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**Making Space for Rehabilitation and Recovery: Examining  
India's Legal Policies Against Human Trafficking**

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## ABSTRACT

*The extant human rights legal framework in India for the prevention and mitigation of trafficking of persons is nascent. Yet, trafficking as a human rights violation is understandably an egregious problem, and needs robust implementation of legal policies. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the UN Trafficking Protocol) puts forth a roadmap for enacting and implementing effective domestic laws against human trafficking. In May 2011, India ratified the three protocols of the United Nations Convention against Transnational Organized Crime, including the UN Trafficking Protocol. However, there was no comprehensive unified legal policy or guideline for combating human trafficking. The current laws and policies that forms that backbone of India's anti-trafficking regime is piecemeal, at best, addressing only components of human trafficking such as slavery, prostitution and child labour and child marriage. The framework does not contain a comprehensive definition of trafficking, leaving loose knots for judicial closure of cases. The Constitution of India prohibits trafficking of human beings and forced labour, but it does not define either term. There are legislations that prohibit and penalise various forms of forced labour under the Bonded Labour System (Abolition) Act, and the Child Labour (Prohibition and Regulation) Act, and the Juvenile Justice (Care and Protection of Children) Act, and one that criminalizes forms of sex trafficking (The Immoral Traffic (Prevention) Act or ITPA). The ITPA does not criminalise sex-work per se, but penalises public solicitation and solicitation at brothels. The 2013 JS Verma Committee report provided for a list of comprehensive measures to combat trafficking. However, these measures were not fully implemented; instead since then, the number of brothel evictions have increased. Section 18 of the ITPA facilitates these evictions - it mandates the closure of alleged brothels and eviction of alleged occupants from the premises without providing any rehabilitation or alternative location to settle down. A number of petitions have pleaded with the judiciary to declare the section as unconstitutional and ultra vires. Currently, there is no legislative guidance on the implementation of Section 18, and in the absence of these, absolute discretion is vested on the police administration to follow any procedure, and there is an abuse of power. After being evicted, most women and girls rescued from these brothels either solicit on the streets, making them far more vulnerable to violence and stigma, or they are taken to government shelter homes where they find themselves detained for months without a hearing or order from a magistrate. So far, there has been no rehabilitation or livelihood strategies implemented in these areas. This paper examines the gaps in the extant framework, that impede implementation of prevention and work, and attempts to find durable solutions. Firstly, the framework prioritises preventing and punishing sex trafficking over other forms of trafficking - current policies conflate trafficking with sexual exploitation. Secondly, there is an gaping absence of measures to ensure safety, rehabilitation and compensation of victims of trafficking. Thirdly, there is no legal provision that decriminalises and safely repatriates victims of cross-national human trafficking.*

Keywords: trafficking, anti-trafficking, legal policy, sex work, rehabilitation

## INTRODUCTION

In April 2017, when we visited the Disha Mahila Bahuudeshiye Sanstha (DMBS) office - a community organisation (CO) comprised of and managed by sex workers in Nashik, when the real work begins when the sun has gone down, but the sunlight has not - it was disconcertingly quiet. Except for the low voice of Mithila\*, a sex worker and a member of DMB, who had escaped a police raid a week ago, though her *maalkin* (brothel madam/landlady) had been arrested, and now she had no place to live or conduct *dhandra* (business). Mithila talks animatedly about her relationship with her *maalkin*, a woman she had a love-hate relationship with - she abused her when she was behind on her rent, and often demanded a larger commissions for finding her clients, but cared for in times of distress with her *mard* (her intimate partner). Now that Mithila has nowhere to live, she walks into the CO office often, hoping to understand where the rest of her friends are - all sex-workers, members of DMBS and victims of police raids in the vicinity of Nashik.<sup>1</sup>

DMBS is a collective of deprived women members founded with the overall aim of “empowering marginalised women in the district through holistic development intervention programmes such as women empowerment economic development through microfinance,

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<sup>1</sup> Interview with Mithila\* at Disha Mahila Bahuudeshiye Sanstha, Nashik, April, 2017.

\* Name changed to protect identity and privacy

livelihood promotion through skill training, facilitating access to government schemes, legal aid and counselling services, etc”.<sup>2</sup> It has a member-based of 803 women, and works in 3 districts of Nashik.

Following the raids, Mithila, other members and the CO staff have participated with ‘advocacy meetings’ with the area police station, a *kafkaesque* representation of what the community has to deal with on a day-to-day basis. The meetings, according to the CO staff and technical support consultants of DMBS, are a starting point towards a discussion around police raids. At these meetings, Mithila - twenty-four, mother of two, and most importantly, reticent - does not hold off; her powerful voice, that cannot hide a native Bengali lisp, demands cooperation from the police men.

Mithila’s striking transformation from self-contained to empowered almost instantaneously during these “advocacy meetings” is completely at odds with what we routinely shown by the media about the horrifying lives of the sex-worker community in India, “*wherein the embattled figure of the enslaved third world sex worker makes her way into the popular imagination in a highly particularized way*”.<sup>3</sup> Despite such meetings, a dialogue between DMBS and external stakeholders such as law enforcement, Department of

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<sup>2</sup> Profile of DMBS

<sup>3</sup> Prabha Kotiswaran, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA, Princeton: Princeton University Press, p. 31.

Women & Child Development (WCD), State Legal Services Authority (SLSA), has not yet been possible. Mithila's empowered, crusading voice is frequently drowned out by the all-pervading legal system, and the policies implemented by key transnational players who adhere to strict governmental guidelines on how to deal with modern slavery and trafficking.

The South Asia office of the United Nations Office on Drug Crime (UNODC) commissioned a small documentary of eight minutes, known as '*One Life, No Price*'<sup>4</sup> in 2007 wherein well-known Bollywood actors talked about fictional narratives of women and children trafficked and transported from their homes to various cities for several types of employment. The documentary indicated that a plethora of activities can be subsumed under the broad umbrella of trafficking, such as sexual exploitation at brothels, dance bars and massage parlours, child labour, domestic worker, and sex tourism.<sup>5</sup> The documentary, then, lists out the ways in which trafficking can be curbed.<sup>6</sup> However, its focus, by and large, came back to sex work, indicating more than once that a strong, vigilant states crack down on the commercial sex trade, rescue 'victims' and arrest clients; this, in essence, becomes the underlying message of the documentary<sup>7</sup> - to continue to the fight against the "organised

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<sup>4</sup> South Asia office of the United Nations Office on Drug Crime (UNODC), *One Life, No Price* (2007). <http://bit.ly/2sQSNqh>

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

<sup>7</sup> Prabha Kotiswaran, *Introduction to Reader on Sex Work* (March, 2017), <http://bit.ly/2tamhLL>

crime of human trafficking”. The documentary, through this message, conflates sex work with trafficking, and by intertwining these two concepts, it offers a complex “policy vocabulary” that is subsumed in the Indian domestic policy around human trafficking.<sup>8</sup>

India’s official stand on sex work, both normative and regulatory, appears in a twilight zone, away from the clutches of law *proper*<sup>9</sup>. India does not have a legislative framework on trafficking but its only legislation on trafficking is focussed on sexual exploitation, and thereby, touches upon sex work heavily; it, however, does not mention the plethora of other acts that would also constitute trafficking.<sup>10</sup> That being said, the terrain of India’s sex industry is more complex than other nations around the world, and this results in a complex debate around sex-work, and therefore, trafficking.<sup>11</sup> India has about 8 million sex workers, while the numbers are much lower in Sweden, and other countries sex work is government regulated. Regulation in the Nordic model also means sex workers have expeditious and effective access to legal services and justice mechanisms.<sup>12</sup> In the absence of an explicit stand on sex work and regulation, India’s community of sex workers live on the

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<sup>8</sup> *Ibid* at p. 8.

