

## SHORTCOMINGS OF INDIAN TRAFFICKING LAWS

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### ABSTRACT

*Although there has been a significant improvement with regard to the grave issue of Human Trafficking in India and the legislation and executive ensured that the country is safer than before, the sheer number of cases flowing in the courts is sufficient to prove that this problem is not properly resolved. This can be attributed to the improper framing of these laws and insufficient action in enforcement of these laws. But to answer the impending question whether the Indian government is effective and successful in enforcing its anti trafficking laws? The undeniable answer to this specific problem of effectiveness of the Indian laws on human trafficking would be no. It is very evident that these practices are still carried out in certain parts of the country. There are major problems concerning these laws in the areas of definitional inconsistencies, rehabilitation, compensation and protection of the victims of human trafficking as well.*

### LITERATURE REVIEW

This research paper appreciates the work of many eminent legal analysts around the world. The research paper in accordance with its topic to cover up all the relevant information relied on some resources for which author being both Indian and foreign. This research paper has its major focus on the online articles and case laws to have deep insight about the short coming of Indian Trafficking laws.

**“Delinking Prostitution - A Look at India's Immoral trafficking prevention act”** This article is authored by Rajalakshmi. This article basically speaks about the major drawbacks of the ITP act. It draws various examples and case laws in explaining these short comings with respect to the provisions of the act.

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*“A REVIEW OF THE IMMORAL TRAFFIC PREVENTION ACT, 1986”* by Kiran Bhatta is a review on the basic provisions of the ITP act. This article discusses about all the pros and cons of the act. It also speaks about the judiciary’s approach towards the cases in concern with said act.

## **INTRODUCTION**

Human Trafficking means illegal transporting people from one country or area to another, for the purposes of exploitation of these trafficked persons for forced labour or sexual labour. Human Trafficking according to UNDOC is defined as recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion/deception, for the purpose of exploitation. Exploitation may include the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.<sup>3</sup>

Human trafficking is a serious crime and grave violation of human rights. According to an UNODC report, most of the victims detected globally were trafficked for sexual exploitation. But this pattern does not comply across all regions. While forced labour is the most common cause of trafficking from detected accounts in sub-Saharan Africa, in Central Asia and South Asia, trafficking sexual exploitation are not uncommon and are near-equally detected in these regions as well.

Considered to be a top destination for human trafficking, India was once identified as the most dangerous country for women in terms of human trafficking according to a *Thomson Reuters Foundation* survey. A total of 5264 cases of human trafficking were reported in India in 2018 according to the *National Crime Records Bureau*, where 64% were women and 48% were below 18 years old. Usually, these cases of human trafficking go unreported and thus, detection of these cases is generally minimal. Geographically, certain regions of Bihar, Maharashtra, Telangana, Jharkhand, Rajasthan, Andhra Pradesh, Assam, Orissa and West Bengal are identified to be most affected areas. Demographically, people from economically disadvantaged classes, and belonging to the categories of SC, ST, OBC are found to be more susceptible to fall victim to such malpractices. The immediate factors for which this practice of Human Trafficking is carried out are listed by the most common reasons as follows poverty,

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<sup>3</sup> Article 3, paragraph (a), Protocol to Prevent, Suppress and Punish Trafficking in Persons of the United Nations

Lack of employment opportunities, Religious/ Traditional Prostitution (Devadasi practice), Child Marriage, False promises for job/marriage, Migration, Sex tourism and Internet Pornography.

Although the common victims of Human Trafficking tend to be women and children sometimes men are subjected to human trafficking too. In India, besides sexual exploitation, a large number of people are trafficked for other various kinds of servitude. The various reasons for human trafficking in India on their most exploited means are for Sexual exploitation, Bonded Labour, Domestic servitude, Begging, Drug peddling/smuggling, forced marriage, Forced criminality, Child soldiers and Organ harvesting.

