *European Journal of Social Work* 710.

58 Msuya (n 14) 1.

point of refusing to testify against traffickers despite guaranteed state protection and assistance has much to do with strong devotion and faith in traditional African religion and culture among the people or what Bourdieu describes as *habitus*.⁵⁹ This is amplified by legendary stories, myths or superstitious beliefs and coincidental events of destruction, death or sickness attributed to powerful deities in the past. This strategy works well in favour of traffickers because, in most cases, traffickers and victims come from same communities or similar socio-cultural backgrounds and therefore know the purported powers of deities being invoked. Thus, the strong influence of traditional belief systems makes victims unenthusiastic and unwilling to cooperate with law enforcement and national prosecuting officers.

The power attributed to traditional oath taking is related to its function, reliability and practice over time among people. Its relative reliability can be seen from the broken state legal system in which agreements are often not honoured and parties end up in lengthy legal battles whereas, traditional oath swearing compels parties to abide by their assurances. As a preferred mode of agreement by traffickers, it does not make provision for break up and serves as continued means of control over victims. Its role in preventing states such as South Africa from sufficiently fulfilling its protection and assistance obligations to victims of trafficking in persons cannot be overlooked. Traditional oath swearing is feared by victims because it is believed that deities are not limited by time and space and can kill or make insane those who backtrack on their oaths irrespective of distance and where in the world they reside. This fact has been reported by Western public institutions such as the Finnish Immigration Services which found that some victims had gone into trances while on witness boxes as a result of fear of breaking their oaths. These institutions acknowledge that while the influence of oath taking does appear strange and mythical from a Western perspective, it remains a real problem and an obstacle to combating trafficking in persons especially for sexual exploitation in Europe.⁶⁰

59 SO Oyakhire 'Expanding the scope of 'appropriate measures': Do traditional institutions play in facilitating the protection of witnesses of trafficking in persons?' (2019) 6 *Journal of Comparative Law in Africa* 80.

60 Finnish Immigration Service, Country Information Service 'Trafficking of Nigerian women to Europe' Public theme report Suunataus Project: Human Trafficking (2015) 10.

As earlier noted, traditional oath swearing create perpetual fear which prevents trafficking victims from cooperating with the police and prosecuting authorities. To overcome this challenge, it is proposed that traditional practices be introduced to complement legal approaches. Psychological fears created by traditional oath swearing impact the thinking, emotion and behaviour of trafficking victims in their daily activities.⁶¹ Since oaths and curses were administered or pronounced by traditional priests, they require to be broken by other traditional priests. This is where the role of traditional priests or *sangomas* in South Africa comes in. South African *sangomas* carry out various functions in society such as divination and healing of physical, and emotional and spiritual sicknesses.⁶² Other functions attributed to them include performing of birth and death rituals, and counteracting of ancestral curses that affect people's fortunes.⁶³ *Sangomas* in South Africa are also believed to possess the ability to go into trance, connect with the spirit world and carry out mediation on behalf of people in the real world.⁶⁴ These functions and others such as diagnosis of misfortunes or causes of illness are carried out by spiritual messengers invited by *sangomas* through divination. *Sangomas* are therefore well-versed in employing magical spells of their spiritual powers to cast curses and protect people.⁶⁵ Through their cleansing powers, they are also able to help clients break oaths and prevent or reverse the consequences of oath breaking.

Following the logic of the African belief system, which holds that a curse placed by one traditional priest can be reversed, broken or removed by another priest or through a combined effort of powerful traditional priests, it is necessary to include these priests or *sangomas* in the psychological healing process of trafficking victims.⁶⁶ The intercessory role of *sangomas* between the real or material world and the spiritual world can assist trafficking victims in regaining confidence, breaking

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- 61 UR Kleinheimpel 'Covert syncretism: The reception of South Africa's sangoma practice and spirituality by double faith' in the contexts of Christianity and of esotericism (2017) 3 *Open Theology* 642.
- 62 Van der Watt & Kruger (n 53) 86.
- 63 T Nyandu & K Naidoo 'Traditional healers, their services and the ambivalence of South African youth' (2016) 14 *Commonwealth Youth and Development* 144.
- 64 Mofokeng & Adewale (n 25) 114.
- 65 A Teppo "Our spirit has no boundary": White sangomas and mediation in Cape Town' (2011) 36 *Anthropology and Humanism* 25.
- 66 Van der Watt & Kruger (n 53).