<sup>9</sup> Sidhartha Sarkar, *Rethinking Human Trafficking in India: Nature, Extent and Identification of Survivors*, The Round Table Vol. 103 , Iss. 5,2014.

<sup>10</sup> Prabha Kotiswaran, [Law’s mediations: the shifting definitions of trafficking](#), Open Democracy, October 8, 2014.

<sup>11</sup> Poonam Saxena, (2002) *Immoral Traffic in Women and Girls: Need for tougher laws and sincere implementation*. Journal of the Indian Law Institute. vol. 44. no. 4. pp. 504–33.

<sup>12</sup> Kathleen Barry (1995) *THE PROSTITUTION OF SEXUALITY: THE GLOBAL EXPLOITATION OF WOMEN*, New York: New York University Press.

fringes of law and therefore, there is no certain pattern to understand their access of legal services and the role of the justice system in their lives.<sup>13</sup> Moreover, India's varied socio-economic conditions include poverty, unemployment, lack of education which may be precursors to the act of trafficking. Prabha Kotiswaran writes in the Introduction to Reader on Sex Work -

*“[U]nlike western sex worker movements where a sex radical emphasis on sexual pleasure and freedom is palpable, in India, the overwhelming motif for sex worker identity is that of the working class woman with familial obligations. This is not to reinforce the abolitionist claim that coerced sex work in India is induced by poverty, or to de-emphasise sex workers' role in giving and receiving pleasure. Indian sex workers' claims also differ in that they do not see themselves primarily as wage labourers, independent contractors or self-employed professionals but as workers in the unorganised sector. This is reflected in the rights discourse they deploy.”<sup>14</sup>*

Then, there are opposing positions to sex-work in the Indian development sector and this results in two broad understandings of the role of law in sex work, and how it must be regulated, if at all. On one end of the spectrum is the abolitionist position that charts the

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<sup>13</sup> *Supra note 9* at 13.

<sup>14</sup> *Supra note* at p. 4.

debates onto a radical feminist analysis of sex work indicating it that the institution is born out of coercion, discrimination and inequality.<sup>15</sup> Therefore, sex workers are considered victims in need of upliftment and empowerment, and there is an amplified significance on the role of criminal law because it has an unassailable effect in the restraint of sex work,<sup>16</sup> though ironically, the Indian Penal Code (IPC) does not explicitly regulate sex-work.<sup>17</sup> Therefore, according to the feminist abolitionists, all sex work is trafficking and hence, coercion.<sup>18</sup>

At the other end of spectrum, there are activists who believe that sex work must be legitimised and regulated, like any other type of work. This position is based on the complete and unequivocal recognition of the right to work for sex workers, without stigma, discrimination or the threat of violence.<sup>19</sup> This school of thinking puts forth the idea that sex work is work when there is no exploitation of women and girls, and looks at a regime for legalisation of sex work. The underlying rationale for this is that legalization would mean stringent regulation and guidelines for sex-work as well for the stakeholders - law enforcement and service providers alike - surrounding the community, and the opportunity to

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<sup>15</sup> Aziza Ahmed, and Meena Seshu (2012), *We have the right not to be 'rescued' ...*: When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers, Anti-Trafficking Review (No. 1). <http://bit.ly/2t8ELm5>

<sup>16</sup> E Bernstein, *The Sexual Politics of the New Abolitionism*, Differences, Vol. 18, no. 3, 2007, pp. 128-151.

<sup>17</sup> *Supra note at 6.*

<sup>18</sup> *Supra note at 6.*

<sup>19</sup> Jo Doezema, *SEX SLAVES AND DISCOURSE MASTERS: THE CONSTRUCTION OF TRAFFICKING*, Zed Books, New York, 2010.



be seen as fully capacitated human beings who turn to sex work for their livelihood.<sup>20</sup>

Removing barriers would translate to use of all services such as legal, medical, social welfare.

The right to work paradigm is an attractive position because it supposedly affords sex workers the chance to live a dignified life, free of violence and victimhood. However, it does not take into account that sex work for some women might not have been an informed choice and could be attributed to poverty, traditional prostitution (devadasi system) and structural violence that might have coerced them into sex work. These activists also believe that criminalising sex work in the garb of a seemingly useful anti-trafficking legislation (Immoral Trafficking Prevention Act, 1956) constitutes a violation of their fundamental rights.

At this juncture, neither of these schools of thought have been able to make a dent on the legislative framework in India, though it is significant to state that the relationships of sex work with stakeholders have improved manifold because of the ‘sex work is work’ paradigm. However, it continues to counteract and thwart the abolitionist position, thereby, making it nearly impossible to have a harmonised stand on the idea of trafficking and the role of criminal law for the anti-trafficking actions.<sup>21</sup> Nonetheless, it opens up a platform for withstanding the increased criminalisation of sex work.

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<sup>20</sup> *Ibid at 67*

<sup>21</sup> J A Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution reform and anti-trafficking law and policy*, University of Pennsylvania Law Reform, vol. 158, 2010, pp. 655 - 728.

## CONFLATION OF TRAFFICKING AND SEX WORK IN LEGAL POLICY

It is imperative to clarify the four varied regulatory positions with regard to sex work that states adopt, in order to comprehend the prevalent policy landscape. Firstly, there is absolute criminalization, where all elements of sex work and actors, including sex workers themselves, in the process are criminalized.<sup>22</sup> Secondly, there's absolute decriminalization wherein special criminal laws against sex work are repealed, and sex work in itself is not regulated; but sex workers are covered by the general laws that apply to all citizens.<sup>23</sup> Thirdly, there is partial decriminalisation where all elements and actors of sex work are criminalized, including customers, but sex workers are not. Lastly, there is legalization of sex work, where sex work is treated another free market business that needs to be regulated by a specific law or guideline. Conventional legalisation consists of zoning, registration and thereafter, compulsory testing of sex workers for public health purposes.<sup>24</sup>

The typology, above, is only a broad manner of how different countries enforce their regimes on sex work. India's sex work regime is a blurred one - it does not explicitly state its stand on sex work but what it does is that that it attempts to curtail trafficking by curbing sexual exploitation. It is safe to say that India's regime on sex work is widely defined by how it

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<sup>22</sup> Prabha Kotiswaran (2014), "Beyond the allures of Criminalization: Rethinking the regulation of sex work in India", *Criminology and Criminal Justice*, Vol. 14 (5) 565 - 579.

