

## Comments on Trafficking Of Persons (Prevention, Protection and Rehabilitation) Bill, 2018

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### Why the Trafficking Bill Must not be Passed in its Present Form

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

The problem with The Trafficking of Persons (Prevention, Protection and Rehabilitation) bill, 2018 is that it criminalizes 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 criminalized environment for instance in sex work or as undocumented workers abroad.

Surveillance is centred on the victims who are then picked up in the hope of catching the traffickers. Therein lays the fault lines in this bill. Since IPC 370 states that, 'consent of the victim is immaterial in determination of the offence of trafficking' a victim centred approach of investigation does not work. Yet, victims are burdened with leading the police to the trafficker and when this method does not pay dividends they face the wrath of the police and law enforcement. In addition, incarceration of the rescued person is the direct result of police operations, thus such rescued persons often refuse to cooperate with the police to find the traffickers. The Bill does not adopt measures to encourage victims to approach law enforcement when violated. The Bill is focused solely on a surveillance mechanism that could be misused to target adults whose work is deemed immoral by the State. The Bill does not adopt measures to encourage victims to approach law enforcement when violated.

The harmful impact of assuming all forced workers as trafficked victims will result in the 'forced rescue' of adults earning a livelihood and incarcerated in 'Sudhar grahas' be they domestic workers, bonded labourers, beggars, sex workers or surrogate mothers. The *Immoral Traffic Prevention Act, 1986* also uses the 'raids to rescue' model whereby law enforcement swoops in and uses the police to 'pick up' victims. The mode of raids by police and anti-human-trafficking units to rescue trafficked victims further traumatizes victims who have no clue why they are being rescued. Very often the IPC 370 clause is interpreted as a loss of consent over a livelihood choice especially in the case of sex work and surrogate mothers.

In the case of sex workers the Bill would also make way for the District committees to use provisions under ITPA and Police repression as a significant method in creating fear increasing vulnerability to violence and unsafe working conditions. Police fear makes it difficult for workers to report violations and other crimes by perpetrators who carry out violence with impunity. Besides, legal constructions of sexual services as exploitation contribute to a climate of stigma and scorn towards persons in sex work and the work itself, thus endorsing State violence and discrimination.

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.

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 Trafficking Bill before it is introduced in the Parliament.

## 1. THE CONSTITUTIONAL CHALLENGE

If one tries to discern the legislative intent behind the Trafficking of Persons Bill 2018, the statement of objects and reasons references Section 370 of the IPC and The Immoral Traffic (Prevention) Act 1956. This indicates that the Bill aims to supplement existing criminal law provisions on trafficking. However even if the Act is expressly meant to supplement existing criminal law, it would still be necessary to look at it within the lens of the Fundamental Rights Chapter of the Constitution. If one is to derive a constitutional rationale for this legislation, the legislation would most likely be meant to protect persons from exploitation. The relevant article would be Article 23 which reads:

*Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.*

However even if this Bill is meant to fulfil the noble purpose of Article 23 of protecting persons from forms of exploitation such as forced labour, the Constitutional scheme is such that one cannot in seeking to fulfil the mandate of Article 23 then violate other constitutional rights. The problem with this Bill that in seeking to potentially fulfil the mandate of Article 23, it ends up violating core protections embodied in Article 21 and Article 19. Article 21 is considered the heart and soul of the Indian a Constitution. It reads:

*No person shall be deprived of life or personal liberty except by procedure established by law.*

The concept of life and personal liberty have been extensively interpreted by the Supreme Court. The concept of life has been held to be more than mere animal existence and includes the right to life with dignity.<sup>1</sup> The concept of both life and personal liberty include the notion of privacy<sup>2</sup>. The key notions underlying Article 21 are dignity and autonomy. The Trafficking Bill in effect, by adopting the definition of trafficking from Section 370 of the IPC which defines victims as those who cannot consent, in effect hits at the autonomy of the so -called victims.<sup>3</sup> Even those who are trafficked have the right to make decisions about their life. By empowering authorities to place persons who are trafficked in custodial institutions without their consent,<sup>4</sup> the Bill fundamentally hits out at the notion that individuals under the Indian Constitutional framework have autonomy of decision making.

By taking away the autonomy of so called victims and treating victims as those without agency, it robs victims of their dignity. Recognizing the dignity of individuals means that all persons including victims have the right to make decisions about their own life. Right to autonomy and dignity of a person does not desert the person even in the most difficult circumstances. A victim of trafficking is entitled to Article 21 rights and should be able to make decisions about his or her life rather than forcibly being sent to a protection home.

<sup>1</sup> The Supreme Court has held: The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Justice Bhagwati, Francis Coralie Mullin Versus Union Territory of Delhi & Ors. <https://indiankanoon.org/doc/78536/>

<sup>2</sup> The Supreme Court in a nine -judge bench decision in *Puttuswamy v Union of India* noted: Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being. [http://www.supremecourtindia.nic.in/supremecourt/2012/35071/35071\\_2012\\_Judgement\\_24-Aug-2017.pdf](http://www.supremecourtindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf)

<sup>3</sup>See Section 370 in particular clause 370. Trafficking of person—(1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—

Sixthly— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 2—The consent of the victim is immaterial in determination of the offence of trafficking.

<sup>4</sup>See Section 17 of the Bill

The Bill also violates Article 19(1)(g) of the Constitution under which a citizen has the right to practice any profession or to carry on any occupation, trade or business. Persons doing sex work are often at the bottom of the socio-economic hierarchy in India. They seek to make a livelihood in extremely difficult circumstances. 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.

The injustice of withdrawing the right under Article 19(1)(g) from adult persons also hits at the norm of equality. Its only when it comes to the question of sex work that the state treat adults who engage in that profession as persons in need of protection. This is because the question of sex work is freighted with notions of morality. For the Indian state, the impulse to defend a majoritarian morality prevails over the impulse to allow adult persons to exercise their right to autonomy, dignity and freedom to practise the profession of their choice. It is important for the government to recognize that its mandate is not to implement the morality of the majority. Rather the government must conduct its policy within the ambit of constitutional morality. The idea of constitutional morality as propounded by Dr. Ambedkar is of a morality which does not impinge upon constitutional rights. Thus, public morality cannot be a justification for depriving persons of their fundamental rights and the adherence to constitutional morality would require that the government protect the right to autonomy, dignity and profession of persons in sex work, regardless of what a majoritarian morality demands.

