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A Critical Analysis of Immoral Traffic (Prevention) Act, 1956 with Special Reference to Criminal Amendment Act, 2013

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ABSTRACT

After drugs and arms, human trafficking constitutes the third- largest organized crime in the world. Though numbers cannot be ascertained, millions of people are trafficked globally. It is a phenomenon that no country can claim to be free from. India is highly affected by this menace. According to reports, India ranks highly in all three elements of trafficking- source, transit, and destination. Every year, millions of people are trafficked in India, both internationally and domestically. While the cross border is a concern for India but intra- country trafficking forms a bulk of victims. To deal with this menace, several laws were enacted by the government. Article 23 of the Constitution explicitly “prohibits traffic in human beings”, and imposes responsibility on the states to address the menace of trafficking and provide support to the victims. Despite Constitutional guarantees and a plethora of laws, trafficking continues to thrive in the country. The domestic law dealing with trafficking is not updated to effectively combat this modern slavery. Recently, the government invited suggestions for the “Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021”. However, this bill is yet to be brought into reality. This article attempts to evaluate the law that redresses human trafficking: The Immoral Traffic (Prevention) Act, 1956 with special reference to the Criminal Amendment Act, 2013, and further argues for a comprehensive law to deal with changing dimensions of trafficking in India.

I. INTRODUCTION

Human Trafficking is a global phenomenon and every state and country is struggling to cope with this menace. It is frequently addressed as the fastest growing crime after drugs and arms². Moreover, many argue that it holds the potential in overtaking the other two. This phenomenal growth of trafficking in person is explained as, unlike drugs and arms humans as a commodity

¹ Author is a Research Scholar at Faculty of law, University of Delhi, India.

² Siddharth Kara, ‘Designing More Effective Laws Against Human Trafficking’, 9 NW.J.INT’L HUM.RTS 123 (Spring 2011).

that can be sold over and over again.

It is an organized crime that encompasses a wide range of human rights violations, from commercial sexual exploitation to forced labour and organ donation³. It has expanded into increasingly complex and diverse forms over the years, forcing the reform of laws and policies aimed at its elimination and control.

The ‘Trafficking in Persons’⁴ estimated 20 to 40 million people being globally trafficked, with females and children continuing to be particularly affected by it. According to the UNODC report⁵, in 2018, about five of every ten victims were adult women and two were girls. These figures, however, are only the tip of the iceberg. The real number of incidents is higher than what has been reported. The crux of the problem is how this crime is committed, with perpetrators operating in the shadows of the internet and the global economy to entrap people for illegal purposes. To address this threat, the United Nations adopted a new “Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, 2000” (hereafter Palermo Protocol). It provided an international framework to combat human trafficking. Countries that have ratified the agreement, such as India, are required to amend their domestic legislation to address the problem at the national level.

Human Trafficking is a horrid reality that confronts the civilized world, and India remains vulnerable to this vice. Due to the nefarious nature of the problem, it is impossible to estimate the number of people trafficked inside and out of India. However, the situation is dire. Statistics depict that India is ranked fairly high in all three components of trafficking- “source”, “transit” and “destination”. The United States Dept of Justice⁶ placed India on the tier 2 watch list for the 4th consecutive year. According to the NCRB⁷ report, India has hit three years high in 2019, with a total of 6,616 cases registered and a sharp drop in convictions. The majority of trafficking in India occurs internally, with forced labour being the most serious concern. Debt-based coercion (bonded labour) is used by traffickers to force men, women, and children to work in “brick kilns”, “embroidery”, “textile factories”, “stone quarries” etc. Traffickers promise large advances to entice the workers to accept low-paying jobs, then increase the interest to exorbitant rates; generate new deductions for items such as “health care”, “wage slips”; or concoct the amount of debt, which they use to coerce workers into continuing to work

³ DR SARFARAZ AHMED KHAN, *SEX TRAFFICKING AND LAW 2* (Satyam Law International) (2018)

⁴ U.S. Department of Justice, *Trafficking in Person Report, 2021*, www.state.gov/reports/2021-trafficking-in-person-report.