<sup>23</sup> *Ibid at 567*

<sup>24</sup> *Ibid at 567*

approaches trafficking, and because of this intertwining, there is a dangerous conflation of trafficking with sex work.

Sex work in India carries within it traces of its colonial past, and conflation of sex work with trafficking was evident in the colonial state's regulation of prostitution "in the interests of the empire". Almost immediately after the independence, the Suppression of Immoral Traffic Act, 1956 (SITA), India's anti-sex work criminal legislation, was passed. SITA was wrought with constitutional challenges, as was evidenced by the Indian Courts in the 1960s.<sup>25</sup> While it was draconian, the judiciary endorsed the underlying framework "*which was to criminalise commercialized sex rather than the sale of sex per se*".<sup>26</sup> In 1986, the Immoral Traffic Prevention Act 1956 (ITPA) came into being; it replaced the SITA, though it was not a departure from the underlying legal objective of SITA. The ITPA defines India's regime on sex work - the statute does not "*criminalise the act of sexual intercourse for consideration per se, it criminalises all activities necessary in order to perform sex work such as soliciting, maintaining a brothel, living off the earnings of prostitution, procuring a woman for the sake*

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<sup>25</sup> P. Chatterjee, (2006) *AIDS in India: police powers and public health*, The Lancet. vol. 367. issue 9513. pp. 805–06.

<sup>26</sup> Halley, Janet E. and Kotiswaran, Prabha and Thomas, Chantal and Shamir, Hila, From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism (June 1, 2006). Harvard Journal of Law & Gender, Vol. 29, No. 2, p. 335, 2006. Available at SSRN: <https://ssrn.com/abstract=1438140>

*of prostitution and seduction of a person in custody.*”<sup>27</sup> The ITPA, thus, provides for a grim embodiment of India’s policy on sex-work - that of complete and absolute, criminalisation.

The most comprehensive guidelines on human trafficking worldwide is the United Nations Protocol to Prevent, Suppress and Punish Trafficking Against Persons (UN Protocol 2000), also known as the Palermo Protocols.<sup>28</sup> The definition of human trafficking within the Protocol is all-encompassing and looks at delineating a wide range of conduct that would constitute the offence of trafficking of persons.<sup>29</sup> A person can be charged with the crime of human trafficking, under this definition, if they satisfy all three components - (i) an act that includes the transport or receipt of persons, (ii) by particular means, such as use of coercion, force, threaten, or abduct; (iii) and this results in exploitation. Under the Protocol, exploitation is defined as “*including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or similar practices, servitude, or the removal of organs.*” In cases of minor trafficking, the second component of “means” is

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<sup>27</sup> *Supra note 22*

<sup>28</sup> 2000. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. G.A. Res. 25. Annex II. U.N. GAOR. 55th Sess. Supp. No. 49 at 60. U.N. Doc. A/45/49 (Vol. I)

<sup>29</sup> Article 3 (a) of the UN Protocol - “*Trafficking in persons*” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;”

waived. The concept of consent is also addressed within the Protocol - consent is irrelevant, where means included in the definition has been employed or if the victim is a child.<sup>30</sup> The overarching objective of the Protocol is to obligate party States to criminalise trafficking in persons, to take steps to address and prevent the trafficking in persons, and lastly, to protect the victims of human trafficking.

India signed the UN Protocol in December, 2002, and ratified it almost a decade later in May, 2011. Generally, the process of ratification would formally indicate the consent and willingness of the State to be bound by the provisions of the international Protocol. However, owing to India's dualist approach towards international law, ratified treaties do not automatically become the law, according to the Indian Constitution. According to Article 51(c) of the Constitution, there should an adherence to the treaty obligations by the government and it should also "*endeavor to...foster respect for international law treaty obligations in the dealings of organized peoples with one another.*"<sup>31</sup> Therefore, despite the fact that India has not explicitly integrated the UN Protocol within its national law, the government is nonetheless mandated to comply with its obligations under the Protocol. All anti-trafficking provisions contained within domestic law, that is, Indian Constitution, Indian

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<sup>30</sup> Article 3 (b) of the UN Protocol

<sup>31</sup> Article 51 (c ) of the Indian Constitution

Penal Code, and other legislations should be interpreting keeping the principles of the UN Protocol in mind.

Article 23 of the Constitution of India prohibits the trafficking in humans. Article 39(f) imposes an obligation on the State towards securing conditions of freedom and dignity of all children, and that children are free from all types of exploitation and moral and material abandonment. The Criminal Law Amendment (CLA) in 2013 inserted a new section in the Indian Penal Code (Section 370)<sup>32</sup> which criminalized the recruiting, transporting, and receiving by certain means of abduction, abuse, power, and inducement for the purpose of exploitation. Prior to the CLA, Section 370 dealt with the aspect of slavery in India without the mention of sexual exploitation. In the present day, however, it is worded in a way that it does justice to India's allegiance to the UN Protocol - "*physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs*" is punishable by the provision under Section 370.

It would be significant to know that the Justice Verma Committee whose work shaped the CLA issued a clarification on the provision on the reasons for the change in Section 370 -

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<sup>32</sup> Section 370 of the Indian Penal Code - "*Buying or disposing of any person as a slave.—Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*"

*“The members of the committee wish to clarify that the thrust of their intention behind recommending the amendment to Section 370 was to protect women and children from being trafficked. The committee has not intended to bring within the ambit of the amended Section 370 sex workers who practice of their own volition. It is also clarified that 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.”*<sup>33</sup> In perusing the clarification, it is apparent that Section 370 would be utilised to protect all women and children from being trafficking, and the Verma Committee did not make an explicit distinction between voluntary and coerced sex workers when it came to the protection of the law. The Committee’s understanding of trafficking was not free from the root causes of the crime - squalor, poverty, lack of education and employment.

The primary legal instrument to address the trafficking of human beings in India is the Immoral Traffic Prevention Act (1956). The legislation emphasizes on trafficking for the purpose of prostitution. Keeping this in mind, the Act outlaws the running of a brothel (section 3), living on the earnings of a sex worker (section 4), the inducing, procuring, taking

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<sup>33</sup> JS Verma, Leila Sheth, and Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law (January 2013).

or transporting of a person for the sake of prostitution, and detaining a person in a place where prostitution is carried out (section 5 & 6), prostitution near public places (section 7) and soliciting (section 8).<sup>34</sup> All offences under this Act are cognizable. Along with this, the Act has a provision for the rescue and thereafter, the rehabilitation of and legal assistance for victims of trafficking, institution of actions against perpetrators and stringent action for trafficking children.