Finally, it should be noted that this Bill by denuding sex workers of their right to practise the profession of their choice, hits at the right to life itself. The state having failed to ensure equality of opportunity, now proceeds to make the precarious lives of those in very difficult circumstances even more unviable. By doing do the state only enhances the contradictions which structure Indian society include that between the wealthy and the poor.

This Bill is one with other measures of the Indian state which increase the already sharp socio-economic divides in Indian society. The Indian state must heed the warning of Dr. Ambedkar<sup>5</sup> and begin to address the problems of trafficking from the lens of redressing socio-economic inequality and not by criminalizing the livelihoods of the poor. If it continues to follow the current course of ignoring the interests of those at the bottom of the socio-economic hierarchy, it put 'our political democracy at peril' and there is a very real possibility that 'those who suffer from inequality will blow up the structure of political democracy'.

## 2. CRIMINALISATION AND NOT WELFARE?

The trafficking 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 proposed trafficking bill envisages a rescue and rehabilitation mechanism to address the vulnerabilities faced by women. Further instead of focusing on creating conditions and laws that make migration safer for women, these policies are focused on deterring women's right to mobility and movement and criminalising vulnerable populations.

The Bill is fundamentally motivated by a criminalizing 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.

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<sup>5</sup> As Ambedkar presciently warned: *On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up.*" Speech to the Constituent Assembly, 25 November 1949

The criminalizing impulse of the Bill 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. This is extremely harmful as it is highly likely that this provision will be misused and false cases will be booked against victims. This is the experience under the ITPA where 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 as well will be sent to custodial institutions, thereby again betraying the state mindset behind this Bill.

This provision along with the provision criminalizing the administration of chemical substance or hormone on a person for the purpose of early sexual maturity also effectively criminalizes both the intimate life as well as the profession of transgender persons. By criminalizing 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.

### 3. SURVEILLANCE CAPABILITIES, LACK OF ACCOUNTABILITY, PRIVACY PROTECTION

Surveillance capabilities of State institutions tasked with functions like anti-trafficking should be viewed critically. Such capabilities should be seen in the context of evolving technology use by law enforcement and its dangers. Surveillance today is enabled through technologies like facial recognition, biometric databases and big data applications that come with the promise of innovative and cutting-edge use-cases, including the promise of finding missing persons, but have been found to threaten democratic space, and reproduce age-old biases and deepen inequalities that are at the root cause of the issues sought to be cured. There is presently no data protection law or regulatory framework that governs how government agencies and intelligence agencies process and share information. Sex trafficking prevention measures are intricately connected to national security, and ambitions of the State's overseeing powers.<sup>6</sup>

The National Anti-Trafficking Bureau (Section 4) is tasked with prevention and monitoring, with powers for surveillance with the cooperation of other law-enforcement bodies, and an explicit function of creating a database of crimes related to trafficking, without concomitant obligations for such intelligence gathering and database creation to be necessary or proportionate.

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<sup>6</sup> In an article for Open Democracy, Jessica R Pliley writes of the US government measures to increase its institutional reach through sex trafficking prevention efforts: *DARPA's celebration of the law enforcement potential of the Memex project should not be taken lightly. The project significantly increases the surveillance state and makes its findings available to law enforcement. This expanded surveillance is justified by drawing on the discursive and political power of the anti-trafficking movement in the United States, and it will be a powerful gift to law enforcement. But if the history of the surveillance national security state and the enforcement of anti-trafficking laws teaches us anything, it suggests that in the past these initiatives grew the power of the state while criminalising the behaviour of migrating women.* <https://www.opendemocracy.net/beyondslavery/jessica-r-pliley/sexual-surveillance-and-moral-quarantines-history-of-antitrafficking>

As part of its role in ensuring that there is prevention of trafficking, the District Anti-trafficking Committees are tasked with roles (Section 13 (iii), (v))<sup>7</sup> requiring ongoing hyper-local surveillance, including coordinating with record-keepers monitoring the availing of government schemes and benefits in other government departments.

While the nature of anti-trafficking efforts are such that they require cooperation between different State units and multiple agencies, there needs to be accountability mechanisms required in the same law, that prevent (a) potential abuse against adults who are consensually or voluntarily engaged in sex work (b) misuse by the agencies for different purposes than what is specified.

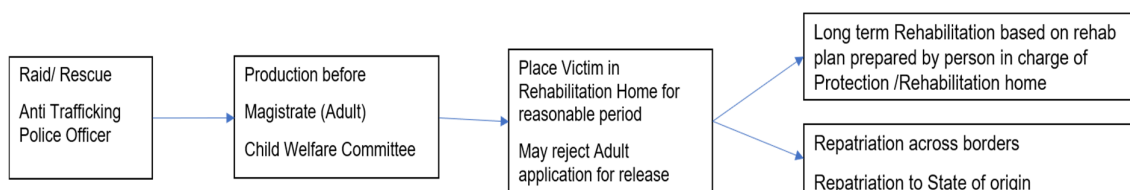
According to Section 20 (iv), the State and District Anti-trafficking Committees have to take measures to coordinate with ‘corporate sector to implement various schemes, programmes for the prevention of trafficking of persons’. It is unclear what is the scope or intention for such coordination. The same section also includes a requirement for accountability<sup>8</sup>, the only mention in the entire Bill. However, no further guidance is provided, and the section remains vague.

This section also provides for a wide ambit to State and District authorities to design ‘prevention’ mechanisms. This includes ‘developing appropriate law and order framework to ensure prevention of trafficking of persons’, ‘organising interface between law enforcement agencies, other Government Departments and agencies with the voluntary organisations or non-Governmental organisations in matters of prevention of trafficking of persons’. These provisions may include creating communication channels for reporting by different bodies of suspected trafficking. However, what’s important is to also consider the wide ambit that is allowed for sharing information without privacy protections.

*Limited conception of privacy*

Section 48 states that the designated Court may record the victim’s statement via video-conferencing, giving due regard to concerns of safety and confidentiality. It provides that no form of communication at any stage of the process shall disclose name and other particulars of the victim or witness that may lead to their identification. However, there is nothing in the Bill which prevents misuse of information by persons in the law enforcement and other State machinery. Further, there is no indication that the data gathered by these agencies shall be stored in a secure manner. Given the inter-linking of databases, storage of data by government bodies on proprietary commercial services and poor security practices in general, the current approach to privacy and confidentiality of information is severely lacking.