⁵ United Nations Office of Drug and Crime, *Global Report on Trafficking in Person, 2020*, <https://data-and-analysis-and-analysis/glotip.html>.

⁶ US DEPARTMENT, *supra* note 3.

⁷ National Crime Bureau Report, 2020, <https://ncrb.gov.in/en.node/2986>.

for little or no pay.

Millions of individuals are exploited in commercial sex within India by traffickers. Scheduled caste females were occasionally exploited under the ancient *Jogini* system, in which Dalit women and girls are ceremonially "married" to a local temple god but are in reality employed as sex slaves for higher caste peasants. Traffickers target Indian women and girls, but also fraudulently recruit significant numbers of Nepali and Bangladeshi women and girls to India for sex trafficking.⁸

To combat human trafficking several laws were enacted by the Indian government. For example, "The Immoral Traffic (Prevention) Act, 1956⁹" (hereinafter ITPA) - deals with trafficking for commercial sexual exploitation. A host of statutes including "The Bonded Labour System Abolition Act, 1976¹⁰", "The Child labour Act, 1986¹¹" and "The Interstate Migration Workman's Act, 1979¹²" are also enacted to cover other aspects of trafficking. Furthermore, several other statutes were enacted that directly or indirectly deal with human trafficking; "The Juvenile Justice Act, 2015¹³", "Protection of Children from Sexual Offences Act, 1973¹⁴" and major Act like the "Indian Penal Code, 1860"¹⁵ (hereinafter IPC) is also used to address components of offences committed during and after trafficking for commercial sexual exploitation. Moreover, Article 23 of the Indian Constitution explicitly "prohibits traffic in human beings and forced labour" and imposes negative as well as positive responsibility on the states to address the problem of human trafficking and provide support to the victims.

Despite Constitutional guarantees and a plethora of laws, trafficking continues to thrive in the country. The domestic laws dealing with trafficking are not updated to effectively combat this modern slavery. The current legislation especially dealing with trafficking covers one aspect of trafficking i.e., Prostitution or commercial sexual exploitation. Although there is a multiplicity of laws to deal with various aspects of trafficking, the practice of this organized crime remains endemic in the country.

India signed the "Palermo Protocol" in 2002 and ratified it in 2011. However, codified in national law in 2013 by an amendment to the IPC. Two new sections, 370¹⁶ and 370A, were

⁸ US DEPARTMENT, *supra* note 3.

⁹ The Immoral Traffic (Prevention) Act, 1956, No.104, Acts of Parliament, 1956.

¹⁰ the Bonded Labour System Abolition Act, 1976, No.19, Acts of Parliament, 1976.

¹¹ The Child labour (Prohibition and Regulation) Act, 1986, No.61, Acts of Parliament, 1986.

¹² Interstate Migration Workmen (Regulation of Employment and Conditions of Services) Act, 1979, No.30, Acts of Parliament, 1979.

¹³ The Juvenile Justice Act (Care and Protection) Act, No.2, Acts of Parliament, 2015.

¹⁴ Indian Penal Code, 1860, No.45, 1860.

¹⁵ The Protection of Children from Sexual Offences, Act 2012, No.32, Acts of Parliament, 2012.

¹⁶ The Criminal Law (Amendment) Act, 2013, No.13, Acts of Parliament, 2013.

added to define “human trafficking.” However, it is contended that the definition was produced half-heartedly and that a significant component was left out of its scope. In a recent development concerning human trafficking, the government solicited proposals for the “Trafficking in Persons (Prevention, Care, and Rehabilitation) Bill, 2021”, which broadened the nature of trafficking offences. However, the bill is yet to become a reality. This article attempts to evaluate the Immoral Traffic (Prevention) Act, 1956 with special reference to the Criminal Amendment Act, 2013 and further, argues for a comprehensive law to deal with changing dimensions of trafficking in India.

II. INDIA AND INTERNATIONAL LAW

International, multilateral, and bilateral collaboration can play a major role in combating human trafficking. Such collaboration is crucial among countries involved in various phases of the trafficking cycle. Effective action of preventive measures, prosecution of traffickers, and victim protection internationally are pertinent to eradicating human trafficking.