The Act is implemented through the police and the Magistracy. The police personnel who are entrusted with the implementation of this Act are accorded with special powers, under Section 13, to raid, rescue and search premises that may be suspected to be brothels. Under Sections 16, 17, 18 and 20, magistrates are authorised to order for arrests and removal, direct custody of rescued persons, shut down brothels for the eviction of sex workers. The regime for ‘institutional rehabilitation’ for rescued sex workers is enshrined in Sections 19, 21, 23 and the ITPA States Rules.

The ITPA is touted as a comprehensive legislation that enables the law enforcement and the justice system to combat trafficking - one that is founded on principles of prevention.

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<sup>34</sup> Lawyer’s Collective Factsheet on ITPA, 1956.



However, there are some fundamental issues with how the Act is implemented.<sup>35</sup> The legislation is supposedly made for the protection of sex workers from being trafficked, but on the ground, it is ruthlessly used against the very people it claims to protect.<sup>36</sup> Moreover, a blatant lack of safeguards for the life and rights of sex workers, beyond the rehabilitation regime, within the ITPA paints a grim picture: it intensifies exploitation by brokers and middlemen, increases violence from the police, and often, the fear of police violence and arrest makes negotiation of safer safe difficult, driving these women to be lax about their vulnerability to HIV and AIDS.<sup>37</sup> The provisions that look at punitive measures are inimical to interventions in the public health structure, and community organisations such as DMBS are apprehended and investigating for “promoting sex work”.

According to the ITPA, brothels are illegal, and while it might serve as an effective way to prevent trafficking, it is detrimental to sex workers’ safety and health. Section 2 (a) in the definition clause of the ITPA defines brothel “*any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more*

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<sup>35</sup> *Supra note 15*

<sup>36</sup> *Supra note 15*

<sup>37</sup> *Supra note 26.*

*prostitutes.*”<sup>38</sup> Section 3 provisions for punishment for running and managing brothels. The phrase, ‘*mutual gain of two or more prostitutes*’, would essentially deem any premises shared by sex workers, including, their residence, illegal under the Act. Shannon & Csete state that brothel evictions, and thereafter, police raids do not result in a safer environment for those rescued, and nor do they stop sex work, as hoped by the abolitionists.<sup>39</sup> But what it does is that it drives the business underground making it more hazardous to the health and safety of sex workers. Ahmed & Seshu stated that the brothel structure would facilitate the delivery of HIV programmes because it was based on the logic that collectivisation of sex workers would reduce the vulnerability to HIV and AIDS.<sup>40</sup> The police raids and brothel evictions adversely affect the de-stigmatisation of the disease and the ways in which treatment could be administered to the people living with HIV (PLHIV).<sup>41</sup>

Another issue identified within the ITPA is that section 4 of the Act punishes adults that are economically supported by sex workers, including those residing with sex workers. Section 4 of ITPA clarifies what elements are needed for proving the concept of ‘economical support’ -

“*Any person over the age of eighteen years who knowingly lives, wholly or in part, on the*

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<sup>38</sup> Section 2 (a) of the ITPA, 1956.

<sup>39</sup> K Shannon and J Csete, *Violence, Condom Negotiation and HIV/STI Risk Among Sex Workers*, The Journal of the American Medical Association, vol. 304, no. 5, 2010, pp. 573 - 4.

<sup>40</sup> *Supra note 15.*

<sup>41</sup> *Supra note 25.*

*earnings of the prostitution of any other person shall be punishable with imprisonment [...].”*

<sup>42</sup> This would mean that all dependents - parents, siblings, partner(s), siblings, and all children above the age of eighteen - would be deemed criminals under the Act. In fact, many women turn to sex work to support their families, including their parents and children, and the irony of the legislation, is that it criminalises these very dependents. <sup>43</sup> While the provision seems significant for the protecting sex workers from pimps, agents and brothel madams, but in the larger scheme of things, this part of the Act does not provide for the protection it promises its subjects.

It is important to examine the legislative purpose and intent of ITPA, as well as the legislative history in 1986. The SITA which was ITPA’s precursor was a response following India’s accession to United Nations International Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.<sup>44</sup> The Convention mandated State parties to punish people who were profiting from the prostitution of women and children, and such mandate was without prejudice to how signatories to the Convention addressed sex workers themselves. The SITA was a reflection of the UN Convention - it

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<sup>42</sup> Section 4 of ITPA, 1956.

<sup>43</sup> *Supra note 9.*

<sup>44</sup> Lawyer’s Collective Submission to Women & Child Development Department on Amendments to ITPA (2010), <http://bit.ly/2tJUGoH>

sought to restrict prostitution on a large, organised scale, but was drafted in a way that it did not punish the act of prostitution or sex workers themselves.

The *travaux preparatoires* also indicate that the definition of prostitution in the SITA as opposed to the current definition in the ITPA was vastly disparate. In the definition clause in Section 2 (f) of ITPA, prostitution means - “*prostitution means the sexual exploitation or abuse of persons for commercial purposes and the expression prostitute shall be construed accordingly.*” The SITA, as discussed, had a contradistinctive understanding of prostitution - “*the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind*” and a prostitute was defined “*to mean the female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind.*” The alternation in legislative purpose and meaning ascribed to prostitution indicated that the government - legislature, executive and judiciary, alike - sought to target ‘exploitation’ and ‘abuse’ that was included in the commercial intent of sex work.<sup>45</sup>

The legacy of SITA, despite alterations in 1986 that also included the substitution of the words, “women and children” with persons throughout the Act to remove prejudice against

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<sup>45</sup> *Ibid*

female sex workers, seeped in through the cracks to get reflected in the ITPA.<sup>46</sup> ITPA enforcement, currently, is misdirected against sex workers, especially because it moralises commercial sex work without creating a sustainable dent in the elimination of trafficking, and the allied abuse and exploitation.

Section 8 of the Act (Seducing or soliciting for purpose of prostitution) penalises sex workers if they draw attention of customers, towards themselves, in a conspicuous area, whether in a public place or a private dwelling.<sup>47</sup> The criminalisation of solicitation does not make adequate sense from an anti- trafficking perspective - how does the state enforce the protection of subjects from ‘immoral trafficking’? How does solicitation figure in the elements of trafficking in the UN Protocol? At best, prima facie, solicitation is with consent - the Act uses the word ‘wilful’ in the provision - how, then, can the State justify the use of such a provision for the curtailing of trafficking? Even if solicitation is viewed as public nuisance, the purported acts can be addressed through Sections 268 (public nuisance) and 294 (obscene acts) of the Indian Penal Code, 1860.

