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# **VIOLATION OF TRAFFICKED VICTIMS' RIGHTS** **UNDER THE FOREIGNERS ACT, 1946**

AUTHORED BY - KOYEL MODAK

## **1. Introduction**

Human trafficking represents one of the gravest violations of human dignity in the contemporary world. It is not merely a criminal act but a systemic denial of fundamental human rights. Victims of trafficking are often subjected to physical, emotional, and sexual abuse, economic exploitation, and the constant fear of criminalization and deportation. In India, this intersection of human trafficking and immigration law presents a particularly troubling scenario. The Foreigners Act, 1946, originally designed to regulate the entry, presence, and departure of foreigners within India- has, over the years, become a legal instrument through which trafficked victims, particularly women and children from neighbouring countries, are criminalized instead of being protected. The act was enacted during British colonial period before independence to check and control the foreigner's entry and departure from India. The foreigners act was originally created to control the migration movement. After the partition in 1947 and after the liberation war of Bangladesh in 1971 irregular migrants became a persistence issue since then this act became an essential piece of legislation in India and Bangladesh to deal with the entry of the foreigners. India and Bangladesh use this act to detain illegal migrants. In India most of the Bangladeshi enters through west Bengal out of which a huge number is of trafficking victims.

Trafficking victims, especially from countries such as Bangladesh, Nepal, and Myanmar, often enter India not of their own volition but as a result of coercion, deception, or force by traffickers. Yet, when discovered, these victims are frequently treated as "illegal migrants" under the Foreigners Act. They face arrest, detention, and deportation, without adequate recognition of their victimhood or access to the protection mechanisms provided under Article 23 of the Constitution of India, which prohibits trafficking in human beings and forced labour. This disjunction between the criminalization of migration and the protection of trafficked persons has created a deeply flawed legal landscape, one that demands urgent reform and a human-rights-centric interpretation of the Foreigners Act.

The purpose of this chapter is to critically examine how the Foreigners Act, 1946 has been applied to trafficked victims, leading to the violation of their constitutional and international human rights. It further explores the legal tension between India's anti-trafficking obligations under instruments such as the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (Palermo Protocol), and the rigid enforcement of immigration law. The chapter concludes with a call for reform - both in the interpretation of existing statutes and the creation of an integrated victim-centred framework.

## **2. Understanding Human Trafficking: Legal and Conceptual Framework**

Human trafficking is a multidimensional crime involving recruitment, transportation, transfer, harbouring, or receipt of persons through coercive or deceptive means for the purpose of exploitation.<sup>1</sup> Under Section 370 of the Indian Penal Code (IPC), the act, means, and purpose of trafficking are all criminalized, with special emphasis on the exploitation of women and children. The Immoral Traffic (Prevention) Act, 1956 (ITPA) is the primary statute addressing sexual exploitation, while other provisions in the IPC and the Protection of Children from Sexual Offences Act, 2012 (POCSO) extend additional protections.

However, in practice, trafficking is often conflated with illegal migration. Victims, especially foreign nationals, are viewed through the lens of immigration control rather than human rights protection. This conflation stems partly from the historical purpose of the Foreigners Act, 1946, which was enacted in the colonial context to regulate and expel foreigners. Section 3 of the Act grants the Central Government wide powers to make orders regarding the movement, residence, and deportation of foreigners.<sup>2</sup> This section states that no foreigner can enter or depart from India or they can do it only with the valid documents at specific time and place and from such route, port or place as prescribed by the law. If any foreigners stay in India after his/her visa has been expired or if there is any contravention of the rules made under thereunder shall be punish under section 14 of the act. This section punishes the foreigner with the punishment of five years and also with fine. When this act is used against the cross-border trafficking victims firstly they are deprived of their human rights and are double victimized. However, there no provision under this act which states how to identify or detect a foreigner or how to detect a trafficking victim and an illegal migrants. Furthermore, whereas one side this act is protecting the India from illegal immigrants and refugees on the other side it is

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<sup>1</sup> Section 370, Indian Penal Code, 1860.

<sup>2</sup> Section 3, Foreigners Act, 1946.

depriving a victim from their rights and making the situation more traumatic for them who has already been victimized by the traffickers. Such sweeping discretion, when applied without sensitivity to the circumstances of trafficked individuals, results in the secondary victimization of persons already subjected to exploitation.

