

# Compendium Resource book for Judicial Officers & Public Prosecutors



**On**  
**COMBATING TRAFFICKING OF WOMEN AND CHILDREN FOR  
COMMERCIAL SEXUAL EXPLOITATION**



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FOR COMMERCIAL SEXUAL EXPLOITATION**

October 2015

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**Winner of "2010 Hero Acting to End Modern- Day Slavery Award  
of US State Dept." June 2010**

**Source:**

1. Judicial Handbook on Combating Trafficking of women and Children for Commercial Sexual Exploitation by UNICEF, NCHRC & MWD&CD
2. SOP for prosecutors to combat human trafficking by UNODC
3. Training manual for prosecutors on confronting Human Trafficking by UNODC & Govt of India.

Supported by :

**Terre des Hommes - Netherlands**

Published by :

**HELP**

2nd Lane, sujatha Nagar, Lawyerpet Extn., Ongole - 520 002.

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## **MESSAGE**

Terre des Hommes Netherlands is a development organization dedicated to children; it is named after a book by the famous French writer and World War II pilot Antoine de Saint Exupéry - author of "The Little Prince". Even before this book was published, he wrote "Terre des Hommes" (Earth of Mankind) in which he called upon 'the people of the earth' to take their responsibilities seriously and to show solidarity. He said: "There is no third world. There is one world for which we are all responsible."

The United Nation's Convention on the Rights of the Child (CRC) is the cornerstone of all our programmes. This Convention represents the recognition by the international community that not only do children deserve to be protected, but that they have a right to be so. These rights have been enshrined in this almost universally accepted treaty and have subsequently been incorporated in national legislation in an overwhelming majority of the world's nations. Terre des Hommes - Netherlands (TdH-NL) has prioritized prevention of Child Abuse in all its operating countries including India.

Terre des Hommes Netherlands had been involved in working with children in India for more than two decades through its NGO partners. Our partners have been working closely with Government departments and institutions for quality service delivery. HELP, one of our preferred NGOs, is involved in combating Human Trafficking for commercial sexual exploitation of children and women in Andhra Pradesh. Terre des Hommes Netherlands is happy to know that a book 'Compendium Resource Book for Judicial Officers & Public Prosecutors' on combating trafficking of Women and Children for Commercial Sexual Exploitation has been prepared by HELP with our support. The Judicial Officers especially the Public Prosecutors play very crucial role in bringing legal empowerment for the victims of trafficking and in turn convicting the traffickers with rigorous punishments in order to curb the crime. To address the gaps in victim/witness protection services and also to improve the rate of conviction of the traffickers, it is important that the key stakeholders striving against Human Trafficking shall empower with full-fledged knowledge and procedural implications of those specific legislations that is in force for dealing with the cases of Human Trafficking for commercial sexual exploitation.

Terre des Hommes Netherlands is happy to be associated in this noble initiative of HELP in preparing the 'Compendium Resource Book for Judicial Officers & Public Prosecutors' for assisting the law practitioners, law enforcement professionals and other related stakeholders to combat the crime. We congratulate HELP for this initiative and are sure that this resource book will be of immense help in achieving better performance in curbing the crime and in bringing notable conviction to the traffickers.

14/11/2015

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# PREAMBLE

The problem of commercial sexual exploitation & trafficking (CSE&T) spread in India like wild fire. While many parts of the AP State became the supply areas the Dist Head quarters and municipal towns became the trafficking destination and the capital of commercial sexual exploitation. Remarkably, the NGOs intervention on the anti trafficking front rose to the occasion developed and refined itself with matching speed and determination. HELP organization played a leading role in this field on all fronts from prevention of trafficking to social reintegration of trafficked victims. As soon as the state concentrated its anti trafficking efforts with rescue operations in Andhra Pradesh the question on how to bring conviction of traffickers became extremely significant. This question had never been answered satisfactorily in the past.

We are proud to state that HELP organization for the first time identified the victim witness protection services as a specialized area of intervention in the anti trafficking work for supporting prosecution for conviction of traffickers. HELP is appointed as a member in AHTU state committee by CID of Andhra Pradesh for prevention of Human Trafficking {*Lr no.3554/WP.A2/2001 Dt. 18.02.2012 issued by The Special Chief Secretary to Government, Dept for Women, Child, Disabled & Senior Citizens(WP) }*}. Further HELP has appointed as a *support NGO by CID of Police, Govt of AP for South Coastal Districts for Speedy Justice Delivery of Anti-Human Trafficking Cases Registered in Guntur, Kirshna & Prakasam Districts and Victim/witness protection support services (order no: C.No.3126/C14/WPC/CID/06 dated. 27.8.09 issued by Office of the Addl. Director General of Police, CID, Govt. of AP)*

Since the inception of AHTUs in the year 2007 there was a remarkable improvement in terms of rescue operations and huge number of victims was rescued. HELP has directly participated in some of these rescue operations and was conducted a study in 2012 on status of reintegrated survivors in Guntur, Prakasam and Krishna districts with the support of AHTUs and the data collected from the year 2007 to 2009. There were a total of 200 cases registered under ITP Act during the said period and 101 survivors have been rescued. It is found that there was no fruitful conviction rate hardly it was in 7 cases only with the facilitation of victim witness support services by HELP with the support of senior officials of the CID (W.P) & Dept of WD&CW, Govt of A.P.

All along our intervention of the past 18 years we came across several difficulties and obstacles. Many of the pioneering initiatives of HELP organization in this field have the potentiality of decisively eroding the very foundation of the organized crime. Obviously, we faced innumerable threats, met with huge difficulties and encountered constant animosity from the agents of CSE&T. There was a pure sense of accomplishment every time we overcame these mandate obstacles. Sadly, we also encountered obstacles and oppositions posed by the very people who occupied crucial positions in public life and in fact had a mandate to facilitate our intervention. Every time we overcame obstacles posed by them the enjoyment of accomplishment wasn't pure.

Trafficking and commercial sexual exploitation of Women and Children is a fundamental violation of their human rights. The social, physical, psychological and moral consequences of commercial sexual exploitation on women and child victims are serious, life-long and even life threatening. It is hoped that, this manual would be the starting point for highlighting to the Judiciary the hidden social dimensions of the exploitation of the unfortunate trafficked women and children when they experience the law from the investigation agencies and judiciary; of the gross violation of their human rights; and of the permanent stigma they are stamped with in society for the future. We are all aware of the fact, which is adequately substantiated by the data brought out in this Manual, that more than 90 percent of the cases registered by the police are under Sec 7 & 8 of the ITPA, Section targeting the trafficked, exploited, abused and enslaved women. Following this, routine judicial acts, such as taking cognizance of police charge sheets, granting bail, accepting pleas of guilt, often become tools in the hands of the traffickers to manipulate the law to enable them to continue their control over and exploitation of the trafficked women.

The primary objective of this Manual is to sensitize judicial officers & public prosecutors to the actual situation of the trafficked victims and to provide him/her with awareness and a perspective so that s/he can proactively safeguard the rights of victimized women and children, through a sensitive interpretation of the law and to focus on procedures for speedier disposal of trafficking cases and taking stringent punitive action against traffickers.

We value the judiciary as a crucial and powerful ally of the Government and all agencies involved in the common objective of combating trafficking of women and children. I am confident that this Manual will further enable members of the Judiciary, especially at the cutting edge, to discern the actual situation of the women and children accused under Sec 7 & 8 of the ITPA, and adopt a sensitive and pro-active approach while using the large measure of discretion available to them under the existing laws, in dispensing justice to the victims of trafficking. In the year 2007 the UNODC & UNICEF have prepared a manual for public prosecutors and Judicial officers. But, later there are several changes in legislations and amendments in Acts have been done. It is known that, there are so many amendments in Cr. PC even in 2012. Hence, we have prepared this compendium by keeping in view of all these changes and amendments for making best use of this book for relevant practitioners and other key stakeholders working on the issue.

**HELP** wish to extend its cordial thanks and acknowledge **Mr. Thanga Perumal – Country Manager – Terre des Hommes - Netherlands** for supporting the very idea of intervention in the Post Rescue scenario and his immense support for preparation of this compendium.

Our cordial gratitude to **Sri S. Umapathi – IPS, Retd. IG – CID (WP)** for his extensive cooperation and support throughout the assignment right from the beginning till finalizing this manual.

We are so grateful to the officials of Dept of Women Development and Child Welfare, Govt of Andhra Pradesh for their valuable support and cooperation for bringing out such an effective Resource Book.

**Rammohan NVS & KN Murthy**

# INTRODUCTION

## 1.1 Background

Human trafficking has a history coterminous with that of society and has existed in various forms in almost all civilizations and cultures. It is a trade that exploits the vulnerability of human beings, especially women and children, in complete violation of their human rights, and makes them objects of financial transactions through the use of force and duress, whether for the purpose of sex, labour, slavery, or servitude. In today's globalised climate of human rights, the world community has taken a unanimous stand condemning this gross human rights violation and has exhorted governments to take effective action against it.

In the 1990s, intense activity in the international scene brought the issue of trafficking into the realm of public debate. International instruments, conventions and the human rights movement brought the issue into greater international focus and exerted very positive pressure on national governments, facilitating commitment to accelerate awareness and the need for proactive interventions. This sustained international momentum acted as a powerful catalyst for advocacy and for demanding greater accountability from governments to take stringent action against the trafficking of women and children that had for long, eluded serious public attention. The decade also witnessed a growing anti - trafficking NGO movement and national and international recognition of their partnership and services.

In India, public debate on the issue of trafficking of women and children for commercial sexual exploitation emerged in the 1990s after the landmark decisions of the Supreme Court in the cases of Vishal Jeet vs. Union of India (1990) and Gaurav Jain vs. Union of India (1997), in which the Supreme Court issued directions to the Union and State Governments to study trafficking in depth and prepare a national plan to address the problem. In 1998, the Government of India (GoI) formulated the National Plan of Action to Combat Trafficking and Sexual Exploitation of Women and Children. This prescribes an exhaustive set of guidelines to Central and State Governments, covering the entire spectrum of prevention, law enforcement, awareness generation and social mobilization, health care, education, child care services, housing, shelter and civic amenities, economic empowerment, legal reform, and rescue and rehabilitation. Today in India, there are seven Public Interest Litigations (PILs) seeking more effective implementation of the Plan by the Central and State Governments.

The 1990s also witnessed a significant shift in the perception of the flesh trade, by differentiating 'prostitution' from 'trafficking', seeing it not early as a moral or law enforcement problem, but as a human rights (including legal and democratic rights) violation linked to gender discrimination and disparity in development. Attendant causal factors that create fertile ground for trafficking, such as poverty, vulnerability of the girl child, lack of access to education and health care, and lack of livelihood options were also acknowledged.

Concern about human trafficking deepens when we consider its sinister dimensions. It is stated to generate a turnover of US\$ 7 billion annually, a figure said to be next only to the income from arms and drug trafficking. A shocking trend reported in India is that the minimum age for trafficked persons has fallen below 10 years

- The Vienna Declaration and Programme of Action, issued by the World Congress on Human Rights (1993) (Para 18); The World Congress against Commercial Sexual Exploitation of Children held at Stockholm (1996); The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000; World Congress against Commercial Sexual Exploitation of Children at Yokohama (2001); The UN Universal Declaration on Human Rights (1948).

## At a Glance the International rough estimates

### Human Trafficking Facts by Global initiative to fight Human Trafficking.

8 September 2011 at 14:11

Human Trafficking: The Facts

#### The headlines facts-

- An estimated 2.5 million people are in forced labor (including sexual exploitation) at any given time.

#### As a result of trafficking of these

- 1.4 million - 56% - are in Asia and the Pacific.
- 250,000 - 10% - are in Latin America and the Caribbean.
- 230,000 - 9.2%- are in the Middle East and Northern Africa.
- 130,000 - 5.2%- are in sub-Saharan countries.
- 270,000 - 10.8%- are in industrialized countries.
- 200,000 -8% - are in countries in Transition.
- 161 countries are reported to be affected by human trafficking by being a source, transit or destination count.
- People are reported to be trafficked from 127 countries to be exploited in 137 countries affecting every continent and every type of economy.

#### The Victim –

- The majority of trafficking victims are between 18 and 24 years of age.
- An estimated 1.2 million children are trafficked each year.
- 95% of victims experienced physical or sexual violence during trafficking (based on data from selected European countries)
- 43% of victims are used for forced commercial sexual exploitation, of whom 98% are women /girls.
- 32% of victims are used for forced economic exploitation, of whom 56% are women and girls.
- Many trafficking victims have at least middle – level education.

#### The Traffickers -

- 52% of those recruiting victims are men, 42% are women and 6% are both men and women.
- In 54% of cases the recruiter was a stranger to the victim, 46% of cases the recruiter was known to victim.
- The majority of suspects involved in the trafficking process are national of the country where the trafficking process occurring.

## The Profit

- Estimated Global annual profit made from the exploitation of all trafficked forced labor are US\$ 31.6 billion of this:
  - US\$ 15.5 billion -49%- is generated in industrialized economies.
  - US\$ 9.7 billion -30.6% - is generated in Asia and the Pacific.
  - US\$ 1.3 billion -4.1% - is generated in Latin America and the Caribbean.

## 1.2. Why Does Trafficking Occur?

There are several factors that lead to trafficking of women and children or cause them to become victims of trafficking. These factors can be broadly classified into two categories: supply factors and demand factors

### Supply Factors

- Abject poverty sometimes forces parents to sell their children to traffickers.
- Harmful cultural practices often make women and children extremely vulnerable. Child marriage is sometimes the route for a child to be trafficked for sexual purposes. The stigma attached to single, widowed, and abandoned women, or second wives through bigamous marriages, causes such women to be abandoned by society. They become easy targets for traffickers.
- Female illiteracy and lack of access to education by girls.
- Male unemployment and loss of family income puts pressure on women to earn and support the family.
- Natural calamities and poor rehabilitation of disaster victims puts pressure on women to earn and support the family.
- Dysfunctional families or families that have difficulty functioning and communicating in emotionally healthy ways; a family that has a negative environment, which contributes little to the personal development and growth of family members
- Desertion by one or the other parent, uncared for or abandoned children.
- Traditional practices give social legitimacy to Trafficking. These include the Devadasi and Jogin traditions where Devadasis are often trafficked and sexually exploited. This is equally applicable to other communities such as the Nats, Kanjars, and Bedias where traditionally girls are made to earn through prostitution.
- Porous borders: Weak law enforcement and inefficient and corrupt policing of the borders ensure that women from neighbouring countries are brought into India and forced into prostitution in different towns.
- Clandestine nature of the crime and weak law enforcement. The crime does not come to light very often because of its clandestine nature. Victims are unable to access justice and even when they attempt to do so, weak law enforcement enables the traffickers to escape.

- Urban opportunities. Many women are either lured by false promises of jobs in urban areas or they voluntarily migrate to urban areas on hearing about the opportunities in cities from their neighbours and friends.

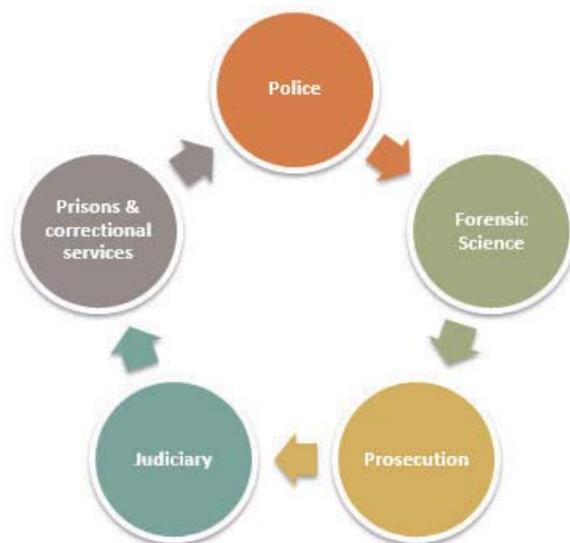
When a woman is pushed into prostitution due to these causes, the issue of consent of the trafficked person is not relevant. Even if a woman knows that she is being trafficked and gives her full consent, it does not absolve the trafficker of guilt. Trafficking is an offence irrespective of the woman's consent (Sections 5 and 6 of the Immoral Traffic (Prevention) Act, 1956).

### **Demand Factors**

- Internet, pornography, over sexuality and sexual experimentation.
- Rising male migration to urban areas and demand for commercial sex.
- Growth of tourism, which sometimes indirectly encourages sex tourism.
- Scare of HIV/AIDS and prevalent myths on sexuality and STDs (Sexually Transmitted Diseases) leads to greater demand for newer and younger girls. The number of trafficked girls thus increases and their age decreases.
- Mental age more than chronological age.

- UN estimates, as quoted in Raymond, Janice G., Guide to the New UN Trafficking Protocol, Coalition against Trafficking in Women (CATW), 2001.
- Trafficking in Women and Children: The US and International Response, 2000, Congressional Research Service Report 98 -649 C
- Ghosh, S.K., The World of Prostitutes, A.P.H. Publishing Corporation, New Delhi, 1996.
- [www.kent.k12.wa.us](http://www.kent.k12.wa.us)

# WINGS OF CRIMINAL JUVENILE SYSTEM



## 1.3 Challenges and Complexities

Combating trafficking in India is especially challenging due to its myriad complexities and variations. The initial challenge lies in changing the mindsets of the key protagonists, such as civil society, enforcement agencies, and the judiciary that sometimes trivialize Trafficking and perceive it as prostitution, “the oldest profession”. The root cause of trafficking in India is poverty that leads to the inherent vulnerability of victims. Poverty, compounded by illiteracy, lack of skills, and few livelihood options, makes women and children easy targets of organised criminal networks that exploit this vulnerability through fraud and deception, promising jobs and a better life. The matter becomes more complex when Trafficking for prostitution is a traditional cultural practice and has the tacit support of family and society, such as in the Devadasi and Jogin traditions still prevalent in some parts of India. Although these traditions have been declared as illegal by the government and comprehensive preventive and rehabilitative programmes have been initiated for them, they still persist in certain patches.

The multi-causal nature of Trafficking, and the size and cultural diversity of India’s population, demand multiple customisations for addressing each form of Trafficking. The clandestine nature of Trafficking and the resultant paucity of data add to the challenge. The erosion of border barriers by globalization, technology, and improved communication has inadvertently facilitated the Trafficking networks.

Further, the ambivalent attitude of society towards trafficking results in a complacent response from the influential sections of society, rural or urban. The tendency to equate Trafficking with prostitution keeps respectable opinion leaders away and prevents them from exerting their power. It is often difficult to get witnesses to prosecute traffickers. Enforcement agencies, if not in complicity with traffickers, sometimes remain indifferent, equating

Trafficking with a 'petty offence' in contrast to crimes such as murder or theft. As the very concept of "Trafficking" and "trafficked victim" is questioned in legal proceedings, traffickers exploit this grey area and the loopholes it throws up to escape punitive action.

The question of Trafficking of women and children has of late been receiving serious attention by the National Human Rights Commission (NHRC), the Department of Women and Child Development (DWCD) and UNICEF. These agencies have undertaken several activities to study the problem in greater depth, so that more effective steps can be taken to prevent the problem and curb it at source, protect the victims more meaningfully, and provide them sustainable rehabilitation.

During the several discussions and consultations among the NHRC, UNICEF, government counterparts, and NGOs, a recurring complaint that came up was the callousness and lack of sympathy of various functionaries who play a statutory role in the prosecution and punishment of the traffickers. With reference to the District and Taluq (block) level judiciary, the main problems expressed were long adjournments, easy bail for the trafficker, harassment and humiliation of the victim, and the ease with which the trafficker, who is undoubtedly more powerful than the victim, exploits the legal system. It was also commonly felt that the implementation of the Immoral Traffic (Prevention) Act, 1956 (ITPA) clearly revealed that its provisions were being interpreted mechanically and not used against the traffickers but against the trafficked victims, which was against the very intent and spirit of the Act. It was felt necessary that the prevailing procedures and interpretations of the ITPA that tilt the balance heavily against the victim should be replaced by a sensitive and humane interpretation of the law and exercise of discretion as provided in several Sections of the Cr.P.C so as to not further victimize the victim.

It was decided that a Manual under the aegis of the NHRC containing guidelines regarding the handling of cases pertaining to trafficking of women and children, keeping in view their state of victimization and vulnerability, might be helpful to sensitise the judiciary. The purpose is being to secure speedier justice for the victims and take more stringent action against traffickers. The Manual will be prepared in partnership with the DWCD, Government of India, and UNICEF Country Office, New Delhi. It was also decided to request the Centre for Women and the Law, National Law School, Bangalore, for assistance in drafting the Manual. To facilitate this task and steer the process, a committee was constituted under the Chairpersonship of Justice Sujata Manohar, Member, NHRC and comprising the Joint Secretary, Ministry of Home Affairs, Member Secretary, National Commission for Women, Deputy Director (Programmes), and representatives of UNIFEM, Lawyers Collective and Joint Women's Programme. Ms. Veena S. Rao, Joint Secretary, DWCD, Ministry of Human Resource Development, Government of India, was designated as the Member-Secretary of the Committee, and has coordinated the entire exercise during the course of the research, drafting, and finalisation of the Manual.

To undertake the research, National Law School, Bangalore, constituted a three-member team consisting of Ms. Sarasu E. Thomas (Coordinator), and Ms. Rajalakshmi and Ms. Sumitra Acharya as Research Associates.

- The Bonded Labour System (Abolition) Act, 1976 and The Child Labour (Prohibition and Regulation) Act, 1986.
- For women – The Minimum Wages Act, 1948. For children – The Child Labour (Prohibition and Regulation) Act, 1986.
- The Immoral Traffic (Prevention) Act, 1956 and The Indian Penal Code (IPC).
- States have their own laws for prevention on beggary.
- The Transplantation of Human Organs Act, 1994.
- IPC, 1860.
- Ibid.

# LEGAL FRAME WORK AND POLICY

## Definition of Trafficking

**Article 3** of the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000, states:

‘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.”

**Article 1 (3)**, SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, signed by India on January 5, 2002, states: “Trafficking means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the of the person subjected to trafficking.”

**Article 1 (4)** of the SAARC Convention defines “Traffickers” as: “Traffickers” means persons, agencies or institutions engaged in any form of trafficking.

**Article 34** of the Convention on the Rights of the Child (CRC) states: “States Parties undertake to protect the Child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any lawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”

Further, **Article 35** of the Convention on the Rights of the Child states:

“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

The Immoral Traffic (Prevention) Act, 1956 (ITPA) does not specifically define “trafficking”. However, the ingredients of Trafficking, such as sexual exploitation and abuse of persons; running of a brothel; living on the earnings of a prostitute; procuring, inducing or taking a person for the sake of prostitution; detaining a person for prostitution, etc., are contained in Sections 3, 4, 5, 6, and 8 of the Act.

## The criminal law amendment Act 2013 has defined trafficking and its constituent offences u/s 370 and 370(A). IPC:

Sec. 370 defines that, whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbors, (d) transfers, or (e) receives, a person or persons, by—using threats, or using force, or any other form of coercion, or by abduction, or by practicing fraud, or deception, or by abuse of power, or by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking.

Sec. 370 (A) defines that, whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

The essential ingredients of Trafficking are covered in the provisions contained in the ITPA and the Indian Penal Code (IPC), viz. Sections 2(f), 3, 4, 5, 6, and 9 of the ITPA, and Sections 366, 366 A, 367, 370, 371, 372, and 373 of the IPC in accordance with the UN Protocol, To Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime or as per the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

Most importantly, Trafficking of persons is an offence, the prohibition of which flows out of the Constitution of India (Article 23), and not merely through legislation (see Table 1).

“Prostitution” is defined under Section 2(f) of the ITPA. It may be noted that the definition includes “sexual exploitation or abuse of person for commercial purposes”. Hence, the basic ingredients of Trafficking, viz. exploitation, abuse, and commercial exploitation, is implicit in the definition of “prostitute”, thereby excluding completely a person who is indulging in prostitution out of one’s free will. In other words, for a person to be defined as a “prostitute”, there must necessarily be the element of “sexual exploitation, or abuse and commercial exploitation.”

- The victim is defined in Cr.PC in Sec 2(wa) ‘victim’ means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir;

As per the ITPA, a “trafficker” would mean a person who is running a brothel under Section 3, and/or a person living off the earnings of prostitution as per Section 4, a procurer/ inducer/transporter as defined under Section 5, and/or a person detaining a woman for prostitution as defined in Section 6.

While prostitution per se is not an offence in India, trafficking is a serious non-bailable offence.

Relevant provisions pertaining to personal liberty, Trafficking in human beings and protection of the dignity of women as contained in the Constitution of India, and in the existing laws in India are follows..

## Constitution of India

**Article 21 provides for protection of life and personal liberty** – “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

**Article 23 (1) prohibits trafficking in human beings and forced labor** – “Traffic in human beings and begar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.”

**Article 51 (e) states that** “It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.”

### **Background, Introduction and Offences under the Immoral Traffic (Prevention) Act, 1956**

The Suppression of Immoral Traffic in Women and Girls' Act, 1956 (SITA) was passed consequent to signing of the Convention of the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950. This legislation was amended in 1986 and was renamed The Immoral Traffic (Prevention) Act, 1956 or ITPA. The purpose (object) of the Act (as stated in its Statement of Objects and Reasons) is to “inhibit or to abolish commercialized vice, namely the traffic in persons for the purposes of commercial sexual exploitation as an organized means of living”. The ITPA is a special law dealing with the commercial sexual abuse and exploitation of persons.

A crucial challenge in the implementation of the ITPA came from the interpretation of Sec. 7 and 8 of the ITPA which led to the arrest of the trafficked women and girls who were themselves 'victims' as 'accused' for soliciting, etc. “A careful scrutiny of the ITPA clearly reveals that the Act was aimed at the suppression of commercialized vice and not at the penalization of the individual prostitute or prostitution itself”. The Action Research conducted by the National Human Rights Commission, during 2002 - 2004 demonstrated that more often trafficked women have been arrested and penalized as 'soliciting persons' to the extent that around 85 to 90 percent of the arrested persons under the ITPA are women and most of them are victims of trafficking. This by itself causes a grave violation of human rights of the victims and causes 're- victimization'.

Various stakeholders (law enforcement authority, prosecution department, CWC/NGOs/ Probation officers and judicial officers) in the criminal justice system must take into consideration the legislative intent behind the framing of the ITPA and ensure that the 'victim' should not be treated as an 'accused'. The NHRC in Aug 2004 have directed the state governments to treat the victim as victim of circumstances beyond her control and mandated police and prosecuting authorities to render assistance. If the Prosecutor comes across a situation wherein he finds that trafficked victims have been charged as accused then he may make an application to the court, bearing all facts in mind, to discharge the victims from being charged as accused persons. The ITPA mandates rehabilitation of victims of commercial sexual exploitation in Protective Homes (Government or NGO run), providing them with care, treatment, maintenance, training and instruction.

**Latest provision on Human Trafficking:** The Government of India wide Criminal Law (Amendment) Act 2013 has provided a new section in IPC i.e. Section 370, 370 (A) IPC exclusively

for Trafficking of persons punishable from sentences of not less than 7 years/10 years, Section 370 A IPC exploitation of a trafficked child with not less than 5 years. These offences are triable by sessions court and are non-bailable.

The Protection of Children from Sexual Offences Act, 2012 which is a child friendly gender-neutral legislation – with child centric in-camera trial procedures.

### **Sec.370 IPC (Gender Neutral) trafficking of person (cognizable and Non Bailable)**

#### **Ingredients :**

- For the purpose of exploitation, investigation officer to find out recruitments, transportation, harboring.
- Transforming or receiving a person or person (male/female) is using threats, force or other forms of coercion or by abduction or by practicing fraud or deception or by abuse of power or by inducement including giving or receiving of payments or benefits in order to get achieve consent of such person.
- Exploitation shall include any act of physical or any form of sexual exploitation, slavery or servitude or the forced removal of organs, selling of human organs, sales of children for exploitation, forced labor, begging and migration.
- The consent of the victim is immaterial in determining the offence of trafficking.

#### **Investigation:**

##### **SDPO is investigation officer**

- I.O should record statement of the VOCSET (Victim of commercial sexual exploitation and Trafficking) or of the person trafficked for other purposes like slavery, organs removal etc.. Use audio-video electronic means of recording verbatim as per 161 (3) Cr.PC.
- Second requisition to court for Sec.164 Cr.PC statement of victims.( Take care to de-stigmatise victims before recording their statement )
- Send victims for medical examination u/s 164(A) Cr.PC (for female), and male victims separately.
- Send accused including “so called customers” for medical exam u/s 53, 53 A Cr.PC.
- Recover all personal belongings, bank balance & other articles of the victim while rescuing him/her from the traffickers.
- Ascertain age of victims from the school/village/hospital records. Ascertain real names of victims as quite often they give false names during rescue. If no documentary proof is available send victims to professor forensic medicine for ossification test. As per Supreme Court judgment lower age bracket to be taken into account.(for ex if Professor of FM state that the victim is between 17 & 19 yrs, then 17 years is taken).
- Collect link evidence from the source (from where he/she is initially trafficked), transit and various destinations (map the different places). Cases can be registered individually and investigated separately.
- Write to SDM of the local area for closure of the place exploitation u/s 18(1) ITP Act.

