

India's Trafficking Bill 2018 is Neither Clear Nor Comprehensive

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The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 is sought to be introduced in the monsoon session of Parliament. The bill is founded on baseless claims and does nothing that it promises, except add yet another legislation to the already fragmented landscape of laws against human trafficking.

This article is a part of the Special Feature *Rethinking Trafficking Bill 2018*. To read other articles in this feature, [click here](#).

For the reasons outlined below, the members of parliament must request the Ministry of Women and Child Development (MWCD) to revisit the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 (hereafter referred to as the bill) in its entirety or, at the very least, refer the bill, when introduced to a parliamentary standing committee.

Neither Clear, Nor Comprehensive

Presently, activities that constitute trafficking of persons are addressed under several laws. These include sections 370-370A of the Indian Penal Code (IPC), 1860 which define and

penalise trafficking in persons; section 371 of the IPC, which criminalises the habitual dealing in slaves; section 372-373, IPC, which criminalises buying and selling of underage girls for prostitution; the Immoral Traffic (Prevention) Act (ITPA), 1956 which criminalises activities related to sex work and provides for the rescue, rehabilitation, and correction of sex workers through a moralistic lens; the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act), which provides a framework for protection of children who are missing or at risk of being trafficked; and the Bonded Labour System (Abolition) Act, 1976 (BLSAA), the Contract Labour (Regulation and Abolition) Act, 1970, the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, the Children (Pledging of Labour) Act, 1933 and the Child Labour (Prohibition and Regulation) Act, 1986, which deal with forced labour and child labour, primarily through regulation and welfare-oriented measures.

Since the trafficking of persons involves many connected acts, other laws like the Indian Contract Act, 1872, which deals with offer, consideration, consent, and acceptance in relation to an agreement or contract; the Prevention of Begging Act, 1952, which criminalises persons who employ or cause another to beg; as well as the Passports Act, 1967 and the Foreigners Act, 1946, which deal with the movement in and outside India, also assume significance.

The existing response is scattered across different laws that do not relate to one another as they approach trafficking with varied, even inconsistent objectives. The demand was, therefore, for a single legislation that harmonised and integrated existing laws. This expectation was emboldened when, in the case of *Prajwala v Union of India* (2015), the MWCD told the Supreme Court that it had set up a committee to study existing laws, identify gaps, and draft a comprehensive legislative framework covering all aspects of trafficking. However, the bill does not fulfill any of these promises and will only end up complicating the existing legal framework on trafficking and its enforcement.

Much of What Is Proposed Already Exists

The bill's statement of objects and reasons makes incorrect assertions that existing legislations do not recognise the trafficking of persons for physical and other forms of exploitation or provide stringent penalties. In fact, Section 370 of the IPC prohibits all forms of trafficking for exploitation and carries a minimum punishment of seven years and a maximum punishment of life imprisonment. Explanation 1 to Section 370, which indicates what exploitation means, is inclusive and covers "any act of physical exploitation, sexual exploitation, slavery, or practices similar to slavery and servitude or the forced removal of organs." Exploitation is described in a non-exhaustive manner, which enables the section to be invoked in an array of cases, including trafficking for forced labour, marriage, and begging, which, according to the bill, are not subject to prosecution under current laws. Even the "means" used to facilitate trafficking, namely "threats, force or any other form of coercion, abduction, fraud, deception, abuse of power, and inducement" through payment or

benefits to achieve consent of a person having control over the victim are capable of expansive application. This has been aided in part by judicial decisions where the apex court in *People's Union for Democratic Rights v Union of India* (1982) interpreted "force" as "any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action."

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 labour, 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 labour, 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 work (*Bira Thoibi & Anr v State (The NCT of Delhi) & Anr* 2015) and conditions of "bonded, tortured, and forced labour" in factories (*Vijay Kumar Barman v State of Chhattisgarh* 2017).^[1]

Newfangled crimes of trafficking resulting in pregnancy or exposure to HIV are capable of being considered as aggravated factors in order to impose a 10-year sentence on a person convicted under Section 370 of the IPC; this is equivalent to the punishment proposed in the bill. Similarly, the new offence of administering hormones or committing trafficking by administering alcohol or drugs can be tried under Section 328 of the IPC, which punishes a person who "administers to, or causes to be taken by any person any poison or any stupefying, intoxicating, or unwholesome drug, or other thing with intent to ... commit or facilitate the commission of an offence ..." with imprisonment up to 10 years. There is, thus, nothing new or different in the bill, which is a rehash of the legal provisions that already exist.