In 2000, after much debate and deliberations, the “Palermo Protocol” was adopted by the international community. It is one of the most significant international instruments in the context of trafficking. It represents a tremendous achievement in international efforts to combat and prevent trafficking in person as it provided the first comprehensive international instrument to address all forms of trafficking, as well the internationally accepted definition of the term “trafficking in person”.

Although India ratified the “Palermo Protocol” in 2011, however, codified in national law in 2013, with the enactment of the Criminal Law (Amendment) Act, 2013. The new amendment to Section 370 followed the same format of the Palermo definition, using the three-part definition for trafficking: purpose, action, and means.

India’s adoption of the amendment to Section 370 of the IPC was influenced by both former case law and state-level legislation¹⁷ on trafficking. In April 2011, the Supreme Court of India ruled in *Bachpan Bachao Andolan v. Union of India*¹⁸ that child trafficking could encompass a long laundry list of forms and purposes. The judgment first quoted the Protocol as the standard definition in international law for trafficking in persons. Despite these modifications, the trafficking framework falls short of achieving the protocol's criteria in a range of aspects.

First, Section 370 does not identify and punish all kinds of trafficking since it omits “forced labour” from its definition. This deliberate refusal to acknowledge forced labour contradicts

¹⁷ The Goa Children’s Act, 2003 and Rules, 2004, No.12, Goa Act, 2004.

¹⁸ *Bachpan Bachao Andolan v. Union of India & Ors*, (2011) 5 SCC.

the Protocol's definition as well as basic international law. This is a major gap in the legislation as forced labour constitutes the major chunk of cases in India.

Second, India's existing legislation and policies do not conform with its obligation to prevent trafficking under the "Palermo Protocol". The ITPA (Section 13A) empowers the Central Government to establish an authority to combat trafficking. However, apart from this enabling clause for the establishment of such an authority, the act primarily concentrates on the punishment of trafficking violations and rehabilitation measures as well. Furthermore, the ITPA makes no mention of trafficking for any reason other than sexual exploitation. Additionally, the Indian Government's preventive initiatives are ineffective in practice¹⁹.

Third, India's adoption of the "Palermo Protocol" obligates it to develop a framework for the "protection", "rehabilitation" and "compensation" of trafficked victims. However, the laws and policies, funding mechanisms, and resources for the survivors' recovery, safety, and compensation remain insufficient. Reports²⁰ also state various difficulties faced by the victims to access compensation and achievement of safe recovery due to disjointed policies and implementation failures.

While in violation of the Protocol's provisions, each omission has also contributed to the system's inability to deal with the problem efficiently. Given the country's reality regarding human trafficking, India should amend its laws and policies to meet the country's duties under the "Palermo Protocol".

III. THE CONSTITUTIONAL MANDATE AGAINST HUMAN TRAFFICKING

The Indian Constitution directly or implicitly forbids human trafficking, and several basic rights are inscribed within four corners, negative as well as positive duties on the state to fight the issue of human trafficking and give assistance to victims. Article 23 "prohibits traffic in human beings and forced labour"²¹. Article 24 forbids the "engagement of minors in any dangerous occupation or in any plant or mine that is unsuitable for their age". The terminology of Articles 23 and 24 imposes a clear mandate on the government to take decisive actions to eliminate trafficking as a violation of fundamental rights. Article 14²² provides for "equality in general", whereas Article 15(3) provides for "special safeguards for women and children". It

¹⁹ US DEPARTMENT, *supra* note 3.

²⁰ Avon Global Centre for Women and Justice at Cornell Law School, Centre for Health Law, Ethics and Technology at Jindal Global Law School, Cornell Law School International Human Rights Clinic, and International Human Rights Clinic at the University of Chicago Law School Report, "India's Human Trafficking Laws and Policies and the UN Trafficking Protocol: Achieving Clarity" (2016), <https://jgu.s3.ap-south-1.amazonaws.com/cjls/India's+Human-Trafficking.pdf>.

