

TRAFFICKING OF WOMEN: LEGISLATIVE FRAMEWORK IN INDIA

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Abstract:

Human trafficking is a complex and multi-dimensional problem that affects countries across the globe, and it is often referred to as one of the fastest-growing criminal industries. It is an industry that generates billions of dollars in profits every year and has devastating consequences for the victims who are exploited and abused. like many other countries, faces significant challenges in combating trafficking. The government has taken several steps to address the issue, including enacting plethora of laws to deal with menace. The Constitution of India “prohibits traffic in human beings and forced labour”. However, despite these efforts, trafficking of women remains a significant problem in India. This paper will discuss various legislations that address the issue of trafficking of women in India. Further, an attempt would to be made to analysis the primary legislation that deals trafficking of women. The paper argues that the main legislation is enacted from the crime-based approach, which focuses more on criminalization of trafficking and prosecution rather protection of the victims. The crime-based approach can often result in the re-victimization of trafficking survivors, who may be treated as criminals or illegal migrants rather than as victims of exploitation. Hence, there is a need for a victim-centric legislation to combat changing dimensions of trafficking of women in India.

Keywords: Trafficking, Women, ITPA, Victim-Centric Approach

Main Paper:

Human Trafficking is a highly profitable industry, generating billions of dollars every year. It often involves transnational criminal networks that operate across borders, making it difficult to track and combat. It is an organized crime that involves the exploitation of individuals through the use

of force, fraud, or coercion, and encompasses several human rights abuses, such as forced labour, commercial sexual exploitation, etc. The Trafficking in Person Report, 2020 projected 20 to 40 million individuals to be trafficked each year, with women and children continuing to be worst affected groups. The most recent Global Report on Trafficking in Persons 2021 (UNODC), observed that despite a decrease of victim detection globally, women still make up a larger share of detected victims.

Trafficking is an appalling truth that affects millions of human beings, and India is susceptible to it. It is challenging to quantify the number of persons trafficked in and outside of India due to the covert nature of the crime. But, the condition is dismal. Statistics show India ranks high as a “source”, “transit” and “destination “country (TIP Report,2020). According to NCRB, India reported 2,189 incidents of human trafficking in 2021, compared to 1,714 cases in 2020, which is 27.7% higher. Of these, cases pertaining to the trafficking of women remain higher than in previous years ‘data (NCRB, 2021).

India signed the “Trafficking Protocol” in 2002 and ratified it in 2011, but it has not yet drafted an exhaustive anti-trafficking law. The existing legislation dealing with trafficking covers just one component of it, viz. “prostitution”. However, it is thought that the existence of different laws addressing the other parts of trafficking makes it possible to address all aspects. But, despite the multiplicity of these laws and a lofty Constitutional mandate the problem of trafficking of women remains intractable.

This paper will discuss various legislation that addresses the issue of the trafficking of women in India. Further, an attempt would be made to analyze the primary legislation that deals with the trafficking of women. The paper argues that the main legislation is enacted keeping in mind the crime-based approach, which focuses more criminalization of trafficking and prosecution rather than the protection of the victims. The crime-based approach can often result in the re-victimization of trafficking survivors, who may be treated as criminals rather than as victims of exploitation. Additionally, this approach does not address the root causes of trafficking, and may not provide the necessary support and services for survivors to recover and rebuild their lives. Hence, there is a need for victim-centric legislation to combat changing dimensions of the trafficking of women in India.

Constitutional Mandate on Trafficking of Women

The Constitution of India provides several provisions that impose a duty on the state to fight trafficking and protect the rights of victims. Article 23 “prohibits traffic in human beings and forced labour”. Article 24 prohibits “engagement of minors in any dangerous occupation or in any plant or mine that is unsuitable for their age”. Article 14 provides for “equality in general”, while Article 15(3) provides for “special safeguards for women and children”. Article 16(1) addresses “equal opportunity in public employment”. Article 38 instructs the states to “establish and maintain, as efficiently as possible, a social order in which social, economic, and political justice informs all institutions of national life”. Article 39 directs that “states should direct their policies toward ensuring, among other things, the equal right to adequate means of livelihood for men and women, as well as equal pay for equal labour, regardless of their age or strength”. Article 39(f) provides that “children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and that childhood’ should be protected against exploitation”. Article 45 guarantees “children’s right to free and compulsory education”, now extensively recognized as a fundamental right. Additionally, Article 46 mandates the state “to promote the educational and economic interests of women and weaker sections of the people and that it shall protect them from social injustice and forms of exploitation.”