## **ELEMENTS OF HUMAN TRAFFICKING**

There are three constituent elements of human trafficking identified on the basis of the definition given for Trafficking by Persons Protocol. They are discussed below:-

### **The Act** (What is done)

This is the act of Recruitment, transportation, transfer, harbouring or receipt of persons. Basically this element is the mode of trafficking itself.

### **The Means** (How it is done)

The following should be used on the victim to constitute the act of human trafficking - Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim. This element shows the disinclination of the victim to this practice.

### **The Purpose** (Why it is done)

This act done should have the reason of exploitation of the victim, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

## **LAWS GOVERNING HUMAN TRAFFICKING ISSUES IN INDIA**

The act of Human Trafficking being a grave offence, the Indian legislature has enacted a wide range of laws enacted to restrain these offences, apart from provisions of the Constitution itself which is the basic law of the country. These laws are listed and discussed below:-

### **The Constitution of India**

There are three main articles in the Constitution of India which directly links to this subject. The foremost idea of prohibition of trafficking of Human beings is discussed under Article 23 as a fundamental right the right against exploitation which prohibits trafficking in human beings and beggar and other similar forms of forced labour. Article 39(e) and 39(f) which ordain that the health and strength of individuals are not abused and that no one is forced by the economic necessity to do work unsuited to their age or strength and that childhood and youth should be protected against exploitation which can be counted as an directive principle of state policy directly specifying about the prohibition of forced labour.

### **Immoral Traffic Prevention Act, 1956**

This act is the only legislation which addresses the practices of Human Trafficking exclusively. It penalizes trafficking of women and children for commercial sexual exploitation. But it contains lot of errors in it which is reviewed in the later of this research paper.

### **The Indian Penal Code, 1860**

The Indian Penal Code, 1860 provides around 25 provisions related to extermination of the practice of human trafficking. Some of the significant provisions among them are discussed below-

- Section 366A- Inducing any minor girl under the age of eighteen years to go to any such place with intent to forced or seduced illicit intercourse with another person shall be a punishable offence.
- Section 366B- Importing any girl under twenty-one years with the intent that she will be, forced or seduced to illicit intercourse with another person is a punishable offence.

- Section 374- Punishes any person who for unlawfully compels any person to labour against his will.

### **Child labour (Prohibition and Regulation) Act, 1986**

The Act explicitly prohibits employment of children below specific age and in certain specified occupations deems everything under it subject to criminal prosecution. It also imposes punishment for the employment of minor children against their will.

### **Juvenile Justice Act, 2000**

The law is relevant for children who are vulnerable and are therefore likely to be the victim of trafficking. It protects juveniles in need of care and protection.

### **Other Legislations**

There are some more legislations which directly or indirectly deal with human trafficking like Bonded labour system (Abolition) Act, 1976 Prohibition of Child Marriage Act, 2006 and Protection of Children from Sexual offences (POCSO) Act, 2012.

The Criminal Law (Amendment) Act 2013, popularly known as the Nirbhaya Act in the legal atmosphere has also come into force recently wherein Section 370 of the Indian Penal Code has been substituted with 370A (IPC) which provides for comprehensive measures to counter the menace of human trafficking including trafficking of children for exploitation in any form including physical exploitation or any form of sexual exploitation, slavery, servitude or the forced removal of organs.

## **PREVENTIVE MEASURES FOR HUMAN TRAFFICKING**

Initiation of various programs and activities for general awareness and education play a key role in protecting individuals who are potentially at risk of being trafficked. For this UNDOC, in which India is a member, has developed Information Education Communication (IEC) materials which are distributed among partner NGO in the geographical areas for further dissemination and development of awareness among the target population. The Ministry of Women and Child Development (MWCD), Government of India, is the nodal ministry, which deals with the subject of prevention of trafficking in women and children for commercial sexual exploitation has developed a series of handbooks and manuals for various stakeholders such as

social workers, medical officers, judicial officers and counselors. These have been widely disseminated to various agencies for use at the grass root levels<sup>4</sup>

The prevention measures also involve the development of social and economic interventions which offer support to those potentially at risk of being trafficked. A compulsory high-quality education, income generation and employment opportunities should be created by the local authorities to ensure no victim or any member of general public is left unnoticed. Some of the activities that the government implement should include job skills and training programs to promote local employment opportunities, empowerment programs to develop self-confidence among the public and assist them in developing their careers. Community enrichment programs should be created to discourage out-migration and crisis intervention programs to provide support for women and children in abusive homes or facing other crises that might otherwise push them to migrate<sup>5</sup>.

