

A Critical Appraisal of The Trafficking of Persons Bill, 2016

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INTRODUCTION

There is no concrete definition of trafficking. For the basic understanding of the term, trafficking is defined as movement or transportation of a person by means of coercion or deceit and consequent exploitation which leads to commercialization.² Article 23 of the Constitution of India, 1950 prohibits traffic in human beings and other similar forms of forced labor as a part of the fundamental rights guaranteed under Part III of the Constitution.³ Only two Indian laws talk about human trafficking in India which is as follows:

The Suppression Of Immoral Traffic in Women and Girls Act, 1956

The Immoral Traffic (Prevention) Act, 1986 (which amended the previous Act)

The Suppression of Immoral Traffic in Women and Girls Act, 1956 defines prostitution as a voluntary act of a female offering her body and thus this definition excludes forced prostitution.⁴ This Act divided females into 2 groups- 21 years and above as females and those below the age of 21 years as girls.⁵ According to the provisions of the Act, the exploited female is to be sent to a protective home and the exploited girl is to be sent to a rehabilitation centre on being convicted under this Act. The punishment for the exploiters has been set in this Act. Both prostitutes and the other persons involved in such act are made punishable under this Act provided the other persons have involved themselves as well the women in prostitution knowingly and willingly. This rider in the provision gives a free space for the pimps and brothel owners to escape the liability under this Act by stating their ignorance of such knowledge. This act only focused on street prostitution and did not provide for prostitution conducted behind closed

doors. This was a grave loophole which led to the establishment of brothel houses.

In order to improve upon the defects of Suppression Of Immoral Traffic in Women and Girls Act, the Immoral Traffic (Prevention) Act, 1956 was enacted. The most important change brought by this Act is through the amendment in the definition of "prostitution." Here, prostitution means sexual exploitation or abuse of persons for commercial purpose and the term prostitute shall be construed accordingly.⁶ Under this Act, prostitution by choice will not be covered because it says that prostitution is sexual abuse or exploitation for commercial purpose. Thus, a wider definition was given to prostitution and it is no more restricted to women and girls.

The draft of the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016 has been put up by the Ministry of Women and Child Development. It is a good piece of legislation but it is not wholly updated and good enough with relation to present day problems of human trafficking and prostitution (commercial exploitation of women). The main purposes of this Bill is to consolidate the existing anti-trafficking laws in India, widening the ambit of the definition to include labour-trafficking along with sex-trafficking, contrary to what earlier legislations like the Immoral Trafficking (Prevention) Act Of 1956 focused at. The Bill promises to provide treatment to the survivors of trafficking as victims in needs of assistance and to make rehabilitation as a right for those who are rescued.

However, the Bill is not free from lacunas. The Bill's biggest weakness is the ambiguity in the language the question as to how rehabilitation will take place and who will be responsible for it. For an instance under the present law it is

provided that when a victim is rescued then the family of the girl needs to collect her within 28 days. If the girl is not collected by her family (which happens generally) within this time slot then the magistrate shall pass an order for detention of the victim in a protective home ranging from one to three years. Reintegrating victims into society should be the ultimate aim of such laws but somehow the current legal framework is lacking such steps and procedure required for rehabilitation of the victims.

In this paper the authors have tried to highlight the loopholes of this Bill and then laid down certain suggestion as to how these gaps can be filled for the betterment of the victims of acts of human trafficking in India.

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The Draft Bill talks about District Anti-Trafficking Committee and State Anti-Trafficking Committee.⁸ However, the powers and functions of the same are not mentioned. The composition of the district anti-trafficking committee reveals that the committee should consist of district magistrate/district collector (chairperson), 2 social workers of which one is woman (nominated by district judge), 1 representative from district legal service authority (nominated by district judge) and district officer of social justice or woman and child development.⁹ It is mentioned that a victim after rescue shall be produced before member secretary of district anti-trafficking committee. The capability of the member secretary is not properly defined. Also, if a child is rescued at odd hours and the member secretary is absent, the procedure relating to the necessary safeguards needed for the child is not mentioned. The member secretary must necessarily be a woman so that it is easier for the child victim of sexual exploitation to unveil the horrific experiences she/he had. In the procedure relating to production of victims to the member secretary, nothing is mentioned. Only, a list of

names are given as to who can produce the victim to the member secretary. Also, the capacity of the members of the board is not mentioned. The two social workers and one representative from District legal services authority are to be nominated by District judge member. But, nowhere is it mentioned that one of these persons have to have a special understanding of child psychology or have had a working experience in such field for a specific period.

