The Trafficking in Persons (Prevention, Care, and Rehabilitation) Bill 2021

Collated Comments by Coalition for an Inclusive Approach on the Trafficking Bill

Introduction

Trafficking is a criminal offense and requires strict measures to combat unscrupulous persons who exploit the vulnerability of workers. Unfortunately, to date, all measures to deal with trafficking focus on the victims rather than the perpetrators of the crime.

The problem with the Trafficking in Persons (Prevention, Care, and Rehabilitation) Bill 2021 is that it ends up criminalising vulnerable individuals in the absence of comprehensive policies, programmes and measures that address the factors that make persons vulnerable to trafficking. The aspiration to move and access better living conditions, poverty, lack of equal opportunity and skewed development policies force persons to move in an unsafe manner and accept work in a criminalised environment for instance in sex work, undocumented workers abroad or for organ trade.

The Bill ignores the problems associated with unequal growth, skewed development and inequity, including – aspirations to migrate for better livelihood. Distress (political, social, economic) and crisis also create conditions for a large proportion of female migration. However, the Bill envisages a rescue and rehabilitation mechanism to address the vulnerabilities faced by women and transgender persons. Further, instead of focusing on creating conditions and laws that make migration safer for women and other marginalised sections, these policies are focused on deterring the right to mobility and movement and criminalising vulnerable populations.

Significantly, with its new broad and vague definitions, the Bill makes consent of the individual irrelevant while determining the office of trafficking, thus striping adult workers of their agency and ability to make choices in a situation of lack of opportunities to earn a livelihood.

The identification of the counter-terror National Investigation Agency (NIA) as the coordinating agency responsible for prevention, investigation and prosecution of trafficking in persons and other offences, is one of the most problematic aspects of the Bill.

Violations of the right to privacy and restricting the right to carry out research or journalism are other serious concerns.

We therefore call on the Minister of Women and Child Development, Government of India to have a transparent and wider consultation with all stakeholders on the Bill before it is introduced in the Parliament.

Our specific concerns are as follows:

1. Attack on Federal Structure

The centralisation approach of the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 (hereafter "the Bill") is embodied in the vesting of power of investigation in the National Investigation Agency and the application of the NIA Act, 2008 as per Section 3(3). This has implications as far as the principle of federalism which is part of the basic structure of the Indian Constitution.

Other investigative agencies of the Central Government such as the Central Bureau of Investigation are mandated to conduct their probes within a state after seeking the consent of the state.[1] The NIA is not statutorily designed to function within such federal constraints. In fact, when it comes to the offences which the NIA is investigating, the officer in charge of a police station on 'receipt of information and recording' of an FIR pertaining to 'scheduled offences' shall forward the details to the state government and the state government 'shall forward the report to the Central Government as expeditiously as possible'. The Central Government then has the power to 'direct the Agency to investigate the said offence', if 'it is of the opinion that a Scheduled offence has been committed which is required to be investigated under this Act.' Once the NIA has been directed to investigate, then 'the state government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency'[2]

The proposal of NIA not only being the investigation agency, but also the applicability of the NIA Act to the investigation of offences under the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 should be a wake-up call for all states in the Indian Union. India was designed as a 'union of states' with legislative power being constitutionally distributed between the union list, the state list and the concurrent list. In this case by ostensibly legislating on trafficking which is related to 'public order', the union is trespassing on a state subject. As noted above, by making the NIA Act applicable the NIA now will have a legal basis to enter states and even begin investigations for trafficking without the consent of the concerned state. In a federal set up, any expansion of the authority of the NIA beyond what is already scheduled in the NIA Act should be viewed with the utmost concern.

2. Over-broad Definitions

The Bill adopts a definition of trafficking which defines victims as those who cannot consent, in effect negates the autonomy of the so-called victims. Even those who had been trafficked have the right to make decisions about their current and future life. By empowering authorities to place persons who are trafficked in custodial institutions without their consent,[3] the Bill fundamentally erodes the notion of individual autonomy guaranteed under the Indian Constitution.

Sex work is defined as an adult provision of sexual services for payment or goods. It is a viable option of work adopted by millions of women, men and trans persons in India. It provides a vital earning through which consenting adults support their families. Equating provision of sexual services with exploitation

[1] https://www.newindianexpress.com/nation/2020/nov/20/state-governments-consent-must-for-cbi-to-probe-in-its-jurisdiction-supreme-court-2225797.html
[2] See Section 6 of the National Investigation Act, 2008.
[3] See Section 17 of the Bill

contributes to a climate of stigma and scorn towards persons in sex work and the work itself, thus endorsing State violence and discrimination.

This Bill by implicitly including sex workers within the definition of persons who are trafficked, makes the lives of those who seek to make a livelihood from sex work that much more precarious. Under the guise of protection, the State seeks to withdraw one of the few options persons have to make ends meet.

One of the most vulnerable sections that will be adversely impacted by the Bill are adult sex workers. The fundamental flaw with the Bill is that it treats victims of human trafficking on par with adult persons in sex work. Trafficking of persons into forced or coerced labour (including sexual exploitation) should not be equated with sex work undertaken by consenting adults. This conflation could lead to misuse and over-broad application of the provisions in this bill.

Specific definitions

Amended definition of Trafficking in Persons

Section 23 of the present draft Bill brings a significant amendment to the existing definition of Trafficking. The Palermo Protocol to which India is a signatory and Section 370 of the Indian Penal Code define the offence of Trafficking as specifically relating to the Acts, Means and Purpose (being exploitation).

The proposed Bill seeks to drastically dilute the definition by removing physical movement or transport from one location to another in the determination of the offence of Trafficking[4]. When read concomitantly with the definition of exploitation included under Section 2 (7); the intention of the proposed bill seems to be to include within its ambit every and any act of exploitation whether the purpose of the same was commercial gain. This renders the Act over broad and vague. Given the harsh nature of penalties and punishments envisaged under the present draft bill, this vagueness has potential for overuse and misuse. Literally every act of exploitation in every sphere will be invoked as an offence of Trafficking. Multiple definitions are provided for exploitation through the text of the draft Bill which have led to redundant arguments.

Trafficked versus non - trafficked

In its efforts to curb trafficking, the Bill does not have any fool-proof mechanism of differentiating between the trafficked and non-trafficked, especially in the context of sex work. Who would determine this status? What if an adult, consenting sex worker claims to be a voluntary entrant? Would this voice carry any weight? Without paying heed to her, what if the label of the trafficked gets affixed on her?

The impact of these questions could be understood across two segments of adult, consenting sex workers viz. those in sex work alone as against those in multiple, informal labour markets.

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[4] Explanation 4, Section 23

a. For those in sex work alone, any attempt to arrest and confine the women/men/transgenders in the name of trafficking could be disruptive of precariously constructed livelihoods. The Bill does not in any way take cognizance of the economic arrangements that sex workers could have created for themselves; any indiscriminate action implicating them could have dire consequences. For example, sex workers are significant borrowers. This has only become more conspicuous after the onset of Covid-19. The arrest and confinement of sex workers over a period of several months could coincide with the term of their loan. Who would bear responsibility for the repayment? Also, sex workers predominantly function from rented spaces. Who will bear responsibility for the rents during the period of their arrest? Unfortunately, the sex workers themselves would end up bearing the economic burden imposed by the state on them; these payments would get extracted from them post their release.

b. Drawing from the Pan India Survey of Sex Workers (2013) and the Covid-19 Survey of Sex Workers (2020-21), significant overlaps could be found between sex work and labour markets. A host of women operating in the informal labour markets do tap into the markets for sex work for improving on their incomes. Such participants make use of the established spaces for sex work (brothels and lodges in Red Light Areas) without actually residing there. Such women do not fall within the ambit of trafficking but are vulnerable to being caught given their presence in the spaces for sex work. Their arrest and confinement in remand homes disrupts both their personal/family lives and livelihoods in labour markets. Also, as mentioned previously, the Bill offers no mechanisms for accounting for their debts and rental payments.