- Include the recruiters, transporters, buyers, sellers, abusers, muscle man, brothel keepers as accused.
- Obtain Municipal/panchayath ownership papers of the premises.
- Seize all documents like register, mortgage documents etc of the premises.
- Seize all other articles like condoms, porno literature, CDs, Write to banks to freeze their bank accounts of the accused.
- Write letters to Enforcement Directorate to take up 'asset forfeiture' of the exploiter's assets under PMLA Act.
- As trafficking is a 'continuing offence' from the time the victim is trafficked, till he/she is rescued, the age at which he/she was trafficked is applicable in determining the offence. Suppose she was rescued at 21yrs and in her Sec 164 Cr.PC statement she states that she was trafficked for commercial sexual exploitation at 17 years, then section 366A, 370,372,373 IPC r/w Sec 5 and 6 POCSO Act and ITP Act sections are applicable.
- Write to collector or PD, WCD/ Secretary LSA for payment of interim relief to victims.

### **Punishments**

- Shall not be less than 7 years, but up to 10yrs and shall also be liable to fine.
- Trafficking of more than one person, and involves a minor not less than 10years, up to life and fine.
- Trafficking more than one minor, not less than 14 years, up to life and fine.
- Person convicted of offence of trafficking of minor on more than one occasion, which shall mean the remainder of the person's natural life and fine.
- Public servant or police officer is involved; imprisonment for life which shall mean the remainder of that person's natural life and fine.
- Trail by court of sessions/ Write for in-camera trail u/s 327 Cr.PC r/w 37 POCSO Act.

### **Sec.370 (A) IPC exploitation of trafficked child (Cognizable and non bailable)**

#### **Ingredients**

- Knowingly using trafficked minor for sexual exploitation.
- Using trafficked person (above 18 years of age) for sexual exploitation (procedure laid for Sec 370 IPC is applicable)

#### **Investigation**

Procedure as mentioned in Sec 370 IPC.

#### **Punishments & Trail**

- Exploitation of trafficked child; not less than 5yrs up to 7 yrs and fine.
- Exploitation of a trafficked person; not less than 3 yrs but which may extend to 5 yrs and with fine.
- Trail by court of sessions.

## **Investigation of Immoral Trafficking Prevention Act,1956 (In short ITP Act).**

There are certain basic principles in ITP Act/IPC.

### **1. Principle of urgency in rescue/raid**

- All inspectors of police and Asst. Commissioner of Police are appointed as Spl. Police Officers (GO.Ms No 475 Date: 16.8.1991) to be assisted by SIs/ ASIs/ HCs/ PCs u/s 13 (2) ITP Act
- Arrest to be made by SPO or under his direction, or subject to his prior approval by police sub- inspector(PSI) sec 14(1)
- SPO by an order in writing may direct any officer subordinate to him sec 14(2) to conduct raid / rescue.
- SI of police may arrest offenders who are likely to escape/ destroy evidence/ give false identity- but shall report to SPO immediately. Sec 14(3) and make a mention in the CID
- Separate traffickers from the victims immediately. Get them medically examined for sexual exploitation presence of S.T Diseases, HIV etc....

### **2. Principle of search and seizure**

- SPO to record grounds of his belief before search. Sec 15(1)
- Among panch witnesses one should be a woman. Sec 15 (2) some exceptions are envisaged in Act 46 of 78
- Refusal to attend as panch witness entails punishment. sec187 IPC
- All persons to be rescued. Sec 15(4). Rescue is not state – specific
- Production before appropriate Magistrate sec15(5)
- Medical exam for age, STD diseases. Sec 15(5A)
- Legal protection from prosecution for SPOs / panchas
- 2 woman police officers to accompany rescue team sec 15 (6A)
- Only SPOS/ Deputies are empowered to conduct rescue. Delhi admn vs Ramsingh AIR 1962 SC 63.
- Seize all registers, municipal/ panchayat receipt/condoms/porn sites etc.. available from the scene of crime.

### **3. Principle of background (Home) verification**

- Inquiry into home verification. Probation officer may be directed by judicial magistrate under sec 17 (2), NGO sec 17A may direct to verify. Satisfy correctness of information- need for care & custody
- Remember false addresses are given both by victims and accused traffickers.
- Safe custody of the VOCSET (victim of commercial sexual exploitation and trafficking) is important to preclude re-trafficking.
- Magistrate to keep a list of 5 experienced social workers (3 women). Sec 17(5) to advise him.
- Check up capacity or genuineness of parent/ guardian or husband.. To cause investigation. Sec 17A.

#### **4. Principle of organized crime perspective**

- Secret net works.
- Driven by profit
- Source – Transit – Destination
- Cut outs
- Commoditization
- Indoctrination of victims
- Drugs / Alcohol etc.

#### **5. Principle of criminal liability of exploiter/ so called customer**

- Sec 6(2) ITP Act... Where any person is found with a child in a brothel.. Presumed to commit the offence
- Sec 6 (2A)... Commercial sexual exploitation of child / minor. VOCSET ( victim of commercial sexual exploitation and trafficking)
- Sec 7(1)...Who carries on prostitution and person with whom such prostitution is carried on. If with child or minor not less than 7 yrs imprisonment. Sec 7(1A)
- Magistrate to order the SPO for recovery of jewellery, wearing apparel, property belongings of victims to prevent re trafficking.
- Most often the victims go back for recovering their earnings. Magistrates play vital role in prevention

#### **6. Principle of basket of crime concept**

- Wrongful restraint / confinement
- Kidnapping / Abduction  
Causing bodily injury
- Rape / Gang rape
- Threatening
- Drugging
- Selling / Buying
- Different crime partners.

#### **7. Principle of continuing crime concept**

- Starts from Source – Transit – Destination. sec 5(3) (a)
- FIRs can be registered at S/T/D Investigated / Charged separately
- Age determination (If trafficked at 16 yrs, rescued at 21 yrs, affirmed in 164 Cr.P.C, then Sec. 366A, 372, 373, 376 (D) are applicable).
- Application of stringent provisions of law is the key to prosecution and prevention.

#### **8. Principal of Burden of Proof**

- Presumption of adults (above 18 years age) living on the earnings of prostitution and exercising influence over the movement of a prostitutions of a prostitute. If found in the brothel (sec 4(2) C ITP Act.)

**Immoral Trafficking (Prevention) Act 1956 r/w 1986 amendment –Penal Sections.**

Sl.No	Sec.of law	Brief Description	Punishments
1	3	Punishment for keeping a brothel or allowing premises to be used as a brothel. Investigation has to be prove that premises is being used for the purpose of prostitution for gain of another person or for mutual gain of two or more prostitutes.	Up to 2 years and with fine and for the subsequent conviction not less than 5 years and fine
2	4	The rule of prudence is to look for corroboration Punishment for living on the earning of the prostitution court should presume if the person above 18 years age is found in the premises that he is living on the earning of the prostitution.	Not less than 7 years if minor is exploited. In case of major upto 2 years and with fine.
3	5(1) 5(2) 5(3)	<p>Procuring or inducing and taking the person for purpose of prostitution. If the offence is committed against the will of any person. If a child (16 years age) is rescued from the brothel house</p> <p>or</p> <p>if the minor (16-18 years age) rescued from the brothel house</p> <p>Case can be tried both at the place at where she is procured, caused to go, taken from that place i.e., at Source, Transit &amp; destination separate cases can be registered &amp; investigated.</p>	<p>Not less than 3 years and not more than 7 years.</p> <p>Not less than 7 years and may extend to life. Not less than 7 years and not more than 14 years.</p>

Sl.No	Sec.of law	Brief Description	Punishments
4	6(1)  6(2)  6(2)(A)  6(3)  6(4)	<p>Detaining a person in the premises where prostitution is carried on.</p> <p>Liability of the customer/client if a customer found with a child in the brothel it is presumed his committed an offence under this section.</p> <p>If a child (16 years age) or minor (16-18 years age) is found on medical examination found to have been sexually abused, the court shall presume that the child or minor has been detained for purpose of prostitution for commercial purpose (Commercial sexual exploitation).</p> <p>In order to compel the women or a girl in a brothel, if the brothel keeper with holds her jewelery, money and other properties or threatens with legal proceedings, the court shall presume that such person has detained her in the brothel.</p> <p>The victim has right to recover his jewelery, money and property from the brothel keeper and she is protected by law.</p>	On conviction not less than 7 years or may be for life.
5	7  7(1)(A)  7(2)	<p>Prostitution in or in the vicinity if the public place 'liability of the client/customer' if a client is found with a women in any brothel within 200 mts of.</p> <p>(1). Temple/church/Mosque (2). School/College/University (3). Hostel/ Hospital/ nursing homes/Public place</p> <p>If such person is found with child/minor</p> <p>The owner, lessor or land lord of any premises mentioned in sec 7(1) is liable for punishment if prostitution is going on with his knowledge of the owner regarding prostitution being carried on within 200 meters of a place mentioned in Sec 7(i)</p>	<p>Punishable upto 3 months</p> <p>Imprisonment not less than 7 years or may be for life.</p>

## Standed Operating Procedures on Human Trafficking and Exploitation

- 1 On receipt of information that children/women are commercially and sexually exploited in a brothel (Sec 2 (a) ITP Act) the SI of Police or the Incharge SHO should make a General Diary entry and inform of their jurisdictional Inspector of Police or CI of Police.
- 2 As all Inspectors of Police and Asst Commissioners of Police in AP are designated vide GO Rt475 Home (Pol.D) Dept, dtd.16/08/1991 as Special Police Officers u/s 13 (1) of the I.T.P Act 1956/86, SPO alone is competent to set law into motion under I.T.P Act.
- 3 If Inspector of Police/ACP is busy, he should give in writing authorizing the concerned SI/ ASI/HC to proceed and conduct raid on the brothel and rescue all the victims.
- 4 If Inspector of Police/ACP is on some other duty farway, he may authorise orally through cell phone/wireless/SMS the concerned subordinate officer to conduct the rescue/raid. The date and time of such "authorisation" by SPO should be mentioned in the station G.D and only then the subordinate officer gets power to implement ITP Act.
- 5 On return from raid/rescue, the subordinate officer shall mention details of authorisation both in the C.D Part I and submit detailed report to the SPO and remand the accused mentioning the specific authorisation.
- 6 Remember, defence counsel always insists whether the raid party has the authority to raid/rescue which S.P.OP alone can
- 7 Remember K.L.P.D.PP concept (of ITP Act) i.e, Sec 3 Keeping a brothel, Sec 4 Living on the earnings, Sec 5 Procuring persons for commercial sexual exploitation, Sec 6 Detaining persons, Sec 7 Prostitution in public places. While writing panchanama in the presence of a Woman Police officer, or a woman panch witness, care should be taken to segregate with the help of nodal NGO (an important stake-holder in rescue protocol) the victims from traffickers.
- 8 The raid party incharge officer should write the age of victims as appear to them, instead of writing the victims age as narrated by them. Remember often victims give false name and nativity and mention that they are above 18 yrs age to save their brothel keeper from severe punishment.
- 9 The raid/rescue party officer should write the age correctly as the victims age. If below 18 yrs, the important non-bailable, session triable sections like Sec 366 A, 366 B, 372, 373 IPC in addition to Sec 370 IPC are applicable.
- 10 As trafficking is made on exclusive session triable offence u/s 370, 370 A IPC invariably in every rescue Sec 370 IPC has to be added along with Sections 3,4,5,6 & 7 of IPT Act as the case be i.e., Sec 370 IPC is a common factor.
- 11 The raid party officer has to send the accused for medical exam u/s 53 A Cr.PC and later produce the accused with a remand report approved by the S.P.O to remand them to judicial custody.
- 12 The raid party officer has to seize all the documents of the brothel like registers of expenditure, other municipal/panchayat receipts, electricity water bills, mortgage/lease documents etc where the brother keeper/muscle man/procurer/buyers nexus can be established.

- 13 The victims after being produced before the Judicial Magistrate with directions to place them in safe custody either in a Government Home run by Women & Child Welfare Department or Home run by accredited NGOs.
- 14 Before sending them to safe custody, the victims have to be medically examined as per Sec 164 A Cr.PC with specific request to the medical officer to find out (i) Sexual exploitation (ii) HIV reports, (iii) Presence of sexually transmitted diseases, (iv) Medical report on unnatural sexual activity the victims were subjected to and obtain the detailed report in the 'proforma' of Sec 164 A Cr.PC
- 15 The customers/clients of arrested, Sec 6/7 ITP Act has to be invoked as they are liable for penal action. If they are found with a child below 18 yrs, a specific mention should be made both in the panchanama, the CD Part I and remand CD as the burden of proof in such cases is on the accused.
- 16 File requisition for recording Sec 164 Cr.PC statement of victims after due counseling and detraumatization by the Counsellor of Women & Child Welfare Dept. Audio-Video recorded statements of Sec 164 Cr.PC have to be sent to court and if it is revealed that the victims are trafficked at the age of 12 or 13 or 14 or 15 or 16 or 17 or 18 yrs Age, the relevant sections like 366 A, 372, 373 IPC are applicable. In case of majors (above 18 yrs) section 376-D IPC (gang rape is applicable).
- 17 In case of children, in addition to Sec 366 A, 370, 372, 373 IPC, Sections 3 to 7 ITP Act and Section 5 r/w 6 POCSO Act 2012 are applicable.
- 18 File 'alternation memo' in the Court when additional Section of law are invoked. Further investigation, further arrests of traffickers have to be made. For example, of a victim is trafficked from Kadiri of Anantapuramu District, taken to Pune (Budhwarpet brothel) under Farazkhan Pet PS of Pune Commissionerate, later trafficked to Kamatipura of Mumbai under Nagpad PS of Mumbai and later to New Delhi (GB Road) under Kamala Market PS, the I.O has to obtain search warrants u/s 93 Cr.PC r/w 166 Cr.PC from the jurisdictional court, conduct raid at all the above places accompanied by the victim and Nodal NGO and arrest the accused and rescue victims. Do not transport the victims and accused in the same vehicle.
- 19 Two Scene of crime maps have to be prepared
  - (i) At the place from where the victim was rescued,
  - (ii) at different places to which the victim was trafficked before the rescue. For example take India map, point out the origin of the trafficked victim, transit and various destinations where she was exploited. For instance map will be showing Kadiri – Guntakal (Transit)-Pune-Mumbai-New Delhi (Place from where victim was last rescued). The visual India (Cross-Country) trafficking map will provide a larger dimension to the Trial court.
- 20 In the charge sheet "organised crime perspective" should be mentioned i.e, the trafficking is a secret network, driven by profit, involving gross human rights violations.
- 21 Immediately after the rescue, a detailed letter should be written to the jurisdictional Sub Divisional Magistrate (Revenue Divisional Officer) for closure of the brothel u/s18(1) ITP Act.

- 22 Write to Project Director, ICDS, WCD Dept for detraumatization, P.T.S.D (Post Traumatic stress disorder) treatment, treatment for H.I.V, S.T.D diseases and parallel take up skill building of the victims. Also for payment of I.R.F (Interim Relief Fund) of Rs.10,000/- as per GO.MS.No.28/2011
- 23 Inform the court for directing the concerned probation officer of the Juvenile Welfare Department for Home verification of the victims u/s 17 of ITP Act or directions to Nodal NGO u/s 17 A of IPT Act. No victims should be allowed to be given to safe custody to the so called parents, guardian, brothers, sisters who are often the abettors, without the Home Verification Report (H.V.R)
- 24 Verify the address (correctness) furnished by the accused as quite often the traffickers furnish false addresses and incorporate the correct address in the CD and charge sheet with alias names. For example during raid the victim says she is Sujatha later turned out to be Roja, I.O has to mention Sujatha @ Roja in the CD.
- 25 Remember the I.T.P. Act is procedural law and defence counsel will always try to find out loop holes in the investigation. Remember you are mandated to conduct raid or rescue only with explicit authorization of S.P.O (Special Police officer) i.e., CI of Police/Inspector of Police (where ever he/she is the SHO).

**Table 1 : Relevant Provision of ITPA and IPC**

S.No	Law	Main provision
1	<b>Section 2 (1) ITPA, 1956</b>	“Prostitution” means the sexual exploitation or abuse of persons for commercial purposes, and the expression “prostitute” shall be construed accordingly.
2		<p>Punishment for keeping a brothel or allowing premises to be used as a brothel-</p> <ol style="list-style-type: none"> <li>1. Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel, shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the event of a second or subsequent to conviction with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees.</li> <li>2. Any person who –               <ol style="list-style-type: none"> <li>a. being the tenant, lessee, occupier or person in charge of any premises, uses, or knowingly allows any other person to use, such premises or any part thereof as a brothel, or</li> </ol> </li> </ol>

		<p>b. being the owner, lessor or landlord of any premises or the agent of such owner, lesser or landlord, lets the same or any part of thereof with the knowledge that the same or any part thereof is intended to be used as a brothel, or is willfully a party to the use of such premises or any part thereof as a brothel , shall be punishable on first conviction with imprisonment for a term , which may extend to two years, and with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction ,with rigorous imprisonment for a term which may extend to five years and also with a fine .</p> <p>2A. For the purposes of sub-section (2), It shall be presumed , until the contrary is provide that at the premises or any part thereof to be used as a brothel or as the case may be, has knowledge that the premises or any part thereof are being used as a brothel, if -</p> <p>a. a report is published in a news paper having circulation in the area in which such person resides to the effect that the premises or any part thereof have been found to be used for prostitution as result of a search made under this Act; or</p> <p>b. a copy of the list of all things found during the search referred to in clau se (a) is given to such person.</p> <p>3. Notwithstanding anything contained in any other law for the time being in force , on conviction of any person referred to in clause (a) or clause(d) of sub-section (2) of any offence under that sub-Section in respect of any premises or any part thereof, any lease or agreement under which such premises have been leased out or held or occupied at the time of the commission of the offence, shall become void and inoperative with effect from the date of the said conviction</p>
3	<p><b>Section 4 ITPA, 1956</b></p>	<p><b>Punishment for living on the earnings of prostitution</b></p> <p>1. Any person over the age of 18 years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term of which may extend to two years, or with fine which may extend to one thousand rupees, or with both, and where such earning relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.</p> <p>2. Where any person over the age of 18 years is proved-</p> <p>a) To be living with, or to be habitually in the company of, a prostitute; or</p>

		<p>b) To have exercised control , direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding abetting or compelling her prostitution; or</p> <p>c) To be acting as a tout or pimp on behalf of a prostitute, it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of sub-section (1)</p>
4	<p><b>Section 5 ITPA, 1956</b></p>	<p><b>Procuring, inducing or taking person for the sake of prostitution –</b></p> <p>1. Any person who –</p> <p>a) Procures or attempts to procure a person whether with or without his/her consent ,for the purpose of prostitution ; or</p> <p>b) Induces a person to go from any place , with the intent that he/she may for the purpose of prostitution become the inmate of, or frequent, a brothel :or</p> <p>c) Takes or attempts to take a person or causes a person to be taken, from one place to another with a view to his/her carrying on , or being brought up to carry on prostitution; or</p> <p>d) Causes or induces a person to carry on prostitution; shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may be extended to two thousand rupees, and if any offence under the sub- section is committed against the will of any person, the punishment of imprisonment for a term of seven years shall be extended to imprisonment for a term of fourteen years.</p> <p>2 Provided that if the person in respect of whom an offence committed under this sub- section.</p> <p>I. Is a child, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life; and</p> <p>II. Is a minor , the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years not more than fourteen years</p> <p>3 An offence under this Section shall be triable –</p> <p>a) In the place from which a person is procured , induced to go, taken or caused to be taken or from which an attempt to procure or taken such persons made ; or</p>

		<p>b) In the place to which she may have gone as a result of the inducement or to which he/she is taken or caused to be taken or an attempt to take him/her is made.</p>
<p>5</p>	<p><b>Section 6 ITPA, 1956</b></p>	<p><b>Detaining a person in premises where prostitution is carried on –</b></p> <ol style="list-style-type: none"> <li>1. Any person who detains any other person, whether with or without his consent -       <ol style="list-style-type: none"> <li>a) In any brothel, or</li> <li>b) In or upon any premises with intent that such person may have sexual intercourse with a person who is not the spouse of such person, shall be punishable on conviction , with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine: Provided that the court may for adequate and special reasons to be mentioned in the judgment ,impose a sentence imprisonment for a term, which may be less than seven years</li> </ol> </li>   <li>2 where any person is found with a child in a brothel , shall be presumed, unless the country is proved ,that he has committed an offence under sub-section(1)       <ol style="list-style-type: none"> <li>2-A.Where a child or minor found in a brothel, is, on medical examination, detected to have been sexual abused, it shall be presumed unless the contrary is proved, that the child or minor has been detained for purposes of prostitution or, as the case may be, has been sexually exploited for commercial purposes.</li> </ol> </li>   <li>3 A person shall be presumed to detain a person in a brothel or in upon any premises for the purposes of sexual intercourses with a man other than her lawful husband, if such person, with intent to compel or induce her to remain there-       <ol style="list-style-type: none"> <li>a. Withholds from her any jeweler, wearing apparel, money or other property belonging to her, or</li> <li>b. Threatens her with legal proceedings if she takes away with her any jeweler, wearing apparel, money or other property lent or supplied to her by or by the direction of such person.</li> </ol> </li>   <li>4 Notwithstanding any law to the contrary, no suit, prosecution or other legal proceeding shall lie against such woman or girl at the instance of the person by whom she has been detained, for the recovery of any jeweler, wearing apparel or other property alleged to have been lent or supplied to or for such woman or girl or to have been pledged by such woman or girl or for the recovery of any money alleged to be payable by such woman or girl.</li> </ol>

<p><b>6</b></p>	<p><b>Section 9 ITPA, 1956</b></p>	<p><b>1. Seduction of a person in custody -</b></p> <p>Any person who having the custody, charge or care of or in a position of authority over any person causes or aids or abets the seduction for prostitution of that shall be punishable on conviction with imprisonment of either description for a term, which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.</p>
	<p><b>166 A indian Penal Code</b></p>	<p><b>Public servant disobeying direction under law</b></p> <p>Whoever, being a public servant,-</p> <ol style="list-style-type: none"> <li>1 knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other, or</li> <li>2 knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or</li> <li>3 Fails to record any information given to him under sub-section (l) of section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable 2 of 1914. offence punishable under section 326A, section 3268, section 354, section 3548, section 370, section 370A, section 376, section 376A, section 3768, section 376C, section 3760, section 376E or section 509,</li> </ol> <p>shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.</p> <p>Punishment for non treatment of victim.</p> <p>Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, 2 of 1914. shall be punished with imprisonment for a term which may extend to one year or with fine or with both.”,</p>

7	<b>Section 366 Indian Penal Code</b>	<p><b>Kidnapping, abducting or inducing woman to compel her marriage, etc.</b></p> <p>Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years and, shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.</p>
8	<b>Section 366 A Indian Penal Code</b>	<p><b>Procuration of minor girl</b></p> <p>Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.</p>
9	<b>Section 366 B Indian Penal Code</b>	<p><b>Importation of girl from foreign country</b></p> <p>Whoever imports into 2[India] from any country outside India 3[or from the State of Jammu and Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, 4[***] shall be punishable with imprisonment which may extend to ten years and shall also be liable to 10</p>
10	<b>Section 370</b>	<p><b>(New Version)</b></p> <p>Whoever, for the purpose of exploitation, (a) recruits, (b) transports,(c) harbors, (d) transfers, or (e) receives, a person or persons, by—using threats, or using force, or any other form of coercion, or by abduction, or by practicing fraud, or deception, or by abuse of power, or by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking.</p>

		<p><b>(Old Version)</b></p> <p>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.</p>
	<b>Section 370A Indian Penal Code</b>	Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.
11	<b>Section 371 Indian Penal Code</b>	<p><b>Habitual dealing in slaves</b></p> <p>Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with 152 (imprisonment for life), or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.</p>
12	<b>Section 372 Indian Penal Code</b>	<p><b>Selling minor for purpose of prostitution, etc</b></p> <p>Whoever sells, lets to hire, or otherwise disposes of any 164 (person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be) employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine</p>
13	<b>Section 373 Indian Penal Code</b>	<p><b>Buying minor for purpose of prostitution, etc</b></p> <p>Whoever buys, hire, or otherwise obtained possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.</p>
	<b>Section 376A Indian Penal Code</b>	Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

- (2) Whoever,—
- (a) being a police officer, commits rape—
    - (i) within the limits of the police station to which such police officer is appointed; or
    - (ii) in the premises of any station house; or
    - (iii) on a woman in such police officer’s custody or in the custody of a police officer subordinate to such police officer; or
  - (b) being a public servant, commits rape on a woman in such public servant’s custody or in the custody of a public servant subordinate to such public servant; or
  - (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
  - (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women’s or children’s institution, commits rape on any inmate of such jail, remand home, place or institution; or
  - (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
  - (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
  - (g) commits rape during communal or sectarian violence; or
  - (h) commits rape on a woman knowing her to be pregnant; or
  - (i) commits rape on a woman when she is under sixteen years of age;
- Or
- (j) commits rape, on a woman incapable of giving consent; or
  - (k) being in a position of control or dominance over a woman, commits rape on such woman; or
  - (l) commits rape on a woman suffering from mental or physical disability; or
  - (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
  - (n) Commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.

	<p><b>376 A In dian Penal Code</b></p>	<p><b>Intercourse by a man with his wife during separation</b></p> <p>Whoever, commits an offence punishable under sub-section (1) or subsection (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.]</p>
	<p><b>Section 376 D Indian Penal Code</b></p>	<p><b>Intercourse by superintendent of jail, remand home, etc. Whoever, being—</b></p> <p>(a) in a position of authority or in a fiduciary relationship; or</p> <p>(b) a public servant; or</p> <p>(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or</p> <p>(d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.</p>
	<p><b>Section 376 D Indian Penal Code</b></p>	<p>Intercourse by any member of the management or staff of a hospital with any woman in that hospital</p> <p>Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:</p> <p>Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:</p> <p>Provided further that any fine imposed under this section shall be paid to the victim.]</p>

	<p><b>Section 376 E Indian Penal Code</b></p>	<p>Repeat of offences</p> <p>Repeat of these offences under Section 376, 376A and 376 D punishable with life imprisonment or death.</p>
	<p><b>Section 3 r/w4 POCSO Act-2012</b></p>	<p><b>A. PENETRATIVE SEXUAL ASSAULT (PSA) AND PUNISHMENT THEREFOR</b></p> <p>A person is said to commit "penetrative sexual assault" if— (a)</p> <p>3. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or Short title, extent and commencement. 43 of 2005. 45 of 1860. 2 of 1974. 56 of 2000. 21 of 2000. Definitions. Penetrative sexual assault. 5 10 15 20 25 30 35 41 of 1988. (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.</p> <p>4. Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.</p>
	<p><b>Section 5 r/ w 6 POCSO Act 2012</b></p>	<p><b>AGGRAVATED PENETRATIVE SEXUAL ASSAULT AND PUNISHMENT THEREFOR (APSA)</b></p> <p>5.(a) Whoever, being a police officer, commits penetrative sexual assault on a child</p> <p>(i) within the limits of the police station or premises at which he is appointed; or</p> <p>(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or</p> <p>(iii) in the course of his duties or otherwise; or</p> <p>(iv) where he is known as, or identified as, a police officer; or</p> <p>(b) Whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child—</p> <p>(i) within the limits of the area to which the person is deployed; or</p> <p>(ii) in any areas under the command of the forces or armed forces; or</p>

		<p>(iii) in the course of his duties or otherwise; or</p> <p>(iv) where the said person is known or identified as a member of the security or armed forces; or</p> <p>(c) whoever being a public servant commits penetrative sexual assault on a child; or</p> <p>(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or</p> <p>(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or</p> <p>(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; Explanation. —When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or</p> <p>(g) whoever commits gang penetrative sexual assault on a child; or</p> <p>(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or</p> <p>(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or Punishment for penetrative sexual assault. Aggravated penetrative sexual assault. 5 10 15 20 25 30 35 40 (j) whoever commits penetrative sexual assault on a child, which—</p> <p>(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (1) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or</p> <p>(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;</p> <p>(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either</p>
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		<p>temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or</p> <p>(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or</p> <p>l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or</p> <p>(m) whoever commits penetrative sexual assault on a child below twelve years; or</p> <p>(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or</p> <p>(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or</p> <p>(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or</p> <p>(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or</p> <p>(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or (s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence; or</p> <p>(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or</p> <p>(u) Whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.</p> <p>6. Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.</p>
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# TRAFFICKED VICTIMS AND LAW

## Section 4 of ITPA — Living on the Earnings of Prostitution

1. Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both, and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.
2. Where any person over the age of eighteen years is proved –
  - a) to be living with, or to be habitually in the company of, a prostitute; or
  - b) to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding abetting or compelling her prostitution; or
  - c) To be acting as a tout or pimp on behalf of a prostitute, it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of sub-section (1).

