

LAWS REGARDING TRAFFICKING AND PROSTITUTION IN INDIA

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Introduction

Human trafficking is an international concern and it involves trans-national crimes which are evident per se, then competency of the existing laws is questionable since, rather than any detrimental effect it has led to an exponential rise in the crimes related to the same, plus the proximity with prostitution makes it more complicated, which is clear like a spider web but all complicated from within. The United Nations Committee on Economic, Social and Cultural Rights defines poverty as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. Poverty has been and remains a constructed social and economic reality. The poor are not poor simply because they are less human or because they are physiologically or mentally inferior to others whose conditions are better off. On the contrary, their poverty is often a direct or indirect consequence of society's failure to establish equity and fairness as the basis of its social and economic relations.¹

Prostitution is dwelled and flourished, was recognized and given recognition. Arthashastra, the magnificent work of Chanakya, has a whole classification of the working of prostitutes. They were also prevalent during the reign of Pandavas and Kauravas. Vatsyayan, a well-known sage has devoted a number of pages on prostitutes in his work called Kamasutra, his classification indicated common, private and clandestine prostitutes.

Religious prostitutes were attached with the Mahakal temple of Ujjain, where the system was common, where girls were devoted by their parents in the service of god and their religion. In the South, they are called Devdasis, in the North, they were addressed as Mukhies. Gradually the morality of the priest became questionable and therefore the divinity took a shift and turned into what we call as clandestine.

According to P. Ramanatha Aiyar's Law Dictionary (Fifth Edition), prostitution means the sexual exploitation or abuse of individuals for commercial purposes. Also, a public prostitute is a woman who is a prostitute by profession and whose trade is to let-out her body on hire to all visitors or to all visitors of a specified class. When a woman rests content with one lover for years though she may have changed her lovers at intervals of some years, she is not a public prostitute.

¹ Voice of Justice by Dr Justice AR. Lakshmanan, Universal Law Publishing Co. Pvt. Ltd., Delhi (2006), page 121

Types of Prostitutes

Generally prostitutes can be bifurcated on the basis of their 'modus operandi' which is as follows:

1. **Brothel Prostitutes:** Their operations are carried out in the brothel which is owned by an ex – prostitutes. The prostitutes work for a commission based on her sexual service.
2. **Call Girl Prostitutes:** They generally operate independently from her place. She may be available directly or solicit customers through middlemen.
3. **Street Prostitutes:** This type solicits customers on the streets and takes the customer to a place of assignation.
4. **Other Types:** Clandestine forms of prostitution are also found in bare, massage parlors, amusement centers, dance clubs etc. ²

Coming to the contemporary realm, the shift has made it dive into the pool of evil, involuntary and forceful sexual exploitation, which has resulted in more trafficking which can be either to obtain organs illegally, to have children for begging, sexual exploitation, slavery and so on. The problem is deeply rooted and is incidental with the history of the nations, especially in Indian context where the mythology speaks for itself and is extremely exhaustive which creates a necessary conjecture. Before digging into the problem, the following are the measure of creating a solution.

Possible Solutions

Preventing trafficking

- Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.
- States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.
- States shall exercise due diligence in identifying and eradicating public sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished. Protection and assistance.
- Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.
- States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and

² Dr. Tulsingh, Pt. Ravi Shankar Shukla. Prostitution in Indian society: Issues, Trends and Rehabilitation (2013)

care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.³

In India, trafficking is primarily an offence under the IPC, 1860.

It defines trafficking as;

- i. recruitment,
- ii. transportation,
- iii. harboring,
- iv. transfer, or
- v. receipt of a person for exploitation by use of certain forceful means.

In addition, there are also other laws which regulate trafficking for specific purposes. For instance, the Immoral Traffic (Prevention) Act, 1986 deals with trafficking for the purpose of sexual exploitation. Similarly, the Bonded Labor Regulation Act, 1986 and Child Labor Regulation Act, 1986 deal with exploitation for bonded labor. Each of these laws operate independently, have their own enforcement machinery and prescribe penalties for offences related to trafficking.