The composition of the State anti-trafficking committee is more or less satisfactory. It is mentioned that the State anti-trafficking committee shall advice the State or Union territory Govt. and District anti-trafficking committee on matters relating to prevention of trafficking, protection and rehabilitation of victims etc. However, a detailed outline of the powers and functions of the State anti-trafficking committee is not given. Also, co-ordination between the State Anti-Trafficking Committee and Central Anti-Trafficking committee is required. Such is not mentioned in the Bill. The mandatory sitting clause, accountability and reporting of the committees must be included.¹⁰

It is mentioned in the Bill that the Central Anti-Trafficking Advisory Board referred to in Chapter-IV shall include members of civil society organizations (among other members). However, nowhere in the draft Bill the specific role of the non-governmental organizations or civil society organizations has been mentioned.¹¹ The Juvenile Justice Act, 2015 mentions that that role of NGOs and social workers is very important in case of restoration and rehabilitation of child victims and thus the State Govt. and social organizations have to work together for such purpose. It is stated in the Act that the restoration and protection of a child shall be the prime objective of any Children's Home, Specialized Adoption Agency or Open Shelter.¹² In the present Bill too, it is suggested that the role of NGOs should be specified.

Chapter-V of the Bill talks about a Special Agency for investigation of offences under the Act. The composition of such agency is not mentioned. There is no mention regarding any Special Police Unit which will investigate into the matter if such is connected with children trafficking. The Juvenile Justice Police Unit needs to co-ordinate with this Special Agency for proper investigation of cases. But, there is no such mention regarding that. Furthermore, Social Investigation Report must be prepared for proper investigation of a case from the grass root level. There is no mention of any such report throughout the investigation process. Also, physical and mental health of a child victim during investigation of the case is to be kept in mind.¹³

Chapter-VI of the Bill deals with support services and talks about Protection Homes and Special Homes. There is a section specifying that the Protection Home and Special Home shall be registered in a manner as prescribed by the appropriate Govt.¹⁴ But, no scheme is mentioned for complying with the registration requirement. The integrated child protection scheme is achieving its objectives to contribute to the improvements and the well being of children, but whether the Protection Homes and Special Homes will be registered under ICPS or Kanyashree has not been mentioned anywhere in the Bill.¹⁵ Also, re-registration and fresh registration clause is not there.

Chapter-VII of the Bill deals with Rehabilitation and Social Integration and here it is mentioned that the appropriate Govt. shall make schemes and programs for rehabilitation, after care etc. It is also stated that the State Govt. shall create special schemes for women victims engaged in prostitution or any form of commercial sexual exploitation. However, there is no mention of re-integration of the child victims in the society. The Bill talks about Shelter Homes as the only measure of rehabilitation.

However, when it is not possible to return the child victim back in the society, the process to be followed therein is not mentioned. Also, what is to be done to reintegrate the child back into the society is not mentioned.¹⁶

Another shocking phenomenon of the Bill is that nowhere in the Bill the role of Child Welfare Committee in reception, restoration and reintegration of the child victims are given. The role of CWC is no where mentioned. Thus, it is suggested that the role of CWC should be highlighted in the Bill.

A child who is trafficked is not necessarily trafficked for prostitution or sexual exploitation. There may be other reasons like child labor, organ transplantation etc. These are not dealt under the present Bill.

Under Sec-19 of the Bill it is stated that bail can be given to an accused where the Special Public Prosecutor has not opposed such release, (or) even if the Special Public Prosecutor has opposed the release, the court may grant release if it is believed that the person is not guilty or he shall not commit an offence while on bail.¹⁷ However, when the accused is on bail and is roaming around in the same community where the child victim also lives, it may create increased trauma and fear in his/her mind. Many a times it is seen that the accused trafficker is a member of the family to which the child belongs. In such a situation, restoring back the child in the same family would subject him/her to same vulnerability or risk. The Bill has failed to realize this part. No checks and balances are given to keep the accused under watch.

Chapter-XII of the Bill talks about Anti-trafficking fund. The appropriate Govt. shall create a fund for the implementation of the Act and also for rehabilitation and welfare of the victims. The fund shall take such voluntary donations.¹⁸ However, the uncertainty of fund creation remains as a question unanswered. The

provision relating to anti-trafficking fund is very vague and needs better definition and utilization.

There is no mention of Prevention throughout the entire Bill even though the Preamble of the Bill starts with prevention of trafficking of persons and to provide protection and rehabilitation to the victims of trafficking. Also, the term Rehabilitation is not defined anywhere in the entire Bill.

SUGGESTION

The member secretary should necessarily be a woman.

The power, functions and role of the District anti-trafficking committee should be properly defined. Also, prevention and rehabilitation have not been defined anywhere in the Bill even though the Bill starts with “prevention of trafficking of persons and to provide protection and rehabilitation to the victims of trafficking.” Prevention action should be a part of police force.

The procedure relating to production of victims to the member secretary should be properly defined.

The District anti-trafficking Board should consist of one or more of such persons having a special understanding of child related issues and/or must have worked in such field for a necessary period of time.

It is not possible for the District Judge to know and nominate social workers and the Chief Justice will know even less. He must be a person having ample knowledge in the field of child rights and having an understanding in child psychology.

If a child is rescued at odd hours and the member secretary is absent, the procedure relating to the necessary safeguards needed for the child is to be mentioned.

Composition of the Special Investigating Agency should be mentioned.