The prostitute as defined in Section 2(f) of the ITPA is sometimes wrongly prosecuted under this Section. However, as stated earlier, it should be noted that Section 4(1) of the ITPA applies to a person above 18 years who knowingly lives, wholly or in part, on the earnings of prostitution of any other person. Hence, it is illegal for a prostitute/ trafficked victim to be charged under this Section.

The Act does not punish or make liable for action a woman who carries on prostitution for her own gain as long as she does not violate the prohibition of soliciting or seducing in a public place (Smt. Ram Devi vs. State and Ors 1963 All L.J. 894). This Section is clearly applicable only to a person living on the earnings of prostitution of another person. It is a Section meant to punish the people living off her earnings only.

Legal Provisions Dealing with Procedures for Investigation, Arrest, Search, Removal and Rescue Under the Constitution of India, Immoral Trafficking (Prevention) Act, 1956 and Criminal Procedure Code.

Article 22(2) of the Constitution of India states

“Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of the Magistrate.”

**Table 2: Legal Provisions for Investigation, Arrest, Search, Removal and Rescue**

Sl.No	Law	Main Provision
1	<b>Section 2(i) ITPA, 1956</b>	“special police officer” means a police officer appointed by or on behalf of the State Government to be in charge of police duties within a specified area for the purpose of this Act;
		<b>GENERAL PROVISIONS</b>
2	<b>Section 2(j) ITPA, 1956</b>	“trafficking police officer” means a police officer appointed by the Central Government under subsection (4) of Section 13
3	<b>Section 13 ITPA, 1956</b>	Special police officer and advisory body – (1) There shall be for each area to be specified by the State Government in this behalf a special police officer appointed by or on behalf of that government for dealing with offences under this Act in that area.
4	<b>Section 57 Cr.P.C</b>	Person arrested not to be detained more than twenty-four hours.- No police officer shall detail in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.
		<b>SECTIONS FROM ITPA</b>
5	<b>Section 15 ITPA, 1956</b>	<p>15. Search without warrant: –</p> <ol style="list-style-type: none"> <li>1 Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer or the trafficking police officer as the case may be, has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.</li> <li>2 Before making a search under sub-section (1), the special police officer or the trafficking police officer, as the case may be shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search and may issue an order in writing to them or any of them so to do: Pro-</li> </ol>

		<p>vided that the requirement as to the respectable inhabitants being from the locality in which the place to be searched is situate shall not apply to a woman required to attend and witness the search.</p> <p>3 Any person who, without reasonable cause, refuses or neglects, to attend and witness a search under this Section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of 1860).</p> <p>4 The special police officer or the trafficking police officer, as the case may be, entering any premises under sub-section (1) shall be entitled to remove there from all the persons found therein.</p> <p>5 The special police officer (SPO) or the trafficking police officer, as the case may be, after removing person under sub-section (4) shall forthwith produce her before the appropriate Magistrate.</p> <p>5-A. Any person who is produced before a Magistrate under sub-section (5), shall be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases.</p> <p>Explanation – In this sub-section, “registered medical practitioner” has the same meaning as in the Indian Medical Council Act, 1956 (102 of 1956).</p> <p>6 The special police officer or the trafficking police officer, as the case may be, and other persons taking part in, or attending, and witnessing a search shall not be liable to any civil or criminal proceeding against them in respect of anything lawfully done in connection with, or for the purpose of, the search.</p> <p>6-A. The special police officer or the trafficking police officer, as the case may be, making a search under this Section shall be accompanied by at least two women police officers, and where any woman or girl removed under sub-section (4) is required to be interrogated it shall be done by woman police officer and if no woman police officer is available, the interrogation shall be done only in the presence of a lady member of a recognized welfare institution or organization.</p> <p>Explanation – For the purposes of this sub-section and Section 17-A, “recognized welfare institution or organization” means such institution or organization as may be recognized in this behalf by the State Government.</p> <p>7 The provisions of the Code of Criminal Procedure, 1973 (2 of 1974)</p>
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		<p>shall, so far as may be, apply to any search under this Section as they apply to any search made under the authority of a warrant issued under 94 of the said Code.</p> <p>8 If Inspector of Police (SPO) is busy he may entrust the search to a sub-inspector of police who after conducting search, rescuing victims, arresting traffickers shall send a report to the inspector of police with all the details under acknowledgment. The inspector of police shall in turn take further action as per law.</p>
<b>6</b>	<b>Section 16 ITPA, 1956</b>	<p>Rescue of person</p> <ol style="list-style-type: none"> <li>1. Where a Magistrate has reason to believe from information received from the police or from any other person authorized by State Government in this behalf or otherwise, that any person is living, or is carrying, or is being made to carry on, prostitution in a brothel, he may direct a police officer not below the rank of a sub-inspector to enter such brothel, and to remove there from such person and produce her before him.</li> <li>2. The police officer, after removing the person shall forthwith produce her before the Magistrate issuing the order.</li> </ol>
<b>7</b>	<b>Section 20 ITPA, 1956</b>	<p>Removal of prostitute from any place</p> <ol style="list-style-type: none"> <li>1. A Magistrate on receiving information that any person residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, may record the substance of the information received and issue a notice to such person requiring her to appear before the Magistrate and show cause why she should not be required to remove herself from the place and be prohibited from re-entering it.</li> <li>2. Every notice issued under sub-section (1) shall be accompanied by a copy of the record aforesaid, and the copy shall be served along with the notice on the person against whom the notice is issued.</li> <li>3. The Magistrate shall, after the service of the notice referred to in sub-section (2), proceed to inquire into the truth of the information received, and after giving the person an opportunity of adducing evidence; take such further evidence as he thinks fit and if upon such inquiry it appears to him that such person is a prostitute and that it is necessary in the interest of the general public that such person should be required to remove herself therefrom and be prohibited from re-entering the same, the Magistrate shall, by order in writing communicate to the person in the manner specified therein, require her after a date (to be specified in the order) which shall not be less than seven days</li> </ol>

		<p>from the date of the order, to remove herself from the place to such place whether within or without the local limits of his jurisdiction, by such route or routes and within such time as may be specified in the order and also prohibit her from re-entering the place without the permission in writing of the Magistrate having jurisdiction over such place.</p> <p>4. Whoever –</p> <p>a) fails to comply with an order issued under this Section, within the period specified therein, or whilst an order prohibiting her from re- entering a place without permission is in force, re-enters the place without such permission, or</p> <p>b) b. knowing that any person has, under this Section, been required to remove herself from the place and has not obtained the requisite permission to re-enter it, harbours or conceals such person in the place, shall be punishable with fine, which may extend to two hundred rupees and in the case of a continuing offence with an additional fine, which may extend to twenty rupees for every day after the first during which she or he has persisted in the offence.</p>
<p><b>8</b></p>	<p><b>Section 10 A(b)ITPA, 1956</b></p>	<p>10-A. Detention in a corrective institution – (1) Where –</p> <p>(b) the character, state of health and mental condition of the offender and the other circumstances of the case are such that it is expedient that she should be subject to detention for such term and such instruction and discipline as are conducive to her correction, it shall be lawful for the Court to pass, in lieu of a sentence of imprisonment, an order for detention in a corrective institution for such term, not being less than two years and not being more than five years, as the Court thinks it:</p> <p>Provided that before passing such an order –</p> <p>i. the Court shall give an opportunity to the offender to be heard and shall also consider any representation which the offender may make to the Court as to the suitability of the case for treatment in such an institution, as also the report of the Probation Officer appointed under the Probation of Offender Act, 1958; and</p> <p>ii. The Court shall record that it is satisfied that the character, state of health and mental condition of the offender and the other circumstances of the case are such that the offender is likely to benefit by such instruction and discipline as aforesaid.</p>

9	<b>Section 17 ITPA, 1956</b>	<p>When the special police officer removing a person under sub-section (4) of Section 15 or a police officer rescuing a person under sub-section (1) of Section 16, is for any reason unable to produce her before the appropriate Magistrate as required by sub-section (5) of Section 15, or before the Magistrate issuing the order under sub-section (2) of Section 16, he shall forthwith produce her before the nearest Magistrate of any class, who shall pass such orders as he deems proper for her safe custody until she is produced before the appropriate Magistrate, or, as the case may be, the Magistrate issuing the order:</p> <p>Provided that no person shall be,</p> <ol style="list-style-type: none"> <li>i. detained in custody under this sub-section for a period exceeding ten days from the date of the order under this sub-section; or</li> <li>ii. Restored to or placed in the custody of a person who may exercise a harmful influence over her.</li> </ol>
10	<b>Section 17 ITPA, 1956</b>	<p><b>Home verification by NGO or recognized welfare institution:</b></p> <p>Conditions to be observed before placing persons rescued under Section 16 to parents or guardians – Notwithstanding anything contained in sub-section (2) of Section 17, the Magistrate making an inquiry under Section 17, may, before passing an order for handing over any person rescued under Section 16 to the parents, guardian or husband, satisfy himself about the capacity or genuineness of the parents, guardian or husband to keep such person by causing an investigation to be made by a recognized welfare institution or organization.</p>
11	<b>Section 17(2) ITPA, 1956</b>	<p><b>Home verification by probation officers of Juvenile Welfare Dept - the report to be submitted within 3 weeks to the court:</b></p> <p>(2) when the person is produced before the appropriate Magistrate under sub-section (5) of Section 15 or the Magistrate under sub-section (2) of Section 16, he shall, after giving her an opportunity of being heard, cause an inquiry to be made as to the correctness of the information received under sub-section (1) of Section 16, the age, character and antecedents of the person and the suitability of her parents, guardian or husband for taking charge of her and the nature of the influence which the conditions in her home are likely to have on her if she is sent home, and, for this purpose, he may direct a Probation Officer appointed under the Probation of Offenders Act, 1958, to inquire into the above circumstances and into the personality of the person and the prospects of her rehabilitation.</p>

12	<b>Section 17(4) ITPA, 1956</b>	<p><b>Magistrates duty in sending victim to the institutional care :</b></p> <p>(4) Where the Magistrate is satisfied, after making an inquiry as required under sub-section (2) –</p> <p>a. that the information received is correct; and</p> <p>b. that she is in need of care and protection, he may, subject to the provisions of sub-section (5), make an order that such person be detained for such period, being not less than one year and not more than three, as may be specified in the order, in a protective home, or in such other custody, as he shall, for reasons to be recorded in writing, consider suitable:</p> <p>Provided that such custody shall not be that of a person or body of persons of a religious persuasion different from that of the person, and that those entrusted with the custody of the person, including the persons in charge of a protective home; may be required to enter into a bond which may, where necessary and feasible contained undertaking based on directions relating to the proper care, guardianship, education, training and medical and psychiatric treatment of the person as well as supervision by a person appointed by the Court, which will be in force for a period not exceeding three years.</p> <p>As many husbands, fathers, mothers, brothers, sisters or directly or indirectly involve in trafficking of the victim whose care and custody is in question, the magistrate is required to exhibit principle of prudence in handling over the victim for safe custody. The prevention of re-trafficking is the object of this section.</p>
13	<b>Section 17(5) ITPA, 1956</b>	<p>In discharging his functions under sub-section (2), a Magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women, to assist him; and may, for this purpose, keep a list of experienced social welfare workers, particularly women social welfare workers, in the field of suppression of immoral traffic in persons.</p>
14	<b>Section 19 ITPA, 1956</b>	<p>Application for being kept in a protective home or provided care and protection by Court – (1) A person who is carrying on, or is being made to carry on prostitution, may make an application, to the Magistrate within the local limits of whose jurisdiction she is carrying on, or is being made to carry on prostitution, for an order that she may be</p> <p>a. kept in a protective home, or</p> <p>b. provided care and protection by the Court in the manner specified in sub- section (3).</p>

		<b>SECTIONS OF Cr. P.C</b>
<b>15</b>	<b>Section 239 Cr.P.C</b>	When accused shall be discharged – If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.
<b>16</b>	<b>Section 240 Cr.P.C</b>	<b>Framing of charge –</b> 1. If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused. 2. The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.
<b>17</b>	<b>Section 251 Cr.P.C</b>	Legal Aid to the Accused at State Expenses in Certain Cases – Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defense at the expense of the State.
<b>18</b>	<b>Section 304 (1) Cr.P.C</b>	Legal Aid to the Accused at State Expenses in Certain Cases – Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
<b>19</b>	<b>Section 327 (1) Cr.P.C</b>	<b>Court to be opened –</b> 1. The place in which any Criminal Court is held for the purpose of inquiring into, or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them :  Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court. 2. Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section

		<p>376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 860) shall be conducted in-camera:</p> <p>Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in the room or building used by Court.</p> <p>3. Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court.</p>
20	<b>Section 465 Cr.P.C</b>	<p>Finding or sentence when reversible by reason of error, omission or irregularity –</p> <p>1 Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent Jurisdiction shall be reversed or altered by a Court of appeal, confirmation of revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.</p> <p>2 In determining whether any error, omission or irregularity in any proceeding under this Code, or any error or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.</p>
21	<b>Section 241 Cr.P.C</b>	<p>Conviction on plea of guilty – If the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon. (Warrant Case)</p>
22	<b>Section 252 Cr.P.C</b>	<p>Conviction on plea of guilty – If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him thereon (Summons Case)</p>
		<b>Evidence Act</b>
		Evidence of character or previous sexual experience is not relevant in certain cases

23	<b>Section 53 A</b>	.. In a prosecution for an offence under section 376, 376A, 376B, 376C or 376D or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.
24	<b>Section 114 A</b>	Presumption as to absence of consent in certain prosecutions for rape.— In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.
25	<b>Section 151</b>	Forbidding Indecent and scandalous questions of the defense by the trial judge The Court may forbid any questions or inquiries' which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed. '
26	<b>Section 152</b>	The trial judge shall forbid questions intended to insult or annoy the witness The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Government of INDIA wanted stern action against traffickers and hence the new amendments. Trafficking in Persons: Separate provisions for Sec 370 & 370 A IPC are incorporated

### **Investigation: Victim—friendly Cr. PC / Evidence Act amendments:**

1. Recording of audio – video electronic statement of the victim witness u/s 161 (3) Cr. PC.
2. Audio, Video recording of statement / confession victim/witnesses and 2012 ,POCSO Act ,under IPC u/s child Marriage )prohibition ( Act, u/s 164 Cr. PC) .Medical examination of the victim of rape u/s 164 A Cr. PC read with Sec. 27 POCSO Act .2012 Compulsory medical examination of the accused u/s 53 A. Cr.Pc. Test Identification Parade(P.I.T) of the accused (in case accused is not known ) u/s 54 A Cr. PC read with rules 34 of Criminal rules of practice and circular orders of High Court of AP. If witnesses are threatened by the accused, or others a 'trial pmoc'to be filed in the court u/s 195 A Cr. PC to punish the person who threatened the witness u/s 195 A. IPC.
  - In rapes cases after registering FIR u/s 154 Cr.PC, the I.O concerned should record the Sec 161 Cr.PC statement through audio-video electronic means in the presence of the women Police officers, women officer. It is mandatory to get Sec 164 Cr.PC statement of victim recorded by by the court within a few days after the F.I.R.
  - Investigation of rape of child to e completed within 3 months from the date of FIR u/s 173(1.A) Cr.PC
  - Attaching the medical examination report of the women is mandatory (Charge sheet) u/s 173 (2h) Cr.PC.
  - The provision of 'plea bargaining' u/s 265 A to L Cr PC is not applicable in the case crime against women and children.
  - A person who is already accused and lodged in a different prison can be secured to face trail u/s 267 Cr.PC.
  - Evidence of witness can be recorded by 'audio-video electronic means' in the presence of the advocate of the person accused of the offence u/s 275 Cr.PC.
  - Where the evidence of women below the age of 18 years (rape victim) is to be recorded, the trial court should take measures that such women are not confronted by the accused, while at the same time ensuring the right of cross examination of the accused u/s 273 of IPC.
  - In case of invoking provisions of POCSO Act 2012, the child has a right to take assistance of legal practitioner of his/her choice u/s 40 of POCSO Act. In addition to the Special Public Prosecutor.
  - In camera trail has to be conducted in the trail of rape case u/s 327 Cr.PC and all such u/ s 37 of POCSO Act, 2012.
  - The trial of rape case should be completed within 2 months from the date of filing charge sheet as per section 309 (1) Cr. PC.
  - Speedy trial provisions are incorporated u/s 309 (2) and the magistrate is bound to examine the witness and shall not grant adjournments .
  - Victim has a right to prefer appeal against any conviction etc u/s 372 Cr. PC earlier 'the state' police was preferring appeal
  - The victim's evidence to be recorded by the trial court in the same language u/s 277 Cr. PC to be deposed by him/her.

## **Procedural laws :**

TO ENSURE PROPER CONVICTION OF TRAFFICKER AND EXPLOITERS AN UNDERSTANDING OF PROCEDURAL LAWS (Criminal Procedure Code i.e. Cr. PC, the Indian Evidence Act, etc.) is of paramount importance. Preventive sections of the Cr. PC are also very necessary.

## **Safeguards to be Kept in Mind by the Magistrate during Investigation and Trial**

- i Proper application of mind — while considering the charge-sheet, the Magistrate should apply his mind and seriously look into the aspect of whether or not the police have investigated into the angle of involvement of any trafficker, pimp, or brothel owner. If the Magistrate comes to a conclusion that the involvement of the trafficker has not been investigated, s/he may direct the police to investigate further
- ii It was seen during the study that in some States, a common misconception seems to be that any woman who is known to be a prostitute/trafficked victim can be arrested under Section 7 or 8 of the ITPA at any time. This is against the law as offences under Sections 7 and 8 of the ITPA must take place in a public place and unless mens rea is established in investigation, the Magistrate has full powers to reject the charge-sheet. During discussions with the trafficked victims in Protective Homes and with NGO representatives, it was revealed that very often, the requirement of proving that soliciting had taken place in public is dispensed with, and the woman is forced or intimidated into pleading guilty either at the behest of the trafficker or the police.
- iii It was also found that women are booked under Section 8 of the ITPA only because of their past record. In some cases, even the FIRs were on cyclostyled forms. This should lead to the reasonable conclusion that proper investigation has not been conducted and may justify discharge of the accused. Slight diligence on the part of the Magistrate in the initial stage may avoid unnecessary humiliation and harassment to the accused. Magistrates should take serious note of such cases and, if necessary, in extreme cases take action against the officer for lodging a false complaint under Section 211 of the IPC.
- iv The woman's plea of guilt should be voluntary. Before accepting a woman's plea of guilt under Section 8 of the ITPA, the Magistrate should ensure that it is voluntary and not induced, forced or coerced. It may be noted that the provisions of the ITPA that are directed against the trafficker (Sections 3, 4, 5, 6 and 8) and Sections 241/ 252 Cr.P.C empower a Magistrate to use his discretion before accepting the guilty plea of an accused woman under Section 8 of the ITPA, to satisfy himself beyond doubt that the act of pleading guilty is not under duress. The Magistrate may question the accused prostitute/trafficked woman separately to ascertain whether she is pleading guilty under the directions of the trafficker, and who is paying the fine for her. If the Magistrate is satisfied that the prostitute/trafficked woman is pleading guilty out of fear and servitude to the trafficker, and the trafficker or his agent will be paying the fine for the accused, the Magistrate has the discretion under Sections 241 and 252 Cr.P.C. to reject the plea of guilt of the accused woman, and pass orders for her intermediate custody to a protective home.
- v The woman is entitled to legal aid. – Every woman produced before the Magistrate under the ITPA, under Section 7 or 8, should be made aware that she is entitled to legal aid as provided under Section 304 of the Cr.P.C.

- vi The same lawyer should not represent both trafficker and trafficked woman . In order to prevent a travesty of justice, the same lawyer must not represent both the trafficker and the victim [Prerna vs. State of Maharashtra 2003(2) MHLJ 105].
- vii Proceedings should be held in-camera. Section 327(1) of the Cr.P.C. gives the judge the discretion to hold proceedings in-camera. During the State consultations, it was strongly felt that while conducting the trial of the accused woman, the judge should have in camera proceedings and create a supportive physical and psychological atmosphere, using sensitive language. The Magistrates should be sensitive to the fact that the prostituted or trafficked victim is completely under the power of the brothel owner or trafficker even while she is pleading guilty or not guilty. Hence, her evidence should be taken in-camera.
- viii Offensive language in a charge-sheet. It was found during the study of FIRs and charge sheets that extremely derogatory, offensive, and abusive language is often used against the accused woman while describing the act of soliciting or seducing. This violates the basic human right of dignity enshrined in our Constitution
- ix NGO participation should be encouraged. As per Section 17(5) of the ITPA, the assistance of NGOs may be used by the Magistrate for the discharge of his duties under Section 17(2) ITPA for the purpose of intermediate custody of persons removed under Section 15 or are rescued under Section 16 of the ITPA.
- x Woman’s dignity should be maintained. During discussions with the trafficked victims in the State Homes and NGOs, it was expressed that the Magistrate should play a role in treating the woman with dignity and maintain a decent Courtroom atmosphere. S/he should not permit any person to humiliate or laugh at or tease the women in open Court, especially when the text of offence, which often has explicit sexual vocabulary, is read out to them. The woman’s fundamental right to dignity enshrined under Article 21 of the Constitution of India should always be protected. [Madhukar Narayan Mardikar vs. State of Maharashtra and Others, 1990
- xiii SOL Case No. 056); Vishaka vs. State of Rajasthan, 1997 SOL Case No. 177].
- xi Sensitivity in the imposition of fine. During discussions with the trafficked victims in the State Homes and NGOs, it was expressed that if the Magistrate convicts the woman and in her/his discretion decides to impose a fine, s/he should be sensitive about the quantum of fine imposed. If the fine levied is high, the woman may be forced into greater exploitation in order to repay the debt of the fine amount to the trafficker, who will bear it on her account. This research has shown fines as low as Rs. 25 being imposed by Magistrates thereby indicating their awareness and sensitivity to the exploitation of the woman.
- xii If a trial is ordered, the period of detention should be specified. One of the facts brought to light by the Magistrates was that they had no information regarding the Protection and Custodial Homes in the States, to which accused woman could be remanded. The State Departments of Women and Child Development and District Magistrates should regularly provide a list of such institutions to the Registrar of the High Courts, with a request to inform the Chief Judicial Magistrate Courts and District Courts of the same, so that the information is readily available with the Magistrates while hearing cases.

## Scrutiny of Charge-sheet by Magistrate

- a Has the police officer applied his mind while preparing the charge-sheetfi
- b If the charge sheet is under ITP Act has the special police officer filed it.fi
- c Has the special police officer filed the audio-video electronic recording of 164 Cr.PC statement of the victim
- d Has the SPO filed the material object connecting the traffickers to the crimefi
- e If the charge sheet is filed u/s 366 a, 372, 373, 376 d IPC which are traible by sessions court the magistrate shall transmit the charge sheet to the concerned court for PRC number.
- f If the charge sheet is filed under aggravated sexual assault U/s 5 red with 6 of POCSO Act, 2012 the charge sheet will be transmitted to the designated session's court.
- g. Is it a cyclostyled charge-sheetfi
- h Is the evidence convincingfi
- i If the accused woman is charged under Section 8, are the evidentiary requirements met that she was soliciting in public and mens rea establishedfi
- j Has the police officer applied the correct provision of lawfi
- k Is the name of the person who is running the brothel under Section 3 of the ITPA, or the person living off the earnings of prostitution as per Section 4 of the ITPA, or the procurer/ inducer or others as defined under Section 5 of the ITPA, or the person detaining a woman for prostitution as defined in Section 6 of the ITPA also included in the charge- sheet. If not, the police may be questioned as to the reasons why they have not been included in the charge-sheet. If the reasons furnished by the police are not satisfactory then the Magistrate may return the charge-sheet to comply with his observations and direct the police to do further investigation.

## Legal Provisions for Investigation and Arrest

Section 14—Offences to be cognizable—

“Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of that Code: Provided that, notwithstanding anything contained in that Code –

- a. arrest without warrant may be made only by the special police officer or under his direction or guidance, or subject to his prior approval;
- b. when the special police officer requires any officer subordinate to him to arrest without warrant otherwise than in his presence any person for an offence under this Act, he shall give that subordinate officer an order in writing, specifying the person to be arrested and the offence for which the arrest is being made; and the latter officer before arresting the person shall inform him of the substance of the order and, on being required by such person, show him the order;
- c. any police officer not below the rank of sub-inspector specially authorized by the special police officer may, if he has reason to believe that on account of delay involved in obtaining the order of the special police officer, any valuable evidence relating to any offence under this Act is likely to be destroyed or concealed, or the person who has committed or is suspected to have committed the offence is likely to escape, or if the name and address

of such a person is unknown or there is reason to suspect that a false name or address has been given, arrest the person concerned without such order, but in such a case he shall report, as soon as may be, to the special police officer the arrest and the circumstances in which the arrest was made.”

Power is given to the Special Police Officer under Section 14 of the ITPA to arrest without a warrant once he gets the information about the prostitution being carried on in a public place. A general diary entry should be made by the concerned police sub-inspector.

- i. Special Officers to deal with cases. Only Special Police Officers or trafficking police officers as defined under Sections 2(i) and (j) of the ITPA and appointed under Section 13 of the ITPA are empowered to deal with cases and offences under this Act (Delhi Administration vs. Ram Singh AIR 1962 SC 63). During the State consultations, the participants said that care should be taken to avoid arbitrary arrests by ascertaining that the woman was committing an offence when she was arrested. Every state government in India have designated an inspector rank officer as special police officer u/s 13 of ITP Act.
- ii. Arrest by police. In practice, the trafficked women may be arrested by the police either by conducting a raid on brothels or other places suspected of prostitution or by arresting them from streets, markets, bus stops and such other public places.
- iii. Cognizable offences. Offences committed under this Act have been made cognizable within the meaning of the Cr.P.C. and a special police officer or trafficking police officer or officers acting under his direction or guidance or with his prior approval accordingly have the power to arrest without a warrant. In certain circumstances, officers subordinate to a special police officer or trafficking police officer also have the power to arrest without a warrant.

### **Section 7(1A) of ITPA – Stringent Punishment to Child Traffickers**

“Section 7(1A) – Where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with imprisonment of either description for a term which not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine.”

- i. Interview of trafficked woman or girl: Any woman or girl who is removed from a searched premises under the provisions of this Section may be interviewed only by a woman police officer or in the presence of a lady member of a welfare institution or organisation recognized in this behalf by the State Government [Section 15(6A)].
- ii. Irregularity or defect in investigation would not vitiate the trial, unless a failure of justice has resulted thereby:
  - Although the language of Section 15 is mandatory in nature, non-observance or noncompliance with the directions contained in this provision would not vitiate the entire legal proceedings and trial (State of Uttar Pradesh vs. Bhagwant Kishore Joshi, AIR 1964 SC 221).
  - A defect or illegality in the investigation, however serious, has no direct bearing on the competence or the procedure relating to cognisance or trial of an offence, which would remain valid pursuant to Section 465 (old 537) of the Cr.P.C., unless the

irregularity or the illegality in the investigation or trial can be shown to have brought about a failure of justice (H.N. Rishbud and Inder Singh vs. State of Delhi, AIR 1955 SC 196).

- Thus, although a search, which is conducted under the Act, must be in compliance with Section 15 of the ITPA, a trial would not be rendered illegal merely on the ground that such search was not conducted in strict accordance with the provisions of this Section. Similarly, a conviction cannot be set aside on the ground of mere irregularity or illegality in the process of investigation, although the Court should be very careful and circumspect in weighing the evidence in such cases (State of Uttar Pradesh vs. Bhagwant Kishore Joshi, AIR 1964 SC 221; Bai Radha vs. State of Gujarat 1970 SCJ 929).
- iii. Rescue under the directions of a Magistrate [Section 16(1) of the ITPA Act]. “Where a Magistrate has reason to believe from information received from the police or from any other person authorised by the State Government in this behalf or otherwise, that any person is living, or is carrying, or is being made to carry on, prostitution in a brothel, he may direct a police officer not below the rank of a sub-inspector to enter such brothel, and to remove therefrom such person and produce her before him.”