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<sup>46</sup> *Ibid*

<sup>47</sup> Section 8 of ITPA, 1956

Section 8, then, only moralises sex workers and places them in a neatly, labelled box to be stigmatised and discriminated against. Research indicates that Section 8 is the most utilised provision in this Act. Over 60% cases registered under the ITPA are under this provision; and 90% of such cases result in conviction.<sup>48</sup> Sex workers become easy targets of the ITPA because of this section, and thus begins, a heady dive into a plethora of arrests, court hearings, convictions and allied stigma and violence from law enforcement. Such a finding brings forth the travesty that is the ITPA - it convicts more women, than it protects, and such conviction is based on a moral interpretation of the law, instead of a rational-legal discernment of the provisions, alongwith a careful understanding of its legislative history.

Lastly, the unbridled statutory powers and procedures under the ITPA on the police and magistrates is almost draconian. For instance, the police can enter and search any premises on mere suspicion, and interestingly, raids are often carried out in utter disregard for the statutory procedure that demands, public witnesses, female police officers, amongst other things. An interview with a community member, Rashi\* from DMBS states - *“Raids are humiliating, and I feel like my rights to be a free person do not exist. I’ve been a victim to police raids at least thrice in my time in Manmad in the past two years. They bring female police officers but*

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<sup>48</sup> Lawyers Collective Women’s Rights Initiative, Traffic in Persons for Commercial Sexual Exploitation: Legislation, Role and Effectiveness of the Law Enforcement and Law Adjudication Machinery, 2003

*they are not on the scene; the male officers come into the establishments suddenly and manhandle us. But we cannot prove this in court.”<sup>49</sup>*

Moreover, section 15 (5A) mandates a medical examination, by registered medical practitioners, of persons who were removed from brothels for detection of sexually transmitted diseases or injuries as a result of sexual abuse. Following this provision, sex workers are often tested for HIV forcibly and these test results are disclosed in court, in presence of a magistrate. This is in many ways a violation of Article 21 of the Constitution of India which provides for the right to life and dignity. It also contradicts the national policy on HIV testing that is mandates informed consent, counselling and utmost confidentiality. In this, the ITPA remains in contravention with the recently passed HIV/AIDS Act, 2017.

Perhaps what is significant in the ITPA is the expulsion of sex workers through the eviction of brothels under Section 18 and 20. These provisions authorise magistrates to shut down premises where sex work is carried out, even including their residences. Geeta\* originally from Bongaon in Bengal was evicted from the brothel in Bhadrakali in Nashik - she and her friends (also sex workers) were let go of by the police, but her brothel madam was arrested.

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<sup>49</sup> Interview with Rashi, Manmad, April, 2017

Their residence building, after eviction, was destroyed after a mandated demolition order from the government. Geeta lost not only her house and friends, who have chosen to live in various parts of the town, but also access to health and HIV services, and constant connection with DMB, where she is a registered member. She now lives in Malegaon, and comes to Manmad every day to conduct 'dhandra' - *“My life is now suspended between Manmad and Malegaon. I sell my body to eat, to make ends meet. No one in my family in Bengal knows. But now my life is worse, without a permanent roof over my head.”*<sup>50</sup> Police raids still happen in Manmad where she comes to work, but she now knows her way around the dilapidated compound to escape each time.

Sections 19, 21, 23, & ITPA Rules talk about rescue and rehabilitation, and these terms are synonymous with the police removing any or all persons from the premises where sex work is carried out regardless of age and consent. Generally, after police raids and consequent 'rescue efforts', these women are sent to state detention centre, or "correction homes", according to the ITPA, where they are detained for months together. Seshu & Ahmed call this phenomenon the 'Raid, Rescue and Rehabilitation' Industry, where abolitionist organisations - both local and international - , along with police raid and rescue sex workers from brothels, and then

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<sup>50</sup> Interview with Geeta, Manmad, April, 2017



transfer them to state-run correction homes. The process is complicated and labyrinthine, and the USAID assessment report charts out their methods -

*“IJM employs two methods for rescuing victims, one is brothel raids in cooperation with the police, and the other is the “buybust” operation. In the latter, undercover agencies attempt to purchase the services of an underage girl. Once the perpetrator accepts the money, the police who are watching and waiting, step in and arrest them. These raids and “buybusts” are targeted at perpetrators discovered through information provided by undercover operatives.”*<sup>51</sup>

The issue with this part of the ITPA is that the word ‘rehabilitation’ is not defined anywhere in the legislation, and therefore, institutions are free to interpret it the way they wish to. Secondly, Section 10 A states that persons rescued must be sent to correction homes, thereby, moralising the concept of sex work yet again, and as a result, further blurring the line between the understanding of the words ‘trafficking’ and ‘sex-work’.

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<sup>51</sup> USAID, *International Justice Mission Anti-Trafficking Program in Cambodia: Assessment 2006*.  
[http://pdf.usaid.gov/pdf\\_docs/Pnadg806.pdf](http://pdf.usaid.gov/pdf_docs/Pnadg806.pdf)

## MURKY GOVERNMENT POLICIES ON ANTI-TRAFFICKING

The trajectory of the policy vocabulary in the context of the anti-trafficking legislation begins at the complete criminalisation of prostitution embodied in the ITPA. The strong domestic strain of the abolitionist school around sex work has been palpable since the early 1990s, which several state bodies such as the National Human Rights Commission (NHRC) and the National Commission of Women (NCW) institutionalised.<sup>52</sup> Moreover, all organisations such as the Ministry of Women and Child Development (MWCD), the Ministry of Home Affairs, the NHRC, and the NCW came to occupy this abolitionist space, and later adopted an Integrated Plan of Action to Prevent and Combat Human Trafficking calling for strict measures for criminalisation. Some Indian states set up anti human trafficking units (AHTU) wings of the law enforcement with the objective of closing down places where sex work takes

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<sup>52</sup> *Supra note 7*

place and rescuing the ‘victims’, and in essence, protect the interests of the abolitionist school.<sup>53</sup>

In the public health scheme of things, sex workers were no longer considered victims but as ‘change agents’ who would negotiate power in the private and public spheres. This position is, as Kotiswaran states, “orchestrated” by the Ministry of Health, the National AIDS Control Organisation (NACO), the Planning Commission and the Second National Commission on Labour at the national level, and the World Health Organisation (WHO) and the UNAIDS at the international level.<sup>54</sup> In fact, the Second National Commission and the Planning Commission suggested that there were legislation and registration for health check-ups, and that sex workers be treated as self-employed individuals to get support for policies that promoted the access to health and insurance. However, it must also be noted that both NACO as well as the Ministry of Health have opposed the repeated attempts to amend the ITPA, instead of proposing policies or legal policies to protect the rights of sex workers.