Hence, the Constitution recognizes the importance of protecting the rights of all individuals, including those who are most susceptible to trafficking and exploitation.

Legislation dealing with Trafficking of Women

Several statutes have been passed by the Government to combat trafficking of women. “The Immoral Traffic (Prevention) Act, 1956” covers trafficking for commercial sexual exploitation (CSE); “The Bonded Labour System Abolition Act, 1976”; “The Child Labour (Prohibition and Regulation) Act, 1986” deals with other forms of trafficking. “The Indian Penal Code, 1860”, “The Code of Criminal Procedure, 1973”, and “The Evidence Act, 1872” are also used to address components of offences committed throughout trafficking. Further, “The Juvenile Justice Act, 2015” was enacted to offer care and support to child victims.

This section will discuss in brief the above mentioned statutes and analyze the only central legislation enacted to combat the trafficking of women.

Immoral Traffic (Prevention) Act, 1956 (ITPA)

ITPA, previously known as the “Suppression of Immoral Traffic in Women and Children, 1956”, is the primary legal statute in India that deals with human trafficking. Its primary objective is to combat trafficking for CSE. However, its scope is limited to “prostitution” or “commercial sexual exploitation”, and does not cover other forms of trafficking. A few relevant sections from the act are discussed below.

It is evident that a significant portion of trafficking for CSE is done for brothel-based prostitution. Section 2 (a) of the Act defines “brothel”. The primary elements that must be proven are that (a) sexual exploitation exists and (b) someone other than the victim is profiting from it, and (c) two women are engaging in prostitution for their own mutual benefit.

The primary objective of the ITPA is to prevent the CSE and to abolish trafficking for the purpose of prostitution. The law acknowledges that such exploitation violates the dignity and rights of the victims, and aims to protect them from such exploitation. To achieve its purpose, the ITPA provides for a range of offences associated with trafficking for CSE. Section 3 of the ITPA criminalizes “keeping of a brothel or allowing premises to be used as a brothel”. Section 4 prescribes punishment “for any person who is above the age of 18 years and lives on the earnings of prostitution”. Section 5 of the ITPA criminalizes a range of activities related to prostitution, including procuring, inducing, taking, or even attempting to do so. This section aims to target individuals who exploit or coerce others into prostitution and recognizes that such behavior constitutes trafficking. The language of the section is intentionally broad, which includes not only direct actions to procure or induce but also attempts to funnel someone into trafficking. Moreover, the section provides an aggravated form of offense, when the crime is committed against a “child” or a “minor” [Section 5(2)].

Section 6 criminalizes “detaining a person in premises where prostitution is carried out with or without consent with the intention to have sexual intercourse with a person who is not the spouse”.

“If a person is found with a child in a brothel, it would be presumed, they have committed the aforementioned offence” [Section 6 (2)]. Moreover “where a child or minor is found in a brothel, is, on medical examination, detected to have sexually abused, it shall be presumed, that the child or minor has been detained for the purpose of prostitution or, has been sexually exploited for commercial purposes.” [Section 6 (2A)]. Section 7 provides punishment for prostitution in the vicinity of a “public place”. Section 9 provides punishment “for the seduction of a person in custody”.

Section 10 A provides that the court can send a female offender to a corrective institution for a term that is “not less than two years and not more than five years” if her “character”, “health”, and “mental condition”, as well as the other conditions of the case, are beneficial to her correction.

Further, Section 13(1) empowers “the State Government to appoint a Special Police Officer for each region”. Section 14, provides that “only a Special Police Officer or any other subordinate officer acting under his direction or supervision may arrest without a warrant for offences under this act”. Section 16 authorizes a magistrate “to direct a police officer to remove and produce a person before him if he has reason to believe that such person is living or is carrying prostitution in a brothel”. Section 18 empowers “the magistrate to order a closure of the brothel at any point of time”. Section 19 facilitates a person “who is carrying on or is being made to carry on prostitution to apply to the magistrate for an order that may be kept in a protective home or provided care and protection by the court”. Section 20 allows “the magistrates to order the removal of prostitutes from any place”. This is further criminalized in the form of severe punishment for activities such as “brothel keeping” U/S 3. Further, Section 21 empowers the State Government to create any number of “protective homes” and “corrective institutions”. While sections 22A, 22AA enables “the government to create special courts to try the offences under this legislation”.