Under Art 23⁴, prohibits trafficking in every form including commercial sexual exploitation of women and girls. There are special legislations like Immoral Traffic Prevention Act (ITPA) and local legislation like Goa Children's Act etc. The Immoral Trafficking Prevention Act, 1956 (ITPA), the main statute dealing with sex work in India, does not criminalize prostitution or prostitutes per se, but mostly punishes acts by third parties facilitating prostitution like brothel keeping, living off earnings and procuring, even where sex work is not coerced. The ambiguity in the law, or say the irony is, being a prostitute is legal but prostitution is not legal, which itself, prime facie is complex.

According to the National Crime Records Bureau, a total of 8,132 cases of human trafficking were reported in India in 2016 under the Indian Penal Code, 1860. This is 15% increase from the number of cases reported in the previous year. In the same year (2016), 23,117 trafficking victims were rescued. Of these, the highest number of persons were trafficked for forced labor (45.5%), followed by prostitution (21.5%)⁵.

The government increased efforts to protect victim. The NCRB reported the government's identification of 22,955 victims in 2016, compared with 8,281 in 2015. The NCRB reported 11,212 of the victims were exploited in forced labor, 7,570 exploited in sex trafficking, 3,824 exploited in an unspecified manner and 349 exploited in forced marriage, although it is unclear if the forced marriage cases directly resulted in forced labor or sex trafficking. The government did

³ Guideline 7, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking', OHCHR.

⁴ Art 23 of The Constitution of India.

⁵ Human Trafficking; Crime in India, National Crime Records Bureau (2016).

not disaggregate the type of exploitation experienced by the age, gender, or nationality of the victim and included a small number of non trafficking crimes in its overall victim demographic numbers; thus the following information included 162 more person than the total number of trafficking victims identified. The government identifies 8,651 boys, 7,238 women, 5,532 girls and 1,696 men as trafficking victims. Of the victims 22,932 were Indians, 38 Sri Lankan, 38 Nepali, 36 Bangladeshi and 73 were various other nationalities, including Thai and Uzbek.

In 2011, India ratified the United Nations Convention against Transnational Organized Crimes, 2000, including its Protocol to Prevent, Suppress and Punish Trafficking in person.⁶

In 2015, pursuant to an order of the Supreme Court, the Ministry of Women and Child Development constituted a Committee to examine the feasibility of a comprehensive legislation on trafficking.

- Emerging forms of sexual exploitation are child pornography, child sex tourism, massage parlour, friendship clubs, escort agencies, placement agencies, dance bars and moving theatres (nautanki in mela), circuses, etc.
- There is a strong linkage between ‘trafficking’ and ‘missing persons’. The Supreme Court has held that whenever a child goes missing, it should be presumed to be a case of kidnapping or trafficking.⁷
- It must be borne in mind that trafficking is a continuing offence, and commercial sexual exploitation must be understood in the context of involuntary entry into the profession through trafficking, and the years spent thereafter entailing a continuum of exploitation.
- The Government has several schemes for women empowerment, protection of children, poverty alleviation and skill development. The need would be to channelize these efforts in areas that are vulnerable, and having vulnerable populations. The existing machinery under the various schemes of the Central Government and the State Government should be made use of, to prevent trafficking. The program implementing agencies should be held accountable if they fail to deliver services as required of them under the various schemes.
- The rescue operations are conducted in an ad hoc manner without effective planning and rescue strategies which are not victim friendly. There is no differentiation in rescue operations relating to trafficked victims in brothel-based and street based prostitution and child victims of sexual exploitation. There is neither inter-State co-ordination, nor inter departmental collaboration.

The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 was introduced in Lok Sabha by the Minister of Women and Child Development, Ms. Maneka Gandhi on July 18, 2018 and passed in that House on July 26, 2018. The Bill provides for the prevention, rescue, and rehabilitation of trafficked persons.

⁶ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000, OHCHR.

⁷ BBA Vs. Union of India W.P.(C) No.75/2012.

HIGHLIGHTED FEATURES OF THE BILL

Definition of Trafficking:

The Bill defines trafficking to mean:

- (i) recruitment,
- (ii) transportation,
- (iii) harboring,
- (iv) transfer, or
- (v) receipt of a person for exploitation, by using certain means.

These means are the use of threat, force, abduction, fraud, deception, abuse of power or through inducement. Exploitation includes physical or sexual exploitation, slavery, or forced removal of organs.

