

GAP ANALYSIS OF THE PREVENTION OF TRAFFICKING IN PERSONS ACT 2018

BACKGROUND

Human trafficking is termed as sickening reality in the UN Chronicle.¹ There is a general lack of understanding about the problem and its gravity. This heinous crime treats the victim as a commodity, not a human being. It is repetition of human slavery. Forced exploitation of victim by those in the position to exert power over him or her constitute the basic ingredient of the offence of human trafficking. In this offence, victim is tricked or deceived, or may even willingly put himself or herself into a situation of exploitation. Spreading knowledge through awareness holds the key for prevention of trafficking which is the main purpose of the Prevention of Trafficking in Persons Act 2018 (TIP Act).

Commercial sex and forced labour of any kind induced by force, fraud or coercion are termed as severe forms of trafficking in persons.² But for a person under 18, mere act constitutes offence without even use of force, fraud or coercion. Further, transportation of victim is not mandatory for commission of offence of human trafficking. US State Department Report 2023 suggests public awareness; training of law enforcers, health professionals and judges; and provision of shelter, psycho-medical care and rehabilitation of victim are some of the potential solutions of the problem of human trafficking. This problem of global scale require resolution especially in society like Pakistan.

FINDING SOLUTIONS

Human trafficking in various forms is one of the major problems being faced by criminal justice system in Pakistan. Every problem of a society requires local research for identification of persons whose behaviour causes the problem, objective, and subjective causes of such behaviour, finding solutions of the causes of problematic behaviour, cost-benefit, and comparative analysis of the solutions.³ Every society has unique causes of problematic behaviour and require unique solutions. One size does not fit all other than the fundamental principles. Absence of proper research before drafting legislation containing solutions invariable leads to gaps in the law and its implementation. The gap in implementation or solving the problem of trafficking in person in Pakistan is mainly because of absence of proper research before enactment of the law on such an important subject.

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An important bill must have the monitoring and evaluation mechanism.⁴ No law ever functions precisely as expected. Prior to enactment, pressures to pass legislation quickly often preclude adequate research as is the case in passage of the TIP Act.⁵ Further, constantly changing circumstances inevitably accompany transformation. After a law's passage and implementation, Parliamentarians can only carry out oversight tasks if they have adequate information to determine whether people and organizations (including implementing agencies) do in fact behave as the bill prescribes, with the expected consequences. Monitoring and evaluation report provides necessary prerequisite for informed policy decisions by the Governments and Parliamentarians.

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¹ Ruth Dearnley, Prevention, Prosecution and Protection - Human Trafficking, available at

<https://www.un.org/en/chronicle/article/prevention-prosecution-and-protection-human-trafficking>

² US Department of State, 2023 Trafficking in Persons Report, available at <https://www.state.gov/reports/2023-trafficking-in-persons-report/>

³ Ann Willcox Seidman, Robert B. Seidman and Nalin Abeyesekere, Legislative Drafting for Democratic Social Change, Kluwer Law International, London, 2001, page 83. Available at https://books.google.com.pk/books/about/Legislative_Drafting_for_Democratic_Soci.html?id=h9cOXp7hioUC&redir_esc=y

⁴ Ibid, page 114

⁵ The Senate Of Pakistan Debates: Official Report, 277th Session, Volume VI, No. 12 (Nos. 01-12), SP.VI(12)/2018, Senate Secretariat, 15 May 2018, Available at: http://www.senate.gov.pk/uploads/documents/debates/1562237590_204.pdf

INTERNATIONAL ANALYSIS

The TIP Act is hailed in Reprieve's submission to the United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children for the thematic report on the implementation of the non-punishment principle in the context of trafficking in persons in Pakistan dated 22 February 2021. It declares that the definitions of the offence of trafficking and victim comply with the Palermo Protocol. However, according to this report, the incorporation of the non-punishment principle in the TIP Act falls short of international standards.