3. Criminalising approach over a developmental approach

The Bill is fundamentally motivated by a criminalising impulse. Issues which have to be seen within the lens of development are sought to be dealt with by criminal law. The state instead of taking on welfarist/developmentalist functions chooses to focus on incarcerating the poor.

The carceral approach is apparent not only in the fact that it sets up agencies and institutions which focus on 'raid' and custodial detention masquerading as rehabilitation but also in the draconian bail provisions. Clause 52 denies the accused person the right to anticipatory bail by specifically denying all persons accused of offences carrying a punishment of above two years; the right to approach the court under Section 438 for anticipatory bail. The experience under the ITPA has been that women in sex workers are arrested and tried as brothel owners and pimps. By denying those arrested under this Bill the right to anticipatory bail, the Bill eliminates provisions meant to prevent misuse. The provisions for freezing of bank assets and sealing of places used for the 'purposes of trafficking' is also about using a criminal law approach to deal with the networks within which precarious labour is forced to eke out a livelihood. This criminalisation approach is also evident in the fact that trafficking for the purposes of begging is seen as an aggravated form of trafficking. The victims in this case will be sent to custodial institutions, thereby again betraying the state mindset behind this Bill.

The criminalising mindset of the law is also reflected in the lack of any reference to special laws to protect children such as the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 2 (15) of the

Juvenile Justice (Care and Protection of Children) Act, 2015 defines "child friendly" as "any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child". The proposed bill is silent on the procedure to be followed when a child is involved in any of the process. It should have been mandated that all the bodies like NIA, the national, state and district anti-human trafficking committees should follow child friendly procedures as prescribed under the JJ Act, 2015.

Some section could have potential for criminalising already vulnerable populations. For example, Section 25 (1) (d) which defines an offence caused by "administering any chemical substance or hormones on a person for the purpose of early sexual maturity" could be misused to target the transgender community within which consensual use of hormones is prevalent. This effectively criminalises both the intimate life as well as profession of transgender persons. By criminalising the administration of hormones, the Bill plays into stereotypes of the transgender community making it seem that persons are abducted and hormones are administered to make them transgender. While any coercive measure should be a criminal offence, in this case, it is likely that the provision will be used to target the consensual use of hormones and the provision of hormones thereby denying transgender persons the right to gender identity and gender expression.

Criminalisation of sex work

The intent to criminalise sex workers and destroy their livelihoods runs through the entire Bill. Despite numerous calls from sex workers to explicitly exclude adult consenting sex workers from the ambit of anti- trafficking laws, their voices are ignored.

Sexual exploitation means the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or production of any pornographic material. (S 2 (25))
Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation… (S 23 (Explanation 1))
Where the purpose of consequence of the offence is prostitution, or any other manner of sexual exploitation of, … (S 25 (o))

The current draft bill continues to conflate sex work and trafficking by equating sex work with sexual exploitation (or any other manner of sexual exploitation) and by rendering the consent of a sex worker immaterial in the determination of whether she was trafficked or practicing sex work of her own volition[5]. This leads to harmful practices such as the forced rescue of adult women, their detention, and rehabilitation as victims of trafficking **against their consent**, separation from their families. This practice has been documented by sex worker groups repeatedly. No safeguards have been inserted into the current draft bill to prevent this harm.

[5] Section 2 (25); Section 23 (Explanation 2)

Sexual exploitation means the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or production of any pornographic material. (S 2 (25))

Sex workers depend on a network of third parties to keep them safe while working. However, the current draft bill criminalises all third parties without even attempting to distinguish those who support sex workers in their work from those who exploit using force, fraud, deceit and other means to obtain consent or compliance.[6] Treating third parties as *per se* criminal or exploiters pushes sex workers into exploitative conditions of unsafe working conditions, low payments.

The Bill also criminalises clients of sex workers[7].

As per *Section 30(1), "Whoever, knowingly or having reason to believe that a person is a victim, exploits such person, or takes benefit out of the exploitation of such person shall be punished."*
Every customer, employer, pimp, broker by whatever name called, who causes engaging of services of a victim as a result of which he is exploited, shall, be liable to be punished on conviction under this section. (Explanation 2)

The approach of criminalising clients is another crippling blow to the livelihoods of sex workers who are already on the margins of society. Since the inception of a similar clause under Section 370 A2 of the Indian Penal Code in 2013; sex workers have been sharing the harassment that they face. In a study conducted by sex workers from the National Network of Sex workers in 2019[8], over 100 cases were recorded in cities and towns of Maharashtra where clients were threatened arrest under the provisions and then let off after they were paid bribes. Some customers were taken to police stations, while others were let off outside the brothel spaces. Law enforcement have used this provision against clients, to demand bribes ranging from Rs. 2000 to Rs. 25000.

Another section that engenders disquiet is the impunity granted to officers implementing the draconian law. Section 51 lays down a clause to protect action "taken in good faith" by providing that "No suit, prosecution, or other legal proceeding shall lie against the Central Government or the State Government or any person acting under the directions of the Central Government or the State Government as the case may be, acting in good faith, or intended to be done in pursuance of this Act, or of any rules, or regulations made thereunder."

Section 51 protects Central and State Government and individuals acting under the directions of the governments. However, when there is no definition provided of "good faith", such a blanket impunity can encourage over-use and misuse of the law. A number of raids, rescue and coercive rehabilitation measures are undertaken at the initiative of NGOs resulting in large scale violation of the rights of persons being 'rescued'. There is no process of transparency or accountability in these raid and rescue processes.

[6] [Section 2 (25); Section 23 (Explanation 1) and Section 25 (o)]
[7] Section 30 (Explanation 2) - Every customer, employer, pimp, broker by whatever name called, who causes engaging of services of a victim as a result of which he is exploited, shall, be liable to be punished on conviction under this section.
[8] Violence faced by sex workers in India, Status Report for the CEDAW Committee, 2019. National Network of Sex Workers, NNSW

It is a fact that many of these NGOs are obtaining project funds from donors to incarcerate individuals who are termed as "victims of trafficking" for long periods of time against their consent. There have been accounts of violence and inhuman treatment especially against sex workers seeking to be released.

Under the current scheme of the proposed Bill, the District Anti Trafficking Committee has been given immense powers to decide on the rehabilitation of the victim/ advice the Magistrate on rehabilitation/ develop plans for rehabilitation. However, mechanisms of accountability have not been laid out in the proposed bill. There is no mention of the process of appeal for individuals seeking to opt out of the rehabilitation plans laid out by the District Anti Trafficking Committee. The agencies undertaking rescue, rehabilitation need to be held accountable for violations and be liable in civil and criminal law.

4. Prosecution and Judicial Trends

Currently the judicial trend appears to prosecute clients of sex workers. Courts have after quashing charges under ITPA directed prosecution under Section 370 A IPC – Exploitation of trafficked person. The prosecution and judicial trends stand substantiated by the experience of sex workers. In the context of Section 370 A, IPC which criminalises exploitation of an adult or minor trafficked person this would imply that clients of sex workers would be presumed to have knowledge or reason to believe that the person was trafficked and would have to establish the lack of such knowledge or belief. Section 370 A is already being used to arrest clients of adult sex workers without attempting to differentiate between "trafficked victims" and "adult women in sex work". In fact, the High Court in a couple of cases in 2016 *suo moto* took cognisance and directed the police to file cases against clients of sex workers under Section 370 IPC. The legislature needs to take on board the trends in practice, especially with regard to creations of offences like exploitation of trafficked person under Section 370 A IPC. While some courts recognise the agency of adult women and their intrinsic right to consent to their work[9]; other courts continue to regard sex workers as victims of trafficking[10].