**4. RAID, RESCUE AND REHABILITATION**



<sup>7</sup> (iii) co-ordinate with other State Departments and Panchayati Raj institutions, to keep a check on the children who drop out from schools and those children who are covered by various schemes and have stopped accessing the benefits of those schemes and inform such cases to the State Anti-Trafficking Committee and take appropriate actions;

(v) facilitate survey of the areas and vulnerable population to identify source, transit and destination areas of trafficking of persons and based on the information received, draw up an action plan for the prevention and protection of people who are vulnerable to trafficking and implementation of the action plan;

<sup>8</sup> (v) ensuring accountability of the concerned agencies, by regular review and appropriate action;

The proposed bill devises rehabilitation measures for rescued victims. Under Section 16, the Anti trafficking Police Officer or Anti Trafficking Unit is empowered to remove an individual who is in “imminent danger to life and person” from any place or premises and produce he individual before a Magistrate or Child Welfare Committee.

In the case of adults rescued by the Anti trafficking units, the Magistrate may make an order sending the victim to a rehabilitation home (Section 17). If the rescued adult makes an application for release, the Magistrate may reject the application on grounds that it has not been made voluntarily.

#### A. 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. There are two provisions that are of concern in this regard.

##### i. Proviso to Section 17

*Provided that, if the victim or any person rescued is not a child and he voluntarily -in makes an application supported by an affidavit for his release and if the Magistrate is of the opinion that such application has not been made voluntarily, the Magistrate may reject such application after recording his reasons in writing.*

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 Draft Bill denies agency to persons categorized as ‘victims’ and makes **no provisions for** ascertaining the wishes and **taking the consent of persons to be prevented, rescued** or rehabilitated under the proposed law. There is **no opportunity** for the **“rescued” individual to exercise their choice** as to the options available and to be exercised.

Section 17 of the Immoral Traffic Prevention Act, which deals with intermediate custody of persons rescued, states that persons remanded to a protection home must be given the opportunity of being heard. Moreover, the magistrate must also carry an inquiry into the correctness of information received under S. 16(1), i.e., that the person was indeed carrying on, or made to carry on, prostitution in a brothel. However, Section 17 of the proposed Bill does not create any such requirement on part of the Magistrate. Section 17 under the ITPA has been long criticised for giving draconian powers to the police, and for allowing Magistrates to remand women indefinitely. However, Section 17 of the Bill gives the magistrate powers that far exceed even this. There is no requirement for the Magistrate to hear the victim before remanding her to the home. In fact, the proposed bill prescribes that the Magistrate may reject the application of an adult victim for release on the grounds that it has not been made voluntarily. The Bill does not have any provision for appeal against an order of detention passed by the Magistrate.

A rescue and rehabilitation mechanism is suggested to address the vulnerabilities faced by women. Instead of focusing on creating conditions and laws that make migration safer for women, these policies are focused on deterring women’s right to mobility and movement. The law proposes to give extraordinary powers to the judicial system to control and decide the fates of adults not accused of criminal offenses; by being vested with the authority to negate their consent – a framework that hits at the very heart of human freedom and human agency. The bill does not provide appeal to challenge such a deleterious provision.



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 recently concluded 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<sup>9</sup>. 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).

We recommend that consent of the rescued person is key before sending her to a Special Home/ Protection Home/ Rehabilitation Home. In the event that a rescued person wants to leave a protection home at any time after she is admitted, she should be allowed to do so on her own cognisance. Rescued persons should have the freedom to opt in for programmes and schemes as per their choice and consent.

### **Limiting Agency of the Victim**

Section 17 of the Bill empowers a magistrate to place a victim in a rehabilitation home. The proviso to subsection (4) states that a victim or a person on their behalf may make an application for release, supported by an affidavit. However, the same proviso 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. For example, in our experience, 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.

The clause is also in violation of the order of the Supreme Court in *Buddhadev Karmaskar v Union of India*, which states that women should not be compelled to be institutionalised in order to avail of rehabilitation.

### **ii. Rehabilitation**

It has been accepted that the major causes of trafficking include – poverty, war, civil unrest, natural disasters, drought, demand for cheap labour, debt bondage among other factors. However, the approach of the present bill is a study in contrast. The Bonded Labour Act provides the following explicit protection to bonded labourers

- Every labourer stands freed and discharged from any obligation to render bonded labour
- Liability to repay bonded debt stands extinguished. No suit for recovery can be filed. If some property was forcibly taken from the bonded labourer, it will be restored.
- Property of bonded labour is freed from mortgage, charge, lien or encumbrance
- Freed bonded labour shall not be evicted from residential premises he was occupying as part of consideration for bonded labour.

The Bill in clause 31(1) defines trafficking for the purpose of bonded labour. The victims in such cases will be produced before the Magistrate before being detained in Custodial Institutions. The approach to Bonded Labour

<sup>9</sup> 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>

in the current 2018 bill is based on custody, while the approach in the Bonded Labour Act is non -custodial and aims to protect the rights of the bonded labour. By privileging the 2018 approach of custody over the 1976 approach of rehabilitation which places the rights and agency of the bonded labour at the center of the legislation, the Bill is sending out a larger message of the way the State prefers to deal with poverty and precarious forms of labour. The proposed Bill only provides an explicit mandate to rescue victims place them in protection homes and repatriate them to state of origin or country. There is no effort to redress the underlying factors that may have led to the trafficking of the individual including debt bondage, loans taken at high rates of interest, distress migration. The proposed bill makes no mention of extinguishing debts which may have been a strong factor in creating vulnerability of the rescued person.

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, 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.

The trafficking bill ignores problems associated with unequal growth, skewed development and inequity, including – aspirations to migrate for better livelihood by criminalising movement of women. Women in distress (political, social, and economic) and crisis move for better livelihood options. Poverty also creates conditions for a large proportion of female migration. Is the criminalisation, incarceration, rehabilitation framework the best possible option to address inequities?

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<sup>10</sup>.

The Supreme Court in the case of *Budhadev Karmaskar v Union of India*, has repeatedly brought attention to the futility of remand in short stay homes against the wishes of the victim<sup>11</sup>. Moreover, the 7<sup>th</sup> Report of the Panel on

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<sup>10</sup> 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.

