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Jurisprudential Analysis of the Trafficking in Persons (Prevention, Care & Rehabilitation) Bill 2021 from the Liberty and Rights Framework of Isaiah Berlin and Henry Shue

SUNEEL KUMAR¹ AND DIVYA KHANWANI²

ABSTRACT

Purpose: The purpose is to use the jurisprudential frameworks given by Isaiah Berlin, Henry Shue, Amartya Sen, Martha Nussbaum, and Iris Young to analyze various provisions of the anti-trafficking bill 2021 from the perspective of a sex worker who is perturbed to be the beneficiary of the legislation.

Findings and Practical Implications: The paper concludes that the act restructures the new provisions on the same erroneous assumptions about what sex workers want. The bill also fails to provide for a workable capabilities approach model as conceptualized by Sen and Nussbaum.

Originality, Value: This paper seeks to add a jurisprudential dimension to understanding the shortcomings of the act, especially in relation to the mandatory repatriation of victims to their origin country.

I. INTRODUCTION

The Trafficking in Persons (Prevention, care & Rehabilitation) Bill, 2021 [from now on referred to as the anti-trafficking bill] is the third version of the bill since 2016 to regulate trafficking in the country. It has been claimed to be victim-centric by the government. In this paper, I use various ideological frameworks (Isaiah Berlin, Henry Shue, Amartya Sen, Martha Nussbaum and Iris

Young) to analyze various provisions of the bill from the perspective of a sex worker who is perturbed to be the beneficiary of the legislation.

II. TWO CONCEPTS OF LIBERTY AND THE ANTI-TRAFFICKING BILL 2021

I use the categorization of liberty propounded by Isaiah Berlin to argue that the anti-trafficking bill 2021 assumes an oppressive character that will serve to the detriment of the vulnerable

¹ Author is a student at NLSIU, India.

² Author is a student at NLSIU, India.

stakeholders, especially women involved in sex work.

Isaiah Berlin was the first to expound on the two facets of liberty namely positive and negative liberty. Negative liberty is marked by the absence of any external interference by persons in the life of an individual. Thus, it is 'freedom from' something. Positive liberty is characterized as the "freedom to" do something.³ This positive liberty comes with a socially prescribed framework. It conceptualizes that an individual has both a rational and an irrational side to the 'self'. It is only when the individual operates from the rational self are his actions considered 'free'.

The anti-trafficking bill defines trafficking under section 23 and explanation 1 to the section declares prostitution and pornography as explicitly in the category of trafficking.⁴ Section 2(25) of the bill defines sexual exploitation as the benefit derived from the involvement of any other in sexual service.⁵ This provision thus assumes exploitation by mere engagement in sexual service. Explanation 2 of section 30 seeks to punish every person, like a customer, broker, etc, who causes the engagement of a woman in a situation of sexual exploitation. Section 11 of the bill enables the law enforcement authorities to force such women out of their profession of sex work, even if consenting, and forcefully put them

in protection and rehabilitation homes.⁶ The effect of these provisions is no person is allowed to engage in any form of sex work, even consensually.

Under the positive liberty framework, the state is seen as a legitimate authority to decide what is good for the individual, and its coercion to choose what the individual will not do is perturbed to be justified in the interest of the real self. In the present circumstance, persons who think they voluntarily engage in such an act are seen by the state to be operating out of their adaptive preferences. The concept of Adaptive preference provides that when humans internalize oppression and because of social conditions make peace with their dismal position and accept it as normal.⁷

The bill declares the people engaged in sex work as mandatorily victims. People engaged in sex work are deemed to be operating out of their lower self and are, therefore, considered to be not free under the positive liberty framework. The rational self always serves the long-term interest of the real self. Berlin says this real self is looking at an Individual as a 'social whole' whose interests align with the collective society thereby achieving 'higher freedom'.⁸ The Indian legislators have viewed sex work from a moral lens and declared it to be an immoral activity that is looked down upon. This is the reason the

³ Isaiah Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31 October 1958* (Oxford: Clarendon Press, 1958).

⁴ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s23.

⁵ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s2(25).

⁶ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s11.

⁷ Martha C. Nussbaum, *Frontiers of Justice Disability Nationality Species Membership*, Oxford University Press New Delhi (2006).