- **Aggravated Trafficking**

Classification of certain purposes of trafficking as ‘aggravated’ forms of trafficking, including trafficking for the purposes of;

1. forced labor,
2. bearing children
3. inducing early sexual maturity by administering chemical substances or hormones,
4. begging.

The punishment for aggravated trafficking is higher than for simple trafficking.

The so-called “new” offence of aggravated forms of trafficking is a clumsy combination of purposes, means, and consequences of trafficking, none of which warrant a separate law. Trafficking for forced and bonded labor, begging, and marriage is already being prosecuted—a fact revealed by the National Crime Records Bureau’s (NCRB) report (2017) which provides purpose-wise disaggregated data on human trafficking cases. It shows that in 2016, the police registered 10,357 cases of trafficking for forced labor, 349 cases of trafficking for forced marriage, and 71 cases of trafficking for begging. Various court decisions further confirm that Section 370 has been invoked in situations of exploitative domestic work⁸ and conditions of “bonded, tortured, and forced labor” in factories.⁹

- **Rescue and Investigation**

Various authorities will be set up at the district, state and national levels for rescue of trafficked persons and investigation of offences.

⁸ Bira thoibi & Anr tate (The NCT of Delhi) & Anr on 4 Feb, 2015, CRL.M.C. 427/2015.

⁹ Vijay Kumar barman & Ors V. State of Chandigarh on 15 Feb, 2017, Criminal Revision No. 28 of 2017.

At the district level, the state government will appoint anti-trafficking police officers and constitute Anti-Trafficking Units for one or more districts to rescue persons and investigate offences. Rescued persons will be produced before a Magistrate or Child Welfare Committee (in case of child victims). The authorities are required to close the investigation of the offence within a period of 90 days from the date of registration of the FIR. The functions of the district authorities will be monitored by a District Police Nodal Officer, to be appointed by the state government.

At the state level, the state government will appoint a nodal office to;

- (i) combat trafficking in the state,
- (ii) monitor functioning of district anti-trafficking officers, and
- (iii) co ordinate and monitor inter-state and trans-border transfer of victims, witnesses, evidence, and offenders. The District Police Nodal Office will report to the state nodal officer.

At the national level, the central government will constitute a National Anti-Trafficking Bureau, which may take over investigation of cases referred to it by two or more states.

- Protection and rehabilitation

Pre-requisite at the central or state government to set up Protection Homes, to provide shelter, food, counseling, and medical services to victims. Further, the central or state government will maintain Rehabilitation Homes in each district, to provide long-term rehabilitation to the victims. The Bill requires the central and state governments to set up anti-trafficking committees at the district, state and national levels to ensure the rehabilitation of victims. Once the district anti-trafficking authorities rescue a person, they are required to inform the district anti-trafficking committee about the rescue operations. The committee will then provide interim relief and rehabilitation services to the rescued persons. The district committee will also;

- (i) pass directions to Protection and Rehabilitation Homes to ensure protection, rehabilitation and restoration of victims, and
- (ii) facilitate inter-state repatriation of victims subjected to bonded labor.

At the state level, the anti-trafficking committee is responsible for;

- (i) arranging training and sensitization of personnel, and
- (ii) providing assistance and inputs for prevention of offences, especially ones having inter-state ramifications or features of an organized crime.

At the national level, the anti-trafficking committee is responsible for;

- (i) ensuring relief and rehabilitation to victims through concerned ministries and statutory bodies,

- (ii) seeking reports from appropriate government, and state and district anti-trafficking committees on quality of services and functioning of Homes, and
- (iii) monitoring the Rehabilitation Fund.

Rehabilitation of victims will not be dependent on criminal proceedings being initiated against the accused, or the outcome of the proceedings. The central government will also create a Rehabilitation Fund, which will be used to set up Protection and Rehabilitation Homes.

- Preventive Measures

The district and state anti-trafficking committees will undertake measures to protect and prevent vulnerable persons from being trafficked. These measures include:

- (i) facilitating implementation of livelihood and educational programs for vulnerable communities,
- (ii) facilitating implementation of various government programs and schemes for prevention of trafficking, and
- (iii) developing law and order framework to ensure prevention of trafficking.

The Bill provides for setting up designated courts in each district, which will seek to complete trial of trafficking cases within a year.