Indian Penal Code, 1860

The trafficking of women involves various processes and means, such as abduction, deception, coercion, or fraud. It is also associated with other offenses, such as rape, sexual assault, forced labour, or slavery. Under the IPC, these offenses can be prosecuted and punished accordingly. More importantly, the 2013 amendment incorporated the definition of “human trafficking”

(Section 370). It also provides punishment for the commission of offence of human trafficking, ranging from a minimum seven years to life time imprisonment [Section 370(2)].

Other relevant provisions are - “Kidnapping” (Section 361) and “abduction” (Section 362). Further, several other offences have been created where kidnapping or abduction is committed with a specific purpose such as; for the purpose of begging (Section 363), compel a woman to marry (Section 366), to grievous hurt or slavery or unnatural last (Section 367). Studies have also shown that “minors” make the majority of population in the arena of CSE (UNODC Report, 2021). This is also clearly punishable under Section 366A of the Code. Section 372 and 373 incorporates provision of punishment up to 10 years for “selling and buying a minor” for the purpose of prostitution. Further, a series of sexual offences including “rape” (Section 375) was incorporated to the Code through a recent amendment (Criminal Amendment,2013).

The Juvenile Justice (Care and Protection of Children) Act, 2015

The Act recognizes children in difficult circumstances, including child trafficking victims, as “child in need of care and protection”. It acknowledges that children who have been trafficked are particularly vulnerable and provides for measures such as rehabilitation and reintegration into society to help them recover from the trauma of their experiences.

Section 74 to Section 83 of Chapter IX, creates offences against children and prescribes punishment for them. Section 75 of the Act provides punishment for “cruelty to a child”. Section 76 punishes “employment for begging”. Section 81 prescribes punishment for the “sale and procurement of children for any other purpose”. Further, the Act also provides for a range of measures to protect and support children in difficult circumstances, including the establishment of Child Welfare Committees (Section 27) to ensure that children in need of care and protection receive appropriate care and support.

The Bonded Labour System (Abolition) Act, 1976

It was passed to eradicate “bonded labour” and prevent the exploitation of vulnerable workers. Section 2(e) defines bonded labour “as any labour or service rendered under the bonded labour

system”. Section 2 (g) defines the bonded labour system. Section 16 provides punishment for compelling a person to work in bonded labour system. While, Section 18 prescribes punishment for enforcing and extracting labour under the “bonded labour system”. The law also specifies the duties that must be performed by the District Magistrate in order to carry out its provisions. Section 11 authorizes the District Magistrate “to try to promote the welfare of the freed bonded labourer by securing and protecting the economic interests.”

The Child labour (Prohibition and Regulation) Act, 1986

It sets out a list of hazardous occupations and processes in Part A of its schedule, which are prohibited for children to work in. In addition it also lays down conditions for children working in non-hazardous occupations. According to the Act, “no child shall work for more than three hours before he or she has had an interval of rest for at least one hour”.

The Code of Criminal Procedure, 1973

The Act provides for the procedures to be followed in criminal cases in India. It lays down the rules for the investigation, trial, and punishment of criminal offenses. In this case, the sections 51(2), 53(2), 98, 160, 327(2), and 357 are pertinent.

The Indian Evidence, Act 1872

It regulates the admissibility and relevancy of evidence in trials. Section 114A and Section 151 are relevant to the issue of trafficking. U/S 114, the court may draw general presumption; U/S 114 A, provides that in rape cases once the victim states before the court that she has not given consent, a presumption as to absence of consent shall be drawn. U/S 151, the judges are prohibiting any questions or inquiries which it regards as offensive or outrageous.