⁸ Isaiah Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31 October 1958* (Oxford: Clarendon Press, 1958).

present legislation that criminalizes sex work is called the Immoral Trafficking Prevention act.⁹ The state refuses to consider the ground reality that many women actually willingly choose sex work as a calculated choice to earn their livelihood.¹⁰ This is often because it is higher paying for women when compared to other avenues available to them like domestic servants, factory workers etc.

The state in its ideological bubble blames the unfreedoms of the sex worker, on their profession.¹¹ This is absolutely wrong. The difference in practice and precept shows that it is the unwillingness of the government to regulate sex work that the women are subject to a terrible life.

The ITPA 1986, already prohibits 'keeping of brothels' and any economic gain from the prostitution of others.¹² The red light area still continues to operate and it has been found that often public officials collude with the pimps to avoid any raids. The arbitrary powers given to the police to conduct raids on suspicion, like section 11 of the bill, have led to extortion of women.¹³ Police officers often take bribes from the sex workers to not take them to the magistrate and send them back home. Rehabilitation facilities in

effect function like detention centres and ironically end up being hubs of human trafficking.¹⁴

The present bill, despite the obvious failures of the law, turns a blind eye to the actual demands of the marginalised. Soto argued that the state should listen to the 'barking dogs' when they make policies.¹⁵ This would imply the state should have heard the problems of the stakeholders of the anti-trafficking bill and listened to what they really wanted. The government gave merely 14 days to seek suggestions on the bill that would so drastically impact the fate of the stakeholders.¹⁶

Sex workers have long demanded regulation of the profession, so the victims can actually approach law enforcement to seek help when they are abused.¹⁷ Regulation will also ensure increased liberty for the women engaged in brothels and will empower them to leave the profession if they want to. The present bill completely takes away the complete negative liberty from persons to engage in sex work. This has assumed an oppressive character as persons are given absolutely no agency to indulge in sex work if they want to.

⁹ V Shankar, R Sahani, 'Sex Work, Sex Trafficking, and Myopia of the State' (2021) 56(43) EPW <www.epw.in/journal/2021/43/special-articles/sex-work-sex-trafficking-and-myopia> accessed on 2 January 2022.

¹⁰ Ibid

¹¹ Amartya Sen, *Development as Freedom* (1999).

¹² The Immoral Traffic (Prevention) Act 1986, s 3.

¹³ The Immoral Traffic (Prevention) Act 1986, s 13.

¹⁴ Prabha Kotiswaran, 'The trouble of rehabilitation' (India Today, 3 August 2018) <<https://www.Indiatoday.in/magazine/up-front/story/20180813-the-trauma-of-rehabilitation-1303846-2018-08-03>> accessed 4 January 2022.

¹⁵ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000).

¹⁶ Adithya Vasanth, 'Flip side of new Trafficking Bill' (The Leaflet, 21 July 2021) <<https://www.theleaflet.in/flipside-of-new-human-trafficking-bill/14-days-news-of-the-government.>> accessed 6 January 2022.

¹⁷ Shiv Sahay Singh, 'Concerns remain over anti-trafficking bill' (The Hindu, 18 July 2021) <<https://www.thehindu.com/news/national/concerns-remain-over-anti-trafficking-bill/article35388874.ece>> accessed 29 December 2021.

The bill, in effect, will not increase the positive liberty of women. The experience from the ITPA regulation has shown that sex work continues to take place on a wide scale even after its criminalization, furthermore the conditions of the sex workers only deteriorate when the brothels operate secretly. The anti-trafficking bill does not make any structural changes that make the rescue and prevention process any better. The real effect of the bill will be twofold:

i. Prevent voluntary sex workers from approaching law enforcement

Sex work is a result of underdevelopment and often Women prefer to engage in sex work over other economic avenues. The law ignores this and forces women to stay in rehabilitation homes from which they are then repatriated. Studies have shown that women often return to sex work after they get out of protected homes.¹⁸ In such a scenario, the bill will prevent women who consensually engage in sex work from approaching law enforcement authorities to report any abuse faced by them in their profession.

ii. Prevent trafficked women from being rescued.