5. Raid Rescue and Rehabilitation

The Bill devises rehabilitation measures for rescued victims. Under Section 11, the Police Officer no below the rank of a sub-inspector is empowered to remove an individual who is in "imminent danger of becoming a victim or of being exploited as a victim of an offence under this Act" from any place or premises and produce the individual before a Magistrate or Child Welfare Committee.

In the case of adults rescued by the police officer, the Magistrate may make an order sending the victim to a rehabilitation home (Section 16 (7)). If the rescued adult makes an application for release, the Magistrate may reject the application on grounds that it has not been made voluntarily.

The Bill calls to attention the continued focus of the State in the Raid, rescue and Rehabilitation model as the panacea for all people who have been trafficked. Even as the consent of the victim gets negated,

[9] Kajal Mukesh Singh and Ors. Vs. State of Maharashtra, 24th September 2020 Cr W.P 6065 of 2020, High Court at Bombay
[10] Ku Priyanka vs. The State of Madhya Pradesh, 20 May 2020, Cr Rev No. 789/2019, High Court of Madhya Pradesh

there is overwhelming evidence that the model has been used to forcibly incarcerate sex workers for long periods of time without recourse to judicial mechanisms.

Despite sex workers stating that they are adult and consent to being in sex work, they are "forcibly" picked up, their families are forced to give affidavits in courts stating that they will not do sex work again. In many instances, courts have refused to release HIV positive sex workers stating that families are not capable of looking after these women. These strategies further drive women in sex work underground and without safety nets in times of violence and exploitation.

Oft heard experiences of vulnerable communities have shown that they have been at the receiving end of laws and policies that have been blindly applied to them in the name of forced rehabilitation. A study conducted by SANGRAM and VAMP called "Raided" revealed that out of a sample of 243 women picked up in raids in Maharashtra, 193 were adult consenting sex workers, who were incarcerated in rehabilitation homes against their wishes. Of these 28 women said that they had been incarcerated for periods between 6 months to 3 years before they were finally released[11]. Under the proposed law, this process will become more brutal and incursive for sex workers. It will also extend to groups of people most vulnerable because of poverty or attempt to make a livelihood through precarious forms of work. (Surrogates, domestic workers, sex workers, transgender people).

Rather than the criminalisation, incarceration, rehabilitation framework proposed by the Bill, in contrast, Section 13 of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 mandates a comprehensive system of rehabilitation that is sensitive to the structural inequities that contribute to manual scavenging.[12]

The Supreme Court in the case of Budhadev Karmaskar v Union of India, has repeatedly bought attention to the futility of remand in short stay homes against the wishes of the victim[13]. Moreover, the 7th Report

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[11] Raided: How anti trafficking strategies increase sex workers' vulnerability to exploitative practices. Table 9, page 53 and Table 10, Page 54. https://www.sangram.org/resources/RAIDED-E-Book.pdf

[12] The Act states:*13. Any person included in the final list of manual scavengers published in pursuance of sub-section (6) of Section (11) or added thereto in pursuance of subsection (3) of Section 12 shall be rehabilitated in the following manner, namely: He shall be given, within one month, a photo identity card, containing, inter alia, details of all family members dependent on him, and such initial, one-time cash assistance, as may be prescribed his children shall be entitled to scholarship as per the relevant scheme of the Central Government or the State Government or the local authorities, as the case may be;*
he shall be allotted a residential plot and financial assistance for house construction, , or a ready-built house, with financial assistance, subject to the eligibility and willingness of the manual scavenger, and the provisions of the relevant scheme of the Central Government or State Government or the concerned local authority; he, or at least one adult member of his family, shall be given, subject to eligibility and willingness, training in a livelihood skill, and shall be paid a monthly stipend of not less than three thousand rupees, during the period of such training.
He or at least one adult member of his family shall be given, subject to eligibility and willingness, subsidy and concessional loan for taking up an alternative occupation on a sustainable basis, in such manner as may be stipulated in the relevant scheme of the Central Government or the State Government or the concerned local authority.
He shall be provided any such other legal and programmatic assistance, as the Central Government or State Government may notify on his behalf.

[13] In its order dated August 24, 2011, the Supreme Court states: *In this connection we wish to say that providing short stay homes to sex workers is hardly a solution to their problem. They must be provided a marketable technical skill so that they can earn their livelihood through such technical skill instead of by selling their bodies. Merely sending them to homes is sending them to starvation. … In this connection, we would like to say that the Central Government scheme has placed a condition that the rescued sex workers must stay in a corrective home in order to get technical training. In our opinion, No such condition should be imposed as many sex workers are reluctant to stay in these corrective homes which they consider as virtual prison.*

of the Panel on Sex Work, constituted by the Supreme Court under the same case, states that provisions such as crèches, day care and night care facilities should be set up for children of sex workers. However, no such provision is incorporated within this Bill.

The UN Trafficking in Persons Report speaks of housing, and the Manual Scavenging Act speaks of provision of plots for house construction. The Karnataka Government has recently recommended the provision of housing for sex workers. These recommendations recognise that merely removing a person from the site of trafficking is not going to assist the victim of trafficking in being rehabilitated. Provision of housing, and not merely accommodation, is essential to the continued rehabilitation process.

Rehabilitation measures must account for the structural factors that contribute to driving women to be trafficked. The manual scavenging act for example, recognizes rehabilitation to be a process which may disrupt any income generation activities of the victim, and also recognises the support that families of exploited persons receive from their exploitation. Such an understanding is completely absent from the Bill.

6. Negating Consent of Adult Victims

The lack of consent of adults to participate in processes that impact their lives, homes, and future hits at the very core of State obligations to preserve and promote an individual's right to free choice and movement. Lack of attention to consent is apparent in the following aspects:

Rehabilitation

Section 16 of the Bill empowers a magistrate to place a victim in a rehabilitation home. Subsection (6) states that a victim or a person on their behalf may make an application for release, supported by an affidavit. However, sub section (7) states that if the magistrate were to find that such application has not been made voluntarily, it may be rejected. What is noticeable is that the section does not set down any criteria that the magistrate must follow before placing the victim in the home. Therefore, in the absence of objective criteria, it is entirely up to the discretion of the magistrate to decide whether to place a woman in the home or not. It should also be noted that other acts that permit institutionalisation, for example, the Juvenile Justice Act, also mention that institutionalisation should be of last resort. In fact, the JJ Act repeatedly stresses upon the importance of family and familiar surroundings. However, the Bill does not even mention that victims of trafficking may have families, neither does it speak of financial and other obligations that victims may have.

Repatriation

Many women "rescued" in raids are separated from their families, including minor children, for months at an end. The Bill does not speak of a victim's right to be reunited with her family. From a reading of Section 16 (7), it seems that the order of the Magistrate will prevail in the event that he reaches a conclusion that the application has not been made voluntarily. It is not clear how the provisions of Section 19(4) will be applied in such a case.

Every citizen is guaranteed the constitutional right to exercise their choice regarding decisions that impact their lives. The law must take into account the wishes and consent of the person in the present point of time for purposes of rescue, rehabilitation and prosecution. Even, if a person may have been initially trafficked at the time of entry, the consent and wishes of the persons in the present have to be ascertained. The wishes of the adult person rescued and not accused of any offence; must be given primacy and Section 19 (4) must be override the provisions of Section 16 (7) if the intent of the Act is to respect the consent and agency of an adult woman.