An Analysis of Immoral Traffic (Prevention) Act, 1956

As discussed above, the ITPA is the only legislation dealing with the “trafficking of women” in India. However, even though the name refers to immoral traffic, its scope is limited to CSE and

“prostitution”. The act penalizes those who facilitate or abet such activities and those who “live off the earnings of prostitutes”. Further, the act provides for the establishing of protective homes for the rehabilitation of victims. However, despite comprehensive provisions, the law leaves more to be desired. Below is analysis of a few shortcomings:

The absence of a clear definition of “trafficking” is a major drawback of the law as it creates vagueness and confusion about what precisely constitute trafficking. This, in turn, makes it difficult to prosecute offenders involved in this crime, which undermines the effectiveness of the law in combatting this menace. Moreover, the ITPA’s narrow approach to CSE is also a cause for concern. Focusing solely on identifying brothels as a location and prosecuting those who assist them, the act fails to recognize the broader scope of CSE that occurs outside of brothels. Therefore, the ITPA may fail to deliver adequate protection to the victims. Additionally, the attempts to prevent trafficking in India are undermined by the lack of clarity in the legislation regarding whether “prostitution” or “prostitution for trafficking” is prohibited. This vagueness may make it accessible to criminals who transport and shelter potential victims to escape punishment.

Section 2 (a) defines a brothel as a “location where two or more prostitutes collaborate for the advantage of another person”. However, the statute does not cover private premises, such as residences, hotels, and clubs. This is a significant limitation because commercial sexual activity has emerged in varied forms, and perpetrators can exploit victims in various locations, including mobile locations.

Further, the existing cultural practice of “devadasis” and “jogins” is also excluded from the scope of the act. The Supreme Court in *Gaurav Jain v. Union of India* held that “the prevailing practice of engaging girls for prostitution in the name of religion is void under Article 13 and punishable by law”. Hence there would be a considerable progress towards ending this sort of sexual exploitation if traditional practices were explicitly mentioned in the law.

The principal objective of the legislation is to abolish the “traffic of women and girls” for the purpose of prostitution as an organized means of subsistence. In a nutshell, it is not a crime for such a woman to involve in prostitution on her property. But, the law criminalizes those who “live off prostitutes’ earnings”. However, it fails to make any allowances for the “children” “legal heirs,” or other “dependents” of these women. Many times, the woman is the only breadwinner of the

family, which is an outrage to the children or other dependents involved. Hence, it is necessary to distinguish between “living off” and “living on” earnings.

Section 7 “criminalizes prostitution near public places” and enforces a higher penalty if there is an involvement of a “minor”. While the inclusion of a higher penalty for minors involved in prostitution is a positive step towards recognizing the severity of the offence and protecting children’s rights, the omission of clear language regarding the protection of child victims is a significant concern. Besides, the addition of Section 8, which criminalizes “seducing” or “soliciting, makes victim culpability obvious. Numerous studies have highlighted that it is the most commonly abused section of the ITPA (NHRC Trafficking Report,2002). It found that the police often hold victims accountable under the ITPA, which is meant to protect them from abuse.

Another controversial provision is Section 20. It authorizes “the magistrate to evict any woman or girl believed to be prostituted from her home or any other place within his jurisdiction”. It was nevertheless challenged in *Kaushilya v. State* in which, the High Court ruled: “Section 20 of the SITA must be struck down under Article 13(2) of the Constitution as it violates both Clauses (d) and (e) of Article 19(1) and Article 14 as well, though the court has not looked into the fundamental issues related to prostitution”. However, in the *State of Uttar Pradesh v. Kaushaila*, the SC set aside the High Court’s decision. It determined that “the restrictions under Section 20 of the ITPA are reasonable restrictions imposed in the public interest”. Further, on the issue of the infringement of fundamental rights to “freely move and reside in certain parts of India” [Article 19 (g)], the court ruled that “the reasonableness of the restrictions is determined by the urgency of the evil required to be contained.”

Section 10A has incorporated a provision for the detention of women in correctional institutions post-conviction U/S 7 or 8 of the ITPA. Yet, it is another provision that in reality violates the human rights of the victims. It states that “any woman whose character, state of health, and mental condition are such that it is expedient that she should be subject to detention for such term and such instruction, and such discipline, as are conducive to her correction.” It is crucial to remember that neither the statute nor the amendment defines the aforesaid expressions. The amendment doesn’t attempt to address the “gender-biased” law that is reflected in the use of these expressions.