- Penalties

The Bill specifies various penalties. Key penalties are specified. All offences are cognizable (i.e. police officer can arrest without a warrant) and non-bailable. Note that if a person is found guilty under the Bill and also under any other law, the punishment which is higher will apply.

Rationale for presuming guilt of accused for certain classes of victims is unclear

The Bill punishes a person who commits, aids or abets commission of offences related to trafficking of persons. Under the Bill, if the victim is a woman, a child, or a mentally/physically disabled person, it is presumed that the accused person committed the offence. That is, in such cases, the burden of proof is on the accused person to show that he is not guilty. There are two issues to consider here.

First, it is not clear why the burden of proof is reversed in these cases. Second, it is not clear why there is a distinction between women, children and disabled persons on the one hand and adult males on the other.

Rationale for gradation of punishment unclear

The Bill classifies some forms of trafficking as aggravated trafficking. Aggravated trafficking includes trafficking for the purposes of forced labor, begging, child bearing or by causing grievous hurt. Physical or sexual exploitation, slavery and forced removal of organs are not included as aggravated trafficking. While simple trafficking attracts an imprisonment between

seven and ten years, aggravated trafficking attracts a minimum imprisonment of ten years up to life imprisonment. It may be argued that the punishment for some of the aggravated offences may not be proportionate when compared to the punishment for the offences of simple trafficking. For example, trafficking for the purposes of begging attracts a higher term of imprisonment than forced removal of organs or sexual exploitation.

Further, the Bill states that whoever 'hires' a person for trafficking will be punished with imprisonment between three to five years along with a fine of at least one lakh rupees. However, under the Bill, the definition of a trafficker includes persons who 'recruit' other persons for exploitation. Such persons may be imprisoned up to seven years along with fine. It is unclear why the punishment for a 'hirer' and 'recruiter' are different.¹⁰

PROBLEM AS BROUGHT INTO LIMELIGHT BY THE NATIONAL LEGAL SERVICE AUTHORITY TO THE HONORABLE SUPREME COURT

1. The term 'sexual exploitation' is nowhere explained, neither in ITPA nor the IPC. ITPA provides for the connotation of prostitution which means sexual exploitation while IPC provides for severe punishments.
2. The Protection of Children to Sexual Offences Act, 2012(POCSO) is a welfare legislation which has defined sexual offences and their aggravated forms but the lacuna prevails since the definite definition of sexual exploitation is not described or expressed.
3. There are places which have created a generational prostitution, the proper mapping or demarcation is not done by the respective authorities. These areas are vulnerable towards commercial sexual exploitation, resulting in lack of target based policies or schemes towards welfare of such vulnerable group, area, zone.
4. The inadequacy on points of rehabilitation, more focus on correction rather than re-integration or empowerment strategies.
5. Moreover, raids are conducted in an ad hoc manner without any understanding of the numbers of rooms and shelter homes required for rehabilitation and shelter of rescued victims.
6. Lack of provision regarding food, medicines, or psychological treatment post rescue.
7. There is no victim/witness protection protocol ensuring the safety of the individual.
8. The abusive threats from traffickers and pressure from the exploiter compel witnesses to turn hostile or fail to appear in the court.
9. There is no provision for victim compensation, or at uniform rates across the country for a victim of trafficking for sexual exploitation¹¹.

¹⁰ The Trafficking of Persons (Prevention, protection and Rehabilitation) Bill, 2018.

¹¹Report of National Legal Service Authority, Submitted to the Hon'ble Supreme Court of India in writ Petition © No. 56/2004 titled Prajwala v. union Of India and others.

The case of Madhukar Narayan mardikar has garnered the color and substance on the view of the rights of prostitutes, where Honorable Supreme Court observed "...even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also, it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard."¹²

CONCLUSION :

Double Standards of morality has to be discouraged: The notation of double standards of morality should be discouraged. As Smt. Ranganayaki observes, "It is in reality impossible to have double standard morally in matters of sex for without male chastity, female chastity is impossible. As a result of a double standard of morality which demands of woman to be chaste, and expects man to be irregular and there developed tolerated vice".¹³ Despite critique being advanced from civil society (Pai et al 2018), the United Nations (ILO 2012) and international human rights experts (UNHRC 2012: 7), institutionalization in so-called protection and rehabilitation homes remains the mainstay of victim support in the bill. Compensation, which ought to have been a new provision in the legislation, has been relegated to section 357A¹⁴ of CPC, which is further subject to schemes framed by state governments for any "victim of crime who has suffered loss or injury as a result of the crime and requires rehabilitation."