Medical examination

Informed consent is also noticeably in Section 11 (1) which provides for medical examination of a person as directed by a Magistrate. Nothing in the wording of this provision refers to the necessity of taking the consent of the adult individual. The right of an adult to consent to medical treatment of any nature is enshrined in the right to bodily autonomy under Article 21 of the Constitution. There have been many cases where medical tests of sex workers have been conducted and shared with courts without consent. HIV/AIDS test results have been used as a ground to deny them liberty from rehabilitation homes on grounds that they were incapable of taking care of themselves.[14]

Repatriation

The proposed law as per Section 20(f) seeks to carry out repatriation of 'victims' within India, which is problematic, given the background of aspirational migration of citizens and their right to move safely through the territory of India.

The Bill seeks to repatriate a victim after psychological counselling. It is not clear what counselling is to be provided to the individual. Importantly, it does not discuss job security to be provided on repatriation to the state of origin. Further does the individual have the right to appeal against the order of repatriation and seek legal aid for the same? There is no clarity on how cases of refusal will be handled by the authorities. When and how are the individuals to be released from rehabilitation homes?

Article 19 (1) of the Constitution of India gives all citizens the right to move freely throughout the territory of India and the right to reside and settle in any part of India. Section 39 providing for repatriation of a 'victim' by the State Police Nodal Officer to the home state of any other state can only come into play by exercise of choice as to the place of residence by the concerned individual. The Section calls on the State Nodal Officer to obtain informed consent but does not lay down the procedure to be followed in the event the "victim' does not wish to move back to his/ her home state except for recommending the victim for counselling. It is not clear whether such individual will be sent to a rehabilitation home. An order of repatriation without the exercise of free choice and consent of the person would be violation of the fundamental rights of the concerned individual, unconstitutional, bad in law and impermissible.

[14] Raided: How anti trafficking strategies increase sex workers' vulnerability to exploitative practices. Sex workers in Kolhapur who were put in rehabilitation were denied discharge on grounds that they were HIV positive because their families had not taken care of them. (Page 66) . https://www.sangram.org/resources/RAIDED-E-Book.pdf

All efforts to "restore" to their place of origin should be completely voluntary and based on consent after examining all available options. The rescued person should be counselled and informed of all available options including the choice of going back to their place of origin. The affected person should also have the right to appeal from any such order of the Committee and appropriate legal aid and other legal assistance should be provided to such individuals. The affected person should also be counselled about their rights.

Repatriation v/s Restoration

The term "repatriation" does not imply that the affected parties shall be reunited with their families, but only indicates that they shall be returned to their place of origin. At present, repatriation indicates that a woman shall be transferred from a shelter home in one state to a home in another state. Once repatriated, the woman has to undergo another long and arduous process of being finally reunited with her family. The Juvenile Justice Act distinguishes repatriation from restoration, with restoration indicating that the child shall be reunited with their family, while repatriation indicates a return to a similar socio-economic and cultural status. As such, in the context of a victim of trafficking, mere repatriation is simply not enough, and moreover, seems to indicate that removing a victim from a geographical area solves the problem of trafficking.

Eviction

Section 42 (1) (i) empowers the Magistrate after a seven- day show cause notice to evict the occupier from the premises being used for trafficking for sexual exploitation. This is an extremely problematic provision. This is in stark contrast to provisions of Section 8 the Bonded Labor Act which expressly prohibit eviction of the person freed from bonded labour and their families from their homestead. Sex workers are evicted and brothels sealed under The Immoral Traffic Prevention Act since brothels are illegal spaces in and of themselves. Experience has shown that in the case of sex workers, they are often evicted from the premises where they live on grounds of brothels being places of trafficking – their families have been thrown on the streets and the brothels sealed with no provision of appeal.

There are two problems emerging from this provision:

- Given the history of the application of the provisions of ITPA, this provision is likely to be used to target brothel spaces and evict sex workers from their homes. This provision can be used to evict sex workers from the premises as occupiers though they have not been accused of any offence. Historically - Section 18 of the ITPA from which this provision has been derived, has been used on numerous occasions to close brothels and evict sex workers and their children. Most recently, we have witnessed these instances in Mumbai, Pune, Kolhapur, Nagpur – in some cases after giving seven -day notice period, but in most cases the brothels were closed without notice. There must be a clear stipulation that the provisions will not be used to shut places where adult consenting sex workers are residing with their children and family members.

- In the case of bonded labourers these places include working establishments such as garment industries, brick kilns, factories. In the case of commercial surrogacy, these places of exploitation potentially could be clinics and hospitals. However, it is a question whether the proposed bill envisages that these spaces will be closed and all employees evicted from the premises in the event that these spaces are being used for exploitation.

7. Lack of Representation of Affected parties

There is a lack of representation of sex workers, bonded labourers, domestic workers and other affected parties at each level of the Committees from the District to the Centre in the Draft Bill. There must be participation of sex worker collectives, organisations working with bonded labour and domestic workers or organisations with a track record of working for the rights of the marginalised in the District/ State Anti-Trafficking Committee. Lawyers with a track record of working with sex workers, women in distress, violence against women should be included in the Committee. The Committee must include a representative of the State AIDS Control Society. The National Anti-Trafficking Board should include members of sex work networks/ collectives and activists with a track record of working on women's rights and labour rights. There is also a lack of representation and consultation of affected parties in the procedures laid down with no opportunity for support and counselling by peers.

8. Accountability of Organisations running Rehabilitation centres, Anti Trafficking Committees

A number of raids, rescue and coercive rehabilitation measures are undertaken at the initiative of NGOs resulting in large scale violation of the rights of persons being 'rescued'. There is no process of transparency or accountability in these raid and rescue processes. It is a fact that many of these NGOs are obtaining project funds from donors to incarcerate individuals who are termed as "victims of trafficking" for long periods of time against their consent. There have been accounts of violence and inhuman treatment especially against sex workers seeking to be released.

Under the current scheme of the proposed Bill, the District Anti-Trafficking Committee has been given immense powers to decide on the rehabilitation of the victim/ advice the Magistrate on rehabilitation/ develop plans for rehabilitation. However, mechanisms of accountability have not been laid out in the Bill. There is no mention of the process of appeal for individuals seeking to opt out of the rehabilitation plans laid out by the District Anti-Trafficking Committee. The agencies undertaking rescue, rehabilitation need to be held accountable for violations and be liable in civil and criminal law.

9. Prolonged Incarceration Without Safeguards

The impact of the Bill will be that those who are arrested under the Act will spend years in jail without trial, in contravention of international jurisprudence. Under the ordinary criminal law, all accused will at least have the possibility that the Court may release them on bail.

The following provisions govern the issue of bail and anticipatory bail in the Bill:
S49 (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -
(a) Nothing in Section 438 of the Code shall apply in relation to any case involving in the arrest of any person on an accusation of having committed an offence under this Act with imprisonment of more than two years.
(b) no person accused of committing an offence under this Act shall be released on bail or on his own bond unless -

> *(i) the Special Public Prosecutor has been given an opportunity to oppose the application for such release;*
> ***(3)*** *where the Special Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail; and*

There are two provisions that give reason for unease of the attempt to limit the right to freedom till convicted of an offence. The first attempt is a blanket denial of anticipatory bail to individuals accused of offences under the proposed bill leading to imprisonment of more than two years. The very purpose of the anticipatory bail provision in the Criminal Code was to ensure that no person would be confined unless and until found guilty. As mentioned earlier this provision is not only harmful but will lead to misuse and false cases being booked against victims.