<sup>11</sup> 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*



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.

### iii. Medical examination

*S 16. (1) Where a police officer or anti trafficking officer or anti trafficking unit has reason to believe.... It may remove such person from any place or premises and produce him before the Magistrate.... and shall take all necessary steps for the medical examination of such person for the purposes of determination as to the age, the assessment or detection of trauma, injury or illnesses incidental thereto.*

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.<sup>12</sup>

## 5. DISTRICT ANTI TRAFFICKING COMMITTEE POWERS

Under the proposed Bill, a District Anti Trafficking Committee (DATC) will be constituted in every district comprising of members from various departments, law enforcement, judiciary and civil society organisations<sup>13</sup>. The DATC can facilitate the creation of an Individual care plan for a victim in a Protection or Rehabilitation Home<sup>14</sup>, pass directions to these Homes<sup>15</sup>, facilitate inter – state repatriation of bonded labourers<sup>16</sup>, assist in rescue operations and transfer of individuals to Rescue homes<sup>17</sup>.

The Committee has been given vast and unfettered powers in relation to identification of a victim (s), their rescue, protection, assistance, rehabilitation and repatriation. Given that the DATC is exercising powers in relation to adults not accused of any crimes; the lack of a consultation process with the victim or placing the

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*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.*

<sup>12</sup> 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>

<sup>13</sup> Members include - District Magistrate or Additional District Magistrate — Chairperson; District Officer for Women and Child Development — Member; Representative, District Legal Services Authority — Member; Representative, Child Welfare Committee — Member; Two Civil Society Organisations or Non-Governmental Organisations working in the field of prevention of trafficking and related issues — Members; such other members as may be prescribed — Members; and District Police Nodal Officer — Member Secretary.

<sup>14</sup> Section 13 (3) i

<sup>15</sup> Section 13 (3) ii

<sup>16</sup> Section 13 (3) iv

<sup>17</sup> Section 13 (3) vii

victim at the centre of decision making, respecting the agency of an adult victim to take their own decisions is problematic. It hits at the heart of adult agency and creates dangerous restrictions on adult freedom guaranteed under the Constitution.

*Section 14. The DATC shall have final authority to dispose off cases for the care, protection, treatment, development and rehabilitation of victims under the Act.*

The decisions of the DATC are final and not open to appeal in courts. In the event that a victim disagrees with or wishes to challenge the decision of the DATC regarding care, protection or repatriation, there is no avenue for the same even within the judicial system. More problematic is the provision of mandatory referral by the Special court in the exercise of its functions.

***24. (3) The Magistrate shall consult the District Anti-Trafficking Committee before taking a final decision with respect to the rehabilitation of the victim or such other person.***

Under the provisions of the Immoral Traffic Prevention Act, the Magistrate was authorized to constitute a panel to assist him/ her on decisions related to the rehabilitation of a victim. In the present case, the powers of the court have been restricted by the mandatory referral process. An ever present fear of this mechanism of functioning is that the decisions of the judiciary are supplanted by a powerful committee at the district level and with no recourse to appeal for the victim. When read in conjunction with the other provisions, it creates an undesirable accretion of powers without transparency, appeal and accountability.

The DATC has also been given powers of Repatriation (both within state and across borders) as described in the next section.

## 6. REPATRIATION AND RIGHTS

*Section 26. (1) The District Anti-Trafficking Committee or the Child Welfare Committee, as the Repatriation case may be, shall be responsible for the repatriation of victims by co-ordinating with their counterparts in any other District.*

*(3) State Nodal Officer shall obtain informed consent from the victim for repatriation purposes and in case the victim is not in a position to give consent to the State Nodal Officer, he shall make arrangements for the counselling of the victim by trained psycho social professional.*

*(4) The repatriation of the victims shall be completed within three months for inter state repatriation, and within six months in case of cross border repatriation, from the date of rescue by the District Anti-Trafficking Committee, or the Child Welfare Committee, or State Police Nodal Officer, as the case may be...*

The proposed law 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 proposed trafficking bill seeks to repatriate a "victim" to his/ her state of origin after counseling. It is not clear what counseling is to be provided to the individual, 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)(d) of the Constitution of India gives all citizens the right to move freely throughout the territory of India. Article 19(1)(e) of the Constitution of India gives all citizens 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.

Every citizen of India has the right to move freely within the territory of India and 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 women shall be reunited with their families, but only indicates that they shall be returned to their place of origin. At present, repatriation often simply 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.

## 7. EXPLOITATION - EVICTION

*34.(1) Whoever keeps or manages or acts or assists in the keeping or management of a premises to be **used as a place for trafficking** of any person shall be punished with rigorous imprisonment for a term which may extend to five years and also with fine which may extend 10 one lakh rupees and in the event of a second or subsequent conviction with rigorous imprisonment for a term which shall not be less than seven years and with fine which may extend to two lakh rupees.*

*(2) Whoever—*

*(i) being a tenant, lessee, occupier or person in-charge of any premises, uses, or knowingly allows any other person to use the premises or any part thereof as a place for trafficking of persons; or*

*(ii) being the owner, lessor or landlord of any premises, or the agent of such owner, lessor, or landlord, lets out the same, or any part thereof with the knowledge that the same or any part thereof **is intended to be used as a place of exploitation of the victim**, or is wilfully a party to the use of the premises or any part thereof as a place for trafficking of persons.*

*shall be punished on first conviction with imprisonment for a term which may extend to three years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which may extend to five years and with fine which may extend to two lakh rupees.*

*Explanation. — For the purposes of sub-section (2), it shall be presumed until the contrary is proved that any person referred to in clause (i) or clause (ii) of that sub-section has not exercised due diligence in allowing to use or letting out the premises or in allowing the premises or any part thereof to be used as a **place of exploitation or as the case may be, and has knowledge that the premises or any part thereof was being used as a place of exploitation of the victim.***

Place of trafficking and place of exploitation are used interchangeably throughout Section 34. There are two challenges associated with this construction. How will the word exploitation be constructed? Will practices of paying lesser than minimum wage held to be “force” by the Supreme Court, be deemed to be an exploitative practice and hence be covered under the present section?

