WE DON'T NEED the 'Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018'

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On 28 February 2018, the Union Cabinet approved the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 (hereinafter "*Trafficking Bill*"). Introduced in May 2016 by the Minister for Women and Child Development ('MWCD'), the Trafficking Bill has been through several draft versions, some of which have been made public and some kept opaque. The present critique is based on the draft, which was selectively released to the media just before Cabinet-approval.

Neither clear, nor comprehensive

For over a decade now, the narrative around anti-trafficking law has been that there is a need for a comprehensive legislation to address all aspects of trafficking in persons.

Importantly, in disposing off a petition on the subject of trafficking, i.e. *Prajwala v Union of India* W.P(C) No. 56 of 2004, the Supreme Court, in its order dated 9.12.2015 recorded the MWCD's submission that it had set up a committee to study existing laws, identify gaps and draft a comprehensive legislative framework covering all aspects of trafficking.

This was what was expected from the Government.

Presently, activities that constitute 'trafficking of persons' are addressed by a range of laws, which include:-

- ***Sections 370-370A*** of the Indian Penal Code, 1860 ('IPC'), which define and penalize trafficking in persons.

- ***Section 371, IPC*** which criminalizes slavery.
- ***Section 372-373, IPC*** which criminalizes buying and selling of underage girls for prostitution.
- The ***Immoral Traffic (Prevention) Act, 1956 ('ITPA')***, which criminalizes activities related to prostitution and provides rescue, rehabilitation and correction of sex workers, albeit through a moral lens.
- The ***Juvenile Justice (Care and Protection of Children) Act, 2015*** ('JJ Act'), which provides a framework for protection of children who are missing or at risk of being trafficked.
- The ***Bonded Labour System (Abolition) Act, 1976 ('Bonded Labour Act')***, the ***Contract Labour (Regulation & Abolition) Act, 1970***, the ***Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979***, ***Children (Pledging of Labour) Act, 1933*** and the ***Child Labour (Regulation and Prohibition) Act, 1986***, which deal with forced labour, child labour, primarily through regulation and welfare-oriented measures.

The existing response is patchy and scattered across different laws, which approach trafficking from varied, and sometimes, inconsistent objectives. For example, while the ITPA focuses on removing and evicting sex workers from their occupation, the Bonded Labour Act protects the worker who was held in bondage from being evicted from the place where s/he was working. A 'comprehensive law' was expected to harmonize different approaches and integrate existing laws into one. The Trafficking Bill does not do that. All it does is add yet another legislation to the already fragmented landscape of laws on human-trafficking, further complicating the legal framework and its enforcement.

No research or rationale behind the Bill

In the past, proposals to reform anti-trafficking laws have been informed by research and assessment of gaps in the response to trafficking. In 2002-2003, the National Human Rights Commission ('NHRC') conducted a country-wide study of the problem and produced two voluminous reports on 'Trafficking in Women and Children in India'. Findings of the NHRC Report prompted the MWCD to move the Immoral Traffic (Prevention) (Amendment) Bill, 2006. Similarly, the Criminal Law Amendment Act, 2013 which led to the enactment of sections 370 and 370A of the IPC against trafficking and exploitation of a trafficked person respectively, were based on the recommendations of the Justice Verma Committee Report, 2013 in relation to laws on sexual offences.

The Trafficking Bill has not been preceded by any research or analysis. Given that the NHRC study is over 15yrs old and in between, new provisions have been enacted in the IPC against human trafficking, the MWCD ought to have commissioned a review before embarking on this legislative exercise. The Government has not been to explain why it has chosen an 'additional' law, when the need was for a 'comprehensive' law on trafficking of persons.

Much of what is proposed already exists

The last legislation against trafficking, i.e. Sections 370 and 370A, IPC contains an all-embracing definition of trafficking in persons, which takes care of concerns of a narrow, purpose-specific application of the law. Section 370, IPC prohibits all forms of trafficking for exploitation. Explanation 1 to section 370 of the IPC, which indicates what exploitation means is inclusive and covers '*any act' of physical exploitation, sexual exploitation, slavery or practices similar to slavery and servitude*." Trafficking for any purpose, whether begging, domestic work, farm or factory work is part of section 370, IPC, which lays down a minimum punishment of 7yrs imprisonment, which may extend to 10 yrs and fine.