Interviews with trafficked victims in the Homes and NGOs revealed that in practice, women who are rescued are not allowed to even take their children or their valuables. Nor is provision made for the care of the children or to ascertain that what little she has by way of money or valuables such as jewellery to be protected. There have been instances when a woman returns from Court or from the custodial home to find her child missing without a trace, and often what little she owned almost always disappears before she gets back.

It was found that in some States such as Delhi, Goa and Andhra Pradesh, Magistrates have used the assistance of reputed NGOs to go along with the police for search under Section 16 of the ITPA. Interstate rescue protocols have been circulated to all the state governments by MHA – UNODC S 16 project of 2007 – 08. This would assist the woman in taking care of her children and safeguarding her property as well as providing her emotional support. This would also encourage trafficked women to testify against the traffickers. It is strongly felt that such rescued women should not be accused of any offences under the ITPA and should be treated as victims of trafficking.

### **Application for Being Kept in a Protective Home for Providing Care and Protection by Court**

“Section 19— (1) A person who is carrying on, or is being made to carry on prostitution, may make an application, to the Magistrate within the local limits of whose jurisdiction she is carrying on, or is being made to carry on prostitution, for an order that she may be— a. kept in a protective home, or b. provided care and protection by the Court in the manner specified in sub-section (3).” Section 19 of the ITPA lays down provisions for a victim to approach the Magistrate for being kept in a Protective Home or for providing care and protection by the Court.

The Magistrate after hearing the applicant and making necessary inquiries shall make an order that the applicant be kept [Section 19(3)]:

- i. in a protective home
- ii. in a corrective institution
- iii. under the supervision of a person appointed by the Magistrate for such a period as may be specified in the order.

**Eviction Order (Section 18 of ITPA) and Removal of Prostitute/trafficked Victim from Any Place (Section 20 of ITPA)**

**Section 18(1) SDM may order for closure of Brothel immediately after a case is reported and as per Sec. 18(2) Court may close after due trail.**

Section 18--“(1) A Magistrate may, on receipt of information from the police or otherwise, that any house, room, place or any portion thereof within a distance of two hundred meters of any public place referred to in sub-section (1) of Section 7 is being run or used as a brothel by any person, or is being used by prostitutes for carrying on their trade, issue notice on the owner, lesser or landlord or such house, room, place or portion or the agent of the owner, lesser or landlord or on the tenant, lessee, occupier of, or any other person in charge of such house, room, place, or portion, to show cause within seven days of the receipt of the notice why the same should not be attached for improper use thereof, and if, after hearing the person concerned, the Magistrate is satisfied that the house, room, place or portion is being used as a brothel or for carrying on prostitution, then the Magistrate may pass orders –

- a. directing eviction of the occupier within seven days of the passing of the order from the house, room, place, or portion;
- b. directing that before letting it out during the period of one year or in a case where a child or minor has been found in such house, room, place or portion during a search under Section 15, during the period of three years, immediately after the passing of the order, the owner, lessor or landlord or the agent of the owner, lessor or landlord shall obtain the previous approval of the Magistrate; Provided that, if the Magistrate finds that t he owner, lessor or landlord as well as the agent of the owner, lessor or landlord, was innocent of the improper user of the house, room, place, or portion, he may cause the same to be restored to the owner, lessor or landlord or the agent of the owner, lessor landlord, with a direction that the house, room, place or portion shall not be leased out, or otherwise given possession of, to or for the benefit of the person who was allowing the improper use therein.”

**Section 20 – “(1) A Magistrate on receiving information that any person residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, may record the substance of the information received and issue a notice to such person requiring her to appear before the Magistrate and show cause why she should not be required to remove herself from the place and be prohibited form re-entering it.”**

Section 18 and Section 20 of the ITPA Act empower the Magistrate to (a) close a brothel and evict the offenders from the premise, and (b) remove a prostitute from any place. At the State consultations, the participants expressed that while applying provisions under Sections 18 and 20 of the ITPA, the Magistrate should be sensitive to the fact that eviction of prostitutes from certain areas may not necessarily stop trafficking but might end up making women more vulnerable to re-trafficking. One such example is the eviction of prostitutes from Mehboobki-Mehandi in Secunderabad, Andhra Pradesh, which resulted in number of suicides of women in prostitution.

The Magistrate under Section 20 of the Immoral Traffic (Prevention) Act, 1956 (ITPA) may upon receiving information that there is a prostitute residing in his/her jurisdiction issue a show cause notice as to why he/she should not be required to remove herself/himself from the place and be prohibited from re-entering it. The constitutionality of this Section was challenged before several Courts across the country as it violates Art. 19 (1) (d) and (e) of the Constitution of India. It has been strongly observed by the High Courts that Section 20 violates the fundamental right to move freely throughout the territory of India and of right to reside and settle in any part of the territory of India. (Smt. Begum vs. The State AIR 1963 Bom 17; State of UP vs. Kaushaliya AIR 1964 SC 416; Shama Bai vs. State of UP AIR 1959 All 57).

## **Checklist for magistrates while handling ITPA cases, particularly under sections 7 and 8**

A quick look through this checklist will help a Magistrate take careful note of all the critical issues while dealing with cases relating to framing charges against a prostitute/trafficked victim. Details of each aspect have been stated in the main chapter.

The Magistrate must remember that the accused victim is not a wilful lawbreaker, but an exploited victim who is forced to be a prostitute/trafficked victim under duress and fear of the trafficker. The very definition of “prostitution” in the Immoral Traffic (Prevention) Act, 1956 (ITPA) confirms this. This realisation should form the background during appreciation of evidence.

- i. Check how she has been apprehended or rescued, including when she was produced in Court and where or in whose custody she was kept before being produced in the Court.
- ii. Check whether a medical examination, including age determination test has been conducted to decide whether she is a major or a minor.
- iii. If the accused is a minor, the Juvenile Justice (Care and Protection) Act, 2000 would apply. For details please refer to Paras 5.1 and 5.2 (v b).
- iv. If the accused is a major, check whether the correct provisions of law have been applied. If she has been rescued under Section 16 of the ITPA, she should not be charged as an accused. She should be told that she has been rescued and not accused under the ITPA. The Magistrate after making enquiries shall order for rehabilitation as laid down in Section 17(4) of the ITPA.
- v. If necessary, make an intermediate order for her safe custody under Section 17(1) of the ITPA. After making an inquiry as per Section 17(2) of the ITPA, make an order for her rehabilitation as prescribed under Section 17(4) of the ITPA.
- vi. The Magistrate must ensure that the FIR is not stereotyped and there is convincing evidence against the accused prostitute/trafficked woman charged under Section 8 of the ITPA for soliciting and mens rea has been established.
- vii. If the Magistrate is not convinced by the evidence produced by the investigating officer in the charge-sheet against the prostitute/trafficked victim, s/he has full powers under Section 173(8) Cr.P.C, to question the investigating officer in depth as to how s/he has come to the conclusion that there was no role of the trafficker in the commission of the alleged offence by the victim charged under Section 8 of the ITPA. If the reasons furnished

by the police are not satisfactory, the Magistrate may return the charge-sheet to the police to comply with her/his observations and do further investigation.

- viii. The Magistrate must talk to the woman privately in order to ascertain:
- If she is a trafficked victim
  - Who is the trafficker
  - Who is actually controlling her
  - Who is the brothel owner
  - Inform her that she need not plead guilty under fear or pressure from her trafficker. If she pleads guilty, the Magistrate before accepting plea of guilty must satisfy herself/himself that it is voluntary and without any inducement or treat from any quarter.
  - The reasons for her pleading guilty for the offence under Section 7 or 8 of the ITPA.
  - Check who will be paying or bearing her bail, or the fine imposed on her. The Magistrate must ensure that under no circumstances should the trafficker or pimp be allowed to pay bail for the accused/victim.
- ix. If at any stages of investigation or inquiry or trial of an offence under ITPA, 1956, the Magistrate is of the view the woman accused under Section 7 or 8 of the ITPA is indeed a woman trafficked and forced into prostitution, s/he may use her/his discretion and grant her pardon under Section 306 of the Cr.P.C and frame charges against the trafficker.
- x. Involve NGOs and social workers as prescribed under Section 17(5) of the ITPA.
- xi. Ensure that necessary counselling is provided to the victim. (See Annexure 6 for a list of NGOs in your State).
- xii. Conduct in-camera proceedings (Section 327 of the Cr.P.C).
- xiii. Ensure that suitable legal aid is provided to her. Ensure that the same lawyer does not represent both the trafficker and the trafficked woman.
- xiv. Ensure that the woman is always treated with dignity and courtesy and is not humiliated by the Court or in the presence of the Court.
- xv. Consider carefully the consequences of each of the alternative courses of action available to the Court.
- xvi. If she is convicted, exercise sensitivity on the quantum of fine or punishment imposed.

# TRAFFICKED MINORS/ CHILDREN AND THE LAW

Although trafficking in children is one of the most heinous crimes both under the ITPA and under the IPC, evidence indicates that child trafficking is taking place on a large scale and managing to escape the dragnet of the law. This is basically because of the fact that age test is seldom properly done and many a time a trafficked child less than the age of 18 years is wrongly classified as an adult above the age of 18 years.

A trafficked child can be brought before the Magistrate under two circumstances, viz. i. when the raid/search/removal takes place by police action (Section 15 of the ITPA), or (ii) when the Magistrate herself/himself passes rescue orders. (Section 16 of the ITPA).

ii. The trafficked child can also be brought before the Magistrate as an accused under Sections 8(a) and 8(b) of the ITPA.

However, it must be noted that as per the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJA), a child below the age of 18 years cannot be accused by the police under Section 7 or 8 of the ITPA but can only be addressed as a child in need of care and protection under the JJA.

## **The Task of the Magistrate**

The Magistrate has a responsibility to ascertain/ confirm that the person produced before her/him is a child by accurate medical examination. According to Section 2(k) of the JJA, a juvenile” or “child” means a person who has not completed the eighteenth year of age. This definition is in harmony with the definition of a ‘minor’ in the ITPA, and hence there is no ambiguity. In this regard both the investigating officers and judicial officers have to take the lower age bracket of the medical report as per Jayamala Vs state of J&K (See PPT of Umapathi and type a sentence in 1st slide)

Once the age test as per Section 17(2) of the ITPA establishes that the victim is a child/minor less than 18 years of age, the following action needs to be taken by the Magistrate/Judge.

1. The Sessions Court while framing charges against the trafficker must also take into consideration whether any offence under IPC (Sections 342, 366, 366A, 366B, 367, 368, 370, 371, 372, 373, 375) is also made out and if so he/she must frame those charges in addition.
2. The child should be considered as a child in need of care and protection under the JJA. The Magistrate should order the handing over of the child to the appropriate State Authority, which is the Child Welfare Committee (CWC) to take care of the child. In States where the CWC has not yet been set up, the Magistrate may order the handing over of the child to the Juvenile Welfare Board.
3. Such a child must not be charged with any offence under the ITPA or IPC (Prerna vs. State of Maharashtra 2003(2) MHLJ 105).

Offences in respect of a Minor or Child: while sections 366 A, 366 B, 370, 370 A, 372, 373, 376 and 376, 376 D IPC are applicable in trafficking of children, the special act which are mentioned below mandate the investigating agency to apply the provisions of special laws. In-camera trial is mandatory as per Sec 37 of POCSO Act, 2012 read with Sec 327

Cr. PC. As per the criminal amendment Act 2009 the victim have a right to prefer an appeal against any order passed by the court acquitting accused or convicting for lesser offence or imposing inadequate compensation (u/s 372 Cr. PC) Evidence of witness also be taken by the trial judge through audio-video electronic means in the presence of an advocate of the person accused of the offence u/s 275 Cr. PC.

Sl.No	Law	Provisions
1	<b>Section 4(1) ITPA, 1956</b>	Punishment for living on the earnings of prostitution.(1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both, and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.
2	<b>Section 5(1) ITPA, 1956</b>	Procuring, inducing or taking person for the sake of prostitution (1) Any person who— a. procures or attempts to procure a person whether with or without his/her consent, for the purpose of prostitution; or b. induces a person to go from any place, with the intent that he/she may for the purpose of prostitution become the inmate of, or frequent, a brothel; or c. takes or attempts to take a person or causes a person to be taken, from one place to another with a view to his/her carrying on, or being brought up to carry on prostitution ; or d. causes or induces a person to carry on prostitution; shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may extend to two thousand rupees, and if any offence under this sub- section is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years:
3	<b>Section 6(2) ITPA, 1956</b>	Provided that if the person in respect of whom an offence committed under this sub-section – i. is a child, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life; and ii. is a minor, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years and not more than fourteen years.
4	<b>Section 6(2A) ITPA, 1956</b>	Where any person is found with a child in a brothel, it shall be presumed, unless the contrary is proved, that he has committed an offence under sub-section 6 (1).
5	<b>Section 7(1A) ITPA, 1956</b>	Where a child or minor found in a brothel, is, on medical examination, detected to have been sexually abused, it shall be presumed unless the contrary is proved, that the child or minor has been de-

		tained for purposes of prostitution or, as the case may be, has been sexually exploited for commercial purposes.
6	<b>Section 23 ITPA, JJA</b>	Where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with imprisonment of either description for a term which not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.
		Punishment for cruelty to juvenile or child – Whoever, having the actual charge of, or control over, a juvenile or the child, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both.
		<b>POCSO Act, 2012</b>
	<b>Sec 3</b>	<b>Penetrative sexual assault:</b>  A person is said to commit ‘penetrative sexual assault’ if – a He penetrates his penis, to any extent, in to the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or b He inserts, to any extent, any object or a part of the body, not being the penis, in to the vagina, urethra or anus of the child or makes the child to do so with him or any other person; or c He manipulates any part of the body of the child so as to cause penetration in to the vagina, urethra or anus of the child or makes the child to do so with him or any other person; or d He applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person
	<b>Sec 4</b>	<b>Punishment for penetrative sexual assault:</b>  Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extent to imprisonment for life, and shall also be liable to fine.

	Sec 5	<p><b>Aggravated penetrative sexual assault:</b></p> <p>Refer Page 15 for details.(which page show the this section )</p>
	Sec 6	<p><b>Punishment for aggravated penetrative sexual assault:</b></p> <p>Whoever, commits aggravated penetrative sexual assault, shall be punished with vigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.</p>
	Sec 7	<p>Sexual assault( Severe than Sec. 354 IPC –A new class of after)</p> <p>Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.</p>
	Sec 8	<p><b>Punishment for sexual assault:</b></p> <p>Whoever, commits sexual, shall be punished with imprisonment of either description for a term which shall not be less than 3 years but which may extent to 5 years, and shall also be liable to fine.</p>
	Sec 9	<p><b>Aggravated sexual assault:</b></p> <p>(a) whoever, being a police officer, commits sexual assault on a child</p> <p>(i) within the limits of the police station or premises where he is appointed; or</p> <p>(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or</p> <p>(iii)In the course of his duties or otherwise; or</p> <p>(iv) Where he is known as, or identified as, a police officer; or</p> <p>(b) Whoever, being a member of the armed forces or security forces commits sexual assault on a child -</p> <p>(i) within the limits of the area to which the person is diploid; or</p> <p>(ii) In any areas under the command of the security or armed forces; or</p> <p>(iii)In the course of his duties or otherwise; or</p> <p>(iv) Where he is known or identified as a member of the security or armed forces; or</p> <p>(c) Whoever being a public servant commits sexual assault on a child; or</p> <p>(d) Whoever being on the management or on the staff of a jail, or remand home, or protection home, or observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits sexual assault on a child, being inmate of such jail, or remand home, or protection home, or observation home, or other place of custody or care and protection; or</p>

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|  |  | <ul style="list-style-type: none"> <li>(e) Whoever, being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or</li> <li>(f) Whoever, being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or</li> <li>(g) Whoever commits gang sexual assault on a child. Explanation. – When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or</li> <li>(h) Whoever, commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or</li> <li>(i) Whoever, commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or</li> <li>(j) Whoever, commits sexual assault on a child, which – (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or (ii) Inflicts the child with Human Immuno Deficiency virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or</li> <li>(k) Whoever, taking advantage of a child’s mental or physical disability, commits sexual assault on the child; or</li> <li>(l) Whoever commits sexual assault on the child more than once or repeatedly; or</li> <li>(m) Whoever commits sexual assault on a child below 12 years; or</li> <li>(n) Whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits sexual assault on such child; or</li> <li>(o) Whoever, being in the ownership, or management, or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or</li> <li>(p) Whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or</li> <li>(q) Whoever, commits sexual assault on a child knowing the child is pregnant; or</li> </ul> |
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		<p>(r) Whoever, commits sexual assault on a child and attempts to murder the child; or</p> <p>(s) Whoever, commits sexual assault on a child in the course of communal or sectarian violence; or</p> <p>(t) Whoever, commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or</p> <p>(u) Whoever, commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.</p>
	<b>Sec 10</b>	<p><b>Punishment for aggravated sexual assault:</b> Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.</p>
	<b>Sec 11</b>	<p><b>Sexual harassment:</b> A person is said to commit sexual harassment up on a child when such person with sexual intent, -</p> <p>(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of the body within the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or</p> <p>(ii) Makes a child exhibits his body or any part of his body so as it is seen by such person or any other person; or</p> <p>(iii) shows any object to a child in any form or media for pornographic purposes; or</p> <p>(iv) Repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or</p> <p>(v) Threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or</p> <p>(vi) Entices a child for pornographic purposes or gives gratification therefor.</p> <p><b>Explanation:</b> - any question which involves 'sexual intent' shall be a question of fact.</p>
		<p><b>Punishment for sexual harassment:</b> Whoever, commits sexual harassment up on a child shall be punished with imprisonment of either description for a term which may extent to 3 years and shall also be liable to fine.</p>

## ***Procedure to be Followed by a Magistrate When the Victim is a Child***

1. According to Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJA), a juvenile” or “child” means a person who has not completed eighteenth year of age. The JJA makes a clear distinction between “child in conflict with law” and “child in need for care and protection”. According to Section 2(l) of the JJA, a “juvenile in conflict with law” means a juvenile who is alleged to have committed an offence.” Section 2(d) (vi) of the JJA defines a child in need of care and protection as one who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal actions.
2. Further, according to Section 2(d) (vii) of the JJA, a child is in need of care and protection who is found vulnerable and is likely to be inducted into drug abuse or trafficking or who is being or is likely to be abused for unconscionable gains (Section 2(d) (vii & viii) of the JJA).
3. A juvenile girl found soliciting under Sections 8(a) and (b) of the ITPA ought to be classified as a child in need of care and protection, rather than as a juvenile in conflict of law, as she has been exploited and abused, and needs to be rehabilitated rather than accused and penalised.
4. Section 7(1) of the JJA lays down the procedure to be followed by a Magistrate not empowered under the Act. The Section states “When any Magistrate not empowered to exercise the power of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or a child, he shall without any delay record such opinion and forward the juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceedings.
5. However, when a child or minor is produced before the Magistrate in relation to an offence committed under ITPA, the following steps shall be taken by the Magistrate:
  - a. **Age test is mandatory** Whenever a trafficked child is produced before the Magistrate, the Magistrate must first arrange to have an age test conducted under Section 17(2) of the ITPA. Section 17(2)–” when the person is produced before the appropriate Magistrate sub-section (5) of Section 15 or the Magistrate under sub-section (2) of Section 16, he shall, after giving her an opportunity of being heard, cause an inquiry to be made as to the correctness of the information received under sub-section (1) of Section 16, the age, character and antecedents of the person and the suitability of her parents, guardian or husband for taking charge of her and the nature of the influence which the conditions in her home are likely to have on her if she is sent home, and, for this purpose, he may direct a Probation Officer appointed under the Probation of Offenders Act, 1958, to inquire into the above circumstances and into the personality of the person and the prospects of her rehabilitation.” Similarly, Section 49(1) of the JJA also provides for presumption and determination of age of the victim. The Section states “Where it appears to a competent authority that a person before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or child, the competent authority shall make due inquiry as to the age of that person and for the purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be.”

**b. Minors should be handed over to the Competent Authority**

If it is found that if the trafficked person is below 18 years of age, the Magistrate should immediately order the handing over of the minor to the competent authority, as stipulated under Section 7(1) of the JJ Act.

Further, Section 29(1) of the JJA defines Child Welfare Committee (CWCs). The Section empowers the State Government to constitute one or more CWCs in every district or groups of district for exercising the powers and discharge the duties conferred on such committees in relation to child in need of care and protection under this Act. Thus, the Magistrate should immediately order the handing over of the minor to the competent authority i.e, the CWC. In States, where a CWC has not been constituted, the child may be handed over to the Juvenile Welfare Board.

**c. Minor trafficked victim should be classified as a “child in need of care and protection”.**

Since in most cases, the child has been forced to engage in sexual activities, the Magistrate as per Section 2(d) of the JJA shall classify a minor trafficked victim as a “child in need of care and protection” rather than as a “juvenile in conflict with law” and deal with her accordingly [Perna v State of Maharashtra 2003(2) Mh.L.J. 105].

**d. The Magistrate may make an order for intermediate custody of minor under Section 17(3) of the Immoral Traffic (Prevention) Act, 1956 (ITPA.)**

Any trafficked child or a minor who is removed or rescued by the police under Sections 15 and 16 of the ITPA, must not be accused of any offence and should be treated as a “child in need of care and protection” under the JJA Section 17 (3) of the ITPA empowers the Magistrate to pass an order for intermediate custody of the trafficked minor or the child. Section 17 (3) of the ITPA states “The Magistrate may, while an inquiry is made into a case under sub Section under sub- section (2) of Section 17 of the ITPA, pass such orders as s/he deems proper for the safe custody of the person: Provided further that a person rescued under Section 16 of the ITPA is a child or minor, it shall be open to the Magistrate to place such child or minor in any institution established or recognized under any Children Act for the time being in force in any State for the safe custody of children: Provided further that no person shall be kept in custody for this purpose for a period exceeding three weeks from the date of such an order, and no person shall be kept in the custody of a person likely to have a harmful influence over her.”

**e. No joint proceedings of juvenile and person not a juvenile**

“Section 18 Juvenile Justice (Care and Protection) Act, 2002—No joint proceeding of juvenile and person not a juvenile. 1. Notwithstanding anything contained in Section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile. 2. If a juvenile is accused of an offence for which under Section 223 of the Code of Criminal Procedure, 1974 (2 of 1974) or any other law for the time being in force, such juvenile and any person who is not a juvenile would, but for the prohibition contained in sub-section (1), have been charged and tried together, the Board taking cognizance of that offence shall direct separate trials of the juvenile and the other person.” According to Section 18 (1) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJA) a juvenile should not be charged with or tried for any offence together with a person who is

not a juvenile. Further, Section 18 (2) of the JJA states that if a juvenile has been charged with or tried with an adult, then the Board can take cognizance of that offence and direct separate trials of the juvenile and the other person.

**f. Same lawyer should not represent both trafficker and trafficked minor**

In order to prevent a travesty of justice, the same lawyer must not represent both the trafficker Trafficked minors/children and the law and the victim [Prerna vs. State of Maharashtra, 2003(2) Mh.L.J. 105].

**g. Evidence of the child should be taken in-camera**

When the evidence of the child/minor is required for the purpose of prosecution of the trafficker, such evidence should be taken in-camera under Section 327 of the Cr.P.C.

**h. Child's dignity should be maintained**

At the State consultations, the participants expressed that the Magistrate should ensure that the child is treated with dignity, and should maintain a decent Courtroom atmosphere. He should bear in mind that the child has already been traumatised and victimised and subjected to sexual abuse and should not permit any person to humiliate the child in open Court. The child's fundamental right to dignity enshrined under Article 21 of the Constitution of India, should always be protected.

**i. Child's best interest should be the priority**

To protect the best interest of the child especially in trafficking cases, the Magistrate should be extra cautious while passing orders for safe custody as there will be several "well wishers" eager to take back the child for prostitution. These may sometimes include parents and other relatives. The Magistrate should check their antecedents as prescribed under Section 17(2) of the ITPA, and if the child refuses to go with the "well wishers" the Court should not grant custody of the child to them. In such a case, the Magistrate under Section 17(3) of the ITPA may place such a child or minor in any institution established or recognized under any law pertaining to children in force in the State. The Supreme Court has held that the right under Article 21 means not just the right to physical survival but the right to live with human dignity and all that will go with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for reading and writing (Francis Corallie Mullin vs. Territory of Delhi, AIR 1981 SC 746).

**5.3. Powers of the Child Welfare Committee in Respect of a Child in Need of Care and Protection**

**i. Committee is the sole authority to dispose of cases**

"Section 31 – (1) Juvenile Justice (Care and Protection) Act, 2000 – The Committee shall have the final authority to dispose of case for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights. (2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection." Thus, the Child Welfare Committee (CWC) is the final authority to dispose of

the cases for the care, protection, treatment, development and rehabilitation of children as well as to provide for their basic needs and protection of their human rights.

## ii. Inquiry

“Section 33 (1) Juvenile Justice (Care and Protection) Act, 2000 – On receipt of a report under Section 32, the Committee or any police officer or special juvenile police unit or the designated police officer shall hold an inquiry in the prescribed manner and the Committee, on its own or on the report from any person or agency as mentioned in sub-section (1) of Section 32, may pass an order to send the child to the children’s home for speedy inquiry by a social worker or child welfare officer.” (2) – The inquiry under this Section shall be completed within four months of the receipt of the order or within such shorter period as may be fixed by the Committee: Provided that the time for the submission of the inquiry report may be extended by period as the Committee may, having regard to the circumstances and for the persons recorded in writing, determine. When a child in need of care of protection is produced before the Committee, an inquiry is required to be held by the Committee or any police officer or the special juvenile police unit or the designated police officer. The Committee may pass an order to send the child to a children’s home for a speedy inquiry by a social worker or child welfare officer. [Section 33(1) of the Juvenile Justice (Care and Protection) Act, 2000 (JJA)]. Such inquiry should normally be completed within four months of its commencement, unless such period is extended in special cases, after recording it in writing the reasons for such extension [Section 33(2) of the JJA].

## iii. Power of rehabilitation

Section 33 (3) of the Juvenile Justice (Care and Protection) Act, 2000 – After the completion of the inquiry if the Committee is of the opinion that the said child has no family or ostensible support, it may allow the child to remain in the children’s home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years.” Upon completion of the inquiry, the Committee may make an order to allow the child to remain in the children’s home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years. This will be applicable only when the Committee is of the opinion that the child has no family or ostensible support.

## 5.4. Powers of the Child Welfare Committee (CWC) & Juvenile Welfare Board (JJB)

In the States where Child Welfare Committee (CWC) has been constituted, the Juvenile Welfare Board has no competence to deal with cases of children who are in prostitution/have been trafficked. Such children must be considered as children in need of care and protection. However, in States where the Child Welfare Committee (CWCs) have not been constituted, these matters may be referred to the

Juvenile Welfare Board [(Prerna vs. State of Maharashtra 2003(2) MHLJ 105)].

- ii. Welfare of the juvenile or child is the need of the day and the Board should adopt a sensitive approach oriented outlook (Kamil vs. State of Uttar Pradesh, 1994 Cri.L.J. 1491).
- iii. A juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1956 (ITPA) or found soliciting in a public place should be released only after an inquiry has been completed by the probation officer. [(Prerana vs. State of Maharashtra, 2003(2) Mh.L.J. 105).]

- iv. Inquiry and orders passed by the Board. The Board is normally required to complete its inquiry regarding the matter within four months of its commencement, unless such period is extended in special cases, after recording in writing the reasons for such extension [Section 14 of the Juvenile Justice (Care and Protection) Act, 2000 (JJA)]. Upon completion of its inquiry, the Board may, if it is satisfied that the juvenile has committed an offence, pass an order in accordance with Sections 15 and 16 of the JJA. Trafficked minors/children and the law

### Checklist for the Magistrate when the trafficked victim is a child/minor

- I Age Determination – Whenever a trafficked child victim is produced before the Magistrate, s/he must first order an age test to be conducted under Section 17(2) of the Immoral Traffic (Prevention) Act, 1956 (ITPA). This is critical because very often the trafficked child may actually be below 18 years but is declared in the age determination report as above 18 years. An inaccurate age determination can make a crucial difference in the conduct of the proceedings and can result in a miscarriage of justice. According to the ITPA, trafficking of minors is a more heinous offence warranting more stringent punishment against the trafficker as per Sections 4(1), 5(1), 6(2), 6(2A), and 7(1A). In cases, where the age determination test establishes that the victim is below 18 years of age, the **Juvenile Justice (Care and Protection) Act, 2000 (JJA)** would automatically apply. In all cases where the Magistrate has any doubt regarding the age of the victim, especially victims fall within the age group of 18-21 years, s/he should be especially vigilant and summon the medical officer who conducted the test, and question him in detail to satisfy himself beyond any shadow of doubt that the accused is above the age of 18 years. Check if a minor is booked under the ITPA and if so, all charges should be dropped and the minor should be treated as a child in need of care and protection as per the JJA.
- II Ensure that a medical examination has been conducted in order to check for sexual abuse and/or rape.
- III Ensure that necessary counseling is provided to the victim
- IV Enquire who is the parent or guardian of the minor and whether the parent/guardian is responsible for the trafficking of the child. Do not hand over custody of the child to the parent/guardian without involving the probation officer.
- V If necessary, make an order for the child's intermediate custody in a safe place
- VI Hand over custody of the child to the Child Welfare Committee (CWC).
- VII Check if the appropriate Sections of the IPC, ITPA and JJA against the trafficker have been stated in the charge-sheet and refer the matter to the Court of Sessions for trial. For details, see Para 6.1.
- VIII Ensure that the evidence of the child is taken in-camera under Section 327 of the Cr.P.C. During the State consultations, the participants expressed that the Court should arrange for translators if the child is from another State and does not speak the local language.