### 3. The Foreigners Act, 1946: Historical Context and Application

The Foreigners Act, 1946, replaced earlier colonial regulations enacted during World War II. Its primary objective was to empower the state to control the presence of foreigners in India for reasons of national security and public order. The Act's structure is administrative, not penal, yet its operation has severe punitive consequences for those deemed to be in violation of its provisions.

Section 3(2)(c) authorizes the government to require foreigners to reside in particular places, while Section 14 provides for imprisonment and fines for contravention of any order made under the Act.<sup>3</sup> The definition of "foreigner" under Section 2(a) is purely negative- any person who is not a citizen of India. This legal simplicity, while effective for immigration control, disregards complex realities such as statelessness, forced migration, and trafficking.

Judicial interpretation has largely upheld the strict application of the Act. In *Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta (1955 SCR 1284)*, the Supreme Court of India affirmed the government's wide discretion to deport foreigners. Similarly, in *Louis De Raedt v. Union of India (1991 3 SCC 554)*, the Court reiterated that foreigners have no fundamental right to remain in India. Such decisions, though grounded in constitutional principles of sovereignty, have been invoked to justify the detention and deportation of trafficking victims who cross borders without valid documentation - even when such crossing results from coercion or deception.

### 4. Intersection of Trafficking and the Foreigners Act: The Legal Paradox

At the heart of this issue lies a paradox: the same individual can simultaneously be both a victim (under anti-trafficking laws) and an offender (under immigration laws). When law enforcement agencies raid brothels or rescue operations are conducted, foreign nationals found without valid documents are booked under the Foreigners Act instead of being identified as victims under

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<sup>3</sup> Section 14, *ibid.*

the ITPA or IPC Section 370.

The National Human Rights Commission (NHRC) has repeatedly observed that this practice violates the fundamental rights guaranteed under Articles 14, 21, and 23 of the Constitution.<sup>4</sup> Treating trafficked individuals as offenders denies them access to legal aid, rehabilitation, and repatriation assistance. Moreover, it perpetuates stigma and distrust toward the justice system. For example, Bangladeshi women trafficked into India for sexual exploitation are often arrested and detained in foreigners' detention centres pending deportation. These women, many of whom were coerced or deceived into crossing borders, are never recognized as victims of trafficking. Instead, they face prolonged confinement, limited legal representation, and repatriation without due rehabilitation. The Supreme Court's directions in *Prajwala v. Union of India* (W.P. (Crl) No. 56/2004) emphasized the need for a victim-centred approach, yet implementation remains weak.

## 5. International Legal Obligations and India's Commitments

India is a signatory to the UN Convention against Transnational Organized Crime (UNTOC) and its Palermo Protocol on trafficking, which mandate state parties to protect victims, prevent trafficking, and prosecute offenders. Article 7 of the Protocol explicitly requires states to consider measures that permit victims to remain in the receiving country, temporarily or permanently, where their safety would be jeopardized upon return.<sup>5</sup>

However, India's domestic implementation remains inconsistent. The Foreigners Act lacks any provision recognizing trafficked victims as a distinct category deserving protection. Unlike the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021, which proposed victim identification and protection mechanisms, the Foreigners Act operates solely within a framework of national security and sovereignty.

This contradiction results in India's partial compliance with international norms. The UN Committee on the Elimination of Discrimination against Women (CEDAW) has, in its periodic reports, expressed concern that trafficked women in India are punished for immigration

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<sup>4</sup> NHRC, *Advisory on Combating Trafficking of Women and Children in India*, 2011.

<sup>5</sup> UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art. 7.

violations rather than treated as victims.<sup>6</sup> The NHRC's 2004 and 2015 reports similarly highlight the lack of coordination between law enforcement and social welfare agencies, resulting in systemic rights violations.

## 6. Constitutional and Judicial Perspective

The Indian Constitution enshrines a robust framework of rights and freedoms applicable to all persons within the territory of India, irrespective of citizenship. The Preamble guarantees justice- social, economic, and political- to all. While the Foreigners Act, 1946 grants the state broad powers to regulate foreigners, the exercise of such power must comply with constitutional mandates of equality and dignity under Articles 14 and 21. The judicial understanding of these provisions has evolved to balance national sovereignty with individual rights.