At least two members of such agency must

be trained to deal with cases relating to child trafficking and one of them must be woman (or)

A Special Police Unit must be formed to investigate into matters connected with children trafficking and one of the members of such unit must be woman.

The Special Juvenile Police Unit mentioned under the Juvenile Justice Act, 2016 and the Special Agency mentioned under this Bill should act together.

Necessary safeguards to protect the physical and mental health of a child victim during investigation of the case must be included in the Bill.

It is not known where the existing laws have failed. Thus, a review of the existing laws must be done.

In the definition clause, there must be a definition for trafficker and trafficking. Also, there is no definition of Special Agency and hence such should be defined.

Rehabilitation and reintegration of the victims must be properly dealt with.

The Bill must be expanded and social support must be included and it should be a part of the committees and units.

Chapter-VI of the Bill which talks about Support Services must necessarily be a Right-based provision and if the rights are not legally enforceable, writs can be filed. Currently it is a Home-based entitlement and if the victim does not go to a Home and goes back to his/her own house, the Rights of the victim in such situation is not dealt with.

Victim compensation from State Fund has not been dealt in the Bill. There needs to be a fund to compensate victims and that should come from the State.

The anti-trafficking fund clause talks about donations. Thus, it is moving towards privatization and no compulsion for the Govt. is

there. It must be specified as to who will be the donors.

Sec-31 and 32 talks about Repatriation. It must be kept in mind that Trafficked persons are already in a vulnerable position. More victim friendly repatriation should be in place for maximum victim protection. It must be determined whether the victim is ready to leave the country. Safe stay, safe journey and safe return of the victim must be ensured.

Sec-35 talks about the power of the Central Govt. to make rules. It says that the Central Govt. may frame model rules in respect of all or any of the matters to which the State Govt. is required to make rules. But, every State knows its ground realities and each State should be allowed to make rules according to its own realities and cultural aspects to carry out the above mentioned purposes.

CONCLUSION

After having a glance through the Trafficking of persons Bill it seems that there has been an attempt to do charity rather than ensuring the rights of the victims. The Bill exposes a vast gap between legal intent and ground reality. It must be remembered that trafficking is not an isolated problem. Immunity and impunity of traffickers and involvement of police and local people and panchayats must be there. This Bill is not in harmony with other prevailing laws, like the Juvenile Justice Act (2016) or POCSO Act (2012). As mentioned above, the support services are not been properly defined. There is no comprehensiveness in terms of standard of care of child victims. The biggest aim of the Bill includes victim rights and demands in the process of investigation, after investigation as well as during reintegration. But this has not been mentioned anywhere in the Bill. India is a signatory State to the Convention on the Rights of Child. But the Bill does not refer to any of the rights mentioned in Convention on

the Rights of Child. Also, responsibility of civil society organizations has not been mentioned in the Bill (as is mentioned in the POCSO Act). The school level, teacher, district superintendent etc. should have the responsibility to know that a child is missing when he/she is absent for a considerable period of time. They must detect from where the child has gone missing and in this context a mandate should be there mentioning the responsibility of the civil society. In order to make the Bill more comprehensive the above mentioned suggestions must be taken into consideration and the Bill must be made more explanatory.

(Endnotes)

- 1 * PHD Scholar, RGSOIPL, IIT Kharagpur
- 2 Bachpan Bachao & Ors. vs Union Of India & Others (WP (Crl.) No. 619 of 2002 & Others)
- 3 Article 23 of the Constitution of India, 1949 (Part-III)- Prohibition of traffic in human beings and forced labour:
 - (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law
 - (2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them
- 4 Definitions- In this Act, unless the context otherwise requires
- (f) "prostitution" means the act of a female offering her .body for promiscuous sexual intercourse for hire, whether in money or in kind;
- 5 The Suppression of Immoral Traffic in women and girls Act, 1956, Act No 104, 1956, Sec-2(b)
- 6 The Immoral Traffic (prevention) Act, 1956, Act No , Sec-2(f)
- 7
- 8 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chapter-II and III, Sec-3 and Sec-5.
- 9 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chapter-II, Sec-3.
- 10 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and

- child development, Chap-III, Sec-5(2).
- 11 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chap-IV, Sec-6(1).
 - 12 Ministry of Law and Justice, The Juvenile Justice (Care and Protection of Children) Act, 2015, Chap-VII, Sec-40.
 - 13 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chap-V, Sec-7.
 - 14 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chap-VI, Sec-10, Registration of Homes.
 - 15 In 2006 the Ministry of Women and Child Development (MWCD) proposed the adoption of the Integrated Child Protection Scheme (ICPS) and in 2009 approved the scheme, ICPS, Childline India Foundation, online: childlineindia.org.in/Integrated-Child-Protection-Scheme-ICPS.htm, last visited: 3/1/18.
 - 16 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chap-VII, Sec-11.
 - 17 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chap-IX, Sec-19, Offence to be cognizable and non-bailable.
 - 18 Trafficking of Persons(Prevention, Protection and Rehabilitation) Bill, 2016, Ministry of Women and child development, Chap-XIII, Sec-29.