How will place of exploitation be determined? Will it be read in conjunction with the provisions of trafficking or as a stand -alone provision and left to the discretion of the Magistrate. Sex workers have experienced that the provisions of ITPA and Section 370 are being used in isolation and in a selective manner rather than to stop trafficking. Magistrates and anti – trafficking NGOs selectively interpret the term “exploitation” to incarcerate adult sex workers and arrest women who are providing their homes to other sex workers to work safely.

Secondly, the wording of the proposed bill seeks to evict offenders and occupiers on the mere premise that the space **may be** used as a place of exploitation without the place having been actually used for exploitation. The provision has wide amplitude and potential for misuse since evictions and sealing can be authorised on the premise that a place **may be** used for exploitation.

It also remains to be seen whether this provision will be extended to factories, mines, clinics, hospitals, and private homes – which are places with the potential of exploitation.

**Section 35.** *(1) Notwithstanding anything contained in any other law for the time being in force, the Magistrate shall, on receipt of information from the police or otherwise, that any premises or any part thereof is being used for the purpose of trafficking of persons, issue notice ... to show cause within seven days of the receipt of the notice why the same should not be sealed ...the Magistrate may pass an order—*

*(i) directing eviction of the occupier or any person from the premises, within seven days of the passing of the order;*

*(ii) directing that the owner, lessor, or landlord, or the agent of the owner, before letting out the premises or any part thereof, which, during the rescue or search has been found to be used for the purpose of trafficking, shall obtain the previous permission of the Magistrate ...*

The proposed bill creates an offence for maintaining **any** space which has been used as a place of exploitation. It mandates for the punishment of any individual who maintains such a space. However, in cases of premises being used for “exploitation”; the offender and **occupiers** are liable to be evicted from the premises. Section 35 (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 labor 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 these provisions

- 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.
- It is clear from the history of the application of the provisions of ITPA, that the provision in question will 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.

## 8. FREEDOM OF EXPRESSION

**Section 36.** (i) *A person is said to promote, procure or facilitate the commission of trafficking of person, if that person—*

*(ii) advertises, publishes, prints, broadcasts or distributes, or causes the 5 advertisement, publication, printing or broadcast or distribution by any means, including the use of information technology or any brochure, flyer or any propaganda material that promotes trafficking of person or exploitation of a trafficked person in any manner; or*

The section has tremendous potential to regulate and impose restrictions on free speech. The term “promoting trafficking or exploitation” has wide amplitude and many actions can be construed to come within this clause. Rather than imposing a rigorous standard of actual and direct nexus with the act of trafficking or exploitation, a weaker standard of causality is imposed. Under the clause, there is a high possibility of authors of adult material, videographers, film makers and internet sites be charged with promoting trafficking or exploitation. The clause might build a legal link between hosting or producing pornography and trafficking.<sup>18</sup>

There is a threat that Section 36, will be read with Section 79 of the IT Act; which will have huge ramifications on the internet freedom in India. There exist several evidences, research work and accepted jurisprudence to link mere hosting of porn and sex work to sex trafficking. If the same is extended to India along with the Kumar Vishwani case, this section will be used as a tool to ban YouTube videos, Facebook, Twitter, Tinder, Soundcloud and related hosting sites’ profiles in the name of “promoting trafficking of a person”.

In India, the jurisprudence regarding legality of sex work falls in an extremely grey area and the government had banned 270 escort sites before in the name of obscenity and morality even though it cannot do that under either Section 69A or Section 79 of the IT Act nor the Section 8 of the ITPA. It had also banned 470 porn sites under the same excuse but later took off the ban as it did not adhere to any legislation. This section will not only legitimize such acts of banning but would also give wide ranging powers to ban other things on the internet like the aforementioned.

*Section 39: Buying or Selling of any person*

<sup>18</sup> SESTA in the US seeks to do away with CDA 230, their benchmark law on internet freedom by providing with restrictions and making third parties liable for hosting sex work material which it believes is linked to trafficking as well. This has been heavily criticized by scholars as well as public advocate groups including groups working for the rights of sex workers. Even their Department of Justice had released a last minute statement against the passing of this bill.

*(2) Whoever solicits or publicises electronically, taking or distributing obscene photographs or videos or providing materials or soliciting or guiding tourists or using agents or any other form **which may lead to the trafficking of a person shall be punished** with rigorous imprisonment for a term which shall not be less than five years but may extend to ten years, and shall also be liable to fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees.*

The grammatical acrobatics of section 39(2) aside, this anti-solicitation provision is severely problematic in that it mandates punishment even for a vaguely defined action or actions that may not actually be connected to the trafficking of a person. In other words, the provision doesn't require any of the actions to be connected to trafficking in their intent or even outcome, but only in *potential connection* to the outcome. At the same time, it says these 'shall' be punished!

This vagary that ignores actual or even probabilistic causation flies in the face of standard criminal law which requires *mens rea* along with *actus rea*. The excessively wide scope of this badly drafted provision leaves it prone to abuse. For example, currently the provision allows the following interpretation to be included: 'Whoever publicizes electronically, by providing materials in any form, which may lead to trafficking of a person shall be punished...'. Even the electronic publicizing of an academic study on trafficking could fall under the provision as it currently reads, if it is argued that publishing studies that show the prevalence of trafficking 'may lead to the trafficking of a person'! It is not hard to imagine that an academic study that shows trafficking numbers at embarrassingly high rates could be threatened with this provision. Similarly, any of our vast number of self-appointed moral guardians could also pull within this provision any artistic work that they may personally find offensive or 'obscene'. Simply put, without any burden of showing a causal connect, it could be argued that *anything* 'may lead' to the trafficking of a person. Needless to say, this paves the way for a severe chilling effect on free speech, especially on critical speech around trafficking issues.

There is also a need to consider the line "taking or distributing obscene photographs or videos or providing materials...." With the ease that we can see that pornography or nudist art can be linked to trafficking, a section that is vague enough to relate anything "obscene" to trafficking without the absence of *mens rea* can mean that there can be mass scale ban on all nudist or semi-nudist websites, articles, literature, magazines as well as the creators and artists taking part in them and they "shall" be punished as mentioned. This makes magazines like Maxim India that often stars prominent national personalities comfortable with their bodies especially liable for trafficking for absolutely no rhyme or reason. Any government in power can easily pin anything close to "obscene" or "nude" as something that "may" lead to trafficking and start a reign of terror in the minds of a lot of artists, creators and magazines. YouTube channels with videos closely linked to say the porn ban, supporting nudist culture etc can also be easily banned in these circumstances. Moreover, such massive clampdowns as mentioned in the comments of the previous section can happen through this Section of the Bill. This may also bring in its ambit consensual sexual activity over the digital world and make it punishable. Apps like Tinder can then be completely banned.