Media has a very important role in prevention of any such human trafficking. This is because it acts as a prominent channel of spreading awareness due to the large viewership. It has to work on transmitting the appropriate message to the victim to ensure that they have a backup and are not alone. It should also make citizens aware of places and institutions to seek help in case if they are victimized. Media should arrange special procedures to educate and spread awareness that human trafficking is illegal and inappropriate and that it has negative consequences.

Preventive measures also include developing laws and statutes to ensure prevention of trafficking. As seen earlier prevention of trafficking of persons is dealt under the provisions of various Acts but there still remains some deficiency in the existing legislation. The primary legislation covering the act of human trafficking is The Immoral Traffic (Prevention) Act, 1986. This act, though amended several times, has many inconsistencies and discrepancies in its provisions. Hence it is necessary that such irregularities are corrected, to ensure that the public maintain their faith in the Indian legislation. Some of the major inconsistencies of the The Immoral Traffic (Prevention) Act, 1986 will be discussed to prove that the existing

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<sup>4</sup><https://www.unodc.org/pdf/india/publications/India>

<sup>5</sup><https://www.hurights.or.jp/archives/asia-pacific/section>

legislation for human trafficking in India is insufficient considering the various outrageous crimes committed relating to trafficking in day today life.

### **INCONSISTENCIES IN IMMORAL TRAFFIC (PREVENTION) ACT**

The Immoral Traffic (Prevention) Act, 1986, originally the Suppression of Immoral Traffic in Women and Girls (SITA), 1956, is the Central legislation dealing with trafficking in India, a country that receives supplies and transits numerous trafficked individuals. Even though the name refers to immoral trafficking of persons, the ITPA's scope is limited only to commercial sexual exploitation (CSW) or prostitution and penalizes those who facilitate and abet commercial sexual exploitation, including clients and those who live off the earnings of prostitutes.

Despite of few amendments to the legislation in 1986 it remains to be an inconsistent and irregular piece of legislation to deal with trafficking. It predominantly suffers from a lack of conceptual clarity on the issue of trafficking and its nuances. This in turn has caused a lot of discrepancies in the provisions of the act, which rather than criminalizing the act, it criminalizes the victim in certain provisions. Further, rights of victims, provisions for their rehabilitation, conflicts over territorial jurisdictions, cross-border issues, lack of data and convergence across departments are other issues concerning the ITPA.<sup>6</sup> Some of the major concerns regarding the Act is discussed below.

### **DEFINITIONAL INCONSISTENCIES**

The main discrepancy in the ITPA is the lack of a definition of trafficking, which is even in the title of the Act. Even commercial sexual exploitation, to which the scope of the Act is limited to, is not well defined in the Act. Instead the focus is on defining brothels as the site of commercial sexual exploitation and thus penalizing the facilitators of commercial sexual exploitation in brothels. Another issue is the insertion of the word "Immoral" in the title of the Act. This inserts an element of morality in the act.<sup>7</sup> Due to which the perception of the act of prostitution because of which maximum trafficking occurs is considered to be Immoral and illegal whereas the Act nowhere explicitly says that prostitution is illegal.