IX Ensure that the Court has a child-friendly and supportive atmosphere while taking the child's evidence.

X At the time of taking the child's evidence -

- Use a screen to avoid the trafficker from looking at the child and thereby protect the child from getting intimidated or afraid during the submission of evidence.
- Let only lady police in civil dress accompany the girl child to the Court.

XII Do not delay repatriation of the child for evidentiary purposes.

XIII If the child has an objection to going back home, try to determine the reason behind the same and take a decision which will serve the best interest of the child rather than giving custody to claimers such as parents or relatives. The environment in the home itself might have resulted in the child being trafficked.

## THE TRAFFICKER AND THE LAW

The Immoral Traffic (Prevention) Act, 1956 (ITPA) (originally known as Suppression of Immoral Traffic in Women and Girls Act 1956) was passed on May 9, 1950. However, even before the enactment of this Act, the Indian Penal Code contained several Sections that criminalize trafficking of persons as a heinous offence, indicating that lawmakers had always been aware of its seriousness. The ITPA and the relevant provisions of the IPC together form a composite code that must be used to prosecute and convict the trafficker.

Though the trafficker is the main focus of the ITPA containing five complete Sections detailing the offences constituting the ingredients of trafficking, (Sections 3, 4, 5, 6, and 8), as stated earlier, in practice it is only the Sections directed against the prostitute/victim that are invoked during implementation of the Act, both at the stage of filing of charge-sheet by the police and of framing of charges by the Magistrate.

Despite the intention and purpose of the law to charge, prosecute and make the trafficker face the consequences of his crime in accordance with law, data reveals that this is not happening. The research study indicates that more than 90 per cent of the cases are registered under Sections 7 and 8 ITPA only, or in combination with other Sections of the ITPA, and around 2 per cent of convictions are under Sections 7 and 8 of the ITPA. The trafficker who is responsible for a woman or child getting into prostitution and who benefits from the exploitation remains beyond the reach of the law. It is thus clear that in practice the main focus of implementation of the ITPA is through the repeated use of Sections 7 and 8 against the prostitute/victim, who in most cases is under the complete control of the trafficker and is soliciting under his orders.

**In the instant study conducted by UNICEF, NHRC & Dept of WD&CW in the year 2004 across 10 states, several trends have been noted:**

1. Very few cases are registered against the trafficker and hence the basic purpose of the Act of focusing on the trafficker is not being fulfilled. As stated above, maximum use is made of Sections 7 and 8 of the ITPA, to target the trafficked woman/prostitute for soliciting.

2. Even when a case has been registered against the trafficker, it very rarely ends up in conviction. The trial progresses slowly, and the witnesses are either not traceable or turn hostile. In effect, the traffickers go unpunished and continue to commit the crime of trafficking with impunity.
3. The research study has revealed that conviction under the ITPA almost always refers to convictions of prostitutes/victims and not of traffickers, pimps or brothel owners. This results in re-victimization of trafficked women and exonerates the main criminal – the trafficker. This is an extremely serious issue and demonstrates that the law is being manipulated to the advantage of the traffickers, and re- victimises the victim/trafficked woman.

### **The Task of the Magistrate/Judge**

- To verify and ensure that the police reports are properly prepared after due application of mind by the police against the traffickers/brothel owners/pimps and others.
- If the charge-sheet is directed only against the prostitute/woman/ under Sections 7 and 8 of the ITPA, the Magistrate may question the police as to why the brothel owner/pimp or customer have not been charge-sheeted. S/he may direct the Police to do further investigation under Section 173(8) of the Cr.P.C with a view to fix the identity of the person who is running the brothel under Section 3 of the ITPA, or the person living off the earnings of prostitution as per Section 4 of the ITPA, or the procurer/inducer or others as defined under Section 5 of the ITPA, or the person detaining a woman for prostitution as defined in Section 6 of the ITPA
- Before framing charges, he may also question the woman accused under Section 7 or 8 of the ITPA to ascertain whether she has been forced into prostitution or is soliciting under duress. If the Magistrate's questioning leads him/her to believe that the woman is trafficked and is being sexually exploited and abused, and being forced to solicit under duress, s/he may direct the police to do further investigation under Section 173(8) of the Cr.P.C. (Issues concerning grant of bail to the accused women have been discussed in Para 4.6 (2).
- If the charge-sheet filed by the police is against the prostitute/trafficked victim, pimp, brothel-owner, etc., jointly, then the Magistrate must direct the police to seriously pursue the evidence against the person who is running the brothel under Section 3 of the ITPA, or the person living off the earnings of prostitution as per Section 4 of the ITPA, or the procurer/inducer or others as defined under Section 5 of the ITPA, or the person detaining a woman for prostitution as defined in Section 6 of the ITPA.
- If at any stages of investigation or inquiry or trial of an offence under ITPA, the Magistrate is of the view the woman accused under Section 7 or 8 of the ITPA is indeed a woman trafficked and forced into prostitution, he may use his discretion and grant her pardon under Section 306 of the Cr.P.C and frame charges against the trafficker who is running the brothel under Section 3 of the ITPA, or the person living off the earnings of prostitution as per Section 4 of the ITPA, or the procurer/inducer or others as defined under Section 5 of the ITPA, or the person detaining a woman for prostitution as defined in Section 6 of the ITPA. The victim pardoned under Section 306 of Cr.P.C shall be examined as a witness against the trafficker as the trial progresses.

- Framing of charges: The Magistrate should frame charges not only under ITPA but also under IPC, so as to ensure that the strongest provisions of law with maximum punishment are made applicable against the trafficker.

### **Trafficking Offences under the Immoral Traffic (Prevention) Act, 1956 (ITPA) and Indian Penal Code (IPC)**

This part identifies the Sections in ITPA and IPC that address various offences related to trafficking. It also discusses the ingredients of each offence and enumerates specific points to be noted by the Magistrate.

#### **Keeping a brothel or allowing premises to be used as a brothel – Section 3 of the ITPA Ingredients of the offence**

- Any person who keeps or manages or acts or assists in the keeping or management of a brothel [Section 3(1)], or
- A tenant, lessee, occupier or person in charge of any premises who uses, or knowingly allows any other person to use, such premises or any part thereof as a brothel [Section 3(2a)], or
- The owner, lessor or landlord of any premises or the agent of such owner, lessor or landlord, who lets the same or any part thereof with the knowledge that the same or any part thereof is intended to be used as a brothel, or is willfully a party to the use of such premises or any part thereof as a brothel [Section 3(2b)].

#### **Points to be noted**

- There may be a presumption of culpability on the part of such persons in certain circumstances [Section 3(2a)] of the ITPA.
- Any lease or agreement under which such premises have been leased out or are held or occupied at the time of commission of an offence under the ITPA is void [Section 3(3)]

#### **Living on the earnings of prostitution – Section 4 of the ITPA**

##### **Ingredients of the offence**

- The offender must be above eighteen years of age
- The offender knowingly lives wholly or partly on the earnings of prostitution
- Such exploitation of living on the earning of the prostitution is being done by the exploiter/trafficker and not he prostitute/trafficked victim.

##### **Points to be noted**

- This Section is not applicable to the prostitute/trafficked victim herself. The Section makes it an offence for any person, and not the prostitute/trafficked victim herself, who is knowingly living on the earnings of prostitution of any other person [Section 4(1) of the ITPA].

One of study data reveals that Magistrate sometimes framed charges and punished the prostitute/trafficked victims under this Section. This is a wrong application of Section 4(1) of the ITPA against the prostitute/trafficked victim.

- If the prostitution is being carried on by a child and a person is living off the child's earnings, the Act provides for stringent punishment of rigorous imprisonment for a term of not less than seven years but may be extended for life.
  - There is a rebuttable presumption that a person is living on the earnings of prostitution [Section 4(2) of the ITPA].
- i. when the person is living with or habitually in the company of a prostitute/trafficked victim.
  - ii. when the person exercises control, direction or influence over the movement of a prostitute/trafficked victim in such a manner as to show that such person is aiding, abetting or compelling her prostitution.
  - iii. acting as a tout or pimp on behalf of a prostitute.

**Procuring, inducing or taking a person for sake of prostitution – Section 5 of ITPA Ingredients of the offence**

- Procuring or attempting to procure a person with or without the person's consent for prostitution.
- Inducing a person to become an inmate or frequent a brothel for prostitution.
- Taking or attempting to take a person from one place to another for prostitution.
- Causing or inducing a person to carry on prostitution.

**Points to be noted**

- Consent of the person who is prostituted is immaterial.
- There is a special provision for punishment of offences against children and minors [Section 5(1) of the ITPA]. See also Chapter 3.
- False marriages are a common way of luring women into prostitution.
- False promises of employment, marriage and inducement are other common methods employed for
- inducing and procuring women and children for prostitution.
- The trafficker who is the focus of this Section could be the seller, the buyer, the pimp, the middleman, the
- brothel owner, or the person who has transported the victim.
- Parents and relatives who abet, sell or cause children to be sold/taken for trafficking or who themselves cause children to become prostitutes are also liable under this Section.

**Section 5 of Immoral Traffic (Prevention) Act, 1956 (ITPA) may be used along with Section 367/368 of the IPC (Kidnapping/Abducting) and/or with 370/371 of the IPC (Sexual Slavery) wherever relevant.**

**Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.**

**Section 367 IPC**

**Ingredients of the Offence**

- Kidnapping or abducting a person.
- Knowing it to be likely that such person may be subjected to or put in danger of grievous hurt, slavery or unnatural lust.

- Wrongfully concealing or keeping in confinement, kidnapped or abducted person

### **Section 368 IPC**

#### **Ingredients of the Offence**

- Knowledge that a person has been kidnapped or abducted wrongfully.
- Concealment or confinement of such kidnapped or abducted person.

#### **Points to be noted**

- Wrongful concealment or confinement of persons is an offence by itself. Some aspects of this are discussed in the above Para's.
- Knowledge by a person/persons of wrongful confinement and wrongful concealment of kidnapped or abducted persons are also offences by themselves. Family members and friends of the trafficker may also be culpable of the offence of knowledge of wrongful confinement and concealment of trafficked women and children, as also those who provide transportation or conveyance for the purposes of prostitution.
- These offences are cognisable, non-bailable, non-compoundable and triable by the Court of Sessions.

### **Buying or disposing of any person as a slave**

#### **Habitual dealing in slaves**

### **Section 371 IPC**

#### **Ingredients**

- Habitually imports, exports, removes, buys, sells, traffics or deals in slaves. Points to be noted
- Much of trafficking happens in conditions of slavery.
- This offence is cognisable, non bailable, non compoundable and triable by the Sessions Court.

### **Detaining a person in premises where prostitution is carried on – Section 6 of the Immoral Traffic (Prevention) Act, 1956 (ITPA)**

#### **Ingredients of the offence**

- Any person who detains any other person with or without the person's consent in any brothel, or
- Any person who detains another person in any premises with intent that such person may have sexual intercourse with a person who is not a spouse of such person.

#### **Points to be noted**

- Actual physical restraint need not be proved.
- Something in the nature of control or influence and some kind of persuasion is sufficient proof (Harnam Singh vs. Emperor AIR 1939 Lah 295).
- Consent of the person who is detained is immaterial.
- There is a presumption of the offence in certain circumstances in respect of a child/minor namely [Section 6(2) and 6(2A)]: "Section 6(2)—Where any person is found with a child in a brothel, it shall be presumed, unless the contrary is proved, that he has committed an offence under sub-section (1).

Section 6(2A) Where a child or minor found in a brothel, is, on medical examination, detected to have been sexually abused, it shall be presumed unless the contrary is proved, that the

child or minor has been detained for purposes of prostitution or, as the case may be, has been sexually exploited for commercial purposes.”

- There is a presumption of the offence in certain circumstances in respect of a woman [Section 6(3)].

“Section 6(3) A person shall be **presumed to detain a person in a brothel or in upon any premises for the purpose of sexual intercourse with a man** other than her lawful husband, if such person, with intent to compel or induce her to remain there –

- a. withholds from her any jewellery, wearing apparel, money or other property belonging to her, or
  - b. threatens her with legal proceedings if she takes away with her any jewellery, wearing apparel, money or other property lent or supplied to her by or by the direction of such person. “
- No legal proceedings may be instituted against a woman who has been detained for the recovery of any jewellery, clothes, money or property alleged to have been supplied or lent to her [Section 6(4)].

“Section 6(4) Notwithstanding any law to the contrary, **no suit, prosecution or other legal proceeding shall lie against such woman or girl at the instance of the person by whom she has been detained, for the recovery of any jewellery, wearing apparel or other property** alleged to have been lent or supplied to or for such woman or girl or to have been pledged by such woman or girl or for the recovery of any money alleged to be payable by such woman or girl.”

- Very often, it has been found that brothel keepers and other traffickers attempt to take away the woman’s savings, jewellery, etc., to prevent her from giving evidence against them.

### **Prostitution in or in the vicinity of public places – Section 7 of the Immoral Traffic (Prevention) Act, 1956 (ITPA)**

#### **Ingredients of the offence**

- The person carrying on prostitution and the person with whom prostitution is being carried on with, is doing so in the vicinity of a “public place” as defined in the ITPA.
- Keeper of a public place, tenant, lessee or occupier, or person in charge of public premises knowingly allows it to be used for the sexual exploitation or abuse of persons for commercial purpose.
- Owner, lessor or landlord of such premises or the agent of such owner, lessor or landlord lets the same or any part with the knowledge that it may be used for prostitution or is willfully a party to such use.

#### **Points to be noted**

- If such public place is a hotel, then the licence of the hotel shall be suspended for three months to one year. However, if the offence is in respect of a child or minor, the license shall be liable to be cancelled [proviso to Section 7(2) of the ITPA].
- Public place has been defined in the ITPA as any place intended for use by or accessible to the public and includes any public conveyance [Section 2(h) of the ITPA].

- There is evidence that sometimes, tourism also involves sexual exploitation of women and often children (paedophilia). Hotels sometimes connive with the trafficker in such situations.

### **Seducing or soliciting for the purpose of prostitution – Section 8(a) of the Immoral Traffic (Prevention) Act, 1956 (ITPA)**

#### **Ingredients of the offence**

- Seduction or soliciting must occur in a public place or within the sight of and in such manner as to be seen or heard from any public place.
- Seduction or soliciting may be done through words, gestures, and wilful exposure of person.
- Also, through tempting/attracting or attempting to tempt/attract for the purpose of prostitution.

### **Section 8(b) of the Immoral Traffic (Prevention) Act, 1956 (ITPA)**

#### ***Ingredients of the offence***

- Soliciting/molesting/loitering for the purpose of prostitution.
- Causing obstruction/annoyance in a public place.
- Offending against public decency.

#### **Points to be noted**

- Traffickers in general and pimps or brothel keepers in particular are liable to be punished under this
- Section (State of Maharashtra vs. Premchand Khubchand AIR 1964 Bom 155).
- Data collected during the research clearly indicates that Sections 7 and 8 are the most commonly used Sections for the implementation of the ITPA, both of which are directed against the prostitute/trafficked women.

### **Seduction of a person in custody – Section 9 of the ITPA**

#### **Ingredients of the offence**

- The offender is a person having custody, charge, care of or a position of authority over another person.
- That offender causes or aids or abets the seduction for prostitution of that person in his custody.

#### **Points to be noted**

- This Section is comprehensive and includes parents, relatives or any de facto guardian of a child or woman who is responsible.

# Practice and Procedure for Investigation and Trial of Traffickers

## *Provisions for Investigation and Trial of Traffickers*

Sl.No	Law	Provisions
1	<b>Section 11 ITPA</b>	<p>1. Notification of address of previously convicted offenders. – (1) When any person having been convicted –</p> <ol style="list-style-type: none"> <li>a. by a Court in India of an offence punishable under this Act or punishable under Section 363, Section 365, Section 366, Section 366A, Section 366B, Section 367, Section 368, Section 370, Section 371, Section 372 or Section 373 of the Indian Penal Code (45 of 1860), with imprisonment for a term of two years or up wards; or</li> <li>b. by a Court or tribunal in any other country of an offence which would, if committed in India, have been punishable under this Act, or under any of the aforesaid sections with imprisonment for a like term, is within a period of five years after release from prison, again convicted of any offence punishable under this Act or under any of those Section with, imprisonment for a term of two years or upwards by a Court, such Court may, if it thinks fit, at the time of passing the sentence of imprisonment on such person, also order that his residence, and any change of, or absence from, such residence, after release, be notified according to rules made under Section 23 for a period not exceeding five years from the date of expiration of that sentence.</li> </ol> <p>2. If such conviction is set aside on appeal or otherwise, such order shall become void.</p> <p>3. An order under this Section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.</p> <p>4. (4) Any person charged with a breach of any rule referred to in sub-section (1) may be tried by a Magistrate of competent jurisdiction in the District in which the place last notified as his residence is situated.</p>
2	<b>Section 15 ITPA</b>	<p>Search without warrant – (1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer or the trafficking police officer as the case may be, has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.</p>

3	<b>Section 18 ITPA</b>	<p>Closure of brothel and eviction of offenders from the premises – (1) A Magistrate ITPA may, on receipt of information from the police or otherwise, that any house, room, place or any portion thereof within a distance of two hundred meters of any public place referred to in sub-section (1) of Section 7 is being run or used as a brothel by any person, or is being used by prostitutes for carrying on their trade, issue notice on the owner, lesser or landlord or such house, room, place or portion or the agent of the owner, lesser or landlord or on the tenant, lessee, occupier of, or any other person in charge of such house, room, place, or portion, to show cause within seven days of the receipt of the notice why the same should not be attached for improper use thereof, and if, after hearing the person concerned, the Magistrate is satisfied that the house, room, place or portion is being used as a brothel or for carrying on prostitution, then the Magistrate may pass orders –</p> <p>a. directing eviction of the occupier within seven days of the passing of the order from the house, room, place, or portion;</p> <p>b) directing that before letting it out during the period of one year or in a case where a child or minor has been found in such house, room, place or portion during a search under Section 15, during the period of three years, immediately after the passing of the order, the owner, lessor or landlord or the agent of the owner, lessor or landlord shall obtain the previous approval of the Magistrate;</p> <p>Provided that, if the Magistrate finds that the owner, lessor or landlord as well as the agent of the owner, lessor or landlord, was innocent of the improper user of the house, room, place, or portion, he may cause the same to be restored to the owner, lessor or landlord or the agent of the owner, lessor landlord, with a direction that the house, room, place or portion shall not be leased out, or otherwise given possession of, to or for the benefit of the person who was allowing the improper use therein.</p>
4	<b>Section 18 ITPA</b>	2) A Court convicting a person of any offence under Section 3 or Section 7 may pass orders under sub-section (1), without further notice to such person to show cause as required in that sub-section.
5	<b>Section 57 ITPA</b>	<p>Person arrested not to be detained more than twenty-four hours – No police officer shall detail in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.</p>

6	<b>Section 156 Cr.P.C</b>	<p><b>Police officers power to investigate cognisable case –</b></p> <p>1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognisable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.</p> <p>2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this Section to investigate.</p> <p>3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned.</p>
7	<b>Section 202 Cr.P.C</b>	<p>Postponement of issue of process – (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,</p> <ol style="list-style-type: none"> <li>a. where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or</li> <li>b. where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.</li> </ol> <p>2. In an inquiry under sub-section (1), the Magistrate may, if he thinks it, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.</p> <p>3. If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.</p>
8	<b>Section 240 Cr.P.C</b>	<p>Framing of charge – (1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.</p> <p>(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.</p>

## Points to be noted:

- The trafficker may be arrested by the police during a raid or a search of premises. The police may conduct a raid upon a brothel or a search of any premises under Section 15 of the ITPA, during which the brothel keeper or trafficker may be arrested.
- Arrested persons must be produced before a Magistrate within 24 hours. Under Section 57 of the Cr.P.C., the accused person must be produced before the Magistrate within 24 hours after her arrest by the police.
- The Magistrate has the following four alternative courses of action available to her/him when the trafficker is produced before him:
  - a. Certain offences must be tried only by a Court of Sessions – Where the trafficker is accused of offences committed under Sections 366, 367, 368, 370, 371, 372, 373 and 375 of the IPC, and/or under Sections 4, 5(i), 5(ii), 6, 7(1A) ITPA, in view of the punishment prescribed for these offences, and as per Schedule II CrPC- Classification of Offences against Other Laws, the Magistrate does not have the power to try these matters and must commit such cases to the Court of Sessions.
  - b. The trafficker may be discharged under Section 239 of the Cr.P.C. – If the Magistrate finds that the case made out against the accused is groundless, the Magistrate may discharge him/her under Section 239 of the Cr.P.C. after recording the reasons for doing so.
  - c. The trafficker may be released on bail, pending filing of charge -sheet and trial. If the trafficker is released on bail, then further steps are to be taken towards trial of the case, after filing of the charge- sheet by the police. During the State consultations, it was found that in many States, Magistrates refuse bail, knowing the dangers in granting bail to the trafficker.

The study of Court records and analysis of data indicates that after the release of trafficker on bail during investigation, witnesses against the trafficker are either not traceable or they turn hostile or otherwise get influenced by the trafficker. For these reasons the trial seldom progresses, cases remain pending and there is a low rate of disposal of cases against the trafficker. Evidence also revealed that after release on bail, the trafficker manipulates the trafficked woman and her plea in Court, and manipulates the minor or child trafficked victims and tries to gain custody of them by posing as their parent or guardian. The trafficker also gains a stronger control over the trafficked woman by paying or bearing the legal expenses and bail for her.

Keeping in view the above data and evidence, and its sinister consequences, the Magistrate should comply with the intent, letter and spirit of Sections 4, 5, 6 of the ITPA and Schedule II (Classification of Offences Against Other Laws) of the Cr.P.C, and refuse bail to the trafficker, so as to prevent her/him from exercising her/his control over the victim and attempts to manipulate witnesses or tamper with the evidence.

- d. The Magistrate may at the earliest frame charges against the trafficker under Section 240 of the Cr.P.C. and ask him to plead guilty or not guilty.
- It is noticed that in most of the cases, the police file charge -sheets under one or two Sections of the ITPA without including relevant Sections of the IPC. It may be noted that the Magistrates/Session Courts are not bound by the classification of offences committed given by the investigating agency and they should frame charges for the offences under other provisions of the ITPA/IPC or any other Act, if commission of such offence is prima facie revealed by the investigating report.
  - After framing of charges, the trafficker has an option of pleading guilty or not guilty
  - If he pleads guilty, he may be fined and punished according to the law. However, in the discussions with Magistrates from all over the country, it was noted that there was not a single instance where the trafficker had pleaded guilty
  - If he pleads not guilty, the Magistrate must proceed to conduct the trial of the matter.
  - The Magistrate should not try adults and minors together. The Magistrate should separate the minor/child victims from the trafficker so that the latter cannot control or manipulate the minor/children in any manner. Due process of law in accordance with the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJA) as explained in Para 5.1 may be followed in the case of minor/child.
  - Paras 4.6, 4.7 and 6.1 may also be read with this Section.
  - The Magistrate should not permit the same Counsel to appear and plead for both the trafficker and the trafficked woman/child.

In order to prevent a travesty of justice, the same lawyer should not be permitted to represent both the trafficker and the victim [Prerna vs. State of Maharashtra, 2003(2) Mh.L.J.105].

### **Checklist for Dealing with the Trafficker**

- I The Magistrate should verify and ensure that the police reports are properly prepared after due application of mind by the police against the traffickers/brothel owners/pimps and others.
- II If the charge-sheet is directed only against the prostitute/trafficked woman under Section 7 or 8 of the ITPA, the Magistrate may issue an order for further investigation so that the names of the traffickers are also included.
- III Before framing charges, the Magistrate may also question the woman, accused under Section 7 or 8 of the ITPA to ascertain whether she has been forced into prostitution or is under duress by the trafficker. If the Magistrate's questioning leads her/him to believe that she is, he may direct the police to do further investigation, and produce the names of the traffickers in the charge-sheet.
- IV If the charge-sheet filed by the police is against the prostitute/trafficked victim, pimp, brothel-owner, etc., jointly, the Magistrate must direct the police to seriously investigate and pursue the evidence against the traffickers to ensure that they are prosecuted and convicted as per law.

- V After framing of charges, if the evidence after questioning of the trafficked victim leads the Magistrates to believe that the woman accused under Section 7 or 8 of the ITPA is indeed a woman trafficked and forced into prostitution, he may use his discretion to offer and grant her pardon under Section 306 of the Cr.P.C, to elicit evidence and frame charges against the trafficker.
- VI The Magistrate should frame charges not only under the ITPA but also under the IPC, so as to ensure that the strongest provisions of law with maximum punishment are made applicable against the trafficker.
- VII The Magistrate must ensure that bail is not granted as a matter of course to the trafficker, if it is evident that s/he is trafficking in women and children, particularly in children. If released on bail, there can be a likelihood that the evidence will be tampered with, and the trafficker will continue to control/network/ live on the earnings of trafficked women and children.
- VIII The Magistrate must ensure that same lawyer should not be permitted to represent both the trafficker and the trafficked woman or child
- IX The Magistrate must ensure that the trial progresses at a fast pace to ensure that witnesses do not disappear or turn hostile.
- X The Magistrate must ensure that where the victim is a child, the child must be dealt with in a sensitive manner while taking evidence and questioning the child (See above Paras for details). The child must be immediately handed over to the Child Welfare Committee (CWC).