²¹ INDIA CONST. art 23, cl.1.

²² INDIA CONST. art 14.

states that “Nothing in this article shall prevent the State from making any special provision for women and children”. Article 16(1) addresses “equal opportunity in public employment”. It simply directs the government to give chances for equitable results. Article 38 requires 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 enjoins 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 widely recognized as a basic right. Furthermore, Article 46 instructs 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”

Thus, a set of constitutional mandates place affirmative responsibilities on governments to engage constructively in support of fighting human trafficking, ensuring that no one's human rights are infringed.

IV. IMMORAL TRAFFIC (PREVENTION) ACT, 1956: A CRITICAL ANALYSIS

ITPA 1956, formerly the “Suppression of Immoral Traffic in Women and Children, 1956” is the main legal statute dealing with human trafficking in India. It was enacted to give effect to the “UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950”, and lofty the constitutional mandate. The ITPA refers to immoral trafficking in human beings; nonetheless, the statute's scope is confined to “commercial sexual exploitation” or “prostitution”. It includes penalties for individuals who aid and abet commercial sexual exploitation in brothels. The act also includes welfare provisions, such as mandating the state government to establish and maintain protective shelters for trafficking victims. Despite precautions, the act falls short and leaves more to be desired. Below is an effort at a concise analysis.

The basic deficiency of ITPA's is that it lacks a definition of trafficking, even though it is a specialized piece of legislation dealing only with trafficking. Furthermore, rather than defining commercial sexual exploitation precisely, the act focuses on identifying brothels as a location of commercial sexual exploitation and prosecuting those who assist it. The legislation is unclear as to whether prostitution or prostitution for trafficking is prohibited. This ambiguity allows a

slew of criminals involved in the transportation and sheltering of prospective victims to go unpunished.

A “brothel” is defined in Section 2(a) of the ITPA as a location where two or more prostitutes collaborate for the advantage of another person. The term “brothel” is too broad to encompass places where such exploitation takes place, such as massage parlours and hotel rooms. However, as determined in *Sushila vs. State of Tamil Nadu*²³, a single episode of prostitution does not constitute a “brothel”. However, *In re: John*²⁴ the court highlighted that to be considered a “brothel”, prostitution must take place for the benefit of another person. This explanation of a “brothel” as a place where two prostitutes can benefit from each other criminalizes commercial sex workers who work voluntarily.

Furthermore, *devadasis* and *jogins* are not covered by the Act. According to the Supreme Court, such prevailing practice of engaging girls for prostitution in the name of religion is void under Article 13 and punishable by law²⁵. The explicit mention of traditional practices would go a long way toward putting an end to this type of sexual exploitation.

The legislation's primary objective, as stated in the “Preamble” to the 1956 version of the statute, is “to inhibit or abolish commercialized vice, namely, the traffic in women and girls for the purpose of prostitution as an organized means of living.” To put in other words, a woman can engage in prostitution on her property without it being considered a crime. However, the act penalizes those who “live off prostitutes' earnings” (Section 4 of ITPA). This section can be used against anyone who profits from the prostitution of others, such as escort service providers, agents, pimps, and other people who profit from prostitutes. Nevertheless, it does not make any exceptions for “children”, “legal heirs”, or other “dependents” of prostituted women and penalizes them. In many cases, the woman is the sole breadwinner for the family. It implies a travesty of justice for the children or other dependents involved. As a result, the distinction between “living off” and “living on” wages must be made.

Section 7 of ITPA criminalizes “prostitution near public places”, and Section 7(1A) “imposes a higher penalty if a minor is involved”. This is a step on the right path towards acknowledging the severity of the offence and providing some safeguards for children's rights. However, the amendment's glaring omission of any explicit provisions for the protection of children trafficked for prostitution is an appalling display of official apathy.²⁶ Furthermore, this law is

²³ *Sushila v. State of Tamil Nadu*, (1982) Cr L.J 702 (Mad) (India).