A New Low in the Criminal Justice System

The bill is replete with fuzzy provisions that criminalise activities devoid of culpability or criminal intent. The bill introduces offences in relation to and authorises closure of premises, which are "to be used" as a place of trafficking. It criminalises electronic information that "may lead to" an offence of trafficking. Penal provisions against "promoting or facilitating trafficking of persons" are equally ambiguous and cast a wide net. Properties may be attacked if they are "likely to be used" for the commission of an offence under the act. Prosecution is not dependent on trafficking having actually taken place. A mere possibility of someone getting trafficked sometime in the future is sufficient. Dilution of procedural safeguards and due process guarantees (such as in provisions for "presumption of guilt" and bar on anticipatory bail) makes the bill even more worrisome. It would not be an exaggeration to say that the bill marks a new low in how crimes are defined, prosecuted, and punished in the country's criminal justice system.

Nothing for Victims of Trafficking

One of the long-standing demands of anti-trafficking organisations has been that victims must not be treated as criminals or prosecuted for acts committed in the course of trafficking or pursuant thereto. The bill fails on this count too. Victim immunity has been provided for “serious crimes” (those punishable with death, life imprisonment, or 10 years of imprisonment) only, whereas in practice, trafficked persons are charged for “minor offences” like travelling without a passport (in case of foreign nationals), soliciting (in case of sex work), or working without authorisation or employment papers (in case of labour trafficking). Besides, protection from prosecution is available only where the victim can show that they committed the offence under coercion/compulsion/threat and were subjected to a reasonable apprehension of being killed or subjected to grievous hurt or injury to themselves or another person who they are interested in. This is a very high threshold which very few victims will be able to satisfy, making the clause unworkable.

Since 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.

Despite critique being advanced from civil society (Pai et al 2018), the United Nations (ILO 2012) and international human rights experts (UNHRC 2012: 7), institutionalisation 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, has been relegated to section 357A of the Code of Criminal Procedure, 1973, 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 Labour and Employment’s policies for victims of bonded and forced labour, and traffic in human beings, including women and children trafficked for sexual exploitation are missing (Ministry of Labour and Employment Memorandum 2016) in the bill. The proposed rehabilitation fund lacks financial commitment and is an empty platitude.

A Maze of Bureaucratic Committees

Instead of streamlining enforcement, the bill swells up institutional bureaucracy by creating at least 10 different agencies, including anti-trafficking officers, units, committees, and a bureau at the district, state and national levels, with no real responsibility, except to coordinate and assist each other. This bureaucratic maze will result in policy indecision and as well as in passing the buck.

Contrary to Claims, the Bill Targets Sex Workers

At first glance, the bill appears to have no impact on sex workers due to the conspicuous absence of the words “prostitution” and “sexual exploitation and abuse for a commercial

purpose.” Maneka Gandhi, the cabinet minister for MWCD, has also made such claims in public (*Hindu* 2018), which are deceptive and misleading for the following reasons.

First, 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 (*S Naveen Kumar v State of Telangana*, 2015; *Sahil Patel & Ors v The State of Andhra Pradesh*, 2016). 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 publicising 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.” This comes perilously close to criminalising 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.

Conclusions

As it stands today, the bill is a deeply flawed and irrational piece of legislation which serves no purpose other than exposing vulnerable communities to a punitive overkill. The MWCD will be well advised to defer its introduction in Parliament and go back to the drawing board with proper research, analysis, and the voices of affected groups to develop meaningful interventions against trafficking.

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End Notes:

[1] The Chhattisgarh High Court upheld charges framed against the accused persons under Section 370 of the IPC upon the allegation that they had lured certain villagers/labourers to work in a factory in a foreign country, and during the course of employment, withheld their passports and mobile phones, did not pay the promised wages, did not provide medical treatment, and forced them to work during illness.

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