In all of this, the law is understood to be only an ‘environmental factor’ or as an obstacle to feasible large-scale interventions. Within the public health sector, professionals advocate for a

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<sup>53</sup> *Supra note 22*

<sup>54</sup> *Supra note 22*

rights-based approach to sex work that denounces trafficking, but does not call for explicit decriminalisation. For instance, to combat violence against sex workers, NACO strove to set up community-based organisations that, by their understanding, would deal with stakeholders such as police and government bodies to reduce stigma and discrimination, with provisions of legal assistance, the promise of quick redressal of violations and the possibility of a more sensitised group of authorities as stakeholders. However, never has NACO questioned the ITPA or called for its repeal.

While the Central government in India indicated no motivations of amending the ITPA, non-governmental organisations (NGOs) invoked the courts to arm-twist the executive into bringing out a policy. The 1998 Plan of Action by the DWCD was a statement issued by the Bharatiya Janata Party (BJP).<sup>55</sup> The Plan was a travesty: it wove a conservative ethic whereby “sale of sex for money was immoral, justifiable only by women’s grinding poverty”.<sup>56</sup> It differentiated between victims of commercial sexual exploitation who were willing to be rehabilitated, and hence, worthy of receiving the support of the state, and others who were not ready for rehabilitation, and were subject to the reinforcement of patriarchal rules for female

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<sup>55</sup> Department of Women and Child Development, Ministry of Human Resource Development, Government of India (1998), *Plan of Action to combat Trafficking and Commercial Sexual Exploitation of Women and Children*, Kolkata: Sanlaap

<sup>56</sup> *Ibid*

sexuality.<sup>57</sup> The Plan was also instrumental in recommending that there be forced institutionalisation of children of sex workers and child victims of sex trafficking, and that people living with HIV (PLHIV) in terminal stages be isolated in separate shelter homes.<sup>58</sup>

The 1998 Plan of Action did not create a provision to remove ITPA, but stated that it must be reviewed so that there is prevention of re-victimisation of sex workers, and clients, traffickers, pimps, brothel owners, guardians, parents and other colluders must be held responsible.<sup>59</sup>

Before this happened, in the early 1990s, the NCW took a stand on comprehending sex work as a violation of basic human rights, especially the right to equality and freedom from exploitation. NCW indicated the workings of the patriarchy, the harms of sex work, and began understanding all sex work as sexual exploitation and slavery. The NCW also assumed that sex workers had no power to consent - it subscribed to the idea that informed consent for the sex workers, however restricted, was not possible in the sex work community, keeping in mind the abject poverty in India; it also, like many before it, conflated sex work with trafficking, and child prostitution with adult prostitution. This was a departure from the tolerant view of sex work as a necessary evil, an “inland drainage system” that catered to the rapacious male libido. In the way that NCW perceived sex work, it also turned to suggest the

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<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid*

<sup>59</sup> *Supra note 3*

discriminatory nature of the implementation of ITPA. It called for amending the ITPA - by putting a stop to the criminalisation of sex workers, and instead the arresting and penalising of customers instead. However, again, there was no mention of repealing the ITPA with a progressive legislation that would provide for the enshrining of rights of sex workers.

Only until very recently, during the debates around criminal law reforms that led to the passing of the Criminal Law Amendment Act, 2013, there has been a deliberate delinking between sex work and trafficking. The State finally seemed open to the idea that individuals can be trafficked into a plethora of sectors, and not just sex work. Despite this, ITPA, with its “non-exceptionalist” definition of trafficking, remains good law - unfortunately, a tokenistic victory for the abolitionist school, and an absolute loss for anti-trafficking principles, under the Palermo Protocols.

The issue with the legal policy within ITPA is that it uses strong language when it refers to law enforcement mechanisms for the prosecution of traffickers, but the language falters when putting down victim protection measures, which they condition on the readiness or ability of the victim to support the prosecution of the traffickers. Moreover, because the ITPA is suspended between an abolitionist agenda and a ‘change agent’ perspective, it does not break

down the trafficking process, and consider each stage of the process, and the consequence of such a consideration being primary to identifying the rights and agency of the trafficked. Instead what occurs is that the state enforces a choice, and patronises victims of trafficking - what Tambe calls 'coercive protection'.

Limoncelli states that anti-trafficking policies ideally should address issues of prevention, prosecution of traffickers, and most importantly, the protection of trafficked persons. The 2000 UN Protocol states that victims of trafficking must be protected, but leaves it to national governments to develop measures to do so in their own laws. India follows the dualist theory, when it comes to implementation of international law at the municipal level. This essentially means that all treaties and conventions of an international nature that India signs and ratifies do not *ipso facto* become the law of the land in India. Hence, all international conventions need backing from a national legislation drafted and adopted into law by the Indian Parliament for its implementation. Article 253 of the Indian Constitution, read with Entries 13 and 14 of the Union List under the Seventh Schedule, is required to give effect to international treaty obligations after ratification by making any law for the whole or any part of India for implementing treaties, agreements or conventions. At this point, though the UN Protocol provides for a clear pathway for state parties to protect the trafficked, ensure their

privacy and physical safety, incorporate provisions for rehabilitation and compensation, India does not incorporate all of these pathways in the ITPA. The ITPA provides for only bare minimum protection measures - restricted to assistance only - that will render the victim to serve as a witness to prosecute the trafficker.

Presently, rehabilitation is the *buzzword* in the sector, but it is just that - only a buzzword. The present legal policy does very little to incorporate any provisions for victims of trafficking that put forth rehabilitation but keeping the agency of the victim as a priority. As discussed earlier in the paper, several Indian government institutions have developed policies where in the protection of victims is discussed, but this discussion is more often than not rather peripheral. For instance, NCW Plan of Action; the NHRC's Plan of Action to Prevent and End Trafficking in Women and Children in India; and the Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women; the MWCD's Draft National Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women and Protocol on Inter State Rescue and Post Rescue Activities relating to Trafficked Persons are all policies developed for rehabilitation and recovery of victims.<sup>60</sup> From the administrative perspective, a Central

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<sup>60</sup> *Supra note 3*



Advisory Committee, under the aegis of the secretary of the MWCD, has been constituted with members from ministries of the Central government such as health, tourism, external affairs. The Committee meets every three months to discuss matters of importance and to strategize pathways for victims. However, there is no concrete measures put down for rehabilitation.<sup>61</sup>

The NCW's 2007-2012 Plan of Action puts together a list of five steps to combat trafficking<sup>62</sup>: integrated coordination between national and states levels to address trafficking; prevent trafficking; rescue victims while focusing on children; rehabilitation while providing special focus on children, and repatriation, rehabilitation and integration in mainstream society with focus on child victims. It also lists responsibilities of all the national and state agencies and departments and provides for crisp time frames for the timely completion of actions.