- *Manharlal Shah v. Yogeshkumar Kanaiyalal Saraia, 1988 920 Crimes 13, 16 (Guj-DB)*
- *Asaram Dadaro Giram v. State of Maharashtra, 1995 (4) Crimes 34 (Bom)*
- *State v. Dayal Sahu (2005) Cr. LJ 4375: AIR 2005 SC 3570*
- *Ratanlal at 551, citing Navnitlal v. Hasmukhlal, AIR 1988 Guj 34*
- *Ammini and others v. State of Kerala, 1998 AIR (SC) 260, 1998 (104) Cr. LJ 481 (Supreme Court)*

## Information on Human Trafficking

### Myths and Facts about trafficked and prostituted women and girls

MYTH	FACT
<p>Prostitutes* enjoy what they do</p>	<p>Most women are induced or forced into sex trade, under conditions of near or absolute slavery. They have been lured/cheated/abducted/ coerced or forced to come this stage. Once they get caught they become option less unless rehabilitated.</p>
<p>Research Data: Ambu was urged to go to Mumbai by someone who promised her a job for Rs. 20,000 a month. The person, who brought her to Mumbai, got her drunk with alcohol and sold her. When she woke up and asked about the job she was told she would get it soon. She had no idea that she had been sold into prostitution. When she realized this, she resisted. To break her resistance she was beaten, very badly until she was black and blue - in fact she still has stomach and back pains from the terrible beating. She was not given a single rupee and served up to 20 men a day. (Ambu: Bhiwandi brothel, interview by B. Abasubel, That Takes Ovaries in December 2005)</p>	
<p>“These women” can never be rehabilitated.</p>	<p>With appropriate measures the victims can be rescued, repatriated and reintegrated into society. Efforts should be self sustaining and based on the ‘best interest of the victim’.</p>
<p><b>Research Data:</b> In the district of Murshidabad in West Bengal state, from which are drawn 23% of Kolkata’s victims of commercial sexual exploitation, the Government of India, under the scheme of Support to Training and Employment Programme (STEP), sanctioned an integrated training and income generation project in the silk yarn production sector. The project targets young women from a group of villages which have high levels of female migration and of victims sold into the prostitution trade. This has helped in curbing the trafficking of young women into the flesh trade from this area while at the same time improving their quality of life. ( Source: Action Research on Trafficking in Women and Children in India (2005) by NHRC)</p>	
<p>Prostitution is “the world’s oldest</p>	<p>profession” and a necessary evil. Prostitution is the world’s oldest oppression of women and girls.</p>

<p><b>Research Data:</b> The necessity of keeping up a steady supply of ‘attractive women’ to keep the British soldiers happy and disease-free prompted Indian authorities to set up licensed brothels. They imported young and healthy, Tibetan and Nepali women as registered “prostitutes” to the cantonment bazaars. This led to the birth of the Kamatipura red-light area in Mumbai. Many of the brothels in Mumbai still have license numbers given by the British saying Welcome House X. The brothels in Agra and Sonagacchi, Kolkata also came up to provide sex to British soldiers and clerks. ( Source: Prostitution in a Patriarchal Society: A Critical Review of the SIT Act)</p>	
<p>An adult woman should be free to make her own choice even if the choice is to be a prostitute.</p>	<p>It would be more accurate to say that a woman victim of commercial sexual exploitation complies with the extremely limited options available to her. Her compliance is required by the fact of having to adapt to conditions of inequality that are set by power disparities based on gender, race, ethnicity and poverty. Moreover, given the substantial risk of physical, sexual and psychological injuries women face in prostitution, it is the harm to and exploitation of the person, that is the governing international standard. Moreover, choice should be based on informed consent. The person should be made aware of all the options and consequences so as to make a ‘choice’.</p>
<p>Poor women can earn a lot of money through prostitution.</p>	<p>In fact, the majority of women’s time in prostitution is spent in debt bondage. A whole chain of traffickers, from recruiters, to transporters, to pimps and brothel managers, ensure that the woman gets a very small cut of her earnings. At the end of the day, women are left with disease-ridden bodies, children and no savings.</p>
<p><b>Research Data:</b> Brothel owners interviewed for an NHRC study said that 27.4% women in prostitution in their old age become inmates of old-age homes or take shelter in NGOs, 18.7% are totally helpless and take to begging or do nothing and 8.5% are maidservants in brothels. Negligible percentages become brothel madams or traffickers.</p>	
<p><b>Most women are forced into prostitution as children</b></p> <p>A writ petition was filed in 1988 with the Supreme Court of India regarding protections for the rights of children in prostitution. When the petition was pending, the Supreme Court appointed an expert committee, known as the Mahajan Committee, to conduct a field study and report to the Supreme Court on the status of children in prostitution. The Committee reported that at any given point in time, at least 35% of the persons in prostitution are below the age of 18 years. In addition, increasingly younger children are being forced into commercial sexual exploitation. The Mahajan Committee found that as many as 60% of persons in prostitution are brought into prostitution as children. (Gaurav Jain v/s Union of India - 1997 (8) SCC 114)</p>	

*The word ‘prostitute’ in this handout is used to denote common terminology applied while speaking about victims of commercial sexual exploitation. The document has kept the word ‘prostitute’ in some places in the handout to highlight common phrases used, but does not accept the term ‘prostitute’*

## Trafficking in human beings- An organized crime

Section 370 IPC, 370A IPC are legislature with a view to having a broad based definition of Human trafficking offence with exemplary punishment Sec 370 IPC & 370 A IPC are gender non bail (boy/girl). Trafficking most often involves a range of people such as a seller, a procurer, a broker, an agent, a middleman, a transporter, a buyer, a moneylender, a money launderer, an owner of illegal premises and an exploiter. All of them know that they are breaking the law to make a profit in cash or kind from this act. This fits in with the definition of the United Nations Convention Against Transnational Organized Crime, 2000, which states that an “organized crime group” is “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit” (Article 2 (a))

The involvement of organized crime groups in India is indicated by case studies, shared by law enforcement officials and covered by news reports. Specifically for prostitution and child labour, gangs and syndicates in India operate at various levels: the village or rural level centres of power at the national level, and the regional or international “flesh trade market”. The different levels are all inter-linked and reflect all the elements of organized crime. Within this criminal activity the commodified victim is repeatedly violated. Thus conceptualization of prostitutions as an organized crime is of vital importance. All parties who are committed or have the responsibility of curbing trafficking have to have an understanding of:

- I Place, time & methods of recruitment of the victims.
- II The profile of procurers in terms of behavior patterns; patterns of social conditioning
- III Intermittent abettors (police, passport authorities, taxi operators, etc.)
- IV Levels of trafficking.

The international links of the traffickers have been well documented. For example, according to the NHRC study, over 10% of the interviewed traffickers had visited one country outside India, 8.1% had visited two countries and 1.3% had visited three or four countries. An overwhelming majority of the traffickers (84.4%) stated that the purpose of the visit was to sell/buy girls. The rest had travelled abroad in connection with associated activities, like arranging dance /song programmes and exploring possibilities for trafficking.

### Vertical and horizontal linkages between crime syndicates and trafficking networks

<ul style="list-style-type: none"><li>• Profits from trafficking are third only to the underground narcotics and arms trade.</li><li>• Strong connections exist between trafficking networks and well - connected individuals who prevent prosecution of traffickers.</li><li>• Revenue generated by the traffickers and exploiters is very high and this is used for propelling/facilitating /indulging in other crimes as well.</li></ul>	<ul style="list-style-type: none"><li>• Organized crime syndicates run trafficking via some recruitment agencies</li><li>• Indian organized crime is involved in the international trade of girls and women from Nepal and Bangladesh to major demand centers in the country and abroad</li><li>• Cash exchanged for trafficking and prostitution fuels money laundering and the black economy.</li></ul>
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### **Who are the trafficked**

The majority of the trafficked person (Boy/Girl) belongs to the economically and socially marginalized groups of India, followed by vulnerable women and children trafficked from Bangladesh and Nepal.

### **Teenage girls and boys.**

The age profile of the trafficked victim presents an important dimension. There is a very high demand for children. Increasing numbers of children, especially girls, being rescued in the few raids conducted by the police show that there is a rapid growth in the number of children exploited for prostitution and other forms of exploitation. Children are most vulnerable to trafficking. Boys are contracted and sold to Hijra community to the MSM (.....)

### **Women and children from disadvantaged circumstances.**

The NHRC study attempted to understand the socio-economic condition of the family before the victims were induced into commercial sexual exploitation. The study found that only a fourth of the respondents had a monthly family income of Rs.2, 000 and above; 47.5% had an income below this level, and 27.7% were not able to give details. A vast majority of the respondents came from poor families.

Women and children from marginalized groups (scheduled castes and tribes, especially girl children from certain communities like Bedia, Kanjar, Gujjar, Devedasis and Nats)

The socio-religious background of trafficked victims studied by NHRC found that almost a third of the victims, 32.3% were from the schedule castes, 5.8% were from schedule tribes, 21.9% from the other backward classes and 17.4% from other castes. The rest were unable to state their caste. Thus, a large majority of the respondents (60%) belonged to socially deprived sections of society.

### **Women and children from drought prone areas , areas affected by natural disasters or human made disasters (conflict, wars, disability).**

68.6%, of trafficking victims came from rural areas, 21.6% from urban centers and 9.8% from urban slums, according to the NHRC research. Exploitation of women and girls in disaster situations is a well-known, documented and reported phenomenon. Disaster increase vulnerability of women and girls, which is shamelessly exploited by the traffickers.

### **Children who are victims of incest, paedophilia.**

Women and girls who have lost their virginity outside the realm of marriage are seen as “immoral”. These victims of incest and child sexual abuse, under social and customary pressures, take to prostitution either on their own or are often induced into prostitution for lack of options or are forced into it by various perpetrators. It has been found that, a staggering 69.8% of victims of trafficking had their first sexual experience as children, i.e., when they were below 18 years of age and that their first sexual experience had been forced on them by someone known to them.

### **Victims of child marriage or women who are married at a very young age.**

71.8% of the respondents had been married when they were children (i.e., when were under 18 years of age). This suggests that child marriage is among the key factors that make women and girls vulnerable to trafficking.

### **Women and girls from isolated districts where the illiteracy rate is high.**

70.7% of trafficked victims, according to NHRC were either illiterate or barely literate. Only 13.6% of the victims had received education up to the primary stage and around 15% beyond the primary stage. A mere 0.4% of the respondents were graduates or above. In the same study 60.8% of them also revealed that, their first sexual experience was forced on them, and 63.8% accused a host of persons including those in school staff, teaches, and persons in positions of authority or who enjoyed their trust like friends, priests ,fathers-in-law, counselors, police officials or domestic help of perpetrating the abuse.

## ***Who are the criminals***

**The Chain of Criminals from Source to Transit to Destination have to he brought justice meticulously.**

### **Traffickers and other exploiters are the criminals**

All those who benefit directly as well as indirectly from trafficking are the criminals. They range from commercial sexual exploiters, to the sex entrepreneurs (traffickers, procurers, pimps, brothel owners, managers and money lenders) who make a profit by trading in women and girls and the users and abusers of bonded labour, cheap and child labour (businesses that use such labour , those who finance such businesses and those who are abettors). Many of these also fall within the definition of 'traffickers'. It is the nexus between the buyers of trafficked labour and services, the trafficker and the manager, supervisors and contractors that creates the demand, perpetuates trafficking and leads to the gross violation of the rights of women, children and men.

The identification of traffickers and buyers of prostituted sex and trafficked labour bringing them to book, confiscating the illegal assets created out of trafficking, making the traffickers compensate for the damages and penalizing them, all at as a deterrent to traffickers and buyers and restores a sense of justice to the survivor.

Commercial sexual exploiters and traffickers of labour should be indentified and brought to the book by confiscating the illegal assets created out of trafficking, making the traffickers compensate for the damages and by penalizing them. All these act as a deterrent to traffickers and buyers and restore a sense of justice to the survivor.

Unless the buyers feel threatened under the law and fear losing their social standing, they will not stop xploiting women, children and men.

Traffickers	Trans - porters	Conspirators	Abettors	Financers/ exploiters	Abusers/ Exploiters
Recruiters	Those who transport	All those who contribute to the various steps involved in trafficking & exploitation	All those who abet the various processes through their presence, their involvement or by acts of omission/commission	All those who finance the various activities	Commercial sexual exploiters, known as 'customers, clients, johns, pimps'
Their agents	Arrange transport		Those who contribute to the perpetration of the sexual/labour exploitation of the trafficked victims in the places of exploitation		Contractors
Their bosses	Arrange halting places				Managers
The master minds					Madams

### Trafficking hierarchy (Organized crime with secret net workers driven by profit)

The trafficking hierarchy consists of several tiers. The field research shows that at least the following levels exist:

- 1 Master trafficker/kingpin
- 2 Primary traffickers/procurers
- 3 Secondary traffickers intelligence gatherers
- 4 'Spotters' or the grass-roots chain of

Traffickers do not operate on their own. They establish a network and develop linkages with other exploiters, like buyers of prostitution, brothel keepers, moneylenders, transporters, border officials, pimps, hoteliers, and corrupt officials. There are several other stakeholders who support the main trafficking structure mentioned above. These include (a) financiers who finance the transactions at various levels;(b) the goons/goondas who provide security at various levels;(c)the hoteliers who provide accommodation during transit; (d) the transporters who provide or arrange transport; (e) paramedical persons who attend to the illnesses of the trafficked victims during transit; (f) officials who, in lieu of sexual services or bribes, provide several services, including immigration clearance and security; and (g)the final exploiters and abusers who may also be part of the network. They dictate terms regarding supply and demand and modulate the trafficking process.

### Modus operandi of traffickers

Traffickers look for the most vulnerable women and children who have no assets and hardly any alternatives. The accessibility of the trafficker to the prospective victim is an important factor in trafficking. The method adopted is usually influenced by the proximity or otherwise of the trafficker to the be treated as an accomplice , even if she gets a share of the income

Offering them jobs as domestic servants	Promising jobs in the film world
Coercion	Offering money
Luring them with 'pleasure trips'	Making false promises of marriage
Befriending them by giving goodies from home	Offering shelter to girls who have run away or are street children
Offering to take them on pilgrimages	Making other kinds of false promises

<b>Four phases of entrapment of young women into prostitution</b>	
<ul style="list-style-type: none"> <li>• <b>Ensnaring</b></li> <li>- Impressing the young girl</li> <li>- Winning her trust and confidence</li> <li>- Making her think he is the only one who understand her</li> <li>- Ensuring she falls in love with him by giving a present signifying stability in relationships</li> <li>- Claiming the status of her 'boyfriend'</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Creating dependence</b></li> <li>- Becoming more possessive</li> <li>- Convincing her to destroy important objects or reject those she is close to</li> <li>- Changing her name</li> <li>- Destroying her connections to her previous life</li> <li>- Isolating her</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Taking control</b></li> <li>- Deciding where she goes, who she sees, what she wears, eat, thinks</li> <li>- Using threats, and if necessary, violence</li> <li>- Enforcing petty rules</li> <li>- Being inconsistent and unreliable</li> <li>- Demanding that she prove her love</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Total Dominance</b></li> <li>- Creating a willing victim</li> <li>- Ensuring she complies to his wishes</li> <li>- Convincing her to have sex with his friend</li> <li>- Convincing her to be locked in the house</li> <li>- Convincing her that he needs the money and the easiest way is through selling sex</li> </ul>

### Who are the exploiters?

Myth about commercial sexual exploiter/abusers	Facts about commercial sexual Exploiters/ abusers
Most commercial sexual exploiters are unmarried.	Many of the commercial sexual exploiters are married as substantiated by the NHRC study in which 45.5% of the interviewed buyers were married men
If they are married, the buyers are separated from their wives.	Most of the exploiters are not only married but also staying with their spouses. This negates the fact that men 'go to prostitutes out of need'. This is again well documented in the NHRC study in which 72.9% of the interviewed married buyers had spouses staying with them.
Most have 'sexually dysfunctional' wives and hence they need some 'outlet'	This is a myth propounded by the patriarchal society, which calls all women who do not submit to men's desires as 'sexually dysfunctional' in the NHRC study again it was seen that 54.3% of the interviewed married men had wives who were in the age group of 26-35 years old.
Most exploiters are illiterate.	This myth is also exploded by the NHRC study which has shown that of the interviewed 582 clients, 22.7% had studied up the graduate level or more and 79.6% were literate.

Most exploiters are migrant laborers.	This myth has been circulated over the years to shield the 'respectable men' visiting brothels. In the NHRC study through a majority of the buyers. 41.9% were from the working class, 8.8% were students, 26.1% were employed in government service and 18.4% were in business.
'Respectable Men' never visit a brothel	A majority of the exploiters in the NHRC study had started visiting brothels during their adolescence
Men visit a brothel only when they are frustrated in their mid years. Men look for 'mature love' in brothels.	There is fair amount of evidence from the world over which is also substantiated by the NHRC study that a large number of buyers demand 'young, nubile virgins'. In the study a large majority (39.2%) of buyers admitted they looked for young girls in brothels, the highest preference being for virgin girls. 53.3% of the respondents started that they look forward to having sex with girls who are submissive and willing to surrender to all their demands

### The offence of trafficking has the following ingredients:

Exploitation of the trafficked person	The displacement can be from one country, state, village, community or home to another or from one situation to another e.g., when a daughter of a woman in prostitution is also pulled into prostitution by the brothel keeper, she is considered trafficked as she has been displaced from the safety of her mother's community to the brothel community, though geographically it may happen in the same room.
Displacement (physical or situational)	The exploitation may be manifest as in a brothel or latent as in massage parlors, dance bars or beer bars.
Commercialization of the exploitation	The exploiter generates revenue in cash or kind from the exploitation even if the victim gets a share of the revenue. The trafficked victim can never be treated as an accomplice, even if she gets a share of the income

**A table outlining the punishment for offences under the ITPA, 1956  
may be referred below.**

<b>Sections of ITPA, 1956</b>	<b>Offence</b>	<b>Punishment upon First Conviction</b>	<b>Punishment upon Subsequent Conviction</b>	<b>Punishment when the offences are committed in respect of a child/minor</b>
Sec.3	Punishment for keeping a brothel or allowing premises to be used as a brothel	RI for not less than 1 year and not more than 3 years AND with fine which may extend to two thousand rupees	RI for not less than 2 year and not more than 5 years AND with fine which may extend to two thousand rupees	
Sec.4	Punishment for living on the earnings of the prostitution	Imprisonment for a term which may extend to 2 years OR with fine which may extend to one thousand rupees or both		Imprisonment for not less than 7 years and not more than 10 years
Sec.5	Procuring, inducing or taking person for the sake of prostitution	RI for not less than 3 year and not more than 7 years AND with fine which may extend to two thousand rupees		Child -RI for not less than 7years but may extend to life Minor – RI for not less than 7 years and not more than 14 years
Sec.6	Detaining a person in premises where prostitution is carried on	Imprisonment for not less than 7 years but which may be for life OR imprisonment up to 10 years AND fine		
Sec.7	Prostitution in or in the vicinity of public places	Imprisonment which may extend to 3 months		Imprisonment for not less than 7 years but which may be for life OR imprisonment up to 10 years AND fine
Sec.9	Seduction of a person in custody	Imprisonment for not less than 7 years but which may for life OR imprisonment up to 10 years AND fine		

## Trafficking in Indian Constitution and Laws

### The Constitution of India expressly prohibits traffic in human beings.

- Article 14 provides for equality in general.
- Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth.
- Article 15 (3) provides for special protective discrimination in favour of women and child relieving them from the moribund of formal equality. It states that, “nothing in this article shall prevent the State from making any special provision for women and children”.
- Article 16 (1) covers equality of opportunity in matters of public employment.
- **Article 23 prohibits traffic in human beings (in any form and for any exploitation) and forced labour.**
- Article 24 prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age.
- Article 38 enjoins the State to secure and protect as effectively as it may a social order in which justice – social, economic and political – shall inform all the institutions of national life.
- Article 39 provides that the State should direct its policy towards securing, among other things, a right to adequate means of livelihood for men and women equally and equal pay for equal work their age or strength.
- Article 39 (f) provides that children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that childhood should be protected against exploitation.
- Article 42 protects against inhumane working conditions.
- Article 45 makes provision for free and compulsory education for children, which is now well settled as a fundamental right of children.
- Article 46 directs that the state to promote the educational and economic interests of the women and weaker sections of the people and that it shall protect them from social injustice and all forms of exploitation.

**For further discussion refer Resource Book on Legal Framework on Anti Human Trafficking, UNODC, 2008.**

### Trafficking offences under the Indian Penal Code

- **The Indian Penal Code, 1860** prohibits trafficking, purchase and sale of minors. In addition, existing rape, assault, and abduction laws can be used to address the systematic abuse of women and girls in brothels. Relevant provisions of significance under the Indian Penal Code are:
- Sections 359-368 which deal with kidnapping, abduction, and wrongful confinement. Section 359, Section 361, Section 362, Section 363, Section 365, Section 366, and Section 366A, which makes procurement of a minor girl (below the age of 18 years) from one part of India to another punishable.
- Section 366B, which makes importation of a girl below the age of twenty-one years punishable. Section 367, which mandates imprisonment of up to ten years for the procurement or import of minors for the purposes of illicit intercourse, kidnapping and abduction leading to grievous hurt, slavery or subjection to “unnatural lust”.
- Section 370, Section 371, Section 372, Section 373, Section 374 makes selling, letting to

hire, or otherwise disposes of any person under the age of eighteen (18) years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose criminal.

- Section 375, Section 376(1), Section 376B criminalizes rape. Rape laws are applicable to both brothel staff and customers.
- If at the time of a raid pornographic CD's are also seized Sections 292 and 293 can be used. In addition, Criminal Procedure Code, 1973 with Sections 51(2), 53(2), 98, 160, 327(2) and 357 and Sections 114 A and 151 of The Indian Evidence Act, 1872 are relevant in this context.

**Source:** Trafficking Women and Children for Sexual Exploitation: Handbook for Law Enforcement Agencies in India, Nair, P.M. 2007, UNODC.

### An illustrative list of Section under IPC to be used in the case of a trafficked girl

Displacement from her community, which amounts to kidnapping/ abduction/ confinement	Sections 361, 362, 365, 366 IPC may apply
Procured illegally	S. 366A
Trafficking of person/minor)	370 IPC
exploitation of a trafficked child & Trafficked person)	370 A IPC
Sold by somebody	S. 372
Bought by somebody	S. 373 IPC
Imported from a foreign country or hails from J&K	S. 366B IPC
Wrongfully restrained	S. 339 IPC
Wrongfully confined	S. 340 IPC
Physically tortured/injured	S. 327, 329 IPC
Subject to criminal force	S. 350 IPC
Mentally tortured/harassed/assaulted	S. 351 IPC
Criminally intimidated	S. 506 IPC
Outraged of her modesty	S. 354 IPC
Raped/gang raped/repeatedly raped	S. 375 IPC, 376 IPC 376 D IPC
Subject to perverse sexual exploitation (unnatural offences)	S. 377 IPC
Gang rape of a child (below 18 years/ Boy or girl)	sec. 5 r/w 6 of POCSO Act 2012
Defamed	S. 499 IPC
Subject to unlawful compulsory labour	S. 374 IPC
Victim of criminal conspiracy	S. 120B IPC

## Other Special laws, which deal with trafficking related crimes, are:

1. The Prohibition of Child Marriage Act, 2006
2. Bonded Labour System (Abolition) Act, 1976
3. Child Labour (Prohibition and Regulation) Act, 1986
4. Children (Pledging of Labour) Act, 1933
5. Maharashtra Control of Organized Crime Act, 1999
6. Goa Children's Act, 2003
7. Information Technology Act, 2000 (Sec. 67 - if the trafficked victim is exploited to develop pornographic material and that porn is circulated electronically).
8. Juvenile Justice Act (Care and Protection of Children) Act, 2000 Myth and Fact of legalization of trafficking

### **Criminal liability**

**Under the law both the clientele or customer and the trafficker are liable**

#### **Customer Liability: whether 'customer' is liable**

The answer is yes. Firstly, he should be booked under Section 5(1) (d) and under Section 7(1) of ITPA. He is a person who 'causes' or 'induces' another person to carry on prostitution and is, therefore, liable under Section 5(1)(d).

(Cherain Vs.Kerala, 1973, Cr.L.J. 839). Moreover, he is a person 'with whom prostitution is carried on' and is therefore, liable under Section 7(1). Further Section 7 (1A) ITPA makes it clear that if the offence of 'prostitution' is committed in respect of a child or minor then the person committing the offence (i.e. including the customer/clientele) is liable for graver punishment and fine with a mandatory minimum imprisonment of 7 years.

Besides these provisions of ITPA, he is an abettor to all violations on the victim, which attracts Section 114 IPC. If the victim is a child, Section 376 IPC (rape) should be added to the charges against the 'customer'. If the victim is an adult, Section 376 IPC will come into operation if it can be established that she had not given informed or willing consent. Moreover perverse sexual acts on the victim invite liability under Section 377 IPC.

#### **Trafficker Liability**

Under Section 5 of ITPA, trafficking committed, contemplated or even attempted is punishable, regardless of consent of the trafficked person. The modus operandi could include procuring, attempting to procure, inducing, taking, attempting to take, causing a person to be taken, causing or inducing a person to prostitution etc.

## Myth and Fact of legalization of trafficking

MYTH	FACT
Legalization brings the sex industry under control.	Experience in various countries which have legalized prostitution has shown that by legalizing prostitution the problem actually expands. For instance, Victoria, Australia has experienced a massive expansion of the sex industry after legalization. In addition to prostitution, other forms of sexual exploitation, such as tabletop dancing, bondage and sadomasochist centres, peep shows, phone sex, and pornography have increased and have generated enormous profits for the sex industry and the State but not for the woman trapped in prostitution
Legalization will dignify the women in prostitution.	Legalization does not dignify the women, but only legitimizes the sex industry.
Women in prostitution will be better protected if prostitution was legalized.	Studies of victims of commercial sexual exploitation show that prostitution establishments – legal or illegal – did little to protect them. A study that interviewed victims of trafficking in five countries showed that 80% of them had suffered physical violence from pimps and buyers; immaterial of whether the sex industry was legal or illegal. Usually the buyer's interests take precedence over the woman's in prostitution. Also, 'safety policies' in brothels do not protect women from harm. The sexual exploitation and violence in prostitution is viewed as sex and often tolerated as part of the so-called job. (Source: Prostitution Research & Education Centre, Melissa Farley)
Women victims of commercial sexual exploitation would be protected against infectious diseases in a legalized system.	A legalized system of prostitution often mandates health checks and certification for the women in prostitution, but not the male buyers. Public health proposals mandate health checks for women to protect the male buyers and not the women in prostitution.
Legalization helps to end the exploitation of women who have been trafficked.	Reducing the demand, and thus the size of the sex industry and the amount of trafficking victims, is an important step in stopping the spread of HIV/AIDS. Condom use policies are only an emergency measure to try to protect trafficking victims from contracting disease. Such policies are ineffective as buyers are frequently averse to using condoms, and brothel owners compel women to give into buyers' demands. For example, only 77% of trafficking victims in India took regular preventative measures against disease, while 67.9% of buyers stated that they used condoms. A majority of the buyers interviewed preferred submissive girls who were willing to give into their demands, such as sex without a condom.
Legalization promotes sex trafficking.	In The Netherlands, where prostitution is legal, a 1999 study showed that 80% of the women in the country's brothels were trafficked from other countries. And in Germany, 10 years after steps toward legalization of prostitution started in the 1980s, it was found that 75% of the women in sex industry were foreigners. After the fall of the Berlin Wall, 80% of the estimated 10,000 women trafficked into Germany were from the former Soviet bloc countries.

**Source:** Janice G. Raymond: *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*. Published simultaneously in *Journal of Trauma Practice*, 2, 2003: pp. 315-332; and in *Prostitution, Trafficking and Traumatic Stress*. Melissa Farley (Ed.). Binghamton: Haworth Press, 2003.

## *For Public Prosecutors*

"[it is] as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice." Supreme Court (in *Shakila Abdul Gafar Khan vs. Vasant Raghunath Dhobale*, (2003) 7 SCC 749)

In plain terms human trafficking is the buying and selling of human beings for profit. At the initial stage a trafficker may use a wide range of methods and means to procure or induce or coerce a person for purposes of exploitation. The methods vary from drugging, blackmailing, confining, abducting, kidnapping, rape, varying degrees of assault, hurt or grievous hurt. The most inconspicuous and commonly used method is the slow and consistent luring of a woman/ child through a process of friendship and love. Traffickers do not generally function in isolation. Often at source areas they are broadly divided into three categories i.e. individuals, small gangs or syndicates. Traffickers are always supported by buyers, financiers, transporters, clients, etc<sup>1</sup>. Trafficking generates very high economic gains through exploiters/ abusers indulging in commercial sexual exploitation, bonded/ exploitative/ forced labor, camel jockeying, trafficking of human organs, groups selling young girls as brides in areas where unequal sex ratios exist or insurgency groups recruiting child soldiers.

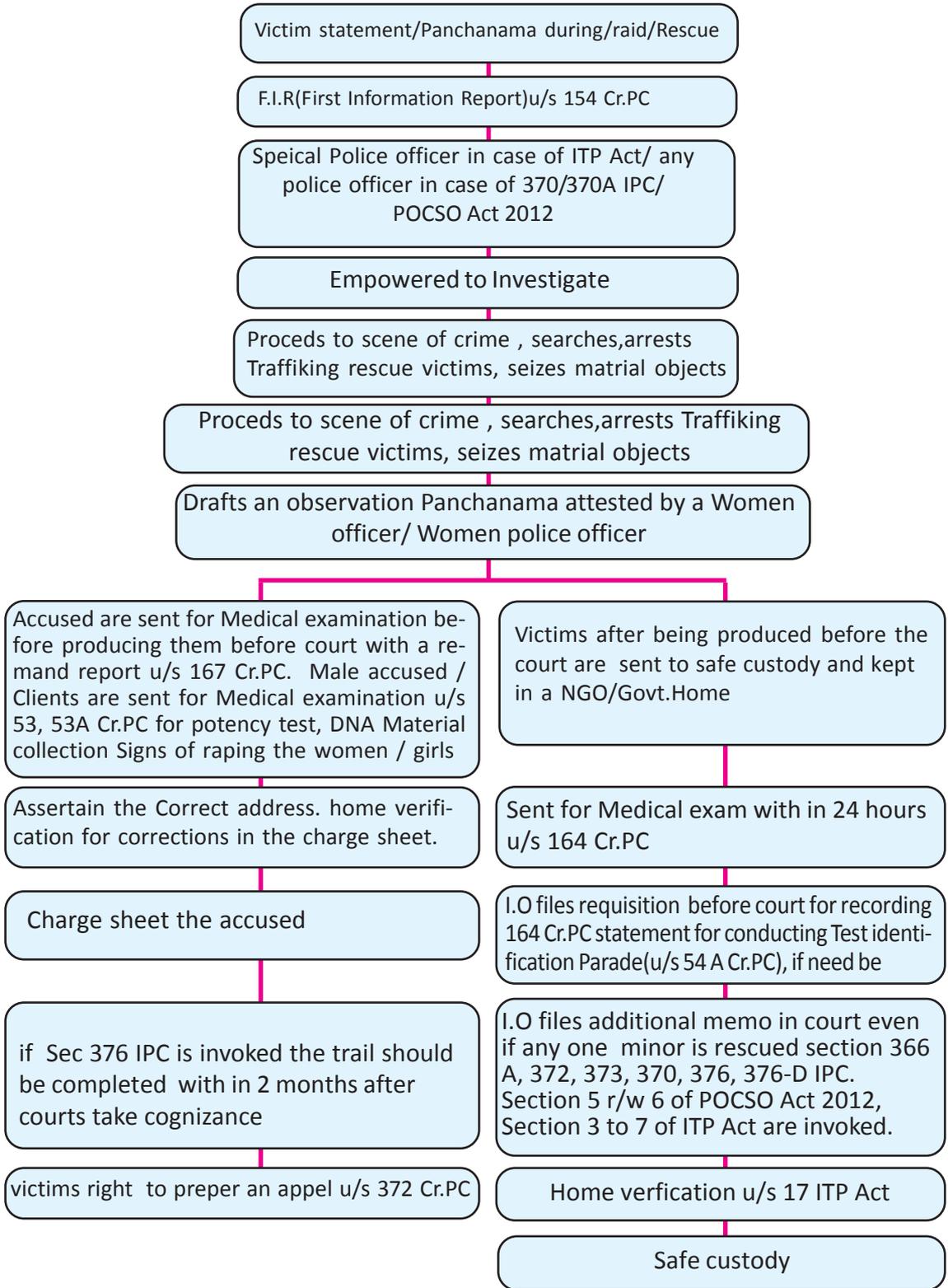
Trafficking as a crime is so rampant that it finds itself among the top three transnational organized crimes. The other two being drug trafficking and arms smuggling. As recorded by UNODC "human trafficking alone accounts for trafficking of persons in 127 countries for exploitation in 137 countries<sup>11</sup>". Human trafficking is a growing organized crime that specializes in commercial exploitation to ensure a continually high degree of profitability during the lifetime of its victims. India serves as a source, transit and destination country in the global context on human trafficking. Apart from the problem of internal trafficking, cross border trafficking from Nepal, Bangladesh and other bordering nations is also widely prevalent.