²⁴ *In re John* (1966) AIR. (Mad) 167

²⁵ *Gaurav v. Union of India* (9 JULY 1997) SC (India).

²⁶ HUMAN RIGHTS LAW NETWORK, TRAFFICKING AND LAW, HRLN (2^D ed.2011).

guided by a moral foundation that seeks to protect "public decency" by directing for "moral cleaning up" of public places. The Act also uses ambiguous language to define "public places" and has been used against women in prostitution, whether or not they have been trafficked.

Moreover, the inclusion of Section 8, which prescribes punishment for seducing or soliciting prostitution, is a clear indication of victim criminalization. Several studies across India show that it is the most abused section of the ITPA because the police frequently use it to hold the victim indictable under it. Women are apprehended in well-known red-light districts, while their brothel owners and pimps go unpunished, if at all. The prosecution requires sex workers to give testimony against the trafficker and third-party defendants like pimps and brothel owners. Because these women rely on these third parties for a living, their tremendous hesitance to cooperate makes prosecution nearly impossible²⁷.

Another controversial provision other than Section 8 is Section 20 of the Act. It is argued as more moralistic and hate-filled against women. Section 20 gives enormous power to a "magistrate to evict any woman or girl believed to be prostituted from her home or any other place within his jurisdiction". This provision however was challenged in *Kaushilya v. State*²⁸, in which, The High Court ruled that 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. The court made the following observation as a reason for declaring the provision unconstitutional:

"It is important to note that Section 20 of the Act is not aimed directly at the carrying on of prostitution, but instead seeks to control the movements and residence of prostitutes. Under this section, a Magistrate is not required to order a prostitute to give up her trade but can direct her to remove herself from someplace within the local limits of his jurisdiction that she is residing in or frequenting such place whether within or without the local limits of his jurisdiction, by such route or routes and within such time as may be specified in the order and may further prohibit her from re-entering the place from which she has been removed. This is a clear infringement of the fundamental rights guaranteed to citizens of this country by Article 19 of the Constitution, to move freely throughout the territory of India and to reside in any part of the territory"²⁹

However, in the *State of Uttar Pradesh v. Kaushaila*³⁰ Supreme Court while responding to six

²⁷ HRLN *supra* note 25.

²⁸ *Kaushailya v. State* (1963) AIR AII 71 (India).

²⁹ *Kaushailiya v. State* (1963) AIR AII 71 (India).

³⁰ *State of Uttar Pradesh v. Kaushaila & others*, (1964) SC 41 (India).

appeals, 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". While responding to the question of the constitutional validity of Section 20, the Supreme Court differentiated between a "prostitute who carries on her trade on the sly or in the unfrequented part of the town and may not be as dangerous to public health or morals as to those who carry on prostitution in the crowd and public places". Furthermore, on the issue of the violation of fundamental rights to freely move and reside in certain parts of India, the court ruled that the reasonableness of the restrictions is determined by the urgency of the evil required to be contained.

Section 10(b) "provides a maximum period of stay of female offenders in corrective institutions". It is yet another amendment that penalizes prostitutes. The ITPA and its amendments state "any woman whose character, state of health or mental condition necessitates corrective treatment must be placed in a facility, whether or not she wishes to be placed there". However, it should be highlighted that neither the Act nor the amendment defines the terms listed above. The use of these terms reflects "gender-biased" law, which the amendment does nothing to address. Furthermore, it allows police to misuse their authority.

Section 13 of ITPA directs the government "to appoint special officers to deal with offences under this act". There is no doubt that the most significant problem faced by these women is related to police harassment and detention. However, rather than focusing on increasing police liability to guarantee that the victims' rights are properly secured, the amendment has whittled down the rank of the special officer from inspector to sub-inspector. This amendment is to be expected to result to even more police abuse of power. However, the judiciary has been stringent in protecting the rights of the accused and has frequently quashed the proceeding whenever there are some latches in following the procedure under Section 13³¹.