The second provision on the conditions imposed on regular bail are equally problematic Section 52 (2) (b) (ii). Bail not jail is the fundamental norm to be followed by courts[15]. Presumption of innocence is the hallmark of criminal jurisprudence. Incarceration in jail as an under trial before an offence has been proved to be committed by the individual subverts the right to life, liberty and the presumption of innocence. Circumstances showing that the person intends to run away or threaten witnesses or commit other offences are the only grounds to refuse bail. Under the general law of bail, in offences punishable with life imprisonment or death notice is to be given to Public Prosecutor and he has to be heard before a decision on the important issue of release on bail. The current sub section 52 (2) (b) (ii) laying down that there should be 'reasonable grounds for believing that the accused is not guilty of such offence' before granting bail amounts to virtual denial of bail, incarceration and curtailment of liberty without undergoing trial and an offence being proved against the individual.

Section 37(1) of the Narcotics and Psychotropics Substances Act, 1987 (NDPS) contains an identical provision that an accused person is not to be released on bail unless the court is satisfied that there are reasonable grounds for believing that the accused is not guilty. Experience of the working of the provision under NDPS shows that it results in virtual denial of bail and years of incarceration. Similar draconian provisions in various anti-terror laws resulted in long periods of imprisonment without trial evoking strong criticism from the human rights movement.

The combination of an NIA investigation combined with a harsh bail provision will only mean years in jail for the accused under the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021.

10. Criminalising Pornography

The sweeping definition of exploitation as per Section 2(25), *"Sexual exploitation means…including pornographic acts or production of any pornographic material"* brings into its ambit consensual adult sexual acts.

[15]State of Rajasthan versus Balchand AIR 1977 SC 2447

Undoubtedly, in any adult performance of pornography, or production of erotica - online or offline - it is critical to use consent and safe working conditions as barometers or markers of what is exploitation. From the point of view of women and other persons in the sex industry, that is more meaningful than defining all pornographic acts as inherently exploitative, rather than focus on creating safe working conditions for them as workers.

Stripped of the stigma surrounding it, pornography or erotic material is nothing but the use of media to stimulate sexual arousal - it can take the form of any media, including books, films, graphics, audio, video etc, depending on technologies that are prevalent at any given time.

In the current context, digital technologies are the most-used and fastest growing technologies in India. In the Covid-19 pandemic context, where close contact and touch are deemed unsafe, many sex workers around the country have lost their means of livelihood and are struggling to earn a living since March 2020.[16][17] Many have been constrained to use digital technologies, including mobile phones, to eke out a living by communicating with their clients through videos and images.[18] As per this definition, these communications and videos would be deemed pornographic and sexually exploitative. But from the perspective of sex workers, these mobile phones and apps are now their digital workspaces and the videos and photos they send customers and clients are essential working tools. Deeming these exchanges as sexual exploitation deprives sex workers, who are already struggling to make a living, of their livelihood opportunities.

Instead, policies related to regulating sexual exploitation in the realm of pornography must understand the challenges and harms of pornographic production and distribution from workers in these spaces and industries, and establish safe working practices and conditions in the creation and distribution of sexual material by adults.

It is critical to understand the security, safety and other challenges that sex workers face when creating and sharing sexual material through phones and on digital platforms. These include: non-consensual sharing of these images by clients with others; blackmailing sex workers into performing sex acts through the threat of making these images public; not paying sex workers as agreed. Some of these constitute online or digital violence and are already punishable as cyber crimes under sections of the Information Technology Act and the Indian Penal Code. Some of these constitute economic offences and must be punished as such.

The non-consensual sharing of sexual images is one of the biggest threats and forms of gender-based violence that women and trans persons in sex work face in digital spaces. Treating this and punishing it as a crime is key to removing exploitation in these spaces. In addition, there is a need for policies that pro-actively create safe working practices in the production of sexual material (much of the production takes place offline) and its distribution. These include: ensuring that the agreed payment is made, that

[16] https://www.thehindu.com/society/from-debt-to-depression-the-pandemic-has-hit-indias-sex-workers-hard/article35113988.ece
[17] https://www.epw.in/engage/article/locked-down-sex-workers-and-their-livelihoods
[18] https://www.livemint.com/mint-lounge/features/how-sex-workers-are-using-technology-to-service-clients-during-the-lockdown-11590152476385.html

condoms and other STD-HIV prevention practices are in place during production, that adult performers are not coerced into performing acts they did not agree to, that distribution - and revenue sharing agreements - are upheld.

Section 23, *Explanation 2* which removes the notion of consent as "*irrelevant and immaterial in determination of the offence of tracking in persons"* is problematic as consent is a critical marker in distinguishing adult sex work from trafficking. When it comes to the production and distribution of images and videos for sex work, it is important to ensure that consent has been upheld separately at each stage, in production and separately in distribution. Adult sex workers note that images and videos they have consensually produced and shared with clients, are often then shared without their consent with others. This is a punishable offence under Section 66E of the Information Technology Act of 2000, amended in 2008. Section 66E titled 'Punishment for violation of privacy' states that: "Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both."

This provision needs to be rigorously and systematically applied when sex workers report violations of consent. An enabling environment must be created at police stations for sex workers to report without stigma, censure or re-victimisation.

Most such cases are currently wrongly booked under another section of the IT Act, Section 67, which regulates 'obscene' images. However, when sex workers themselves produce visual material for their customers' private use but that is then shared further by the customer without the sex workers' consent, the crime is not that of obscenity but 'violation of privacy' and needs to be dealt with as such. Criminalising the production of the image itself in such cases by booking it as obscenity ends up wrongly criminalising sex workers, who produce these images.

11. Implications for the Media

Intermediary liability

Sec 33 (4) Subject to the provisions of any other law for the time being in force, whoever publishes through intermediaries any electronic record which may lead to trafficking in persons in any form or exploitation of victims of such trafficking, shall be punished with rigorous imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine up to fifty lakh rupees.

(5) Subject to the provisions of any other law for the time being in force, whoever, being an intermediary providing any service related to electronic communication and records, having been seeing the content uploaded on his platform or service, fails or deliberately neglects to report an offence under this Section which has been caused on his platform or through the service which he provides, in such manner as may be prescribed, shall be punished with a fine upto ten lakh rupees.

The infrastructure of the electronic / digital world requires third party intermediaries to handle information during most forms of electronic activities, whether transmission, storage or display. Users who upload

and initiate transfer of information online, are not the same parties who do the actual transmission of the information.

It is not feasible, desirable or even practically possible for intermediaries to verify the legality of every bit of data that gets transferred or stored by the intermediary. Hence, 'safe harbours' are provided by law for intermediaries, protecting them from liability of the information being transmitted through them. These ensure that entities that act as architectural requirements and intermediary platforms are able to operate smoothly and without fear. If intermediaries are not granted this protection, it puts them in the impossible position of having to monitor un-monitorable amounts of data and face legal action for anything that slips through inadvertently. Importantly, there are several levels of free speech and privacy issues associated with having multiple gatekeepers on the expression of speech online.

Distribution, selling or storing of information online would require the transmission of information over intermediaries, as well as the temporary storage of such information on intermediary platforms. In India, intermediaries engaging with transmission or temporary storage of information are provided safe harbour by Section 79 of the Information Technology Act, 2000 ('IT Act'), with certain conditions and due diligence.

Thus, it can be seen that the IT Act already provides an in-depth regime for intermediary liability, and given its *non-obstante* clause which states that Section 79 of the IT Act would apply "Notwithstanding anything contained in any law for the time being in force", it is generally considered the appropriate legal framework for this issue. However, the IT Act has not been referenced in the Bill.