The bill resorts to increasing punitive measures to curtail the wrongs of trafficking. This is bound to fail. When the laws focus only on increasing the criminalisation aspect of the law, and ignore the implementation aspect, then bribes are seen

to increase. Pimps will end up paying more to the police and politicians for the continued sex work. Additionally, the brothels will go even out of the radar and will completely take away any liberty from the women to move according to their will.

The proposed legislation, thus, imposes an unequal paternalistic idea of freedom that is bound to result in physical and mental hardships for the women engaged in sex work. The bill is a typical example of armchair policy-making which in name of positive liberty for victims, will worsen their condition.

III. STATE'S RESCUE, REHABILITATE AND REPATRIATE FRAMEWORK

The rescue, rehabilitate and repatriate framework has been adopted under the bill to prevent and protect victims of trafficking. This section analyses the problems from the lens of the vulnerable groups it purports to protect.

1. Rescue

Section 11 of the bill gives police officers the power to impose 'rescue' on the victims.¹⁹

Section 16(6) provides the victims to make an application along with an affidavit if they want to be let out of the rehabilitation homes.²⁰ Section 16(7) of the bill further accords the magistrate with the power to refuse the application of the victim to be let out of the protection homes.²¹

This application process in itself is ignorant of the realities of these victims. Most of these

¹⁸ Snigdendu Bhattacharya, 'Why Sex Workers' Organisations Aren't Pleased With the Draft Anti-Trafficking Bill' (The Wire, 12 July 2021) <<https://thewire.in/rights/draft-anti-trafficking-bill-sex-workers>> accessed 4 January 2022.

¹⁹ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s11.

²⁰ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s16(6).

²¹ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s16(7).

people are not educated and cannot write. For this procedure, victims will have to rely on legal aid which is extremely bad in our country. To escape the unwilling and incompetent lawyers, victims might engage independent lawyers thus forcing them into debt. The victims should have been given a provision to start the process through an oral appeal where they can be enquired about the reasons they want to leave the rehabilitation. The law systematically makes it difficult for these illiterate people to go out of their homes as per their own will. The law, therefore, seeks obedience from the “trafficked” people without giving them a **real** choice. This creates a situation that Iris Young explains to be Powerlessness.²² The law has in effect reduced the employment opportunities for these people who have no source of income left.

2. *Rehabilitate*

Amartya Sen propounded dual concepts of capability and functioning.²³ The state should enable individuals with the capability to achieve whatever they desire. Functioning in Sen’s work refers to actual achievement. Prima facie, the bill aligns with the capability approach by providing vocational training, education, health care, shelter, etc for the victims.

The efficacy of a policy can only be determined by the true convergence of practice and precept.

Section 12(4) provides that government can use existing homes for the purposes of this act.²⁴

Existing homes lack any proper facilities and put victims in dismal conditions where they are often preyed on for re-trafficking. Disturbingly, Victims often commit suicide and try to forge escape from their homes.²⁵

Adequate Monetary Funding is a prerequisite to any benefit that can accrue out of rehabilitation for the victims. Meagre funding has been a point of concern under the existing ITPA act as well.²⁶

The bill ignorantly again introduces a vague provision putting the onus on ‘respective’ governments to allocate funds with absolutely no threshold.²⁷ This is likely to result in extremely underfunded, detention centres, homes.

Rehabilitation homes reinforce the patriarchal division of labour for women. The women are often given no real options to choose the skills that are imparted to them.²⁸ They are often restrained from working in beauty parlours, massage centres and even become taxi drivers.²⁹ Hand looming Industry is the predominant sector that is considered appropriate for women and they are forced to go there.³⁰ Thus, the rehabilitation homes often impart only one type

²² Iris Marion Young, ‘Five Faces of Oppression’ (Princeton University Press 1990)

²³ Amartya Sen, *Idea of Justice* (HUP 2009).

²⁴ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s12(4).

²⁵ Prabha Kotiswaran, ‘The trouble of rehabilitation’ (India Today, 3 August 2018) <<https://www.Indiatoday.in/magazine/up-front/story/20180813-the-trauma-of-rehabilitation-1303846-2018-08-03>> accessed 4 January 2022.

²⁶ Ibid.

²⁷ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s 6(3).

²⁸ Moira Louw, ‘Going home’ [2020] 13(2) J. Political Sci. Educ.

²⁹ Ibid.