Under the TIP Act, a victim cannot be prosecuted, but they may face prosecution under other laws, such as narcotics or Hudood laws. In cases involving narcotics, the value of the narcotics is often disproportionate to the income level of the carrier, who may be a victim of human trafficking. This practice contradicts the recommended principle on human trafficking by the Office of the High Commissioner for Human Rights.⁶ The Committee on the Elimination of Discrimination against Women also highlighted enforcement gaps of the TIP Act due to absence of systematic training for judges, prosecutors, rangers, immigration and Federal Investigation Agency officials and other law enforcement personnel.⁷

PREVENTION

The short title, long title, and preamble of the TIP Act indicate that it is primarily a proactive law aimed at preventing human trafficking. However, apart from section 14, which deals with awareness raising and prevention, all other substantive provisions are reactive, focusing on combating the crime. Even section 14 is discretionary rather than mandatory, as the government may choose whether to implement the measures mentioned. To make the law more prevention-oriented, provisions such as mandatory training for relevant officials, periodic awareness campaigns, a toll-free helpline for reporting, protection from prosecution for reporting suspicious activity, observance of National Human Trafficking Awareness Day on January 11, and use of places of worship for raising awareness among vulnerable communities could be included.⁸

CHILD BIRTH REGISTRATION

In case child is the victim of the offence of human trafficking, it constitutes an aggravating factor which attracts severer penalty.⁹ Further, the Court may not consider the consent of the child victim, his or her parent or guardian as a defence if an accused is charged or prosecuted for the offence of human trafficking.¹⁰ A child is defined as a person under 18 years.¹¹ Effective enforcement of these children friendly provisions requires undisputed system of age determination. Achieving that goal would require a universal childbirth registration system, which currently stands as low as 34% in Pakistan and a dismal 1% in vulnerable areas like Bara District of Ex-FATA.¹²

FRAUD AND DECEPTION

The definition of trafficking in persons includes fraud as one of the means of trafficking, but it is not further explained or defined.¹³ Further, initially victim may have willingly put himself or herself in a position of vulnerability but is deceived or tricked to be victim of human trafficking. This situation constitutes the offence of trafficking in person. Rather than leaving this situation to court interpretation, an explanation could be added to address such circumstances.

ABETMENT AND CONSPIRACY

Cross referencing to other laws especially to the Pakistan Penal Code 1860 may have been avoided in the TIP Act.¹⁴ A reader should not have to search for other laws, so any necessary provisions should be repeated in the TIP Act. For example, the provisions of the Penal Code regarding abetment and conspiracy could be included in the Act to facilitate enforcement.

NON-CULPABILITY OR BLAMELESSNESS

Non-culpability or blamelessness of victims¹⁵ of the offence of trafficking in persons in Pakistan is subject matter of intense international criticism. It is appropriate that victim of human trafficking may not be prosecuted for any offence

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⁶ OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking', section 7

⁷ Concluding observations on the fifth periodic report of Pakistan (10 March 2020), available at <https://digitallibrary.un.org/record/3856608?ln=en>

⁸ FEMA, 5 Ways We Can Work Together to Prevent Human Trafficking, January 10, 2023. Available at <https://www.fema.gov/blog/5-ways-we-can-work-together-prevent-human-trafficking>

⁹ The Prevention of Trafficking in Persons Act 2018, section 3(2)

¹⁰ Ibid, section 7

¹¹ Ibid, section 2(a)

¹² UNICEF Pakistan, Count every child because every child counts, January 2018. Available at <https://www.unicef.org/pakistan/stories/count-every-child-because-every-child-counts>

¹³ The Prevention of Trafficking in Persons Act 2018, section 3

¹⁴ Ibid, section 5

¹⁵ Ibid, section 5

committed through him or her while he or she was victim of human trafficking. This provision of non-culpability should be broadened to encompass offenses under other laws as well.