The criminalising of intermediaries under the current draft must be considered in conjunction with the recently enacted overbroad Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules"). The IT Rules have been challenged in court as violative of Article 19 of the constitution guaranteeing freedom of speech and expression. The Rules do not meet the definition of "reasonable" restrictions placed on this fundamental right.

The attempt to regulate the vibrant digital media has been criticised for overbroad requirements for traceability, automated content removal and content takedown requirements for intermediaries. Increasing government control the absence of any regime for data protection is a dangerous trend legitimised by the IT Rules and sought to be strengthened by the proposed Bill.

Mandatory police reporting

Section 35. (1) Every person who knows or has reason to believe that a person has been trafficked or that an offence under this Act has been committed shall report forthwith to the nearest police station.

Non-reporting of the commission of the offence can attract imprisonment and/or a fine. This requirement puts journalists pursuing investigative stories on human trafficking in a compromised situation, as approaching the police at an inopportune moment could not only jeopardise only themselves and their sources but more importantly, victims and their families. Mandatory reporting in the absence of sensitive approach to victims, witness protection and source protection, would have a chilling effect on journalism itself.

12. Presumption of offence

In cases of offences committed under the Bill, where the victim-survivor is a child or woman or person with physical or mental disability, Section 46 enjoins the court to presume that a person has committed or abetted or attempted to commit the offence, unless the contrary is proved.

The presumption of innocence of the accused and placing the burden of proof on the prosecution to establish the ingredients of the offence alleged to be committed constitutes the heart of criminal jurisprudence. Removal of this presumption directly impacts the crucial fundamental right to life and liberty guaranteed in Article 21 of the Constitution. The section clubs women with child and a person with disability and under the guise of being sympathetic to these sections seeks to bring a fundamental change in criminal law. From the maxim of "Innocent till proven guilty" it introduces "Guilty till proven innocent". This would directly translate into incarceration on being charged of the offence in violation of the right of life and liberty.

In criminal law the offences are to be precisely defined and thereafter the ingredients which constitute the offence are to be established in court. Section 46 turns this on its head and states that the court may presume the commission of the offence, "unless the contrary is proved". The investigative agencies which under the present Bill is the National Investigative Agency have the powers to question and examine witnesses, powers of search, seizure and collection of evidence as to the commission of an offence. Material and evidence as the doing of acts which constitute an offence can be found but to collect evidence to establish the not doing of a thing is extremely difficult task. An individual does not have any power to question any witnesses, or to search a place or seize material and collect evidence, thus making the task of "proving to the contrary" as laid down in the provision impossible.

Once a window is opened of discarding the fundamental "presumption of innocence" and introducing the "presumption of offence", as apparent measure sympathetic to vulnerable sections, it would open the doors of and legitimize bringing in the principle for a host of offences, leading to years of detention and curtailment of life and liberty.

13. Wide ambit of Abetment

The term Abetment has been given a wide ambit in Section 107 of the IPC. A person abets if he instigates any person to do that thing. In turn a person is said to instigate by wilfully misrepresenting or concealing facts bound to disclose or causing or attempting to procure or cause a thing to be done or intentionally aiding through act or illegal omission or by engaging in any conspiracy to doing that thing. Section 108 IPC makes the chain longer and makes the abetment of the abetment of an offence also an offence.

Section 29 makes the abetment, including the promotion, procurement of facilitation of the commission of offences punishable with the same punishment as the offence in addition to the punishment for abetment under the Indian Penal Code, 1860 (IPC). Attempt to commit the offence is punishable with half the term of imprisonment and fine laid down for the offence.

Section 29 deems enticing through electronic or other means resulting in the commission of an offence to be abetment. Advertising, publishing, printing, broadcasting or distributing by any means including electronic of any brochure, flyer, or material that promotes trafficking or exploitation of trafficked person is included in the phrase "promote, procure or facilitate" the offence.

The definition of abetment in the IPC is itself of wide amplitude; Section 29 enlarges the scope of abetment even further and gives ample space for arbitrary application of the offence of abetment by the Executive. A charge of abetment may be laid even though the individual may not have the intention or knowledge of the acts which may amount to an offence. The enlarging of abetment makes it likely to be used extensively in an arbitrary manner and roping in a large number of persons within the ambit of the offences under the Bill.

14. Implications of Mandatory reporting

Mandatory reporting (as detailed in Section 35) has negative consequences for women and children. Doctors interviewed for a study conducted by Centre for Child and the Law, NLSIU[1] on mandatory reporting mentioned that the legal requirement to mandatorily report an incident of child sexual abuse, regardless of the consent or wishes of the child, flies in the face of their legal and ethical duty to maintain the confidentiality and privacy of their patients.

The proposed Bill does not provide any exception for failure to report. Inaction on the part of professionals, whatever the intention, has not been condoned. Reporting may result in further victimisation. Reporting an offence means that the focus is no longer on the survivor - who ought to be the primary concern - but on the abuser, and that the lack of a supportive atmosphere can only add to the victim's discomfort and trauma. The insensitive manner in which victims are questioned by the police and in Court, often leading to further system induced victimisation. The possibility of biased reporting on the basis of caste, religion and political affiliation cannot be ruled out. It does not recognise and exempt consensual sexual relations between two adults. There is a lack of a proper support system which is child friendly and keeps the child as its focus. Mandatory reporting pushes the child or woman to face the system without providing any support or preparation to face it. This does more harm than good.

When reporting is made into a mandate, the victims is forced to go through the process of disclosure once more. While the POCSO Act provides for child friendly procedures, if a child is made to "disclose" when they are not ready, or to people they do not want to talk to, or when they are still coping with and carrying forward the impact of the first level disclosure, the process can have adverse effects on the child.[2] A similar adverse effect can be extrapolated to victims of trafficking.

15. Implications for Industry and Labour Rights

Section 30 of the Bill declares that "Whoever, *knowingly or having reason to believe that a person is a victim, exploits such person, or takes benefit out of the exploitation*" shall be punished with rigorous imprisonment for five years fine up to Rs 25 lakh. In case the victim is a child the punishment is enhanced to minimum of seven years extendable to life imprisonment.

Explanation I to the section lays down that for the determination of the offence the *giving of any consideration in terms of money or benefit or remuneration to the victim who has been exploited is immaterial*.

Explanation III declares that - Every person, knowingly or having reason to believe that in any of the supply chains there is bonded or forced labour of, or any other form of exploitation of victims, engage with such supply chains thereby taking benefit out of such bonded or forced labour or *exploitation of such victims*, directly or indirectly, shall be deemed to have committed an offence under this section.

Section 2(7) of the Bill defines: "exploitation" includes causing of harm to or taking of benefit or gain from a victim *without due or appropriate consideration*, compensation or return in any form or manner for the benefit or gain of another person who himself may or may not be the perpetrator of such exploitation. Victim in turn is defined in Section 2(wa) IPC as a person who has suffered loss or injury by the act of the accused.

In a Bill piloted for the prevention, care and rehabilitation of trafficking in persons, perhaps, unnoticed by industry, the provision seems to have large scale implications for industry impacting both employers and employees. Section 2(7) of the Bill links exploitation with not getting due or appropriate consideration. In contrast Section 30 makes giving money or remuneration to the victim immaterial in determination of the offence.

The definition of the offence in Section 30 by making a person who exploits or takes benefit of exploitation and declaring the giving of money or remuneration to the victim immaterial, makes a sizable category of employers liable to the invocation of the penal provision and punishable to years of imprisonment. Explanation III in addition to taking advantage of bonded or forced labour, by the inclusion of the phrase "exploitation of victims" including any engagement with supply chains, in the category of offenders, further broadens the category of employers punishable in the context of the applicable definitions of exploitation and victim.

