



| BEYOND TRAFFICKING AND SLAVERY

## **A recipe for injustice: India's new trafficking bill expands a troubled rescue, rehabilitation, and repatriation framework**

India's proposed trafficking in persons bill replicates the flaws of the existing framework. It must be re-written if it is to better the lives of the women it purports to help.

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The proposed Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill of 2018 (the bill) is driven by anti-trafficking activists' desires to shape a comprehensive legislation on human trafficking – a laudable goal, given that existing anti-trafficking law and procedures generate an array of harms. We describe these harms below by elaborating on efforts to address sex trafficking under the Immoral Trafficking (Prevention) Act, 1986 (ITPA). We argue that the bill serves to extend rather than redesign the present, flawed anti-trafficking infrastructure. It will create additional complications through vagueness and overlap. Consequently, we recommend that the bill be jettisoned and that the ills of existing legislation (especially the ITPA) be remedied rather than ignored.

## **Flawed foundations: Ills of the ITPA**

Despite its nomenclature, the ITPA is primarily an anti-prostitution rather than anti-trafficking law. It centres on housing those 'recovered' from prostitution in protective

homes, thereby removing them rather than curbing exploitative practices within the sex industry. Yet, many experience this very form of intervention as an extended mode of trafficking. Women and girls report that at each point of encounter with the ITPA apparatus, they are met with a strong and sometimes violent disregard for their rights and needs.

This disregard begins with the practice of rescue. The ITPA gives Special Police officers the power to 'remove' persons from prostitution at their discretion. It neither specifies that these persons must have been trafficked, nor that they must consent to being removed. Seshu and Ahmed (2012), Pai, Seshu, and Murthy (2018), and Walters (2016) each found that police teams in various locales regularly force rescue upon women who do not consider themselves to be trafficked or who do not wish to leave their work. A study by the National Human Rights Commission has detailed violent, insensitive and inappropriate police conduct during raids and critiqued the focus on removing women from brothels, while their earnings, possessions, and even their children are left behind (Sen and Nair 2004 (Vol. II): 403-404).

Hyderabadi sex workers report that during large anti-trafficking raids on train stations, the police sometimes choose arbitrarily which sex workers to process as victims of trafficking and which to charge as sex traffickers in a bid to rapidly amass concrete numbers of trafficking convictions (Walters n.d.). Not all rescues are forced. Observing rescue operations conducted in New Delhi's G.B. Road, Ramachandran (2017) found that some NGO staff do attempt to differentiate between adult women who wish to leave brothels and those who do not. It is however very difficult to make this essential distinction, which the ITPA does not even consider, in the rush of a rescue operation.

After rescue, the system of 'protective custody' or shelter-based detention further controverts the will of those rescued, infantilising them in the process. The ITPA mandates that, once rescued, not only underage girls but also adult women be locked in state-run or licensed protective homes. They remain there while the court ascertains their "age, character, and antecedents", verifies the suitability of their families or guardians to "take charge of them", and initiates the lengthy process of

repatriating them. Regardless of their consent, they cannot be released until then. To appeal against such an order by a judicial magistrate, inmates or their families must approach an appellate court, for which they seldom have resources.

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Rescued women spend their time waiting for release in the carceral spaces of the protective homes managed by Women and Child departments of different states. Care offered to the inmates is indifferent at best and abusive at worst. Some shelters do not provide the inmates adequate nutrition, sanitation, or even anti-retroviral and diabetic medications. Shelter staff treat them as dangerous and belligerent adversaries or as shamefully immoral (Das 2016; Krishnan 2014; Times of India 2013).

Inmates cannot support, care for, or readily communicate with their family members. Protective custody also severely limits women's capacity to earn (Ramachandran 2015). The rehabilitation programmes offered with the help of NGOs miscalculate the socio-economic realities of women's lives (Walters 2016). Many rescued women in Mumbai said they could not afford to learn new skills; their priority was rather to earn (Ramachandran 2015). Moreover, pursuing supposedly 'indecent' career opportunities as dancers or actresses was not supported. Rehabilitation programmes thus remain unattractive even to those who wish to leave the sex trade.

Rescued women experience inordinate bureaucratic delays to their release (Ramachandran 2015, Walters n.d.) and are offered scant legal counsel to hasten the process. As their stay in shelter homes lengthens from the prescribed three weeks into several months, many inmates fall into depression; some of them attempt to escape, to riot, or even to commit suicide (Walters 2016). Bangladeshi women and girls in Indian shelters often find themselves in a seemingly interminable legal limbo (Ramachandran 2015). Rescued minors experience even longer stays in shelters while their age is determined through bone ossification tests at government hospitals.

Once home, information circulated by traffickers, the police escorting them home, or even some NGOs sometimes causes women to be turned out by their landlords, shunned in their villages, and estranged from their families. Many people designated as victims of trafficking eventually return to the same situations from which they were initially rescued. This is unsurprising given that many are the unwilling objects rather than the agentic subjects of anti-trafficking interventions. Rescue and rehabilitation that deny freedom and agency to an adult woman who has committed no crime violate her basic rights and should be eschewed. Indeed, legal scholars have long questioned the constitutionality of the ITPA procedures (Baxi 1988: 65; Muralidhar 1996: 293-294).