### i. Article 14: Equality before Law and Equal Protection of Laws

Article 14 guarantees equality before law and equal protection of laws to all persons, citizens and non-citizens alike. The Supreme Court in *Maneka Gandhi v. Union of India*<sup>7</sup> interpreted this equality as inclusive of fairness, non-arbitrariness, and reasonableness in state actions. Applying this to trafficked victims, any detention or deportation under the Foreigners Act must satisfy these constitutional standards. However, in practice, foreign women and children trafficked into India are detained without individualized assessment, violating procedural fairness.

In *National Human Rights Commission v. State of Gujarat*<sup>8</sup>, the Court reaffirmed that the right to equality extends to all human beings, and discrimination on the basis of nationality in humanitarian contexts offends the constitutional conscience. Therefore, while the state has a legitimate interest in border regulation, such power must be exercised in a manner consistent with the dignity of victims of trafficking, who are often not voluntary entrants.

### ii. Article 21: Right to Life and Personal Liberty

Article 21 guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. The Supreme Court has expanded this right

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<sup>6</sup> CEDAW Committee, *Concluding Observations on India's Combined Fourth and Fifth Periodic Reports*, 2014.

<sup>7</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>8</sup> *NHRC v. State of Gujarat*, (2009) 6 SCC 342.

to include the right to live with dignity, health, shelter, and protection from exploitation. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*<sup>9</sup>, the Court held that the right to life includes the right to live with human dignity and the bare necessities of life. Applying this principle, the detention of trafficked women in foreigner detention camps without access to rehabilitation or psychosocial care violates Article 21.

In *People's Union for Civil Liberties v. Union of India*<sup>10</sup>, the Court reiterated that constitutional rights are not limited by nationality. Thus, foreign victims of trafficking enjoy the same rights to humane treatment and due process as Indian nationals. Yet, administrative practice often ignores this, as trafficked victims are placed in custodial settings indistinguishable from prisons, without medical or psychological support.

### iii. Article 23: Prohibition of Trafficking and Forced Labour

Article 23(1) prohibits trafficking in human beings and forced labour. It is not limited by citizenship and hence extends to all persons in India. The Supreme Court in *People's Union for Democratic Rights v. Union of India*<sup>11</sup> recognized the wide scope of this protection. However, the contradiction arises when trafficked foreigners- whose rights under Article 23 are directly violated- are prosecuted under the Foreigners Act instead of being treated as victims entitled to state protection. The constitutional intent of Article 23 is thereby defeated when enforcement focuses on immigration status rather than protection from exploitation.

## 7. Administrative Practices and Case Studies

The interplay of law enforcement and administrative discretion significantly shapes the lived realities of trafficked victims under the Foreigners Act. In practice, the lack of standard operating procedures (SOPs) for victim identification and protection has led to arbitrary and inconsistent treatment across states.

### i. Detention and Deportation Practices

In several border states such as West Bengal, Assam, and Tripura, police routinely invoke the Foreigners Act against Bangladeshi and Rohingya women rescued from brothels. These women are detained in judicial custody or “shelter homes” functioning effectively as detention centres. For instance, the NHRC Report on Trafficking of

<sup>9</sup> *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746.

<sup>10</sup> *People's Union for Civil Liberties v. Union of India*, (1997) 3 SCC 433.

<sup>11</sup> *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473.

Women and Children (2015) documented multiple cases where foreign victims were charged under Section 14 of the Foreigners Act and held for months before consular verification.<sup>12</sup> The absence of a clear distinction between illegal migrants and trafficking victims creates a systemic violation of due process.

The case of *State of West Bengal v. Reema Begum (2017)*<sup>13</sup> illustrates this problem. The victim, trafficked from Bangladesh at the age of sixteen, was booked under the Foreigners Act after being rescued from a brothel. Despite evidence of coercion, the court ordered her deportation without access to rehabilitation or counselling. Such outcomes reflect an enforcement mindset prioritizing border control over human rights.

## ii. Institutional Gaps and Lack of Coordination

Administrative agencies, including the police, border security forces, and shelter home authorities, often operate in silos. The Ministry of Home Affairs' Advisory on Combating Trafficking (2011)<sup>14</sup> recognizes the need for inter-agency coordination and the establishment of Anti-Human Trafficking Units (AHTUs), yet these units seldom intervene in cases involving foreigners. The absence of a standard mechanism for victim identification means that many trafficked persons are misclassified as offenders. Additionally, the Foreigners Regional Registration Offices (FRROs) lack trained personnel to identify trafficked victims during verification or deportation procedures. This institutional incapacity perpetuates wrongful detention and undermines rehabilitation efforts by NGOs and social workers.