Similarly, the broad definition of exploitation and victim in the Bill, by the stroke of a pen seems to have turned workers from the paradigm of rights and collective bargaining into "victims". The Bill clearly enumerates the raid, rescue and possible detention approach towards victims – a category to which the worker is to get reduced in the legal regimen introduced by the proposed law.

16. Death Penalty

Death penalty is prescribed under Section 26(4) of the Bill which provides: "Where a person is convicted of an offence under this section against a child of less than twelve years of age, or against a woman for the purpose of repeated rape, the person shall be punished with rigorous imprisonment for twenty years, but which may extend to life, or in case of second or subsequent ***conviction with death***, and with fine which may extend up to thirty lakh rupees."

Section 27. (1) Every person, belonging to or associated with an organised crime syndicate or an organised criminal group which commits an offence under this Act, including an offence with cross border implications, shall be punished on conviction-

*(a) if such offence has resulted in the death of a victim, **with death** or with rigorous imprisonment for life, which shall mean the remainder of the natural life of that person, and shall also be liable to a fine up to fifty lakh rupees.*

Section 28. (1) Whoever commits an offence of trafficking under section 23 on more than one person or has been previously convicted of an offence punishable under this section and is subsequently convicted of an offence punishable under this section, shall be punishable with rigorous imprisonment for ten years and which may extend to life imprisonment and shall also be liable to fine up to ten lakh rupees.

(2) Whoever commits an offence of aggravated form of trafficking under section 25 on more than one person or has been previously convicted of an offence punishable under section 25 and is subsequently convicted of an offence punishable under the sections 23 or 25, shall be punishable with rigorous imprisonment for ten years but which may extend to rigorous imprisonment for life which shall mean the remainder of the natural life of that person, and shall also be liable to fine up to twenty lakh rupees or such other fine as is provided for that offence under any other law for the time being in force, whichever is higher:

*Provided that if the victim is a child, the offence shall be punishable on conviction with rigorous imprisonment for the remainder of that person's natural life or **with death** and shall also be liable to fine up to thirty lakh rupees or such other fine as is provided for that offence under any other law for the time being in force, whichever is higher.*

Death Penalty undermines human dignity, which is the bedrock of the Universal Declaration of Human Rights, 1948 (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) which has been acceded to by India in 1979.

Article 6(2) of the ICCPR states that countries which have not abolished the death penalty, may impose it only for the "most serious crimes". The Human Rights Committee, the treaty-body responsible for the monitoring of the ICCPR has stated in General Comment No.6 that "the expression "most serious crimes" must be read restrictively" and "crimes not resulting directly and intentionally in death, such as ….sexual offences, although serious in nature, can never serve as the basis, within the framework of Article 6, for the imposition of the death penalty."[19]The Committee also noted that providing the death penalty for offences that do not result in death would also violate the Article 7, ICCPR prohibition on "torture or to cruel, inhuman or degrading treatment or punishment."[20] In 2006, the UN Special Rapporteur on

[19] Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, para 35, 30 October 2018, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf

[20] Ibid., para 52.

extrajudicial, summary or arbitrary executions narrowed the interpretation of "most serious crimes" to imply "cases where it can be shown that there was an intention to kill, which resulted in the loss of life".[21]

The Supreme Court of India has also recognized that the death penalty should not be imposed for non-death offences. While upholding the Constitutional validity of Section 364-A of the Indian Penal Code, 1860 (IPC),[22] the Court noted that "*In the ordinary course and in cases which qualify to be called rarest of rare, death may be awarded only where kidnapping or abduction has resulted in the death either of the victim or anyone else in the course of the commission of the offence".*[23]

Globally more than 142 countries have abolished the death penalty either in law or by practice. Only 23 countries of the world continue this practice, amongst which only 13 other countries at present have the death penalty for child rape, namely: Qatar, Bahrain, Jordan, Kuwait, the UAE, China, Cuba, Mauritania, Sudan, Tajikistan, Thailand, Tunisia and Vietnam. Considering that none of the countries mentioned are democracies, it is time to consider whether India, the world's largest democracy should align itself with this group of countries, or the lamentable Human Rights Indices they represent.

The imposition of the death penalty is fraught with arbitrary decision-making, and this has been acknowledged by the Supreme Court itself. On multiple occasions has itself voiced the concern that application of the death penalty is subjective and arbitrary and that even though "the rarest of rare doctrine" intended principled sentencing, sentencing has now really become judge- centric.[24] This has been noted by the Law Commission of India in its Report No. 262 on the 'Death Penalty'.

The Death Penalty India Report, 2016,[25] based on interviews with India's death row prisoners (373 in number) found that 74.1% of India's prisoners on death row were from economically vulnerable backgrounds, and that 84% of the prisoners who either had their mercy petition pending or rejected were from marginalised communities. 76% of India's death row prisoners were from backward classes and religious minorities and the proportion of SC/STs was 42% at the mercy stage. Religious minorities comprised 19.6% of the cases at the High Court pending stage, but their proportion increased to 29.4% at the Supreme Court pending stage. Out of 270 prisoners who spoke of their experience in police custody, 80% said that they had experienced severe custodial torture. Out of the 92 prisoners who had confessed in police custody, 78.3% said that they had given forced confession due to the torture suffered in police custody. This clearly demonstrates that the burden of the death penalty falls disproportionately

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[21] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20, 29 January 2007, paragraphs 39-53 and 65.

[22] Indian Penal Code, 1860, Section 364-A ("Section 364-A Kidnapping for ransom, etc. – Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government of any foreign State or international, inter-governmental organization or any other person to do or abstain from doing any act to pay a ransom, **shall be punishable with death**, or imprisonment for life, and shall also be liable to fine. [Emphasis Added]")

[23] *Vikram Singh v. Union of India,* (2015) 9 SCC 502, para 54.

[24] Sangeet v. State of Haryana (2013) 2 SCC 452; SantoshkumarSatishbhushanBariyar v. State of Maharashtra (2009) 6 SCC 498; LAW COMMISSION OF INDIA. REPORT NO. 262 ON THE DEATH PENALTY (2015) Available at: http://lawcommissionofindia.nic.in/reports/Report262.pdf

[25] Anup Surendranath and Shreya Rastogi, "*Death Penalty India Report, 2016*", Centre on the Death Penalty, National Law University of Delhi. Available at: http://www.deathpenaltyindia.com/The-Death-Penalty-India-Report-2016.jsp

on socially and economically marginalised groups in India, who are also extremely vulnerable to police excesses.

17. Conflict with Bonded Labour Act

The overarching agency is the Central one, the National Investigating Agency, which is part of the Home Ministry. Whereas the Bonded Labour System (Abolition) Act, 1976 (BLA) was under the purview of the Central Ministry of Labour and Employment, and from 1996, The National Human Rights Commission, through a judgment of the Supreme Court, and the implementation was left to the Revenue Departments in the States and the Union Territories. There is a plethora of administrative structures at the National (National Investigating Agency, National Anti-Human Trafficking Committee), State (State Anti-Human Trafficking Committee, State Anti-Human Trafficking Nodal Officer), district (District Anti-Human Trafficking Committee, District Magistrate, the Additional District Magistrate, and other lower levels (the Sub-divisional Magistrate, any other Officer authorized by the appropriate Government, the Sub-Inspector of a local Police Station).