#### *Section 41: Offences related to media*

*41. (1) Whoever commits trafficking of a person with the aid of media, including, but not limited to print, internet, digital or electronic media, shall be punished with rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and shall also be liable to fine which shall not be less than one lakh rupees.*

*(2) Whoever **distributes, or sells or stores**, in any form in any electronic or printed form showing incidence of sexual exploitation, sexual assault, or rape for the purpose of exploitation or for coercion of the victim or his family members, or for unlawful gain **shall be punished** with rigorous imprisonment for a term which shall not be*



*less than three years but may extend to seven years and shall also be liable to fine which shall not be less than one lakh rupees.*

The drafters of this bill have perhaps overlooked the fact that unlike the physical world, the infrastructure of the electronic / digital world requires 3rd party intermediaries to handle information during most forms of electronic activities, whether it is transmission, storage or display. As 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, 'safe harbours' are provided in 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 unenviable position of having to monitor un-monitorable amounts of data, and face legal action for the slip-ups that are bound to happen regularly. Furthermore, there are several levels of free speech and privacy issues associated with having multiple gatekeepers on the expression of speech online. A charitable reading of the intent of a provision which does not recognise safe harbours for 3rd party intermediaries, would be that the drafters of the bill have simply not realised that users who upload and initiate transfer of information online, are not the same parties who do the actual transmission of the information.

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'), so long as they:

*(i) act as a mere 'conduit' and do not initiate the transmission, select the receiver of the transmission, or select or modify the information contained in the transmission.*

*(ii) exercise due diligence while discharging duties under this Act, and observes other guidelines that the Central Government may prescribe.*

The Information Technology (Intermediary Guidelines) Rules, 2011, list out the nature of the due diligence to be followed by intermediaries to claim exemption under Section 79 of the IT Act.

Intermediaries will not be granted safe harbour if they have conspired, abetted, aided or induced commission of the unlawful act, or if they do not remove or disable access to information upon receiving actual knowledge, or notice from the Government, of the information that is transmitted or stored by the intermediary being used for unlawful purposes. This argument on safe harbour can be furthered by reviewing case laws on this issue<sup>19</sup>.

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, it appears that the drafters of the 2018 Anti-trafficking bill have not considered this aspect at all, since they have not referenced the IT Act in this context in the bill, and have additionally added their own *non-obstante* clause in Section 59 of the bill:

*59. The provisions of this Act, shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.*

So the regime as prescribed by the IT Act allows for safe harbours, whereas the regime as prescribed by the Anti-Trafficking bill does not allow for safe harbours, and both say that they would have an overriding effect for any

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<sup>19</sup> Vodafone India Limited vs M/S RK Productions Pvt Ltd (Madras high Court), Nirmaljir Singh Narula vs Sh. Yashwant Singh (Delhi HC case, even though the case went against the plaintiff the court held that the media houses and houses for publication are protected under Sec. 72 of the IT act), Babu Digumarti vs Govt of NCT of Delhi (Delhi HC), Tata Sky Ltd vs YouTube LLC and Ors (Delhi HC).

conflicting law. This legislative bumble could potentially be solved by using the settled principle that a special Act prevails over a general legislation. This is still a little tricky as they are technically both special Acts. It could be argued that given the context of the Anti-trafficking bill as focusing on trafficking, and the context of the IT Act focusing on the interface of law and technology, that for the purposes of Section 41(2) of the Anti-trafficking bill, the IT Act is the special legislation. And thus Section 79 of the IT Act should make redundant the relevant portion of Section 41(2) of the Anti-trafficking bill. This reading would require the bill to be modified so as to remove the redundancy and the conflicting portion of Section 41(2).

## 9. CRIMINALISING/ STIGMATISING VULNERABLE POPULATIONS

### i. Begging

Transgender persons who beg will come under the preview of this law, as will beggars. Trafficking will have to be proved but just like sex workers TG who beg will be picked up for rehabilitation as trafficked victims.

### ii. Sex work

The provisions of the Bill relating to rescue, rehabilitation and repatriation will be applied to adult consenting sex workers unless they are explicitly excluded from the Draft Bill<sup>20</sup>. Unless and until, the provisions of the Immoral Traffic Prevention Act are repealed, brothel keeping, living off the earnings of sex work, public place provisions will continued to be used against sex workers and third parties who support their work. The experience of sex workers show that laws are used in isolation rather than keeping the intent of the law in mind. Currently under the provisions of ITPA sex workers are

- Sex workers are picked up under brothel offences when they are living together and supporting each other. They are denied bail for long periods of time
- Third parties supporting sex workers to work safely are arrested and detained
- Adult sex workers are denied release from rehabilitation homes despite stating that they are adult consenting and not trafficked.<sup>21</sup> The Supreme court panel in the 15<sup>th</sup> interim report had recommended that sex workers living together and working for their mutual gain should be kept out of the ambit of the law. Despite this, sex workers continue to be forcibly rescued and incarcerated without hearing in rehabilitation homes.
- For instance in a study conducted by VAMP and SANGRAM, out of a sample of 243 women who were forcibly rescued by anti- trafficking NGOs and AHTU, 193 women said that they were adult and consenting sex workers. Despite this, they were detained without appeal in Rehabilitation homes, some of them for as long as 3 years<sup>22</sup>.

- i. Adult persons doing sex work on their own volition and their clients<sup>23</sup> should be kept out of the purview of the proposed Draft Bill. It should be clearly and explicitly stated in the Statement of Objects and Reasons of the Draft Bill.