The Trafficking Bill does not redefine trafficking but incorporates the existing definition under section 370, IPC. It however, creates a new category of '*aggravated forms of trafficking'*, which carry a minimum sentence of 10 years, which may extend to life imprisonment. Some of the '*aggravated forms of trafficking'* introduced in the Bill are *trafficking for the purposes of forced labour*, *begging*, *marriage and child-bearing,* which, as noted above, are already criminalized under section 370, IPC. This is borne out by the National Crime Records Bureau ('NCRB') reports, which provide 'purpose-wise' disaggregated data on human trafficking cases under the IPC. According to the NCRB, in 2016, the Police registered *10,357* cases of trafficking for *forced labour, 349* cases of trafficking for forced marriage and *71* cases of trafficking for begging.[1] The claim that these are 'new' forms of trafficking that are not addressed under existing laws is totally baseless.

Similarly, the so-called 'new offence' of administering hormones or committing trafficking by administering alcohol or drugs is already incorporated in section 328 of the IPC, which punishes a person who:-*"administers to, or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to ….. commit or facilitate the commission of an offence…, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

Repeat offenders, trafficking of more than one person are all punishable under existing law.

Prevention, rescue and rehabilitation are also incorporated in current laws. For example, the JJ Act seeks to prevent child trafficking through protective mechanisms like the Child Welfare Committee. The Bonded Labour Act provides for vigilance committees in every

[1] Crime in India, 2016, National Crime Records Bureau, Ministry of Home Affairs, Govt of India.

district to carry out surveys and surveillance, with the aim of preventing bonded labour practices. Rescue and rehabilitation measures under ITPA are all too well-known.

There is nothing 'new' or 'different' in the Trafficking Bill, which is a re-hash of legal provisions that already exist, including those that have failed to work. The Bill appears to be an exercise in one-upmanship, with the Government keen to 'show' that it is doing more and better than its predecessor, when, in fact, all that it is doing is "more of the same".

Recommendations of the Supreme Court appointed panel ignored

In 2011, while hearing an appeal in *Budhadev Karmaskar v. State of West Bengal* (Criminal Appeal No. 135 of 2010, the Supreme Court constituted a panel to examine legal issues in relation to: -i) prevention of trafficking, ii) rehabilitation of sex workers who wish to leave sex work, and iii) conditions conducive for sex workers to live with dignity in accordance with the provisions of Article 21 of the Constitution of India. Over the next few years, the Court-appointed panel submitted a set of interim as well as final recommendations on the three terms of reference. One of the key recommendations of the panel was to adopt community-based rehabilitation, i.e. alternatives that are not contingent on trafficked women staying in state-run 'homes'. Another suggestion was to revise laws like the ITPA so as to distinguish between those coerced into sex work and those who engage in it voluntarily, so that interventions are tailored to those who need them. None of these ideas, which emerged from in-depth analysis and multi-stakeholder deliberations, have been taken on board in the Trafficking Bill.

Yet, in its affidavit dated March 2017 before the Supreme Court, the MWCD expressed agreement with the panel's findings and stated that it is:-"*taking steps to implement recommendations of the panel.*" The affidavit further submits that the Panel's recommendation to create awareness amongst sex workers about their rights *"is very*

important" and that *"the government is taking steps to create awareness amongst sex workers regarding their social as well as legal rights*."

In light of the contents of the Trafficking Bill, this is nothing but double-speak.

Problems with the Bill

The Trafficking Bill is deeply flawed, with provisions that are both problematic and make little sense. Some of these are noted below:-

- **Gradation of offences is illogical:** The Trafficking Bill categorizes trafficking for certain purposes as 'aggravated forms of trafficking', with a punishment of 10 years or life imprisonment. Logically, offences that are graded higher must be more serious or culpable than the acts that constitute trafficking under Section 370, IPC, which attract punishment of 7 -10yrs imprisonment and fine. But that is not the case. Trafficking for the purposes of begging is considered 'aggravated', whereas trafficking for sexual exploitation is simple trafficking, even though the MWCD maintains that its primary concern is sexual abuse and exploitation of women and children. Further still, *'slavery and practices similar to slavery and servitude*', which capture the most egregious forms of coercion and bondage under domestic and international law, are also simple trafficking.

- **Vague, overbroad and impractical provisions:** The Bill criminalizes a host of activities, which lack culpability and criminal intent. For example:-

  The Bill introduces offences in relation to, and authorizes closure of premises, which are '*to be used'* as a '*place of trafficking'*. 'Premises', which is widely defined to include land, location and conveyance, may be a home, factory, farm or a vehicle used for public transport. Applied in the

context of labour trafficking, the law would allow factories and farms to be 'closed down', merely on the basis of a complaint by the Police or any other person that the said premises is to be used for trafficking. A public transport bus in which a trafficked person may travel could also be seized. These are absurd consequences, to say the least.