The issues with these policies are manifold. Firstly, the policies and plans of the government departments don't pinpoint to specific actions to prevent trafficking or rehabilitation/reintegration attempts - there is also no statistics to this end. Secondly, here are

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<sup>61</sup> S Sen and PM Nair (2004) *Trafficking in Women and Children in India*, New Delhi, India: National Human Rights Commission, UNIFEM, Institute of Social Sciences

<sup>62</sup> *Supra note 9*

gaps in the policies; for instance, the action plan talks about creating a website where information on missing/abducted/trafficked women but this directive is at odds with another directive that calls for the maintenance of privacy and confidentiality of the trafficked persons. Thirdly, the government departments are in themselves divided on the “integrated” approach to combat trafficking, and this is reflective of the way they perceive the ITPA; there is no agreement over the inclusion of the basic tenets of rehabilitation and reintegration. The law enforcement hunts down sex workers and arrests for the charges of “immoral trafficking”; the traditional public health sector treats sex workers as agents of change but does not think beyond STI/STD treatments and a quick violence redressal mechanism to decrease their vulnerability to HIV/AIDS; the NCW perceives sex work as exploitative and assumes everyone in sex work to be trafficked, and hence, eligible for rehabilitation; the legal services authority perceives legal assistance being the beginning of , and the legal proceedings against traffickers as a veritable end to the rehabilitation process. A single, standard and integrated approach to rehabilitation has not yet been determined by the State. Lastly, the rehabilitation plans do not recognise sex work or prostitution within their directives, even though the ITPA’s main focus is victims of trafficking who were exploited in sex work or prostituted. This makes the concept of rehabilitation murky as the law makes it easy to round up sex workers and put them into “correctional homes”, as accorded in the ITPA, but it does not

provide for substantial and tangible ways to reintegrate survivors back into mainstream society.

## REHABILITATION AS A MISSING LINK

India unveiled its first ever comprehensive anti-trafficking bill - the Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016 in May, 2016.<sup>63</sup> The ostensible promise that the Draft Bill makes is that it would treat survivors of trafficking as recipients of assistance, instead of as criminals. The Draft Bill was proposed by the Ministry of Women and Child Development (MWCD), and the Union Cabinet Minister for the MWCD stated to the Reuters that - *“The bill shows far more compassion and makes a very clear distinction between the trafficked and the trafficker, which is a nuance that should have been made 60 years ago.”*<sup>64</sup> She also added that the object of Draft Bill was to unify and consolidate all existing anti-trafficking provisions in the laws, prioritise the needs of survivors and to prevent victims - in brothels or soliciting in public places - from being arrested and treated like criminals. Between May and June, 2016, the Draft Bill was circulated by the Ministry for feedback and suggestions from various stakeholders. Around the same time, the Global Slavery Index was released by the Walk Free Foundation which claimed that out of the 45.8 million modern slaves in the world, India housed about 18.3 million.<sup>65</sup>

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<sup>63</sup> Ministry of Women and Child Development, Government of India, Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016, <http://bit.ly/2kj8eGk>

<sup>64</sup> Reuters, *India unveils first-ever comprehensive draft law on human trafficking, May, 31, 2016.*

<http://reut.rs/2sGIBD4>

<sup>65</sup> *Ibid*

The Bill, in most part, is a toothless tiger, and as Kotiswaran considers it - a hollow and empty gesture by the Ministry.<sup>66</sup> It envisions very little change in the alleviation of trafficking in India. The Draft Bill copies from a Western approach to a juridical construction of the problem of ‘trafficking’ without contextualising the issue within the confines of India’s impoverished, vulnerable populations. It seemed like a poorly thought-out solution that was being brought in as a quick fix for the “deep, long-festering wounds caused by severely unequal wealth and resource distribution”.<sup>67</sup>

The Draft Bill, in the form that it was circulated in, would not be able to achieve its purpose of prevention of trafficking and providing rehabilitation to the trafficked. This is because in India’s growing architecture of anti-trafficking legal policy, there already lies three types of legislations - enmeshed - and are applicable to a plethora of domestic trafficking: the general law (IPC), the special criminal law (ITPA) which is applicable to the sex industry only, and a plethora of labour legislations that regulate bonded labour, contract labour and interstate migrant workers. All the legislations arise from vastly different *travaux preparatoires* and ideas about what ‘trafficking’ is, and also from political discernments of exploitation and

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<sup>66</sup> Prabha Kotiswaran, [“India’s New Anti-Trafficking Bill is An Empty Gesture”](#), The Wire, June 5, 2016.

<sup>67</sup> *Ibid*

coercion. Additionally, there is also an intricate mesh of regulatory mechanisms to address exploitation.

The approaches to combat trafficking for sexual exploitation and labour-related profiteering are very distinct from each other. The legal policy framework around sexual exploitation - IPC and ITPA - are rather carceral and punitive in nature, while labour-related exploitation is less so; it is generally embodied in a framework of administrative and labour law mechanisms, making it almost impossible to find a common ground on the understanding of trafficking. Whereas the criminal laws advocate for a strict and moral definition of trafficking, and in the process, assume a potentially 'good' helpless character (the victim), and an evil one (the trafficker), labour-related exploitation is presumed to be endemic and laws around it, impose duties for better working conditions, amongst other things, to combat its effects. Moreover, other types of 'trafficking activities' that are perpetrated through a social structure - for instance, begging and sex work by transgenders on the instruction of their fictional families - lies in between these two scenarios, and are not regulated by the carceral legislations no the administrative one, and falls through the cracks unchecked.

In the midst of this, what the Draft Bill tries to do is to build a framework around the recently passed Section 370. However, India does not need another half-baked framework; what it needs is a comprehensive, efficient anti-trafficking law that does not only amalgamate the distinct strains of anti-trafficking provisions, but also consolidate the different political perspectives of severe exploitation and the best-suited regulatory means to focus on their redressal. Regrettably, the Draft Bill is unable to focus on such consolidation.

The Draft Bill looks at the creation of state and district-level anti-trafficking committees, which would comprise of government officers and representatives of NGOs for the efforts to prevent, rescue, protect and rehabilitate victims of trafficking and promises to provide medical care, legal and psychological assistance and life-skills development. The way the Draft Bill envisions the layout, the victim after her/his rescue would first be brought to the district committee or a police station by the investigating officer, a social worker, public servant or the victims themselves. Next, the Draft Bill looks at the creation of protection homes for provisions of food, shelter, clothing, counselling, legal assistance, and medical care of the rescued individuals, while specialised home would be established for long-term institutional support. But how are these homes different from the state-wise shelter homes that already exist, the Bill does not say. The Bill also states that the government shall formulate

rehabilitation programmes and schemes for aftercare and reintegration support to victims. The Draft Bill also talks about state governments to establish specialised rehabilitation schemes for women in sex work; it also stipulates registration with placement agencies for providing employment to women in sex work. However, no other protections are available to victims of trafficking when it comes to employment after exiting sex work. The government would be advised by a Central Anti-Trafficking Advisory Board for an efficient implementation of the Bill.