## iii. Role of Judiciary and Civil Society

Civil society organizations such as Prajwala, Shakti Vahini, and the Bachpan Bachao Andolan have consistently highlighted the misuse of the Foreigners Act against trafficked persons. In *Prajwala v. Union of India*<sup>15</sup>, the Supreme Court directed states to adopt a victim-centric approach and ensure rehabilitation before repatriation. Despite these directives, lower courts often overlook these guidelines, treating undocumented victims as illegal entrants.

The judiciary, while sympathetic, has lacked a uniform jurisprudence. Some High Courts, such as the Gauhati High Court in *State of Assam v. Nurjahan Begum (2019)*<sup>16</sup>,

<sup>12</sup> NHRC, *Study on Human Trafficking in India*, 2015.

<sup>13</sup> *State of West Bengal v. Reema Begum*, 2017 SCC Online Cal 3445.

<sup>14</sup> Ministry of Home Affairs, *Advisory on Preventing and Combating Human Trafficking in India*, 2011.

<sup>15</sup> *Prajwala v. Union of India*, W.P. (CrI) No. 56/2004 (Supreme Court).

<sup>16</sup> *State of Assam v. Nurjahan Begum*, 2019 SCC Online Gau 1584.

have ordered the release of trafficked victims detained under the Act, holding that humanitarian considerations override immigration violations. However, such cases remain exceptions rather than the rule.

## 8. Reforms and Recommendations

The persistent violation of trafficked victims' rights under the Foreigners Act calls for comprehensive legal and policy reform. A multi-layered approach addressing legislative gaps, administrative practices, and international obligations is essential.

### i. Legislative Reforms

#### a) Amendments to the Foreigners Act, 1946:

The Act should be amended to incorporate a victim protection clause recognizing trafficked persons as a special category exempt from prosecution under Section 14. This amendment could mirror provisions in other jurisdictions that provide temporary residence permits to victims cooperating with law enforcement.

#### b) Integration with Anti-Trafficking Framework:

The Foreigners Act should be harmonized with the Immoral Traffic (Prevention) Act, 1956 and Section 370 IPC. This could include mandatory referral of suspected trafficking victims to designated welfare authorities rather than immediate arrest.

#### c) Rehabilitation and Non-Refoulement Safeguards:

The law must incorporate the principle of non-refoulement, ensuring that victims are not deported to countries where they may face retaliation or re-trafficking. Such safeguards align with India's obligations under the Palermo Protocol and customary international law.<sup>17</sup>

### ii. Administrative and Judicial Reforms

#### a) Standard Operating Procedures (SOPs):

The Ministry of Home Affairs should adopt SOPs mandating that all foreign nationals rescued from exploitative conditions be treated as potential victims until proven otherwise.

#### b) Training of Law Enforcement and FRRO Officials:

Capacity-building programs must emphasize human rights, trauma-informed

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<sup>17</sup> Palermo Protocol, Art. 14 (2).

interviewing, and victim identification.

**c) Judicial Sensitization:**

**d)** Judges must be trained to recognize the interplay between trafficking and immigration law, ensuring that detention and deportation are last resorts.

**iii. International and Bilateral Cooperation**

India should enhance bilateral agreements with neighbouring countries, particularly Bangladesh and Nepal, to facilitate safe and dignified repatriation. The Memorandum of Understanding between India and Bangladesh on Human Trafficking (2015)<sup>18</sup> provides a framework for information sharing and victim assistance but requires better implementation.

**iv. Role of Civil Society and Human Rights Commissions**

Civil society organizations must be formally integrated into the identification, rehabilitation, and reintegration processes. The National Human Rights Commission and National Commission for Women should monitor detention facilities to ensure compliance with human rights standards.

## Conclusion

The continued prosecution of trafficked victims under the Foreigners Act, 1946, represents a profound moral and legal failure. It undermines the constitutional promise of dignity and equality and contradicts India's international commitments to protect victims of trafficking. The challenge lies not only in legislative reform but in changing the institutional mindset—from one of control and suspicion to one of compassion and protection.

As India moves toward a more humane legal order, recognizing trafficked victims as rights holders rather than offenders must be the cornerstone of reform. The Foreigners Act, when reinterpreted through the lens of human rights, can evolve from an instrument of exclusion into one of justice and restoration.

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<sup>18</sup> Memorandum of Understanding between the Government of India and the Government of the People's Republic of Bangladesh on Human Trafficking, 2015.