Penal provisions against '*promoting or facilitating trafficking of persons'* are equally vague and cast a wide net. IT companies, travelogues and employment sites should be worried as hosting materials or advertisements that 'promote trafficking of person' will attract punishment.

Provisions for confiscation of property are also framed in an overbroad manner. Properties may be attached not only when they are used for the commission of an offence, but also if they are '*likely to be used*' for the commission of an offence under the Act. There is no guidance as to when and under what circumstances such a likelihood would arise so as to warrant attachment of the property.

- **No due process:** Criminal justice safeguards and due-process guarantees have been watered down considerably, without any justification. The breadth of offences under the Bill makes provisions like 'presumption of guilt' even more worrisome.

- **Reliance on rescue and rehabilitation, which is outdated:** The Bill falls back on the outmoded methods of 'rescuing and detaining' victims in the name of rehabilitation. Institutionalization of victims in 'homes', ostensibly for their protection and rehabilitation is antithetical to fundamental rights and re-integration. The United Nations Special Rapporteur on Trafficking in Persons,

especially Women and Children has explicitly noted that:-"..*detention of victims of trafficking is incompatible with a rights-based approach to trafficking because it inevitably compounds the harm already experienced by trafficked persons and denies them the rights to which they are entitled*."[2]

There is ample evidence of the ineffectiveness and harm of 'rescue, raid and rehabilitation' imposed on sex workers under the ITPA.[3] As a result, sex workers have developed alternate community-led models of peer-support and oversight and self-regulatory boards, which have been more effective in removing unwilling persons from sex work.[4] Instead of examining such approaches and finding alternative means to offer support, the Trafficking Bill proposes to continue and extend rescue and institutional rehabilitation to all victims of trafficking.

- **A 'maze' of bureaucratic committees and institutions:** Instead of streamlining enforcement, the Trafficking Bill swells up institutional bureaucracy, by creating *10* different agencies including *anti-trafficking officers*, *units, committees* and a *bureau* at the district, state and national levels to counter the problem, which will result in chaos and policy-indecision as well as 'passing the buck' on questions of accountability. Besides, none of the proposed bodies have any representation from affected communities, whose participation and perspective is vital for addressing trafficking successfully. As noted above, involvement of sex workers in oversight committees and anti-trafficking boards was strongly recommended by the

[2] Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, [A/HRC/20/18, dated 6th June, 2012]

[3] RAIDED, How Anti-trafficking strategies increase sex workers' vulnerability to exploitative practices, SANGRAM, India, March 2018.

[4] Jana S, Dey B, Reza-Paul S, Steen R."Combating human trafficking in the sex trade: can sex workers do it better?" J Public Health (Oxf) 2013; published online Oct 31. DOI:10.1093/pubmed/fdt095.

Supreme Court appointed panel, in light of their effective role and contribution. This has been overlooked completely.

- **Chilling effect on health and social protection programmes**: The Trafficking Bill will have a chilling effect on health and social security programmes for vulnerable communities including sex workers, who tend to fall under the punitive framework of anti-trafficking laws. Contrary to claims that the Bill does not affect sex workers, proposed offences such as trafficking and exposure to HIV and AIDS and pregnancy reveal a definite intent to target sex work. The tendency to incriminate sex workers in trafficking offences through '*guilt by association'* has increased fear among peer and outreach workers carrying out public health or social protection initiatives with sex workers. More so, when ITPA and other punitive laws will continue to be applied. India can ill-afford to put its National AIDS Control Programme under risk or threat, especially when its success is founded on large-scale targeted interventions with female sex workers.

- **No wisdom in applying criminal law to a 'development' problem:** The problem of trafficking cannot be disassociated from poverty, livelihood, displacement and security. People have and will always move for work, whether out of distress or for better opportunities. Prisons cannot capture or confine the dreams and aspirations of people, especially the poor and the marginalized. If the '*development*' mantra is to be used, it must be used here, in the response to trafficking. Adopting a carceral approach to what is largely a socio-economic phenomenon is misplaced and unwise.

The Trafficking Bill does not serve any logical or legitimate purpose. It is a shoddy piece of legislation, which should not be taken forward or introduced in Parliament. And if tabled, it must be referred to the Standing Committee for careful scrutiny, which has evaded the Bill till now.