Human trafficking syndicates have significant influence and financial leverage over their operations and victims. They are often able to access the best possible legal advice it's not uncommon for prosecutors in cases of human trafficking to face some of the finest legal minds at every stage of the trial. Human trafficking syndicates also have a high degree of success in tampering with victims once they are rescued by the police. They also demonstrate significant ability to manipulate or tamper with the evidence in the case. An attempt to tamper takes place at every stage of a case within the criminal justice system in cases of human trafficking. Prosecutors play a vital role in the justice delivery system in ensuring conviction of offenders/ traffickers. They can also play a critical role in advising the police on the legal provisions and procedures during the course of investigations, undertaking the state arguments on bail and remand, undertaking the criminal trial, supporting the applications for rehabilitation on behalf of the victims and recommending to the court measures for victim protection during trial. Prosecutors also support the law enforcement officials in various ancillary proceedings such as closure of premises where commercial exploitation occurs, attachment and seizure of criminal assets, contesting appeals filed by the accused against the state regarding their bond proceedings and other such matters and finally they are involved in the process of responding to writs and criminal appeals filed by the accused.

The Standard Operating Procedures (SOP) is a focused attempt to bring together in one exhaustive document a recording of all available statutes, case laws, good practices and legal procedures on human trafficking, as a resource for prosecutors in India. The document acknowledges the extensive expertise that exists within the fraternity of prosecutors in India and hopes to benefit from their feedback and constructive input to make this document a handy, helpful tool in ensuring sharing of lessons and availability of new tools in combating human trafficking.

*1 Recent Criminal Law Amendment Act, 2013 provides for punishment of traffickers U/s 370, 370(A) IPC and the POCSO Act 2012 also provides certain legal mandates against traffickers.*

## Flow chart of Trafficking Crime



# PRE TRIAL

The role of the Prosecutor is very limited at this stage of the legal process, since a large part of the work that is required to be done by the police will come within the ambit of the Prosecutor's work, only when the accused is/ are produced before the Magistrate. Below is a brief description of the procedures followed by the police when performing functions under the ITPA . Note that the Prosecutor will not be involved in these pre-trial procedures under the ITPA. They are however, illustrative of what process may have taken place before a victim/ accused are produced before the appropriate Magistrate/ Court<sup>2</sup>.

- Information is conveyed to the Special Police Officer (SPO) that any offence punishable under this Act is being committed on any person<sup>3</sup>.
- In A.P Spl. Police officers of the rank of Inspector of Police & Asst. Commissioner of Police are appointed as SPO U/s 13(1) of ITP Act, 1956.
- The SPO records the grounds of his belief and then enters and searches such premises without a warrant, if search of the premises cannot be made without undue delay<sup>4</sup>.
- Two respectable inhabitants (one of whom shall be a woman) from the locality of the place to be searched shall attend and witness the search. The woman witness need not be from the locality where the search will be done<sup>5</sup>.
- The SPO shall be entitled to remove all the persons found in the place where search has been carried out u/S. 15 (1) of ITPA<sup>6</sup>.
- The SPO shall produce all the rescued persons before an appropriate Magistrate (Metropolitan Magistrate, Judicial Magistrate of the First Class, District Magistrate or Sub-Divisional Magistrate)<sup>7</sup>.
- After producing the rescued persons before the Magistrate, a registered medical officer shall examine the persons for:
  - Determination of age.
  - Detection of any injuries as a result of sexual abuse.
  - Presence of any sexually transmitted diseases<sup>8</sup>.
- The SPO shall be accompanied by two women police officers for a search under the ITPA<sup>9</sup>.

2 Also see; *Standard Operating Procedures (SOP) on Investigating Crimes of Trafficking for Commercial Sexual Exploitation*, UNODC, 2007.

3 Sec. 15(1) ITPA

4 Sec. 15(1) ITPA

5 Sec. 15(2) ITPA

6 Sec. 15(4) ITPA

7 Sec.15(5) ITPA

8 Sec.15(5-A) ITPA

9 Sec.15(6-A) ITPA

- Interrogation/ interview shall be conducted by a woman police officer and if no woman police officer is available the interview shall only be done in the presence of a female member of a recognized welfare institution/ organization<sup>10</sup>.
- In case the person rescued u/S. 15(4) of ITPA cannot be produced before the appropriate Magistrate then the nearest Magistrate can pass orders for the safe custody of the person for ten days till the person is produced before the appropriate Magistrate<sup>11</sup>.
- The appropriate Magistrate shall cause an inquiry to be made by a Probation Officer appointed under the Probation of Offenders Act, 1958, with respect to the age, character, antecedents, personality of the victim(s) the suitability of husband/ guardian/ parents taking charge; nature of the influence that the victim's home has on her and the prospects of his/ her rehabilitation<sup>12</sup>.
- Pending inquiry of the Probation Officer, the Magistrate may remand a rescued victim for a period of three weeks in safe custody<sup>13</sup>.
- When the Magistrate is satisfied with the inquiry by the Probation Officer and determines that the victim is in need of care and protection then the Magistrate may order that the victim be sent to a Protective Home for a period of one to three years for rehabilitation<sup>14</sup>.
- The Magistrate may give directions about the care, guardianship, education, training, medical and psychiatric treatment of the victim as well as supervision by a person appointed by court, during the victim's stay at the Protective Home<sup>15</sup>.
- The Magistrate may take the assistance of an advisory committee consisting of five persons three of who shall be women to assist him and for this purpose may keep a list of experienced social worker in the field of anti human trafficking<sup>16</sup>.

**Sec. 16 of the ITPA** - A Magistrate (Metropolitan Magistrate, Judicial Magistrate of the First Class, District Magistrate or Sub-Divisional Magistrate) is empowered under this provision to take cognizance of an offence under the ITPA, on information received from the police or any person authorized by the State Government in this behalf or any source. In a matter before the court, it was held that no defence can be raised, that cognizance of an offence under the ITPA cannot be taken except upon a report submitted to the Special Police Officer<sup>89</sup>. Upon receipt of information that a person is being made to carry our prostitution in a brothel, the Magistrate may direct a police officer not below the rank of a sub-inspector to rescue and produce that person before him. If such a matter is brought to the notice of the Prosecutor, then he can ensure in-camera or chamber proceedings to ensure anonymity of the place that is to be searched.

10 Sec.15(6-A) ITPA

11 Sec.17(1) ITPA

12 Sec.17(2) ITPA

13 Sec.17(3) ITPA

14 Sec.17(4) ITPA

15 Sec.17(4) ITPA

16 Sec.17(5) ITPA

17 *Shakila v. State*, AIR 1962 All 633.

**Sec. 17 of the ITPA** This provision provides for powers of the Magistrate to grant interim custody of rescued persons. The principle guiding the Magistrate in making orders for safe custody is to ensure that the rescued person is not restored or placed in the custody of another person who may exercise a harmful influence over the rescued person. Hence, interim custody has to be read within the power which has been conferred on the Magistrate to make an inquiry<sup>18</sup>. The Magistrate exercising powers u/S. 17 is a tribunal of limited jurisdiction and has to act strictly within the four corners of the statute creating such a tribunal. The Magistrate has no inherent jurisdiction to pass any order on the ground that the acts involved relate to public morality<sup>19</sup>.

**Sec. 19 of the ITPA** - A victim of commercial sexual exploitation may herself make an application to the Magistrate (Metropolitan Magistrate, Judicial Magistrate of the First Class, District Magistrate or Sub-Divisional Magistrate) to place her in a Protective Home or be provided care and protection by the court. There are several instances where victims seek state protection, when they do not have any form of ostensible support. In such cases the Prosecutor may petition the court to provide the victim with safe shelter. The victim is required to be present before the court and an order directing that the victim be kept in the Protective Home may be passed.

## A. First Information Report

The role of the First Information Report (FIR) is very important in preliminary proceedings and more often than not it is this document that can make or break the case. A common belief is that only a form filled under Sec. 154 of the Cr. PC is an FIR. In many cases the courts have held that entries in police station diaries may constitute an 'FIR' within the meaning of the Cr. PC<sup>20</sup>. Further any written document that records information disclosing the commission of a cognizable offence can serve as an FIR<sup>21</sup>.

## Challenges

### 1. Adding Charges and Severity of Charges

FIR is a preliminary assessment of the nature of crime allegedly committed. Any time before judgment charges may be added or altered<sup>22</sup>. When the Prosecutor feels that during the trial there are other charges that can be made out against the accused based on the depositions and evidence exhibited, he may petition the court to add charges. The alteration of charges can take place as many times as the court deems fit<sup>23</sup>.

18 *Prem v. District Magistrate, Meerut*, AIR 1959 All 206 at p. 207

19 *Ram Devi (Smt) v. State*, 1963 All LJ 894

20 *H.N. Rishbud and Inder Singh v. State of Delhi*, 1955 AIR (SC) 196 (Supreme Court 1954), paragraph 5

21 *Superintendent of Police, C.B.I. and Others v. Tapan Kr. Singh*, 2003 AIR (SC) 4140, 2003 (6) SCC 175 (Supreme Court 2003), paragraphs and 20

22 *Suren Bannerjee v. State* 69 Cal WN 741

23 *Kapildeo v. State*, AIR 1954 All 557

A most common defense raised in courts is that the FIR does not lay out in absolute terms the details of the crime. However, there is no requirement that an FIR should be an exhaustive document. Further, “only the essential or broad picture need be stated in the FIR and all minute details need not be stated therein. It is not a verbatim summary of the prosecution case”<sup>24</sup>. The FIR is a report that sets the law in motion and at the stage of investigation further details can be gathered and filled up<sup>25</sup>.

## 2. Quashing of FIR

Another common method used in trafficking cases by defense lawyers is petitioning the courts to quash the FIR. Prosecutors will rarely find an FIR that is water tight and thus, situations where in an attempt is made to quash proceedings are not out of the ordinary. “The legal position is well settled that if an offence is disclosed the court will not normally interfere with an investigation into the case and will permit investigation into the alleged offence to be completed. If the FIR, prima facie, discloses the commission of an offence, the court does not normally stop the investigation, for, to do so would be to trench upon the lawful power of the police to investigate into cognizable offences.”<sup>26</sup>

The Prosecutor must make attempts to ensure that cases run their natural course rather than consenting to quashing of proceedings at the preliminary stages.

## 3. Delay

Mere delay in filing FIR is no ground to doubt the case of the prosecutrix that evidence given by her should not be accepted. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the grounds of delay in lodging the FIR. Delay has the affect of putting the court on guard to search if any satisfactory explanation has been offered for the delay<sup>27</sup>. Often victims speak up and come forth with details which may constitute offences after long periods of time and particularly after intensive psychosocial counseling<sup>28</sup>. “It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal<sup>29</sup>. Delay in filing of FIR is an irregularity that the Prosecutor can adequately explain. However, failure of prosecution to explain the extraordinary delay in lodging FIR is viewed with suspicion by the courts<sup>30</sup>. The FIR is expected to reflect the occurrence truly, without embellishment or fabrication. Thus, to save the report from any kind of attack and also to derive assurance and authenticity to the facts stated in this report, compliance of the provisions of the Criminal Procedure Code is essential<sup>31</sup>. If an FIR passes the tests mentioned above then there is no reason for it suffer from any defects merely on the ground that there has been a time gap between the occurrence of the crime and the filing of the complaint.

24 *Baldev Singh and Another v. State of Punjab*, AIR 372 SC 1996

25 *State v. Aru Pradhan, Accused Convict*, 91 Cr. LJ 161 Orissa HC 1985

26 *Satvinder Kaur v. State (Govt. of NCT of Delhi) and Another*, Cr. LJ 4566 (SC 1999)

27 *Gian Chand* AIR 2001 SC 2075; *Dildar Singh* (2006) Cr. LJ 3914 (SC)

28 For further details see: *Journey to Justice A Manual on Psychosocial Intervention*, UNODC, 2008

29 *Ravinder Kumar and Another v. State of Punjab*, 7 SCC 690 2001

30 *Raji Surjya and Another v. State of Maharashtra*, Cr. LJ 1105 (SC 1983). Also see, *Nalli Alias Nallianna Gounder v. State*, 99 Cr. LJ 1409 (Madras High Court 1993)

31 *NA Victor Immanuel and Others v. State*, 97 Cr. LJ 2014 (Madras HC 1991)

#### 4. Crimes committed outside territorial jurisdiction

Human trafficking more often than not involves an element of intra and inter-state and inter-country participation. With the entire chain of events sometimes being strung across a large geographical region, the Prosecutor dealing with trafficking cases will have to deal with crimes which may have implications extending to regions beyond the jurisdiction of the court before which the matter may be. If the investigating officer arrives at the conclusion that the crime was not committed within the territorial jurisdiction of the police station, then FIR can be forwarded to the police station having jurisdiction over the area in which the crime is committed. But this would not mean that in a case which requires investigation, the police officer can refuse to record the FIR and/ or investigate it. Under Sec. 5 (3) of the ITPA an offence committed under the Act shall be triable at the source or transit or destination areas through which a trafficked person is moved.

#### B. Complainant

Complaints are lodged either at the instance of Non Government Organizations (NGO), the police or victims. Instances of victims filing complaints are few and far. The Prosecutor may bear in mind that there is nothing in the definition of 'complaint' in Sec. 2 (d) Cr. PC which requires it to be made by a person who is actually aggrieved ... anyone can set the law in motion and no specific authorization is necessary to file the complaint. The complaint is made with the object that the Magistrate should take action. Sec. 16 (1) of the ITPA also provides for making of a complaint by any person before the Magistrate.

1. Recording confession & statement of 164 Cr PC by the court r/w Sec 25 of POCSO Act, 2012
2. Conducting T.I (Test Identification) parade of accused (in case accused is not known u/s 54 A Cr PC).
3. Filing requisition in the court for ordering a person to give specimen hand writing u/s 311 A Cr PC.

Since language is very important, use of local language in trial court u/s 272 Cr PC is essential (In AP vide GO.Ms No 485 Home (Court – B) Dept of 29.03.74, Telugu language should be used in lower courts)

Filing petition for audio-video electronic evidence of the witness in the presence of the advocate and the person accused of the offence U/s 275 IPC.

Filing requisition in the trial court to record the statement of witness in the language deposed by the witness.

Filing and requisition to advocate under Sec 376 D (Gang rape) by the PP/Spl PP after getting a 164 Cr PC statement of the victim that the repeat rapes were against her consent. In such event Sec 53 A Evidence Act is applicable. Defence advocate can't examine regarding character of the victim or her previous sexual experience. Filing petitions to preclude defence advocate from asking questions intending to annoy the victim/witness (U/s 152 Evidence Act). Evidence recording in trial of rape cases to be completed within 2 months from the date of charge sheet U/s 309(1) or (2) The presence of applicant seeking anticipatory bail mandatory during the anticipatory bail proceedings provided the PP/Spl PP files an application in the court. The PP/Spl PP to file a petition before the court for ascertaining the no. of persons to whom the surety stood for U/s 441 A Cr.PC.

Relevant provisions of Cr.PC for the prosecutors for their intervention at different times during pre-trial and trial.

### **Challenge: Trafficker not found at Scene of Crime**

Many times the traffickers are not found at the scene of crime and more often than not in sex trafficking offences the brothel keeper, cook, cleaning maid are the ones that get arrested. There is a tendency of not arresting those that are a part of the crime yet are not present at the scene of the crime. Theories of liability may be raised when those that conspire, abet, act as accomplice or that share common intention to commit the crime are not found at the scene of crime. Criminal conspiracy can be proved either by direct evidence or by circumstantial evidence or by both<sup>32</sup>, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. The Supreme Court stated that, "there is no difference between the mode of proof of the offence of conspiracy and that of any other offence; it can be established by direct or circumstantial evidence. For common intention even if it is not charged, an accused may be punished. Mentioning an unknown accused (such as a customer, brothel manager, etc.) at the time of filing an FIR is possible based on the preliminary statement that the victims give at the time of filing of FIR<sup>33</sup>.

## **VICTIM FRIENDLY**

### **Indian Evidence Act provision (A must for every prosecutor)**

1. Section 53 A IE Act. Evidence of Character or previous sexual experience, when question of consent is in issue, not relevant in the trail of u/s 354, 354 A to D, 376, 376 A to E IPC cases.
2. Section 114 A IE Act: when victim states in her evidence before the court that she did not consent for the rape, court shall presume absence of consent.
3. Section 119 IE Act: Assistance of an interpreter is taken for recording statement of dumb/victim /witness.
4. Section 146. IE Act: Defense counsel is precluded from putting question to the victim in cross examine as to general immoral charter, or previous sexual experience of such victim with any person for such consent or quality of counsel.
5. Section 151 IE Act: The Court may forbid indecent and scandalous questions of defense counsel.
6. Section 152 IE Act: the court shall forbid questions of defense counsel which appear to the intended to insult or annoy are needlessly offensive.

32 *V.C. Shukla v. State (Delhi Admn.) 1980 SCC (2) 665*

33 *Esher Singh v. State of Andhra Pradesh 2004, AIR SC 3030*

### **C. Production before a Magistrate**

After a person is arrested in accordance with the provisions of Cr. PC, he/ she must be produced before an appropriate Magistrate. Both the Cr. PC and ITPA state this requirement. Under the ITPA, whenever the Special Police Officer (SPO) or the Trafficking Police Officer (TPO), has reasonable grounds for believing that an offence punishable under the Act has been/ or is been committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant. In such cases, after removing persons from a location searched, the SPO or TPO shall forthwith produce them before the appropriate Magistrate [Sec. 15(5)]. The Schedule to ITPA identifies the appropriate Magistrate for Sec.15 (5) as being a Metropolitan Magistrate, a Judicial Magistrate of the First Class, a District Magistrate or a Sub-Divisional Magistrate.

All the victims removed from the place of exploitation must be produced before the Magistrate. If it appears that the rescued victims are clearly below the age of minority or suspected to be minors, then they may be produced before the Child Welfare Committee within 24 hours<sup>34</sup>. If at the time of first remand, the Prosecutor notices that there are no victims being produced, then a question must be raised before the court, as to what procedure has been undertaken for their production before the Magistrate.

### **D. Procedure Subsequent to Production before Magistrate**

In ITPA cases, a key element of production of victims before a Magistrate is the ordering of a medical examination. Sec. 15(5A) of ITPA directs that any person who is produced before a Magistrate u/S. 15(5) shall be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse, or for the presence of any sexually transmitted diseases.

When rescued persons are produced before the appropriate Magistrate under the provisions of Sec. 15 (5) or Sec. 16, the person shall be given an opportunity of being heard by the Magistrate. The Magistrate u/S. 17 (2) shall also cause an inquiry to be made of the: -

- age,
- character,
- antecedents of the rescued person,
- suitability of the parents, guardian or husband for taking charge of the rescued person,
- nature of influence of the conditions of the home of the rescued person.

The Magistrate may summon a panel of five respectable persons to assist him in discharging his functions u/S. 17 (2), three of whom wherever practicable, shall be women social welfare workers.

## **E. Procedure in case of children/ minors - Juvenile Justice (Care and Protection of Children) Act, 2000 /2006.**

After the rescued persons are produced before a Magistrate, they are as a standard practice, sent for age verification so that the appropriate course of action may be determined for them. The victims if verified as minors/ children (as defined in the ITPA) are to be immediately produced before the Child Welfare Committee (CWC) under the JJ Act and not before a Judicial Magistrate. The Bombay High Court has given a harmonious construction to both the Juvenile Justice Act, 2000 and the ITPA, 1956<sup>35</sup>.

The JJ Act in Sec. 2(d) defines a 'child in need of care and protection'. A child that is subject to or likely to be commercially sexually exploited or is vulnerable to trafficking falls into one or more categories of 'child in need of care and protection'. All actions with respect to such children shall be taken by the CWC. Whenever, minor/ child victims are produced before the court, the court may be informed by the Prosecutor, that it cannot exercise jurisdiction over such persons. If a victim is of age 18 years and below and is produced before a Magistrate not empowered under the JJ Act, the Magistrate shall record his opinion and forward the child without delay to the competent authority under the JJ Act (Sec. 7).

Prerna v/s State of Maharashtra<sup>36</sup> was a Public Interest Litigation filed to protect children and minor girls rescued from the flesh trade against the pimps and brothel keepers keen on reacquiring possession of the girls. In this case, the Mumbai High Court passed the following directions which are of great significance for the children rescued from brothels: -

- No Magistrate can exercise jurisdiction over any person under 18 years of age whether that person is a 'juvenile in conflict with law' or a 'child in need of care and protection', as defined by Sections 2 (1) and 2 (d) of the JJ Act, 2000. At the first possible instance, the Magistrate must take steps to ascertain the age of a person who seems to be under 18 years of age. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such a 'juvenile is in conflict with law', or the Child Welfare Committee if such a person is a 'child in need of care and protection'.
- Any juvenile rescued from a brothel under the ITPA, 1956 or found soliciting in a public place should only be released after the Probation Officer has completed an inquiry.
- The said juvenile should be released only to the care and custody of a parent / guardian after such parent / guardian has been found fit by the Child Welfare Committee, to have the care and custody of the rescued juvenile.
- If the parent / guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the JJ Act, 2000 should be followed for the rehabilitation of the rescued child.

35 *Prerana v. State of Maharashtra* 2003 (2) BLR 562, 2003 (2) Mh. LJ 105

36 2003 (2) Mah LJ 105

## E. Age verification

Jayamala Vs Home Secretary of J&K (AIR-1982 SC 1297) The Supreme Court held that when experts' opinion is given within an age bracket, the lower age should be the one taken into consideration, so that benefit of doubt favors the victim.

All persons found during search and rescue conducted u/S. 15 and 16 of ITPA must be produced forthwith before the appropriate Magistrate<sup>37</sup>. Victims often don't know their own exact age and/ or may have been tutored by the offenders to proclaim themselves as adults. Age of the victim is a major factor in determining whether the case will be handled by the Judicial Magistrate or the CWC. Therefore, the correct age of the victim needs to be addressed at the earliest instance. Upon production of the rescued person, the Magistrate shall order for an age verification of the victim u/S. 15 (5A) or 17 (2) of ITPA. Child/ minor victims are to be produced before the CWC under the JJ Act, 2000/2006.

**Challenge:** The age verification reports and medical examinations usually place the victims in an 'age bracket'. Thus, the report may state that the victim is between 17-19 years old. There is a plethora of police records where the age of the rescued girls is recorded as "appears to be of 17-19 years of age". In such cases, the Prosecutor may pray the court for the victim's age to be considered as 17 years so that all proceedings and actions with reference to the victim to be carried out before CWC.

**Challenge:** The age verification report states that the victim is a major but it seems as though this may not be a correct estimation. The Prosecutor in these situations can ask the court to order re-age verification at a different medical facility. The age of the victim is a crucial factor in offences dealing with trafficking.

- If it is determined that the alleged victim is a child/ minor, the question of **consent** of the victim becomes immaterial.
- The ITPA provides for more stringent **penalties** if offences under it are committed in respect of a child/ minor.
- All actions with respect to rescued persons under 18 years of age will be taken under the JJ Act.

Thus, verifying the age of the victim is a crucial step in cases of commercial sexual exploitation and in Such cases the burden of proof is always on the prosecution<sup>38</sup>.

37 *If a victim is a minor then she should be produced before the Child Welfare Committee. No Judicial Magistrate may pass an order with regard to a child/ minor victim.*

38 *Chattu v. State 1973 All Cr. R 391, Madho Singh v. State of Rajasthan 1997 Cr. LJ 2641 (Raj)*

## The following documents serve as authentic proof of age :-

**A. Municipal Records:** A birth entry in the municipal record is the best piece of evidence that can be produced regarding a victim's age<sup>39</sup>. It is not necessary for the official who made the entry in the record to be examined if the entry was made by the concerned official in the discharge of his official duties<sup>40</sup>.

**B. Testimony of the Father:** In the absence of a birth certificate, the testimony or an affidavit from the father of the victim is often considered the most persuasive evidence regarding the victim's age<sup>41</sup>. However, other corroborative evidence is helpful and often necessary<sup>42</sup>.

**C. School Records:** Entries in school registers are admissible evidence to prove the age of the person concerned<sup>43</sup>. The statement contained in the admission register of a school, as supplied by the father, guardian, or close relative of the person in question is a good proof of age unless it is shown by unimpeachable contrary material that it is inherently improbable<sup>44</sup>. However, it must be shown that the person who made the entry in the register had some 'special means of knowledge' regarding the date of birth to establish the age beyond a reasonable doubt<sup>45</sup>.

**D. Horoscope:** Though not the most scientific of documents or the easiest to decrypt, the horoscope has served as a tool of determining when the person whose name is mentioned in the horoscope was born. Among all documents that are capable of being used for determination of age the least persuasive is the horoscope<sup>46</sup>.

**G. Custody Applications :** It is not uncommon to see genuine/ fake “family members” suddenly surface to try and obtain custody of victims once they have been rescued from commercial sexual exploitation (CSE)/ forced labour. The Prosecutor must ensure that the victim is not handed over to the first person who turns up to seek custody of the rescued victim. Conducting of inquiry as mentioned in Sec. 17 (2) of ITPA is mandatory for deciding on the future course of action regarding placement of rescued persons.

When a 'child in need of care and protection' is produced before the Child Welfare Committee (CWC) u/S. 32 of the Juvenile Justice Act 2000/2006, the CWC shall hold an inquiry regarding any further orders to be passed in respect of such a child.

39 *Joginder Singh v. State of Punjab* 1975 Cr. LJ 1604

40 *Harpal Singh v. State of Himachal Pradesh*, AIR 1981 SC 361 (Supreme Court 1980) (The court ruled that the evidence was clearly admissible without examination under Section 35 of the Indian Evidence Act, 1872)

41 *State v. Babu Lal*, AIR 1965 Raj 90; 1965 (1) Cr. LJ 483

42 *Mohd. Ikram Hussain v. State*, AIR 1964 SC 1625

43 *Harpal Singh v. State of Himachal Pradesh*, AIR 1981 SC 361

44 *State of Punjab v. Mohinder Singh* (Supreme Court of India) 2005(2) KLT 126, 130

45 *Rakesh and Another v. State of Rajasthan*, 1998 (104) Cr. LJ 1434, 1997 Indlaw Raj 14 (Rajasthan High Court 1997) (such “special means” can include the student's application for admission).

46 *State of Punjab v. Mohinder Singh*, 2005(2) KLT 126, 130 (Supreme Court 2005) - this case held that horoscope is a weak form of evidence and the person making it must have special knowledge i.e. he must know of when the person whose horoscope is being made was born.