Measures like cash assistance, land and housing, education of children and livelihood support that are included in the Ministry of Labor and Employment's policies for victims of bonded and forced labor, and traffic in human beings, including women and children trafficked for sexual exploitation are missing (Ministry of Labor and Employment Memorandum 2016) in the bill. The proposed rehabilitation fund lacks financial commitment and is an empty platitude.

The bill adopts the definition of trafficking of persons in Section 370 of the IPC which includes "any form of sexual exploitation" and is rigorously applied to sex work.¹⁵

Second, the proposed crime of trafficking "resulting in pregnancy" or "causing exposure to HIV" is more likely to occur in sex work than any other sector.

Third, the bill introduces an offence of "soliciting or publicizing electronically, taking or distributing obscene photographs or videos or providing materials or soliciting or guiding tourists or using agents which may lead to the trafficking of a person," punishable with five to 10 years of imprisonment. Like everyone else, sex workers too increasingly use online platforms to solicit work and communicate with potential clients. The proposed provision does not even require actual trafficking, but will kick in if a WhatsApp message or image "may lead to trafficking".

¹² AIR 1991 SC 207.

¹³ <http://www.isca.in/IJSS/Archive/v2/i3/6.ISCA-IRJSS-2013-027.pdf>

¹⁴ Sec 357A Of The Code of Civil Procedure, 1973.

¹⁵ (S.Naveen Kumar v. The State of Telangana, 2015, Criminal Petition No. 3158 of 2015)(Sahil Patel & Ors v. The State of Andhra Pradesh, Criminal Petition No. 2572/2014)

This comes perilously close to criminalizing all sex workers. Besides, the ITPA and other criminal statutes laws will continue to be enforced as the bill is “in addition to” existing laws.¹⁶

As depicted in the contemporary scenario, the bill is flawed and not comprehensive, somewhere in parts it seems irrational, unnecessary exposing the vulnerable communities to a punitive sort of kill. Awareness and sensitivity in the framing of the legislation is strongly advised. Proper research, in order to highlight the main voice of the aggrieved groups so that nothing remains in the grey area and all of it comes in black and white. The bill does not extend to citizens of India outside India (extraterritorial jurisdiction), the immunity clause will not protect trafficked victims who face the death sentence for crimes committed abroad, notwithstanding their vulnerability.

Allahabad High Court through Aditya Nath Mittal, J., in the matter of observed that, even if a prostitute lodges a report of rape and her evidence inspires confidence, then there is no rule of law that the statement of the prostitute cannot be believed. The Court observed that, even a prostitute has the fundamental right as well as moral and social rights and she is at liberty to permit, or not permit, a person for sexual intercourse. Nobody can commit sexual intercourse even with a prostitute under threat or compulsion.¹⁷

The concept of social justice and economic empowerment is firmly rooted in the constitutional firmament of India, holding it ‘fundamental’ to the life and liberty of every citizen (prostitutes and their children included) under Art 14¹⁸, provides equality in general, Art 21¹⁹ guarantees the right to life and personal liberty, Art 15²⁰ prohibits any kind of discrimination. Art 15(3)²¹ provides for positive discrimination in proximity with women and children. Art 23²² prohibits human trafficking and forced-labor, making it punishable under defined laws along with Art 51A²³ which enjoins duty on every citizen to develop scientific temper, humanism and the spirit of enquiry and reform and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.

¹⁶ Tripti Tandon, India’s Trafficking Bill 2018 Is Neither Clear Nor Comprehensive, Vol. 53, Issue No. 28, 14 July, 2018.

¹⁷ Sushil & Anr v. State of Uttar Pradesh, Criminal Misc. Application No. 2938/2009.

¹⁸ Art 14 of The Constitution of India.

¹⁹ Art 21 of The Constitution of India.

²⁰ Art 15 of The Constitution of India

²¹ Art 15 (3) of The Constitution of India.

²² Art 23 of The Constitution of India.

²³ Art 51A of The Constitution of India.