<sup>20</sup> The Final Report of the Panel appointed by the Supreme Court of India vide its order dated 19.07.2011 in Budhadev Karmaskar Versus State of West Bengal (hereinafter referred to as 'Final Report SC Panel') clearly lays down: "**The involuntary detention of sex workers violates the right to liberty, equal protection of law and fundamental freedoms guaranteed under the Constitution and International Human Rights Laws.**"

<sup>21</sup> RAIDED, SANGRAM, VAMP, 2018. <https://www.sangram.org/resources/RAIDED-E-Book.pdf>

<sup>22</sup> Table 10, page 54, RAIDED, SANGRAM and VAMP, 2018. <https://www.sangram.org/resources/RAIDED-E-Book.pdf>

<sup>23</sup>The Verma Commission in a clarification issued on the amended Section 370 IPC had stated; "the recast Section 370 ought not to be interpreted to permit law enforcement agencies to harass sex workers who undertake activities of their own free will, and their clients. The Committee hopes that law enforcement agencies will enforce the amended Section 370 IPC, in letter and in spirit". **Email dated February 8, 2013, Gopal Subramaniam, Clarification in respect of recommended amendment to Section 370 IPC, by the Justice J.S Verma Committee.**

- ii. The Draft Bill should in the definition and at all relevant sections referring to prevention, rescue and rehabilitation clearly state that adult persons doing sex work on their volition are to be excluded from the ambit of the provisions<sup>24</sup>.
- iii. Adult persons voluntarily doing sex work are not to be detained either as accused or rescued for “reformation”.

### **Lack of Representation of Sex Workers**

There is a lack of representation of sex workers at each level of the Committees from the District to the Centre in the Draft Bill. There must be participation of sex worker collectives or organisations with a track record of working for the rights of sex workers 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 including rights of sex workers. There is also a lack of representation and consultation of sex workers in the procedures laid down with no opportunity for support and counselling by peers.

### **Prosecution and Judicial Trends - Exploitation of trafficked person**

Currently the judicial trend appears to be 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.

### **iii. Bearing a Child**

*[Whoever commits the offence of trafficking for the purpose of bearing child either naturally or through assisted reproductive techniques] Section 31 (ii).*

‘Consent’ of the adult woman choosing to be a surrogate is being invisibilised, on the lines of the proposed Surrogacy Bill. While the term surrogate/surrogacy is not specifically invoked in the Bill, it appears that the Surrogacy Bill 2016 as approved by the Union Cabinet has been used as a template. But, it is noteworthy that the Surrogacy Bill is yet to be tabled in the Parliament and the public debate and discussion over the ban on

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<sup>24</sup>The Special Rapporteur on Violence Against Women (SR VAW) had in her India report submitted to the Un General Assembly (1 April 2014), “noted a tendency to conflate sex work with trafficking in persons and when sex workers are identified as victims of trafficking, the assistance that is provided to them is not targeted to their specific needs.” She further noted with concern that there were rehabilitation centres for sex workers and the violence faced by them in custodial settings. The SRVAW had called for a review of the ITPA “to ensure measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers.” *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Mission to India. 1 April 2014. A/HRC/ 26/38/Add.1*

commercial surrogacy is far from settled. There is a need to question the way the ban on commercial surrogacy is being brought in with regard to the Surrogacy Bill, at a broader level.

Moreover, it seems that **all surrogacy is being deemed exploitative** and seen as equivalent to trafficking. As is the case with other labour options that find mention in this legislation, it seems under no circumstances are women thought to be capable of consenting to become surrogates, and this is far from the reality on the ground.

#### iv. Stigmatising people living with HIV/AIDS

*[Whoever commits the offence of trafficking of person and a consequence of trafficking the victim if exposed to a life-threatening illness, including HIV/AIDS] Section 31 (viii)*

The section needs to mention all occupational hazards. There is no need to specifically and singularly mention HIV since it exacerbates stigma. With the availability of ART, HIV has become a chronic, not life-threatening condition.

With regard to HIV/AIDS, the three crucial principles of **Consent (Informed), Counselling and Confidentiality** must be mentioned within the law. In the event the trafficked person is being tested for any infection / disease specifically STI or HIV/AIDS, then she/ he must be provided with pre-test counselling, informed consent should be obtained. In the event the individual does not wish to be tested, her rights must be protected. In the event she does undergo testing of her own volition, the results of the tests must be kept confidential and not made a part of public records.

#### v. Young People and Adolescents

There are ample studies and experiences to prove that the anti -trafficking laws are frequently used (abused) by parents to punish young and adolescent boys and girls for marrying or eloping out of choice<sup>25</sup>. This bill will have negative effects on young people struggling within the caste, class and religiously ridden society. While most of young boys caught by parents and police are put behind the bars, girls find their way to shelter homes. These girls themselves fear going back to their parent's home and are completely at the mercy of system that sees them as case of rehabilitation while all they want is freedom to choose and decide. Boys and their families are worst victims of this, especially if they belong to 'lower castes' or minority religions. The police act with tremendous alacrity in locating adult couples of inter-faith/inter-caste elopements, and bringing boys and their families under provisions of law. The boy's family is considered as much a criminal as boy and powerful caste and religious majorities ensure retribution.

Rescue<sup>26</sup> provisions laid out will be misused to strengthen the hands of feudal communities and young boys and girls and families from marginalised communities will become extremely vulnerable to harsher laws and

<sup>25</sup> Nirantar conducted a study, to map the practices and reasons for early marriages in India. We also came across many violations of Trafficking law to punish and trap young people for exercising choice and challenging the caste and religious norms of marriage. Protection officers and district magistrates shared that most of the cases in their district under anti trafficking laws were slapped against young boys who had eloped or married girls of other castes and religion especially if they were under 18 years. Likewise, organisations in West Bengal and Jharkhand shared that parents marry their underage daughters in lieu of money whether above or below 18 years, but when girls and boys want to have relationship with their choice or want to get married, parents charge boys and their families under anti trafficking laws. Community elders in Haryana agree that in the event of out of caste/religion marriages, rape laws in conjunction with anti trafficking laws are most commonly used to book boys and their families. *Study conducted in seven states, Rajasthan, Andhra Pradesh, West Bengal, Bihar, Jharkhand, Maharashtra, and New Delhi, with over 50 organisations and key informants. Analysis of early and child marriage to identify its root causes and enabling factors. The responses of the State towards early marriage arranged by parents or by young boys and girls; was mapped. 2014-15. (<http://www.nirantar.net/uploads/files/EM%20Report%20-%20English.pdf>)*

<sup>26</sup> Where a police officer or Anti Trafficking Police Officer or Anti-Trafficking Rescue and Unit has reason to believe that it is necessary to rescue person without undue delay due to the imminent danger that may cause to his life and person, he or it may remove such person from any place or premises and produce him before the Magistrate or Child Welfare Committee, as the case may be, and shall take all

stringent actions. It will also increase atrocities against young men and boys and apathy against young girls at the hand of police and judiciary which is as feudal and fundamentalist as the powerful communities in India.