Section 13(3)(b) requires the "state government to consult a non-official advisory board constituted of five top social welfare professionals in that jurisdiction on general issues of significance in terms of the Act's operation". However, neither the composition criteria nor the membership procedures of the non-official advisory board are specified, nor are the specific areas of consultation. This increases the possibility of rejection of the advisory board's recommendations without adequate consideration.

Rehabilitation, Compensation, and Protection

The lack of a specific set of rights for victims in terms of rehabilitation and compensation is perhaps the most obvious flaw in the law. As previously stated, this comprises their detention

³¹ In *Delhi Administration v. Ram Singh* (1962) AIR SC 63 (India).

without their consent in protective or corrective homes, but it also includes the full range of “rehabilitation services”, including “relief” and “compensation”. Section 2 requires the state governments to establish “protective homes”. The provision of safe havens for victims of human trafficking is consistent with a welfare state's responsibilities. However, measures must be put in place to guarantee that these homes are habitable. Nonetheless, they are treated as criminals in these homes; forced to wear uniforms and provide easy access to pimps and brothel keepers³². Besides due to a severe shortage of “space”, “financial resources”, and “trained personnel”, government-run and funded shelters remain deficient. In numerous cases, such homes continue to run regardless of substantial gaps in obligatory reporting and abuse accusations, which sometimes are attributed to alleged political connections³³. Furthermore, reports suggest that a major proportion of children, including trafficked victims, are subjected to physical punishment, substandard food, insufficient medico-legal aid³⁴. Education, skill training, and other livelihood-providing facilities are also lacking, which would go a long way toward sustaining rehabilitation. It's hardly surprising, therefore, that victims are released after a time of "detention" and, more frequently than not, return to their former lives. Respectively, the absence of a clear policy to guide the finalization of the amount of compensation, as well as the process to be followed, means that victims must wait for an extended period, if at all, before getting anything.

V. CONCLUSION

An evaluation of the ITPA and its attempt to amend it reveals that the essence of the law has not changed. Instead of being protective, the law remains punitive. Sections 8 and 20, which are primarily used to prosecute victims of human trafficking, are examples of the statute's punitive nature. Although the law has increased the punishment for those who live “off the earnings of prostitutes”, it inadvertently brings their children within its purview, robbing them of their sole source of sustenance. ITPA is profoundly slanted in punishing the crime of sexual exploitation and does not cover any other form of trafficking. Besides, it focuses on the issue of prostitution, per se, and not exclusively trafficking, as per the Palermo protocol. Moreover, it waters down the line between “consensual prostitution” and “trafficking for sexual exploitation”, and rather than empowering sex workers or prostitutes, it violates their right to a living and the right to practice their profession. Furthermore, victims' rights are also not clearly defined in the act. This is also a fundamental flaw in the statute, as welfare measures

³² Sen, Shankar, A Report on Trafficking in Women and Children in India 2002-2003, NHRC, UNIFEM and ISS [http://www.ashanet.org/focusgroups/sanctuary/articles/ ReportonTrafficking.pdf](http://www.ashanet.org/focusgroups/sanctuary/articles/ReportonTrafficking.pdf).

³³ US DEPARTMENT, *supra* note 3.

³⁴ *Id* at 285

were set without first identifying how they would be implemented. This gap contributes to poor implementation of the rehabilitation process. Moreover, cross border dimension of trafficking remains neglected in the Act.

Trafficking of persons is a multifaceted phenomenon. There is no dearth of doubt that the gravity of the issue is intensifying every passing day. There has been a growing concern at various levels for a more holistic and victim-centric approach, as evidenced by changes in international trafficking regulations. However, unfortunately, in India, apart from the amendments to sections 370 and 370 A in IPC no concrete step had been made to bring a law in line with reality.

Human rights violations are inextricably linked to the trafficking process. As a result, any action taken to deal with the problem of human trafficking must prioritize the protection and respect of human rights. However, the current model of protection offered to the trafficked victims too often prioritizes the needs of law enforcement over the rights of the trafficked person. The problem of human trafficking is multi-dimensional. Hence, there is an urgent need to develop a comprehensive law that addresses the unique characteristics of India's context and as well the concept of the Palermo Protocol.