Section 13 of the Act incorporates the provision for a “special police officer” to be notified for the purpose of this legislation. While the provision is an important mechanism for enforcing the law, the lack of senior police officers and resources poses a significant challenge to its effective implementation. In practice, many police stations in India are located in remote areas and may be headed by a sub-inspector who may not have the authority to investigate and thus register cases under the Indian Penal Code as a matter of general practice. This can make it difficult to effectively enforce the provisions of the ITPA and hold perpetrators accountable for their actions. However, the judiciary has been strict in scrutinizing the proceedings and quashing them when there are lapses in following the required procedures (*Delhi Administration v. Ram Singh*, AIR 1962 SC 63, *Re Kuppamal* AIR 1959 Mad 389).

Rehabilitation, Compensation, and Protection under ITPA

The dearth of extensive rights for victims in terms of “rehabilitation” and “compensation” is a significant flaw in the law. The provision of “shelter homes” for victims is an important aspect of a welfare state’s responsibility to protect vulnerable individuals and provide them with the necessary support and service. Hence, it is crucial to ensure that these homes are habitable, adequate services are provided, and protection is offered to the victims. Unfortunately, government-run and funded shelters for victims have been criticized for their deficiencies, including lack of space, pecuniary resources, and competent personnel. In some cases, these homes continue to operate despite considerable gaps in mandatory reporting and abuse allegations, that can be ascribed to purported political influences (TIP Report,2021). In addition, victims of prostitution are often treated as offenders in these homes. They are “forced to wear uniforms” and are provided access to pimps and brothel keepers (NHRC Report on Trafficking, 2002-03).

Further, there is a glaring absence of a policy to serve as a roadmap for determining the amount of compensation and the procedure to be used. A report stated that there is an inconsistency in compensation amounts between states and low numbers of victims filing and receiving compensation (Sanjog,2020). In addition, there is a lack of awareness about the compensation schemes, and the application process is not victim-centric. This can further hinder victims’ ability to access compensation and rehabilitation services.

The government needs to develop clear policies and guidelines regarding compensation for the victims. These policies should take into account the unique circumstances of each victim and ensure that compensation is victim-centric, fair, and consistent across states.

Conclusion

The examination of ITPA and its efforts to amend it, discloses that the fundamental nature of the act has not transformed significantly, and it continues to be punitive towards sex workers and victims of trafficking. Sections 8 and 20 are specific examples of provisions that are often used to prosecute trafficking victims and perpetuate the cycle of criminalization and stigmatization of sex work. Further, the narrow focus of the law on “prostitution” alone fails to cover other forms of trafficking, such as “labour trafficking”, which is a significant issue in numerous parts of the world as well as in India. Moreover, the blurring of the contour between “consensual prostitution” and “trafficking for sexual exploitation” can result in violations of the rights of sex workers and hinder efforts to provide them with appropriate support and protection. Furthermore, the ITPA continues to disregard the cross-border component of trafficking, which is a crucial element of modern-day trafficking.

Trafficking is a complex and multi-faceted phenomenon that requires a holistic and victim-centric approach to address it effectively. In recent years, there has been a growing concern globally to adopt such an approach to combat trafficking. In case of India, the amendments made to sections 370 and 370A of the Indian Penal Code (IPC) in 2019 were an essential step towards addressing trafficking in a more inclusive form, and were in line with India’s commitment at the international level. These amendments expanded the definition of trafficking, increased the punishment for offenders, and provided for the protection of victims, among other measures. However, there is still a need for a dedicated anti-trafficking law in India that can comprehensively address all aspects of trafficking. Although, efforts have been made to draft and propose a comprehensive anti-trafficking law in India such as “The Trafficking of Persons (Prevention, Protection, and Rehabilitation) Bill, 2018”, which seeks to provide a legal framework that

addresses various aspects of trafficking, including “prevention”, “protection”, and “rehabilitation” of victims, as well as the prosecution of traffickers. However, the bill has not been passed to date.

Trafficking violates human right of the victims, hence it is important to recognize the need for a victim-centric approach that addresses the root causes of trafficking, provides support and rehabilitation to victims. It is essential to move beyond a punitive approach and focus on providing support, resources, and protections for the victims, who are often marginalized and vulnerable to abuse and exploitation.

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