The Draft Bill also suggests that special courts be instituted for prosecuting the crimes under Sections 370-373 of the IPC, and the offences under the Draft Bill itself. The Bill makes a provision for the payment of back wages, but an anti-trafficking fund is to be set up for the implementation of such payment, but there has been no formal commitment from the government to provide such funds (for instance, like the Nirbhaya funds).

A significant issue of the Bill is that it fails to define its key objectives by shying away from defining trafficking and rehabilitation. Without specific definitions, the rights of women and young girls not to be free from exploitation is far from actualised. The Bill also promotes the idea of shelter homes, and specialised protection homes; however, there is no mention of



ensuring that present shelter homes are better equipped to support the aftercare of victims, or that the victims are treated with dignity and respect at these homes.

The Draft Bill has good intentions but is not effective in the long run. It attempts to create a disparate criminal law structure on trafficking. It develops a trajectory for the trafficked: the first responder is the district trafficking committee led by a plethora of social actors, governmental and otherwise, who must report a victim. It is, however, uncertain which department or agency does the raid and rescue parts of the intervention, but the victim must be at the protection/shelter home, the law enforcement investigates the crime and a case is initiated by the special public prosecutor in the special fast-track court. Kotiswaran states that this structure is already embedded in our criminal law system, and is not an innovative step forward -

*“This classic raid-rescue-rehabilitation model is grounded in a robust criminal law system with stringent penalties, reversals of burden of proof, provisions for defanging traffickers by stripping them of assets and a parallel adjudication machinery consisting of special courts and special public prosecutors. The anti-trafficking Bill thus proposes to make the prosecution of trafficking under Section 370 meaningful. However, the Indian legal system has historically been unable to meaningfully translate the law into action. The raid-rescue-*

*rehabilitation model built into the ITPA has similarly been a failure; protective homes under the ITPA have perversely resulted in state officials sexually abusing women and colluding with brothel-keepers and pimps.”<sup>68</sup>*

There is also very little thinking around how this model of rescue and rehabilitation would fit into the administrative regulations of bonded labour laws, and how it would interact with the existing vigilance committees under such regulations and the protective homes under ITPA. The Bill also does not take into account the nuances of a survivor’s life - it does not take into consideration the differences between victims’ identities, backgrounds, and locations. Moreover, without the government providing for financial commitments for real work on the ground, the anti-trafficking bill only seems to be a gesture for appeasement of certain masses. And in doing so, the government once again chases sex work and conflates it with trafficking. With its focus on trafficking in the sex trade, the draft bill is silent on labour trafficking, organ removal and forced marriages. The success of the Draft Bill would have been a consolidation of present legislations and enforcement mechanisms for a more nuanced and coherent way to understanding ‘trafficking’. However, what was supplied to the community writ large was a tokenistic piece of legislation with no teeth. <sup>69</sup>

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<sup>68</sup> *Ibid*

<sup>69</sup> Jayant Sriram, [“The Trafficking of Persons bill is good, but not good enough”](#), The Hindu, June 26, 2016.

Another problem with the Bill is that communities affected by it were not a part of its drafting. The Bill will affect female sex workers, transgenders and gay men in commercial sex worker and begging, migrant workers - but representatives from these groups have not come together in any form to add to discussions on the Bill. The Bill is not representative of the problems and challenges that victims face on day to day basis.

## RECOMMENDATION & CONCLUSION

In the Avahan III Programme, of which Swasti Health Resource Centre, Bangalore is the primary implementer, 69 community organisations (comprising of, and administering to female sex workers, gay men and transgenders) have resolved to work together in order to prevent trafficking by working against the root causes of trafficking as an endemic problem.

This requires work around the three-tier system for violence prevention, that the community organisation adhere to; the three-tier system looks at three different levels at which the key population identify and report violence incidents: the first tier are people closest to the key population member (her peers, friends and family members), the second tier is the structure of the community organisation itself (helpline, staff, field workers, paralegal volunteers, senior leaders) and the third tier are the external stakeholder who institutionalise violence protection at the government-level (police, legal services authority, department of women and child development, protection officers, etc.).

To prevent trafficking, firstly, all community organisations have adhered to a legally-binding anti-trafficking protocol, whose contravention has civil and criminal consequences. Secondly, the community organisations, with the help of District Legal Services Authority (DLSA), State Legal Services Authority (SLSA) and paralegal volunteers are working to provide basic

information on the ITPA, that currently affects the community. In addition to this, anti-trafficking as a concept of prevention of violence exists and is being implemented in the form of two strategies - (i) awareness and socialisation to young girls and women (ii) facilitating exit strategy for older sex workers.

Swasti and 32 community organisations from the Avahan III programme have partnered with My Choices Foundation to work together to implement their Save Village Programme that works to build capacities of families to understand and work around the threats of trafficking: full families with young girls are educated on laws against trafficking, along with ways to prevent trafficking. Secondly, Swasti is also working with several organisations and livelihoods programmes to facilitate a smooth exit for older sex workers, who want to leave the industry. The rationale for these two strategies is that Swasti believes in attacking the causes of gender-based violence in order to strive for prevention, instead of working to redress the issue after the violence has occurred. The optimum time for preventing trafficking is to use an approach to train young girls to prevent them from becoming victims of trafficking, and to support older sex-workers to exit the industry before they transport and recruit young girls and become perpetrators of trafficking. A strategy such as this where there is an actual and genuine attempt to curb trafficking at the national level makes more sense,

and imposing a carceral legislation that imposes a criminal infrastructure on a vulnerable community. The idea is that law does not always have all the answers, and that the untempered schism of trafficking can only be understood and tackled by the integration of socio-economic and cultural ethos along with legal policy and mechanisms.

In this paper, we focussed on trafficking as a form of gender-based violence, and comprehended that the current legal policy framework at multiple levels spanning the national, state and district level is, redressal-based, at best. At the theoretical level, the policy seems to be addressing trafficking in a way that it affects women's subjectivities and vulnerability as sex-workers. The extant law that addresses trafficking conflates the crime of trafficking and sex work, and this results in a plethora of violations against women in sex work. There is a double victimisation on the part of these women - they are violated by traffickers themselves who recruit them in sex-work, often in coerced circumstances, and then, by law enforcement and government agencies who interpret the extant legislation in ways that deems them perpetrators of trafficking. Moreover, the law talks about rehabilitation but there is no concrete mechanism that paves the way for rehabilitative efforts. The Draft Bill that attempts to look at trafficking as a consolidated offence, but fails to be an effective measure. At this juncture, not only should existing policies be implemented in various levels ,

keeping in mind, the subjectivities and agency of trafficked victims but newer policies should also take into account their diverse experiences, at the local, domestic and global level.

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