³⁰ Nalini Nayak, ‘Anti-Trafficking Bill 2018 Fails to Address Changing Forms of Labour Exploitation’ (2021) 53(29) EPW <www.epw.in/engage/article/anti-trafficking-bill-2018-severely> accessed 12 January 2022.

of skill that the victims might not want to pursue. It has also been noted, sometimes skills imparted do not lead to the employment of the victims as they are not in demand in the areas where these women will be repatriated.

3. Repatriate

Repatriation of the victims is the last step under the bill. Section 21(5) of the bill mandates that inter-country repatriation will be done within 6 months.³¹ This expatriation is done irrespective of the consent of the victims. This is different from intra-India repatriation where the law explicitly provides for the informed consent of the victim. In this section, I draw upon the rights framework proposed by Henry Shue to argue that cross border trafficked victims have a right to not be repatriated without their informed consent. To this end, the government has been vicious in essentially depriving these stakeholders of their basic rights.

Henry Shue argues that a right has three basic elements “(1) the rational basis for a justified demand (2) that the actual enjoyment of a substance is (3) socially guaranteed against standard threats.”³² The current Indian law does not give the cross-border victims the social guarantee to not be repatriated against their will. Shue argues that if it can be shown that a rationally justified demand for such a social guarantee against standard threats exists, then the

government is obligated by the duty of giving such a right to the people.

- Rational basis for a justified demand

The starting point of this discourse is the reason why a lot of victims got trafficked in the very first place. These victims often undergo widespread persecution based on their religion, ethnicities in their home country and are subjected to extreme economic and human rights deprivation. In such a vulnerable position, they are easy targets of trafficking. A lot of these people also run from their countries to seek refuge in India. Sometimes, families of victims sell them to traffickers. Thus, trafficked victims will likely be subject to re-trafficking if they are returned to the same place without taking their consent and reasons for their trafficking into consideration.

Martha Nussbaum provided a philosophical understanding of the capability approach and provided a list of 10 central human capabilities that a state must provide people.³³ Implementation of Section 21(5) will disentitle the vulnerable sections of almost all these capabilities.

Mandatorily Expatriating the victims back to the country they fled from will put them at extreme risk of persecution and re-trafficking and will reduce their life to a stage that is not worth living. People will be pushed back into the poverty-stricken circumstances they once escaped from and lack of shelter will seriously lead to

³¹ Trafficking in Persons (Prevention, care & Rehabilitation) Bill 2021, s21(5).

³² Henry Shue, *Basic Rights: Subsistence Affluence and US Foreign Policy* (Princeton University Press 1996).

³³ Martha C. Nussbaum, *Frontiers of Justice Disability Nationality Species Membership*, Oxford University Press New Delhi (2006)

compromised health. Integrated women often face ostracization, for instance, personal accounts of Nepali women have disclosed that they are seen as “broken eggs” when they return after being rescued from trafficking.³⁴ A lot of women thereby choose to return to sex work. This jeopardizes their reproductive health as they are again prone to sexually transmitted diseases, forced abortions and all of the treatments are conducted by untrained professionals in extremely unhygienic circumstances.³⁵ The law in effect limits the bodily integrity of these women by mandating where they will live and does not offer these women protection against violence in their home countries. The bill does not provide these women with the requisite education that can empower them as a six-month period is a very short time span to do that. Emotions are the fifth item on Nussbaum’s list and provide for the ability to love and care for those one wants to and the state of freedom from fear and anxiety. The bill miserably fails at providing respite from the state of fear and anxiety, rather it makes their fear a lived reality for these refugees. The Enclave immigration theory provides that often the most vulnerable sections of the society live together and start associating with each other.³⁶ The trafficked victims often work together and create a sense of belongingness towards each other. The bill forces

the victims to separate from each other even if they don’t want to. Refugees are often not allowed to practice their religion and do not have liberty in their home country. Repatriating them would again subject them to the compromised capability of practical reason and affiliation as proposed by Nussbaum. Lastly, extreme economic deprivation coupled with social stigma will most likely mean the victim would again have no control over their political and material environment.

Forced repatriation will therefore compromise the basic rights of the victims of security and subsistence. All 10 central human capabilities are violated through the violation of this right and therefore, it is a basic right that forms a justified demand.