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<sup>6</sup><https://sagarmediainc.com/2017/11/18/a-review-of-the-immoral-traffic-prevention-act-1986/>

<sup>7</sup>Vaishna Roy, Go back to the drawing board, The Hindu (July 12,2016)

The word “Prostitute” is also not defined clearly under the act as in Section 2 clause (f) “means the sexual exploitation or abuse of persons for commercial purposes, and the expression “prostitute” shall be construed accordingly”<sup>8</sup>. Therefore there needs to be a commercial purpose which means acceptance of money by prostitute, but it The Act misses out on what actually constitutes trafficking-- the elements of force, deception, and coercion. The definition of prostitution as ‘commercial sexual exploitation’ or ‘abuse of persons for commercial purposes is too wide and does not allow for commercial sexual activity as part of legitimate sex work. It ignores the fact that some people are divulging into this activity voluntarily, the reasons vary from poverty to the thrill of the act. This misconception ignores the idea that someone can do this act voluntarily.

### **VICTIM BECOMING THE OFFENDER**

There exists a treatment of victims as offenders, while prostitution *per se* is not illegal in India; all women in prostitution are routinely treated as offenders under the ITPA. Even though this criminalizes the keeping of brothels (Sec. 3, ITPA 4), living on the earnings of prostitution (Sec. 4, ITPA 6), procuring and inducing a person for the sake of prostitution (Sec. 5, ITPA 6) and detaining a person in premises where prostitution is carried on (Sec. 6, ITPA 7), There are sections where the Act criminalizes prostitutes thereby diffusing the focus on the exploitative elements of the process and the violations suffered by the trafficked women<sup>9</sup>.

The most significant inconsistencies and loopholes of the act are the sections 3, 4, 7, 8 and 20. Section 3 makes managing brothels illegal, it even describes the place where two or more prostitutes jointly carry their work as brothel and provides punishment for the same. Section 4 of the act provides punishment for persons living on the earnings of the prostitutes. This provision ignores the fact that children of the sex workers and elderly parents might also live on the earnings of the sex workers. In Sec. 7 where prostitution in or in vicinity of public places is punishable. This section is governed by a moralistic base whereby it aims to protect "public decency" aiming at the "moral clean up" of public places in the society. The Act also defines public place in ambiguous terms. This section has been used against women in prostitution regardless of whether they have been trafficked or not.

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<sup>8</sup>Section 2 (f),ITPA, 1986

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A clear indicator criminalizing the victim and interfering with the act of prostitution is the inclusion of Sec. 8 which punishes seducing and soliciting for the purpose of prostitution. Section 8 (a) says “*Seducing or soliciting for purpose of prostitution.—whoever, in any public place or within sight of, and in such manner as to be seen or heard from, any public place, whether from within any building or house or not—*

*(a) by words, gestures, willful exposure of his person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise tempts or endeavors to tempt, or attracts or endeavors to attract the attention of, any person for the purpose of prostitution;*”<sup>10</sup>, The construction of this offence is said to be extremely patriarchal and is reflected in the “wilful exposure other person”. Also the period of imprisonment is three months for men which less compared to the six months for women, this is provided in the proviso of the provision which says, “*where an offence under this section is committed by a man he shall be punishable with imprisonment for a period of not less than seven days but which may extend to three months*”.

Also in Sec. 20(1) of ITPA a magistrate can order a prostitute, eviction from his jurisdiction and also prevent her re-entry for simply being a prostitute. According to this section upon receiving information that a woman is a prostitute, a magistrate can issue notice to the woman to show cause and then it is up to the woman to prove that she is or is not prostitute and why her existence does not damage the interests of the society.<sup>11</sup> This section provides the magistrate with arbitrary power, which in most cases is used against women. The Supreme Court also held in support of this section in one of its judgment, The Supreme Court held that the restrictions imposed by section 20 of the act were reasonable restrictions imposed in the public interest.<sup>12</sup>

The law also does not clearly define the rights of the victims. Moreover, due to the lack of a witness protection program or the option of in-camera proceedings, victims refrain from testifying; especially in the cases of child victims. The Act severely neglects the cross-border dimensions of human trafficking, which also includes inter-state trafficking.