The sections on forfeiture of property will particularly have a long- lasting impact on the parents and families of boys who are falsely implicated for falling in love with inter-caste/inter-religious girls.<sup>27</sup>

There is no dearth of evidence- based studies to establish that our police system and judiciary is as gender and caste biased as ordinary communities. During our study, when we tried to probe with DMs and protection officers about the false cases, all of them were very sympathetic to parents and said that they understand the parents' problem as well since what else 'poor parents' could do if children turned up to be so useless (*nalayak*). Clearly system has soft corner for parents who abuse anti trafficking laws to punish innocent boys and girls and favour parents as their social responsibility. An anti trafficking bill which now gives unlimited power to police and judiciary to decide the fate of girls can create havoc for girls and boys. Our experience says that in cases of consensual relationships between young people, rescued girls do not want to go back to their homes/villages for fear of being brutally punished or even killed. However according to new bill magistrates have to repatriate rescued girls within three months (with their consent, which is almost forced because there is also a time limit of 3 months for doing it), it will not be a surprise that parents will push for these repatriations to teach lessons to girls who dared to marry out of their choice and forcefully marry them against their will. This is a very common practice among most of the feudal communities but girls are able to survive this pressure because of unconditional stay at shelter homes. But if this is taken by the bill, it may lead to increase in natal family violence against girls and honour killings.

*"The repatriation of the victims shall be completed within three months for interstate repatriation, and within six months in case of cross border repatriation, from the date of rescue by the District Anti-Trafficking Committee, or the Child Welfare Committee, or State Police Nodal Officer, as the case may be:"*

*"The State Nodal Officer shall obtain informed written consent from the victim for repatriation purposes, and where needed, shall make arrangements for the counselling of the victim by trained psycho-social professionals."*

While this is laudable for real victims of trafficking, this works very differently for girls caught due to inter-caste and inter-religious relationships. During our study, protection officers who were also playing the role of counsellors believed that "these girls and boys are stupid. They fall in love and create problems for parents. They must understand that marriage is not a joke and it has to be arranged by parents to be right, after all parents also have some Izzat (honour). With this attitude, if we think of counsellors giving advises to young girls, we can imagine the nature of counselling which instead of helping them might just increase their mental and emotional trauma.

The bill says that *"for the purpose of marriage or under the pretext of marriage trafficks a woman or child after marriage"* or *who is a pregnant woman or the offence results in pregnancy of the person; is said to commit an offence of aggravated form of trafficking of the person."* This means that all the parties involved in these marriages will be liable for aggravated punishments. The data across the country shows that such cases happen mostly in extremely poor and tribal communities. With this bill becoming, law, the chances are that all the parents will also come under the fold of aggravated offense and will have to face legal action. While poor and

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necessary steps for the medical examination of such person for the purposes of determination as to the age, the assessment or detection of trauma, injury or illnesses incidental thereto" (Section 16).

<sup>27</sup> "Where a person has been convicted of any offence under this Act, the designated court shall, in addition to awarding any punishment, declare that any property, movable or immovable or both, belonging to such person or held by any person on his behalf, which has been used for the commission of that offence or accrued thereby, or which has been attached under sub-section (l), shall stand forfeited to the appropriate Government and the same may be authorised for the purpose of realisation of any fine imposed by the designated court and the proceeds shall be remitted to the Rehabilitation Fund."

tribal communities are failed by the system and apathy of the successive governments have rendered them completely resource and powerless, they will also be punished for taking desperate measures. It would also become very difficult to segregate under age marriages from marriages for trafficking (whether under age or not). Bill provides no clarity how parents of the girl will be viewed under aggravated trafficking provisions.

Such laws as anti -trafficking law in the country seems to be doing only good, are actually also used by unassuming constituencies and in this particular case, mostly by unassuming constituencies. By not considering these misuses which are rampant in the system where police and judiciary colludes with the feudal communities and parents to curb the right to choice and freedom of young people, has to be taken with lot more seriousness and must also be viewed for its misuse and thus brining appropriate caveats within the bill to save young boys and girls from the unconstitutional actions and belief systems of the parents and communities.

## 10. INFRINGEMENTS ON THE RIGHT TO BAIL

*S52 (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;*

*(ii) 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<sup>28</sup>. 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

<sup>28</sup>State of Rajasthan versus Balchand AIR 1977 SC 2447



Prevention of Terrorism Act (POTA) and Terrorist and Disruptive Activities (Prevention) Act resulted in long periods of imprisonment without trial evoking strong criticism from the human rights movement.

The experience of sex workers who have been booked under brothel owning charges of ITPA already indicate that they are kept for long periods of time and denied regular bail. It takes women anywhere between 4-5 months if they are being supported by their sex worker collectives to get bail. In conditions where women do not have access to such collectives, they languish for indefinite periods in jail on trumped up charges of trafficking, forcing women into sex work or living off earnings of sex workers. The potential for the misuse of these provisions is extremely high.

#### 11. PROTECTION OF ACTION TAKEN IN GOOD FAITH (S. 53)

The present provision protects Central and State Government and individuals acting under the directions of the governments. 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/ advise 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.

#### 12. LICENSES OF SPECIAL HOMES AND PROTECTION HOMES

The quality and performance of Special Homes and Protection Homes should be evaluated at regular intervals. The proposed Bill should have explicit provisions for the cancellation of Licenses and registrations of Special Homes and Protection Homes if any of the rescued persons complain of abuse and harassment or forced detention. There must be explicit provisions for initiating Criminal proceedings against authorities running such Special Home or Protection Home where abuse is reported.

#### 13. MULTI -TIERED MECHANISMS

The Act elaborates on multiple tiered mechanisms, but practice shows that such a roadmap is fraught with the following problems:

- a. Functional relationship with existing police machinery unclear
- b. Multiple tasks will finally be laid upon same officials which is likely to be unproductive
- c. Budget heads for all these mechanisms is unspecified
- d. Timeline for appointment of above-mentioned officers is unspecified
- e. Criteria for selection of 'social workers', and welfare organisations to be part of such mechanisms is unclear and could open the way for vested interests, moral policing and vigilantism.

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