The definition of 'Debt Bondage' in 2(5) is too broad. It can be applied to many situations in contrast to what is stipulated in ss. 2 (b) and 2 (g) of the BLA. The s. 2 (g) has the following requirements , agreements to pledge labour/services, advance, payment below minimum or prevalent wages and lack of freedom of movement and employment till the advance is cleared. Now, under the Bill, only the status arising from the pledge to render service in lieu of payment of an advance amount constitutes bonded labour / debt bondage. It is better to adopt the definitions of s. 2(g) and 2 (b) as they are in the BLA.

The definition of Trafficking in Persons in s. 23 of the Bill adopts almost fully the first part of the TIP definition in Article 3 of the Palermo Protocol. The many explanation clauses to elaborate on Exploitation and other elements of TIP have many negative implications in dealing with bonded labour practices. The IPC 370 introduced in 2013 had taken out certain forms of exploitation, like prostitution and forced labour, indicating the intent of the Parliament as not criminalising prostitution and forced labour. Now this section along with s. 370A of IPC are to be deleted from the IPC. The minimum punishment is 7 years extendable to 10 years. For aggravated forms of TIP, which are 23 in s. 25 (1) of the Bill, the punishment is 10 years extendable to rigorous life imprisonment.

S. 55 of the Bill states that the Bill is in addition to, and does not derogate, any other law in force. But given the thrust towards criminalisation the fact that the administrators do not seem to take up administrative actions to ameliorate the conditions of bonded labour or remove the causes that lead to bondage, like non-implementation of minimum wages and working out rehabilitation measures, as a first step at addressing bonded labour, the criminal approach fostered in the Bill will take ground. Also, in the Bill, the investing agency at the National level is National Investigating Agency and the local level it the Police sub-Inspector. Whereas in the BLA, the identification, release and rehabilitation is to be done by the Executive Magistrates and the District and Sub-Divisional Vigilance Committees.

The elaboration of various types of relief and rehabilitation are to be carried out by Protection Homes and Rehabilitation Homes, which are to be set in every district. This reveals that according to the Bill the various relief and rehabilitation measures are institution based. It is alright if only children and youth in

bondage as individuals are envisaged for relief and rehabilitation. But what if, the entire families are involved or only the adult members in a family are involved. In all likelihood, they will not accept relief and rehabilitation provided in an institution. Neither is it feasible that they leave out their families and be in an institution for a prolonged period of time. Community based Rehabilitation or rehabilitation measures to be worked out at the place of their stay as envisaged in the BLA and the Central Sector Scheme for Rehabilitation, 2016 (CSS) is the best way to rehabilitee bonded labourers all over the country. Fund will be eaten up by setting up and maintaining the Protection and Rehabilitation Homes instead of providing for effective rehabilitation of freed bonded labourers.

Further, there is no specific scheme or mechanism as in the BLA or the CSS for rehabilitation. S. 22 (7) stipulates that the appropriate Government shall provide adequate funds for it within one month from the date of commencement of the new Act on TIP. This is as good as saying that nothing will materialize regarding the rehabilitation of bonded labourers.

18. Curbing Availability by Restricting Demand

The approach of curbing demand for goods and services is not new in policy terms, getting applied commonly to goods deemed harmful to humans, or to environmentally damaging goods and services. But in all such cases, the users are not subject to penal legislation, and instead the approach is one of reasonable restrictions on usage.

The current Bill seeks to demand by introducing penal provisions to sanction those who engage with supply chains where there is reason to believe that there is bonded or forced labour. However, as rightly pointed out in the Backgrounder on Good Practices and Tools in reducing the demand for exploitative services, there is no agreed definition of the term 'demand' in the context of trafficking in persons. Citing from the text:
Consumer demand is generated directly by people who actively or passively buy the products or services of trafficked labour, for example the husband who buys flowers picked by a trafficked adolescent or the tourist who buys a cheap T-shirt made by a trafficked youth in a sweatshop. Research suggests that most of this kind of demand is non-determinant because generally it does not directly influence the trafficking – for example, the husband buying flowers does not specially ask traffickers to exploit children to pick them, and the tourist buying a cheap T-shirt does not specially ask traffickers to exploit children either.

Rather than being understood in the context of restricting trafficking, the clauses could be subject to misuse as a qualitative barrier to trade. For instance, if a certain set of commodities – say cut flowers, agricultural commodities or garments – from a particular Supplier A were to be restricted on the grounds that they are being produced under exploitative conditions by Supplier B, it is unclear where the burden of proof lies. Are the suppliers meant to provide for a certification to this effect? What would be the validation of such certification? Presently there are attempts to orient customers/clients towards ethical buying by increasing awareness and labelling about sustainable use of materials and non-use of child labour. However, penalizing customers for purchasing the products could be counter-productive.

RECOMMENDATIONS

Trafficking in humans is a grave criminal offense that can be tackled only through a multi-pronged approach through a range of stakeholders. Any measures to combat trafficking must be victim centric and uphold the rights of the affected parties. Simultaneously, due process must be followed in keeping with constitutional mandates and standards of international jurisprudence. Given this context, we urge that the Trafficking in Persons (Prevention, Care, and Rehabilitation) Bill 2021 not be passed in its current form.

We urge:

1. Dropping the proposal to identify the National Investigation Agency (NIA) as the coordinating agency responsible for prevention, investigation and prosecution of trafficking in persons and other offences. Tasking this counter-terror agency with combating trafficking is not only a case of over-reach, but also erodes the autonomy of decentralised law enforcement by states.
2. Adopting a developmental, rights-based approach to combating trafficking will not only be uphold the rights of the affected persons, but also be more effective in the long term than a criminalized, carceral approach.
3. Wide ranging and inclusive consultations with the wide range of stakeholders that will be affected by the proposed law.
4. Launching a more inclusive process of review of existing laws on trafficking, sexual assault, bonded labour, data privacy, media regulation and labour rights, overlaps and contradictions therein, in order to draft a cohesive approach to end trafficking.

Contributors

- Rakesh Shukla, Advocate, Supreme Court of India
- Aarthi Pai, Lawyer, SANGRAM Sanstha
- Arvind Narain, Lawyer, Alternative Law Forum
- Professor Babu Mathew, National Law University
- Meena Saraswathi Seshu, SANGRAM Sanstha
- Bishakha Datta, Point of View
- Laxmi Murthy, Founder and Editor, Free Speech Collective
- Geeta Seshu, Founder and Editor, Free Speech Collective
- Kiran Kamal, JeeVika – Jeeta Vimukti Karnataka
- Shruti Raman, Centre for Child and Law, National Law University, Bangalore
- Sudha Reddy, Centre for Child and Law, National Law University, Bangalore
- Kumar swamy, Centre for Child and Law, National Law University, Bangalore
- Sarasu Thomas, Centre for Women and Law, National Law University, Bangalore
- Rohini Sahni
- Kalyan Shankar
- Rajesh Srinivas, Sangama
- Madhu Bhushan, CIEDS Collective/ Gamana Mahila Samuha
- Shakun D, CIEDS Collective/ Gamana Mahila Samuha
- Kiran Deshmukh, President, National Network of Sex Workers
- Maya Gurav, Veshya Anyaya Mukti Parishad
- Sudhir Patil, Muskan Sanstha
- Mahadevi, Saheli Sangh

- Devi, Me and My World, Andhra Pradesh
- Nisha Gullur, Karnataka Sex Workers Union
- Mukta Pujjar, Uttar Karnataka Mahila Okkuta
- Ganika Sangh, Nagpur
- MJSS, Parbhani
- Gokila, President, Vadamalar Federation
- Lalitha, Kerala Network of Sex Workers
- Kavya Bharadkar
- Tejaswi Sevekari, Director, Saheli Sangh
- Meera Raghavendra, Director, Women's Initiatives, Tirupathi