## **Building on flawed foundations: the new bill offers more of the same**

The bill lacks any mention of sexual exploitation, yet builds upon the same model of rescue, rehabilitation, and repatriation established by the ITPA. It does nothing to redress the rights violations authorised by the ITPA. Rather than ameliorating the endemic problem of forced rescues, the bill states that it is not the purported victim but rather an anti-trafficking police officer or unit that should decide whether rescue is necessary. Without mention of consent, Section 16(1) further states that these police units “may remove such person from any place or premises and produce him before the Magistrate or Child Welfare Committee”.

The bill repeatedly mentions instances “where the person rescued is a victim” implying that some persons rescued will in fact not be victims, thereby condoning indiscriminate rescue. There is no mandate that the magistrate consider the desires of the purported victim. And while a rescued person may apply for release, this is presumed to be involuntary, predisposing enforcement personnel to disregard the rescued person’s agency.

The bill opts out of the progressive legal approach of labour legislation such as the Bonded Labour System (Abolition) Act, 1976 (BLSAA). This encompasses all forms of forced and underpaid labour and prescribes that bonded labour be set free, rather than detained in ‘protective custody’ as in the ITPA. The bill instead favours the

ITPA's approach, rooted in moral anxieties around 'fallen' women and the perceived need to detain and reform them.

Its extension of the ITPA's shelter home framework to other forms of human trafficking is perplexing. Are all categories of trafficked persons, including bonded labour or those subjected to forced surrogacy or forced marriage, now also to be subjected to similar punitive conditions in the name of paternalist protection? Further, how are law enforcers to determine who is to be considered bonded labour and set free under the BLSAA, and who is to be sent to shelters as victims of trafficking?

## Plagued by vagueness

The bill is vague and confusing, rendering it impracticable and unenforceable. For example, it prescribes that rescued individuals be sent to rehabilitation homes and protection homes, without specifying how these homes would function, who would run them, or how long those rescued are to stay in them. Are these protection homes the same as the ITPA's protective homes (given the difference in nomenclature)? Are they to follow the same carceral post-rescue procedures governing those institutions? The bill does not clarify.

The purpose of protection and rehabilitation homes under the bill being to "enable the immediate and long-term sustainable rehabilitation of victims" (Sec 11 (3) (ii)), Sec 17 (4) empowers the magistrate to place a victim in a rehabilitation home for a "reasonable period." These provisions do not specify how much time is to be spent in these homes. That is left to the magistrate's discretion, thus exacerbating the rampant problem of judicial delay.

The bill specifies that the inter-state repatriation of victims be completed within three months and inter-country repatriation within six months (Sec 26 (4)). This specific repatriation timeline is a strength of the bill; however, the relationship between victims' stay in the homes and their repatriation remains unclear. The bill does not define repatriation. As currently envisaged and implemented in anti-trafficking interventions, it is a myopic approach which presumes all rescued

persons wish to return to their home and family. In truth, many do not, given contexts of abusive homes, dire poverty, or remote areas with scant employment options.

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The lack of legal aid while in protective custody inhibits women rescued under the ITPA from negotiating their release. Ramachandran found in her ethnographic research that the impoverished families of women in protective homes scramble to hire lawyers to appeal to the Sessions Court against the magistrate's orders. Some women seek assistance from the accused in these cases. This increases their financial burden and risk of being exploited, as the accused (even if not involved in trafficking them), expect the women to return the favour by working for them. The bill requires the state-level anti-trafficking committee to liaise with local NGOs to provide legal aid, among other forms of assistance (Sec 12 (3) (iii)). However, it does not specify when and where, how often, and by whom legal aid will be provided, nor for what purposes. This is a missed opportunity.

Last, but not least, the bill mentions various forms of victim compensation, which is a strength. However, it does not lay out specific procedures for their disbursement. Ramachandran (2015) found that even when anti-trafficking NGOs help women pursue compensation ordered by courts, it is mired in bureaucratic delays with victims and their families having to run between courts and the Legal Services Authority. The bill should have streamlined this process and identified state agencies responsible for disbursement, so survivors of trafficking are spared from running pillar to post.

## Conclusion

The bill has some strengths such as the specification of a timeline for release and victim compensation. However, a comprehensive anti-trafficking bill should remedy the ills of existing procedures and offer more than a one-size-fits-all approach. Rescue and rehabilitation may help some trafficked persons, but others may prefer

remaining in and reconfiguring their situations. Victims must have a choice about staying in protection homes, participating in rehabilitation programmes, and returning to their families.

The ITPA is moralistic and paternalistic in spirit and its implementation is mired in bureaucratic state practices. With its vaguely worded provisions, its disregard for the choices and preferences of trafficked persons, and its replication of the ITPA framework, the bill is unfortunately rife with similar ingredients of injustice and will further befuddle and burden an already beleaguered system.

It must be abandoned. We echo Kotiswaran (2016) in advocating that the bill must think beyond trafficking as a crime and that a comprehensive solution to the widespread problem of forced and exploitative labour requires an equally wide-ranging movement for safe migration and labour rights – especially for improved wages across all sectors. If India is to take leadership in developing truly comprehensive and progressive solutions to human trafficking, it must avoid the pitfalls of the Trafficking of Persons Bill, 2018.

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