- Standard threat

These threats are contextual and are particular to the experiences of cross-border trafficked victims as a whole.³⁷ If the actual substance of this right is not enjoyed by the victims they will be subjected to the following hardships.

Trafficked refugees would avoid seeking help from law enforcement authorities. This will lead to a situation of oppression that would be characterized by what Iris Young calls exploitation, marginalisation and powerlessness.

³⁴ Jayagupta, "The Thai Government's Repatriation and Reintegration Programs," 47(2):227 INT MIGR <https://www.researchgate.net/publication/229934920_The_Thai_Government's_Repatriation_and_Reintegration_Programmes_Responding_to_Trafficked_Female_Commercial_Sex_Workers_from_the_Greater_Mekong_Subregion> accessed 11 January 2022.

³⁵ Diana Tietjens Meyers, ‘Victims of Trafficking, Reproductive Rights, and Asylum’ in *Oxford Handbook of Reproductive Ethics* (OUP 2017).

³⁶ O Osaghae & T Cooney, ‘Exploring the relationship between immigrant enclave theory and transnational diaspora entrepreneurial opportunity formation’ (2020) 46(10) *Journal of Ethnic and Migration Studies* <<https://www.tandfonline.com/doi/full/10.1080/1369183X.2018.1560001?scroll=top&needAccess=true>> accessed 12 January 2022.

³⁷ Henry Shue, *Basic Rights: Subsistence Affluence and US Foreign Policy* (Princeton University Press 1996).

Exploitation is when a group's labour results in the benefit of the other and causes unequal distribution of resources such that accumulation of wealth can be assimilated.³⁸ Trafficked refugees will try to hide from law enforcement at any cost and thereby be subjected to forced labour and extreme forms of exploitation with not a single way out. Personal accounts of Rohingya women in the Jammu camp showed they were made to work in a local factory only to earn 80 rupees for 12 hours of work.³⁹

Young defines Marginalisation to be when people are excluded from employment and cannot find work.⁴⁰ This causes them to face extreme poverty and engage in extremely harmful occupations just to live. The trafficked refugees do not have any legal documents and therefore cannot work in the formal sector, further, they won't have access to health and education facilities.⁴¹ They will be further marginalized from society because of the difference in their ethnic, religious and cultural identities. The fear of being reported to law enforcement is a constant sword hanging on the fate of their entire families.

The law does not provide such trafficked victims with any option for asylum. This means the law seeks absolute obedience from these victims to

return there and they have no option but to comply once they are caught. Thus, they are completely powerless in their despicable situation.⁴²

The victims thus need to be protected from the standard threats and have a rational basis for the justified demand for a social guarantee. This guarantee can be extended by according the victims the right against repatriation against their informed consent. The government through this legislation will lead to essential deprivation of the victims. This is not due to the carelessness of the government but because of its viciousness.⁴³ I see this bill in light of the CAA bill that has been passed. Refugees have been segregated on the basis of the religion they belong to. In a scenario such as this, the government knew the effects of its actions and still went ahead and did it.

IV. CONCLUDING REMARKS

Poverty is a lived reality for the victims. The bill fails to learn from its predecessor acts and makes a structural mistake which leads to abject curtailment of freedoms and leaves stakeholders worse off in the present system.

³⁸ Iris Marion Young, 'Five Faces of Oppression' (Princeton University Press 1990)

³⁹ Neha Dixit, 'Those Rohingya Women in Camps' (The Wire, 25 March 2021) <<https://thewire.in/rights/rohingya-refugee-women-jammu>> accessed 5 January 2022.

⁴⁰ Iris Marion Young, 'Five Faces of Oppression' (Princeton University Press 1990).

⁴¹ 'Always on the move: Trafficking risks in the absence of refugee law in India' (Centre for Feminist Foreign Policy, 20 November 2019) <<https://centreforfeministforeignpolicy.org/journal/2019/10/31/always-on-the-move-trafficking-risks-in-the-absence-of-a-refugee-law-in-india>> accessed 5 January 2022.

⁴² Iris Marion Young, 'Five Faces of Oppression' (Princeton University Press 1990)

⁴³ Henry Shue, *Basic Rights: Subsistence Affluence and US Foreign Policy* (Princeton University Press 1996).