VICTIM PROTECTION

The Federal and Provincial Governments have discretion to protect or not to protect victims of human trafficking.¹⁶ Victims of this offence of human trafficking need full protection to encourage them to testify against the traffickers and ensure protection of their rights.¹⁷ UN Protocol on Trafficking in Persons (2000) mandates protection and assistance to victims of such an offence, with full respect for their human rights. This includes protecting privacy; ensuring victims receive information on court proceedings; measures to provide for physical, psychological and social recovery of trafficking victims; providing for physical safety of victims; measures to allow victims to seek compensation or damages; and temporary or permanent stay of the victim. A child victim will need an immediate care and protection including security, safe accommodation, food, access to social and health services, psychosocial support, legal assistance and education. These are mandatory safeguards for protection of victims. Of course, scarcity of resources may constitute an insurmountable hurdle in comprehensive victim protection program but protection mechanism atleast for women and child victims may be made mandatory. The Governments especially the Provincial Government may use the existing infrastructure for protection and shelter of women and children for this most vulnerable category of victims of human trafficking. Rehabilitation of victims through education and/or skill development along with adjustment in the job market are also necessary for the purposes of restitution of the wrong done to them. Further, mandatory periodic training of the law enforcers, prosecutors and judges is necessary to protect and enforce the rights of victims of human trafficking.¹⁸ This important aspect is missing in the TIP Act but an incomplete passive provision is added in the rules without specifying whose obligation to provide training and consequence of failures to provide such training.¹⁹

COMPENSATION TO VICTIMS

Article 6(6) of the Trafficking in Persons Protocol mandates legal provisions containing measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered. The current compensation provision in the TIP Act is skeletal, only referencing the maximum amount of compensation as limited to the fine imposed on the offender.²⁰ A comprehensive system of mandatory provisions of compensation to victim of human trafficking may be incorporated in the Act that may include provisions:²¹

- (a) Recognizing civil right of the victims to sue traffickers, abettors and conspirators for damages with summary procedure and a minimum ceiling provided by the law;
- (b) On the analogy of section 545 of the Code of Criminal Procedure 1898, mandating criminal courts to order that compensation be paid by offenders to victims with a minimum (not maximum) ceiling contained in the law in order to avoid imposition of nominal compensation;
- (c) Establishing a dedicated fund enabling victims to claim compensation from the State for injuries or damages incurred as the result of human trafficking where the State fails to apprehend, prosecute, or punish the offender or offender has failed to pay compensation to the victim; and
- (d) Providing victim support to obtain compensation under the above provisions through due process.

CONCLUSION

The TIP Act represents a significant advancement in combating human trafficking, yet there is always room for enhancement. A crucial aspect is the implementation of a proper monitoring and evaluation mechanism, not only to enhance the enforcement of this law but also to bring about systemic reforms to address the issue of human trafficking. It is important to prioritize prevention over cure, and policymakers should consider systemic reforms aimed at preventing human trafficking before it occurs. Additionally, reforms are needed in victim protection and support. Implementing universal childbirth registration would not only assist in enforcing this law but also greatly benefit society by aiding in the planning and enforcement of laws related to children. Ultimately, to address this appalling crime against humanity, prevention of human trafficking, an effective system for detecting, investigating, and prosecuting traffickers, and proper protection of victims are essential.

¹⁶ Ibid, section 11

¹⁷ UNODC, Rights of victims to justice and protection. Available at <https://www.unodc.org/e4j/en/tip-and-som/module-9/key-issues/rights-of-victims-to-justice-and-protection.html>

¹⁸ UNODC, Toolkit, Tool 5.20 Training tools for law enforcement officials and the judiciary. Available at <https://www.unodc.org/unodc/human-trafficking/>

¹⁹ Prevention of Trafficking in Persons Rules 2020, rule 42

²⁰ The Prevention of Trafficking in Persons Act 2018, section 13

²¹ UNODC, Toolkit, Tool 8.17 Restitution and compensation for victims. Available at <https://www.unodc.org/unodc/human-trafficking/>