oaths and freeing themselves from the bondage of traffickers. A parallel to this approach can be drawn from Nigeria, where a traditional ruler together with his chiefs and indigenous spiritualists revoked oaths forced on trafficking victims and simultaneously placed a curse on human traffickers as part of the fight against human trafficking.⁶⁷ The involvement of *sangomas* in the fight against trafficking in persons in South Africa will increase the confidence of trafficking victims and enhance their willingness to cooperate with enforcement and prosecuting authorities in investigating and prosecuting suspected traffickers.⁶⁸

6 Conclusion

This chapter has analysed human trafficking as an intractable problem of human rights violations. It has argued that, despite the existence of anti-trafficking in persons legislation aimed at combating human trafficking nationally, regionally and internationally, the problem has persisted. Its persistence is due to the governments' predominantly legal strategies that prioritise detention, prosecution and deportation of victims over protection and provision of services to victims. Consequently, victims of trafficking in persons are still being detained and prosecuted for violating national immigration legislation and engaging in unlawful commercial sexual activities, and deported based on non-cooperation with law enforcement agencies in the prosecution of suspected traffickers.

It is acknowledged that in South Africa, commendable progress has been made following the adoption of PACOTIP in 2013 in terms of an increase in the number of arrests, criminal prosecutions, convictions of trafficking offenders and rescuing of trafficking victims. However, South Africa remains challenged with respect to effectively fulfilling its obligations to protect, assist, rehabilitate and return trafficking victims to their countries of origin, where they can be reintegrated into society. This is mainly because South Africa's protection and assistance programmes are based on the extent of a victim's cooperation with the South African Police Service and national prosecuting authorities in the investigation and prosecution of suspected traffickers as prescribed in PACOTIP. The refusal of victims to cooperate with law enforcement agencies and

67 Teppo (n 65).

68 As above.

national prosecuting officials has in many cases led to trafficking victims that are reasonably suspected to be detained and deported instead of being referred to care services and shelters in different parts of South Africa.

While laws are necessary to help solve intractable problems such as trafficking in persons, experience has shown us that we cannot always legislate our way out of every problem. The challenge faced in protecting and assisting trafficking victims indicates that a predominantly legalistic approach to preventing and combating trafficking in persons is not sufficient in addressing the problem. The law is limited in certain respects and needs to be complemented by other strategies. Thus, it has been proposed that traditional approaches be incorporated into national programmes to complement the laws. This is necessary because evidence has shown that criminalisation may lead to an increase in arrests, prosecutions and imprisonment of offenders, but cannot solve the problem of vulnerability to manipulative tendencies inherent in traditional oath swearing. Traditional oath swearing has the capacity to hold victims perpetually captive as well as limit the efforts of state authorities in preventing and combating trafficking in persons. The incorporation of traditional approaches can help victims overcome psychological fear of breaking traditional oath swearing that affects their thoughts, emotions and behaviour on a daily basis. Overcoming of psychological fear would improve the confidence of victims and enhance their willingness to cooperate with law enforcement and prosecuting authorities in countries such as South Africa.

Although the suggested strategy is aimed at managing and combating trafficking in persons, it is recommended that the law be complemented by poverty alleviating measures. This measure falls within the prevention strategy and should be targeted at the most vulnerable persons and areas susceptible to trafficking in persons operations in the country. These measures entail, among others, improving ongoing skills acquisition schemes in shelter houses which are directed at making victims acquire relevant skills that can enable them rehabilitate and reintegrate quickly into society and lead meaningful lives. The criticality of skills acquisition further makes it necessary for immigration officials to ensure that provisions of the South African anti-human trafficking legislation, which provides for judges to order victim restitution in trafficking cases, be effectively implemented to help victims rebuild their lives.

Given that the rigidity, conservativeness, formalism and complexity of the law prolong trafficking in persons cases, it becomes necessary that victims remain in countries where they were trafficked to until the finalisation of their cases. This means that the South African Department of Home Affairs needs to ensure that immigration services for trafficking victims are prioritised. Prioritisation of immigration for victims should entail ensuring, among other things, issuing a visitor's visa for 30 days as well as issuing temporary identity documentation to foreign trafficking victims, in accordance with PACOTIP provisions. Prioritisation of immigration services should involve ensuring that trafficking victims receive relief from deportation, especially if they are cooperating with the police in investigations or standing as witnesses in court. These predominantly legal measures, when complemented by the incorporation of traditional approaches involving the use of *sangomas* to break traditional oaths and curses and to rebuild any damage done to the psyche of victims, would greatly help in the fight against trafficking in persons. This is especially so in the area of protection and rendering of assistance to victims.