## **REHABILITATION, COMPENSATION AND PROTECTION**

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<sup>10</sup>Section 8 (a) of ITPA, 1986

<sup>11</sup>Section 20(1) of ITPA, 1986

<sup>12</sup>State of Uttar Pradesh vs. Kaushaila, (1964) 4 SCR 1002

The existing legal framework concerning human trafficking is insufficient in terms of providing an effective system for the safety, recovery and compensation of victims of trafficking. One of the most evident inconsistency regarding rehabilitation is the absence of a specified set of right for the victims. This includes their detention in protective or corrective homes without their consent. According section 19, upon receiving an application regarding the prostitution which is taking place, magistrate may upon inquiry order for the detainment of the person involved in prostitution in a preventive or corrective homes, as said is section 19(3), which says “*order should be made under this section, he shall, for reasons to be recorded, make an order that the applicant be kept, -*

*i. in a protective home, or*

*ii. in a corrective institution, or*

*Under the supervision of a person appointed by the magistrate, for such period as may be specified in the order”*

This amounts to her detention in an arbitrary manner without her consent and thereafter without being provided any counselling or opportunities for rehabilitation. Though the Act nowhere order prostitution to be illegal but provision like this punishes the prostitutes no matter if they are victim of human trafficking or actual sex workers. And also section 21 Instead of specifying rights the ITPA gives state governments the option of making provisions for corrective and protective institutions. This section implies that state governments comply with these provisions only to the extent that their budgets or capacities allow.

As a result, these areas have been grossly under served, with state governments taking arbitrary measures to bring relief to the victims. This is evidenced from the fact that protective and corrective homes are poorly equipped. Counselling, including legal counselling is completely absent and also are the provisions for health and education of the victims. Providing livelihood opportunities, that would go a long way in sustaining rehabilitation are also absent. Hence in most cases after a period of ‘detention’, the victims are released, and more often than not they fallback into their older lives. Similarly, there is also the lack of a proper policy to guide finalization of the minimum and maximum amount of compensation for the victim and the procedures to be followed are also nowhere mentioned in the Act.

## **CONCLUSION**

Upon the above research it can be said that there is a need for a specialized legislation in India to deal with human trafficking. Even though there are various existing statutes such as *Indian Penal Code* (IPC) 1860, Juvenile justice act 2000 Child labour (Prohibition and Regulation) Act, 1986 etc., all such statutes are very specific and narrower. IPC for examples deals with the offence of kidnapping, abduction and illegal trading of minors (Sections 359-373 of IPC). The wide range of activities involved in human trafficking do not neatly fit into "kidnapping" or "abduction" as they are quite narrow. Thus these statutes are less adept in dealing with the nuances involved in organized human trafficking.

Also as the The Immoral Traffic (Prevention) Act, 1986 scope is limited only to commercial sexual exploitation rather than covering various aspects of human trafficking. Hence it remains to be an inconsistent and irregular piece of legislation to deal with trafficking, as It predominantly suffers from a lack of conceptual clarity on the issue of trafficking and its nuances. It can be asserted that the primary legislation is insufficient in preventing human trafficking and in protecting the victims of such acts. This opinion can be derived upon the deep analysis of the sections 3,4,5,7,8,15 and 20. These are the provisions with some major flaws and conceptual loopholes. Another major issue is the absence of provisions regarding the rights of the victim, rehabilitation.

Thus there is a requirement for new legislation governing the legal consequences of human trafficking. This new legislation should include trafficking for other purposes such as domestic work, marriage, etc. It should also take into account the various human rights violations that occur in the process of trafficking and provide proper treatment for the victims as well to ensure access to basic rights. Most importantly the newly formed legislation should be backed by various policies to combat trafficking prevention, rescue, reintegration and rehabilitation set on the lines of international laws, principles and standards held in Conventions and treaties and must be accompanied by state rules which will take into account local realities

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- A Review of the Immoral Traffic Prevention Act, 1986 (Kiran Bhatta November, 2017)
- Delinking Prostitution - A Look at India's Immoral Trafficking Prevention Act