**H. Bail/ Opposing bail :** The law governing bail is found in Chapter XXXIII of the Criminal Procedure Code, Sec. 436-450. The primary provisions regarding bail are Sec. 436-439. Sec. 436 pertains to bail for those accused of bailable offences for which bail can be claimed as a matter of right<sup>47</sup>. Sec. 437 pertains to bail for those accused of non-bailable offences, for which a court has discretion whether or not to grant bail to the accused. Sec. 438 regards bail for those apprehending arrest, otherwise known as anticipatory bail<sup>48</sup>. Sec. 439 pertains to the special powers of the High Court and the Court of Sessions regarding bail matters<sup>49</sup>. Sec. 440-450 are minor provisions that further define bail law principles and procedure established u/S. 436-439. All ITPA offences that involve minors are non-bailable. The remaining ITPA offences are classified as bailable or non-bailable, depending on the number of years with which the offence is punishable.

The primary considerations that the courts take into their notice while determining bail are:

- Likelihood that the accused will flee justice<sup>50</sup>.
- Likelihood that the accused will tamper with witnesses and evidence.
- Magnitude of the charge<sup>51</sup>.
- Severity of the punishment which the conviction will entail.
- Evidence in support of the accusation.
- Position and status of the accused with reference to the victim<sup>52</sup>.
- Nature of offence.
- Likelihood of committing similar offences/other offences<sup>53</sup>.
- Health, age and sex of accused<sup>54</sup>.
- Length of trial<sup>55</sup>.

47 *Ratilal Bhanji Mithani v. Assistant Collector of Customs, 1967 (73) Cr. LJ 1576 (Supreme Court 1967)*

48 *Anticipatory bail is an order by the court that, in the event of arrest, entitles a person to immediate release on bail. It is applicable only before arrest. Balchand Jain v. State of Madhya Pradesh, 1977 (83) CrLJ 225 (Supreme Court 1976)*

49 *Sec. 439 gives the Court of Sessions and the High Court concurrent jurisdiction to grant bail as if the bail application was being presented for the first time. Generally, the accused will not petition the Court of Sessions or High Court for bail until after the original petition has been rejected by a Magistrate. In the same way, the Court of Sessions and the High Court have power to impose or change conditions or cancel a bail order granted by a lower court altogether. Guruharan Singh v. State (Delhi Administration), 1978 (84) Cr. LJ 129 (Supreme Court 1977)*

50 *Guruharan Singh v. State (Delhi Administration), 1978 (84) Cr. LJ 129 (Supreme Court 1977)*

51 *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, 1978 (84) Cr. LJ 502 (Supreme Court 1977)*

*Guruharan Singh v. State (Delhi Administration), 1978 (84) Cr. LJ 129 (Supreme Court 1977). This consideration to deny bail plays an important part when the accused are powerful and the trafficked victims are vulnerable.*

52 *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, 1978 (84) Cr. LJ 502 (Supreme Court 1977).*

53 *See Cr. PC, first Proviso to Section 437(1).*

54 *Gyan Prakash v. State of Rajasthan, 1991 (97) Cr. LJ 1176*

55 *See State of Punjab v. Ramdev Singh, 2004 AIR (SC) 1290 (Supreme Court 2003)*

## **Bail opposition by the Public Prosecutor**

The failure to give heightened sensitivity to cases involving sexual abuse against women and children risks a danger to the collective interests of society<sup>56</sup>. If perpetrators are released on bail or acquitted on minor -

technicalities, it reinforces the unwarranted stigma of the victim and allows criminals to walk free within the community<sup>57</sup>. Decency and morality in public life can be promoted and protected only by dealing sternly with those who violate societal norms, such as committing sexually-motivated crimes<sup>58</sup>. The perpetrator of trafficking crimes against women and children if released on bail can revert back to committing similar crimes against other vulnerable women and children. The chances of an accused disappearing after grant of bail are also a high possibility. One of the most important reasons to oppose bail in matters involving trafficking of women and children is to ensure that the accused do not intimidate/ harass the victims, once they are out on bail.

## **Declarations from the sureties u/s. 441A Cr. PC**

Under the provision of Sec. 441-A of Cr. PC, every person standing surety to an accused person for his release on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars. The court before which these individuals stand as surety is required to ascertain the sufficiency of fitness of these persons. The sureties may file affidavits for determining their fitness or sufficiency<sup>59</sup>.

## **Challenge: Ensuring Safety of Victims upon Release of accused on bail**

When an accused is released on bail it becomes pertinent to ensure that the victims' safety is not compromised. Making sure that the accused don't gain access to the very victims they have allegedly exploited is of paramount importance. The imposition of conditions in the Court's order granting bail will ensure that the victim cannot be approached and evidence shall not be tampered with. Sec. 437 (3) of Cr. PC provides for statutory conditions that may be placed by a Court upon a person whilst granting bail. Upon grant of bail, conditions that restrain the accused from establishing contact with the prosecutrix, may be made<sup>60</sup>. Further, if there is a violation of the conditions that were laid out in the bail order the Public Prosecutor must petition the Court of Sessions or High Court for cancellation of bail u/S. 439(2) of Cr. PC.

The following table lists out offences under the ITPA and provides information on the punishments as well as whether the offences are bailable or non-bailable. Notwithstanding the provisions of the Criminal Procedure Code (Cr. PC), 1973, all offences punishable under the ITPA, 1956 shall be deemed to be cognizable offences as per Sec. 14 of the ITPA, 1956.

57 State of Punjab v. Gurmit Singh, 1996 AIR(SC) 1393 (Supreme Court 1996)

58 State of Maharashtra v. Chandraprakash Kewalchand Jain, 1990 AIR (SC) 658 (Supreme Court 1990)

59 Moti Ram v. State M.P. (1978) 4 S.C.C 47

60 Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, 1978 (84) Cr. LJ 502 (Supreme Court 1977) (In this case the court had imposed a condition that the accused shall stay out of the village of Gonedondla, where many of the witnesses resided. The Court allowed the accused to enter the village one day a week in order to oversee their agricultural business, but they had to report to the police station when they arrived and left the village.)

<b>Sections</b>	<b>Punishment (imprisonment)</b>	<b>Bailable/ Non-Bailable</b>
Sec. 3 (1)	1st conviction 1 to 3 years	Bailable
Sec. 3 (1)	2nd conviction 2 to 5 years	Bailable
Sec. 3 (2)	1st conviction 2 years	Bailable
Sec. 3 (2)	2nd conviction 5 years	Non - Bailable
Sec. 4 (if victim is an adult)	2 years	Bailable
Sec. 4 (if victim is a child or minor)	7 to 10 years	Non Bailable
Sec. 5	3 to 7 years	Non - Bailable
Sec. 5 (offence committed against will of any person)	7 to 14 years	Non - Bailable
Sec. 5 (if victim is a child)	7 years to life imprisonment	Non - Bailable
Sec. 5 (if victim is a minor)	7 to 14 years	Non - Bailable
Sec 6.	7 to 10 years to life imprisonment	Non - Bailable
Sec. 7 (1)	3 months	Bailable
Sec. 7 (1) (if victim is child or minor)	7 to 10 years to life imprisonment	Non - Bailable
Sec. 7 (2)	1st conviction 3 months	Bailable
Sec. 7 (2)	2nd conviction 6 months	Bailable
Sec. 8	1st conviction 6 months	Bailable
Sec. 8	2nd conviction 1 year	Bailable
Sec. 9	7 to 10 years to life imprisonment	Non - Bailable

## I. Absconding accused

An absconder is someone who hides himself to evade the process of law<sup>61</sup> or one who intentionally makes himself inaccessible to the processes of law<sup>62</sup>. To be an 'absconder' in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. In many instances the accused abscond to frustrate witnesses who are prepared to testify and thwart the victim's pursuit of justice.

**Challenge:** Proceeding with a trial in the absence of an accused. Willful delay on the part of the accused to ensure that victim's testimony is weakened.

The Cr. PC makes provisions for the court to record evidence in the absconder's absence. Sec. 299(1) Cr. PC provides that the court may examine prosecution witnesses in absence of the accused and record their depositions, if it is proved that the accused has absconded and that there is no immediate prospect of arresting him. This provision may be effectively utilized when trials get delayed due to the absence of the accused. This provision may be relied upon by the Prosecutor to counter long trials and extended periods of time which victims are made to spend at Government/ NGO run Shelter Homes pending their depositions. Depositions recorded u/S. 299 (1) may be given in evidence against the accused if the deponent is: -

- dead, or
- incapable of giving evidence, or
- his/ her presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Further, Sec. 317(1) (2) Cr. PC which provides for provisions of dispensing with the attendance of the accused may be read into situations of accused absconding. Laying reliance on this provisions it may be stated that, if an accused is not present during criminal proceedings, the court may, if it thinks fit: (i) adjourn the proceedings or (ii) order that the case of the absent accused be taken up or tried separately. However, while doing this the court must record clearly and in detail reasons for the order.

The Madras High Court held that Sec. 317(2) Cr. PC gives power to every judge and magistrate to split up a case against an accused if their personal attendance is necessary, but they have absconded and or failed to participate in the trial. The trial against an absconding accused can be split, whether or not they are represented by a pleader<sup>63</sup>.

61 *Kartarey v. State of Uttar Pradesh (Criminal Appeal No. 153 of 1973)*, the Supreme Court has held that an absconder is one who makes himself willfully unavailable to the process of law.

62 *State of Mysore v. Sanjeeva*, 1956 AIR (Mys) 1, 1956 Cr. LJ 77, paragraph 14 (Mysore High Court 1955)

63 *In Re Duraisingam*, 1983 CrLJ 1765, paragraph 5 (Madras High Court 1983)

Relevant provisions of the Cr. PC with respect to an accused who has absconded are represented in the table below.

Sec. Cr. PC	Particulars
82	Proclamation for person absconding.
83	Attachment of property of person absconding.
84	Claims and objections to attachment.
85	Release, sale and restoration of attached property.
205	Magistrate may dispense with personal attendance of accused.
299	Record of evidence in absence of accused.
317	Provisions for inquiries and trial being held in the absence of accused.

## J. Identity Disclosure Laws

The Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) vide Sec. 21 stipulates that details of inquiry of 'juvenile in conflict with law' and 'child in need of care and protection' may not be published in any form. Even surrogate details such as name/ address/ school or any other particular which may lead to the identification of the child/juvenile should not be published. The Prosecutor must ensure protection of the identity of trafficked victims in the first instance when they are brought to the court. Anyone who contravenes this provision shall be liable to pay a fine which may extend to twenty five thousand rupees. Sec. 21 in the JJ Act has been affirmed in *Jose Maveli v. State of Kerala*<sup>64</sup>. The IPC also provides within Sec. 228-A for a prohibition on the disclosure of identity of victims of certain offences. Punishment may be imposed if details such as name, address and photographs of victims of rape within the meaning of Sec. 376, 376-A, 376-B, 376-C or 376-D<sup>65</sup> are published.

An alternate strategy to keep a check over media agencies is the Press Council of India. The Prosecutor can make a complaint against news agencies that fail to adhere to protect the identity of victims of rape and sexual assault<sup>66</sup>.

<sup>64</sup> 2007 Indlaw Ker 175; 2007 (2) KIT 762

<sup>65</sup> *In the case of State of Karnataka v. Puttaraja*, 2004 AIR (SC) 433 (Supreme Court 2003) the SC clearly laid out guidelines on this issue and stated of how it sought to promote protection of the identity of victims of rape. These guidelines may be read into and applied across the board to cases of all other form of sexual abuse.

<sup>66</sup> *In Shri Jayanta Deka & others v. The Editor Sadin Guwahati Sr. No. 37 (F. No.14/139/03-04 PCI)*, the Indian Press Council held that while reporting crime involving rape or sexual assault of children, the names, photographs of victims or other particulars leading to their identity should not be published. It reasoned that while publication of information that discloses victim identity serves no legitimate public purpose, "it may bring social opprobrium to the victims and social embarrassment to their relations, family, friends, community, religious order or the institution to which they belong."

**Challenge:** Protecting victim's identity during trial from the media and press

The Press Council of India<sup>67</sup>, a statutory quasi-judicial body, has adopted guidelines cautioning against the identification of victims of rape or sexual assault. These Guidelines clearly state that the identities of victims of sexual abuse/ assault is not to be revealed. Disclosure of identity of a victim either through publishing or printing may have repercussions on matters connected with the repatriation of foreign victims. Disclosure of identity may lead to permanent branding of these victims<sup>68</sup>.

## **K. Statements under Sec. 164 of the Cr. PC**

Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under the Cr. PC or under any other law, or at any time before the commencement of the inquiry or trial.

Any statement (other than a confession) shall be recorded in the manner provided for the recording of evidence which in the opinion of the Magistrate is best fitted to the circumstances of the case the Magistrate has the power to administer oath to the persons whose statement is so recorded. The

Statement thus recorded shall be forwarded to the Magistrate before whom the case is to be inquired or tried.

In a trafficking related matter, if the Prosecutor feels that a rescued victim is in a position to give a statement which will further strengthen the case then he may make an application to the court to take a statement of the victim u/s. 164 Cr. PC. These statements can be used during bail hearings and other pre-trial hearings. If there is a situation wherein the victims become subsequently unavailable then these statements become relevant in attaining convictions. The statement of the victim/ witness cannot be discarded merely because they were recorded u/s. 164 of Cr. PC. But their evidence should be approached with caution as the witnesses feel tied to their previous statement given on oath and have but a theoretical freedom to depart from the earlier version<sup>69</sup>. A statement of a witness recorded by a Magistrate u/s. 164, Cr. PC is a public document and it does not require any formal proof it is not necessary to summon the Magistrate recording the prior statement to prove the contents thereof<sup>70</sup>.

67 <http://presscouncil.nic.in>

68 *Norm 6 of the Press Council of India Norms states that "while reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published."*

69 *Balak Ram v. State of UP, AIR 1974 SC 2165*

70 *Guruvindappali Anna Rao v. State of AP, (2003) 2 Crimes 72*

## L. Rights of a Victim

Victims of human trafficking are entitled to all rights granted to each person under the Constitution of India. Their rights are therefore, to be protected at every stage of the criminal justice system by the police, the prosecutors and the judiciary. An enumeration of some of the victim's rights during rescue, post rescue and during trial is provided below. The prosecutor may not necessarily have a role to play at the stage of rescue of the victims. However, post rescue and during trial the prosecutors need to ensure protection of victims' rights.

### During Rescue

1. The rescued persons are to be treated as 'victims' and not as 'offenders/ accused'. Victims should be treated with compassion, respect and dignity.
2. Victims are entitled to access to justice and prompt redress, as provided for by national legislations, for the crimes of trafficking inflicted upon them and the resultant abuse and exploitation.
3. All procedural formalities as outlined in the ITPA and other laws need to be complied with during search and rescue of victims.
4. The victims are to be segregated from the offenders as soon as they are rescued to prevent the offenders from threatening them.
5. During rescue, the victim should be allowed time to collect her children and belongings<sup>71</sup>.

## POST RESCUE

1. The victims are not to be treated as accused/ offenders.
2. The victims are not to be placed in the same room/ transport along with the offenders, as there is a possibility that the victim would undergo trauma at the sight of the perpetrators or that they may be threatened.
3. The statement of the victim is to be taken in the presence of a social worker or any woman police official<sup>72</sup>.
4. The Investigation Officer should not pressurize the victim, if the victim is not in a position to give evidentiary statement<sup>73</sup>.
  - a It is imperative that the victim's statement should be recorded at the earliest instance. However, if it seems that the victim is in a state of mental shock then it is inadvisable to coerce her to give a statement. In such cases, as an alternative the police authorities can be requested/ instructed to take the statement of the girl when she is in the rehabilitation/ Shelter Home. Under Sec. 160 of the Cr. PC (power to summon a victim to attend a police station) there is a proviso that a female witness or male

71 For further details see *Standard Operating Procedures on Investigating Crimes of Trafficking for Commercial Sexual Exploitation, UNODC, 2007*

72 *Sec. 15 (6A) of ITPA*

73 For further details refer, '*Journey to Justice' Manual on Psychosocial Intervention by UNODC, 2008*

witness less than 15 years has the right to give their statement at their place of residence rather than being compelled to attend a police station<sup>74</sup>.

- b Many states have enacted rules that set out the procedures to be followed for minor victims. For ex. Sec. 8 (3) in Chapter III of the Rules framed by the Maharashtra Government under the JJ Act, 2000 lays down that a 'child in need of care and protection' shall not be kept in the police station and shall be kept in a place of safety till they are produced before the CWC. Other states have formulated similar provisions.

### **Victim Rights during Medical Examination**

The prosecutor may pray to the court to ensure the following when the victim is sent for age verification/ medical examination: -

1. The victim is accompanied at all times by a woman police official or female representative of an NGO.
2. The accused and the victim should be segregated whilst being sent for their respective medical examinations.
3. The victim has a right to be examined only in the presence of trained medical staff and that the presence of those who are not essential to the process should be avoided.
4. The victim has a right to refuse invasive tests. However, there may be times when it is required that a test for determination of sexual abuse be conducted. In these situations the NGO representative/ counselor may counsel the victim appropriately.
5. The victims are to be taken to a Shelter Home/ Protective Home/ Children's Home after medical examination.
6. Testing for HIV/ AIDS must not be done without the persons' consent. Willingness of the victim is mandatory and if such tests have been already undergone, then their status and their identity is a subject matter of confidentiality. The National AIDS Control Organization (NACO) guidelines<sup>76</sup> may be referred to by Prosecutors.

The rights of a victim during trial will be discussed in the subsequent segment dealing with trial.

74 *Under the amendments to the Cr. PC, 2008 - In section 157 of the principal Act, in sub-section (1), after the proviso, the following proviso shall be inserted, namely:- "Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality."*

75 *Public at large v. State of Maharashtra (Suo Moto Writ Petition No. 112 of 1996)*

76 [http://www.nacoonline.org/guidelines/guideline\\_10.pdf](http://www.nacoonline.org/guidelines/guideline_10.pdf)

# TRIAL

## A. Trial and the role of prosecutors within a trial

Convicting those that indulge in trafficking is a major part of what goes into attaining justice for the victims of trafficking. Existing literature reveals that the percentage of convictions in trafficking cases is less and thus, more often than not victims feel vulnerable to future retribution from their exploiters. Further, the traffickers almost immediately begin to replenish their “stock of human victims” once they are freed of their charges. The cycle is systemic and endless. The only way to break this vicious cycle is by way of effective prosecution the prosecutor's role is to prosecute however, in doing so he protects other victims from being abused and prevents the re-occurrence of these crimes.

## B. Framing of Charges

The process of framing of charges is an important part of how the trial is to proceed. Using multiple statutes and effectively filtering the ones that clearly fall into the given set of facts is of utmost significance. Proceeding with a weak set of charges is more often than not going to lead to acquittal. At the initial stage of framing of charges, the prosecution evidence does not commence. The Court has, therefore, to consider the question of framing the charges on general considerations of the material placed before it by the investigating agency. At this stage, the truth, veracity and effect of the judgment which the prosecution proposes to adduce are not to be meticulously judged<sup>77</sup>.

## C. Amendment/ Addition of Charges

Under Sec. 216 of Cr. PC, the Court may alter or add a charge any time before the judgment is pronounced. This process must be explained to the accused and if it causes no prejudice to the accused then the trial will proceed immediately and if in the eyes of the judge there is no prejudice then the trial will progress normally. What is relevant in this entire process is that there must be no prejudice caused to the accused or the prosecutor in the conduct of the case. Whenever a charge is altered the Prosecutor or the accused will be allowed to recall any of the witnesses and re- examine them, however, this will have to be limited to the scope of the altered charge<sup>78</sup>.

When there is addition/ amendment of charges and the defence summons the victim to be re-examined, the prosecutor needs to ensure that questions that have been earlier asked and answered are not repeated again. The victims are often fearful and anxious of the court and legal procedures. The process of re-examination may cause trauma to the victim. The prosecutor must therefore, explain the process to the victim to assuage her apprehensions.

77 *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, AIR 1980 SC 52*

78 *Sec. 217 Cr. PC*

#### **D. Preventing Secondary Victimization / Re-victimization**

It is often stated that a woman who is raped undergoes two crises the rape, and the subsequent trial. While the first seriously wounds her dignity, curbs her individual, destroys her sense of security and may often ruin her physically the second is no less potent of mischief, in as much as it not only forces her to re-live through the traumatic experiences, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her<sup>79</sup>. The same is true of trafficking victims when faced with the criminal justice system.

Expressing concern particularly about the treatment of victims of sexual offences in the courts during their cross-examination, in *State of Punjab v/s Gurmit Singh and Others*<sup>152</sup>, the Supreme Court observed: “There has been lately, a lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of the Evidence Act regarding relevancy of facts notwithstanding, some defence counsels adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of crime, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as 'discrepancies and contradictions' in her evidence”.

There are various ways in which victims are put through “Secondary Victimization” during investigation and prosecution: -

- Insensitive and adverse questioning by the police and the lawyers, who may harbour a 'guilty victim syndrome' a feeling that the victim has somehow “asked” to be victimized
- Embarrassing and intimidating questions.
- Uncomfortable and insecure or hostile environment at the police stations and courts often involving close proximity to the offender (whether related or a stranger).
- Lack of clear, simple explanation of proceedings and decisions to the victim.
- Fear resulting from intimidating threats, and acts by the traffickers.

A court may therefore, order special directives for preventing re-victimization and protecting a trafficking victim from trauma, shame and embarrassment while testifying. In fact, to most

*79 84th Law Commission Report on RAPE AND ALLIED OFFENCES: SOME QUESTIONS OF SUBSTANTIVE LAW, PROCEDURE AND EVIDENCE, 1980. Chapter 1, para 1.2 152 (1998) 2 SCC 384 Para 22*

effectively elicit the truth, it is “absolutely necessary” that the environment in which a victim/witness testifies is a “free environment without any embarrassment<sup>80</sup>.” Some defence counsels try and negate these special procedures available for the victims of sex trafficking by laying reliance on natural justice. The rights of an accused to have all allegations/proceedings held in his presence must be measured against the victims without compromising the truth. In cases where it will not obstruct the truth-finding capabilities of a trial, a court may order measures that protect the victim/witness from unnecessary trauma, shame and embarrassment while testifying<sup>81</sup>.

Sec. 327(1) Cr. PC warrants that proceeding ought to be held in open court. However, in sub clause (2) the section makes a special provision whereby the trial may be held in camera in crimes of rape. Sec. 273 of the Cr. PC states that except where otherwise provided, all evidence taken in the course of criminal proceedings shall be taken in the presence of the accused or his pleader. This allows the accused to challenge evidence, note the demeanour of the witness and confront witnesses making statements against him or her<sup>82</sup>.

However, in trials of trafficking crimes, especially when children are victims, the mere sight of the accused may cause an element of extreme fear in the mind of the victim/ witness or put her in a state of shock. The victim will not be able to testify fully to the details of the incident, which inhibits the truth-finding process, and may result in the miscarriage of justice<sup>83</sup>. Rules of procedure are meant to facilitate, and not obstruct, the truth-finding process. Therefore, a court may enlarge or expand rules of criminal procedure to accommodate victims during testimony in order to elicit the truth and do justice to the parties<sup>84</sup>. In the absence of legislation, Supreme Court decisions have begun to define permissible accommodations. In the Sakshi case the following directions were passed with respect to child victims:

- The in camera provisions of Section 327(2) should be applied to Sec. 354 of IPC (assault or criminal force to woman with intent to outrage her modesty), and Sec. 377 of IPC (voluntary carnal intercourse against the order of nature with a man, woman or animal).
- The questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the Presiding Officer of the court who may put them to the victim or witnesses in a language, which is clear and is not embarrassing.
- The presiding judge should also allow the victim of child abuse or rape, sufficient breaks as and when required while giving testimony in court.
- A screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused.

80 *Sakshi v. Union of India, 2004 (5) SCC 518 (Supreme Court 2004)*

81 *Sakshi v. Union of India*

82 *Dharmanand Pant v. State of Uttar Pradesh, AIR 1957 SC 594*

83 *Sakshi v. Union of India*

84 *Sakshi v. Union of India*

Soon after the judgment in the Sakshi case, the Delhi High Court passed a judgment wherein it laid down further parameters with respect to the conduct of trial in a child sexual abuse case<sup>85</sup>. The Court held that the child could give evidence in an environment outside the Court if he / she were uncomfortable going to the Court. It further held that in all these cases, the child would be entitled to get a support person with him / her during the trial, and this support person could also be the parent of the child.

The prosecutor should make effective use of the above quoted judgments in all trials involving child/ minor victims of trafficking.

In another case, it has been held that, in cases of sexual assault against women, a court should consider assigning a female judge so that the witness can testify with greater ease and assist the court to properly discharge its duties<sup>86</sup>.

## E. Video Conferencing

As per Sec 275(1) Cr.PC (Criminal Law Amendment Act 2008) Evidence of witness/ victim can be recorded by audio – video electronic means and many trial court are adopting this procedure in any case trial of a case u/s Sec 376 IPC is to be completed within 2 months from date of taking cognizance of the case in accordance with Sec 309 Cr.PC

Recording of evidence by way of video-conferencing vis-à-vis Sec. 273 Cr. P. C. has been held to be permissible by the Supreme Court in the case of State of Maharashtra v/s Dr. Praful B. Desai<sup>87</sup>. The Supreme Court observed: “The evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video-conferencing. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. Thus, it is clear that so long as the accused and/ or his pleader are present when evidence is recorded by video-conferencing, that evidence is recorded in the “presence” of the accused and would thus fully meet the requirements of Section 273 Criminal Procedure Code. Recording of such evidence would be as per “procedure established by law”. The advancement of science and technology is such that now it is possible to set up video-conferencing equipments in the court itself. In that case evidence would be recorded by the Magistrate or under his direction in the open court”.

Another order by the High Court of Delhi on video conferencing can be effectively utilized by prosecutors. The High Court delivered this order<sup>88</sup> in a petition filed by an NGO - Prajwala of Hyderabad. Due to the intervention of the Delhi High Court, girls rescued from the brothels in Delhi were repatriated and rehabilitated to their hometowns in several parts of India including Andhra Pradesh. The rehabilitation work was carried out by the Andhra Pradesh government with the involvement and participation of the NGO, Prajwala. Many of these girls who had

85 *Sheba Abidi v/s State of Delhi and Another*, 113 (2004) DLT 125

86 *State of Punjab v. Gurmit Singh*, 1996 (102) Cr. LJ 1728 (Supreme Court 1996)

87 (2003) 4 SCC 601 p. 603

88 *CrI.M. 1467/04 in CrI.W. 532/1992*

been rehabilitated to districts like Nellore were summoned by the trial court in Delhi for providing evidence against the exploiters. Since these girls were repatriated after spending considerable time in the rescue home in Delhi, ideally speaking, their statements should have been recorded by the trial court during that period. However, due to the delays in the trial, this was not done and these girls were called to Delhi. The government agencies in Andhra Pradesh tried their best to get in touch with these girls. As their efforts failed, Prajwala was asked to step in again. The NGO realized that these girls were reluctant and unwilling to go to Delhi mainly because they did not want to undergo any trauma and agony again. It was decided to move the Trial Court for facilitating the recording of evidence from these girls in their hometowns. However, the court did not approve of this for want of the required infrastructure.

The matter was therefore taken up with the Delhi High Court which directed the government counsel to look for alternatives. The counsels for the government and the NGO with the assistance of the Andhra Pradesh government found that a video - conferencing facility was available in Andhra Bhawan, New Delhi. The state government agreed to provide this facility from Delhi and the concerned district headquarters in Andhra Pradesh. The High Court confirmed the availability of these facilities at Andhra Bhawan and then gave orders for recording the evidence of the victim through video - conferencing.

*The prosecutors may take recourse to audio – video electronic recording of evidence as envisaged u/s 275(1) Cr.PC indeed, it is victim friendly.*

## **F. Private Pleaders**

It is the discretion of the Court to grant permission to the party who desires to be represented before the Court by a private person who is not an advocate<sup>89</sup>. When Sec. 301 (2) of the Cr. PC authorizes a private counsel to act in a case under the direction of the Public Prosecutor, he may do everything in the case provided that it is done under the direction and control of the Public Prosecutor<sup>90</sup>. The word “conduct” in Sec. 301(2) of the Cr. PC conveys the idea of leading and guiding; and the person conducting the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards all material witness or demands made by the accused with respect to the evidence. So long as the Public Prosecutor leads and guides, in the above sense the pleader of the complainant, no objection to such a procedure could be entertained<sup>91</sup>. If a lawyer instructed by a private person feels that the trial is not conducted fairly it will be open to him to draw the attention of the court in that regard. If the court feels that some assistance is necessary on a point rising before it, it may appoint such lawyer or any other lawyer as amicus curiae<sup>92</sup>. With the permission of the court the person so appointed can submit written arguments<sup>93</sup>.

89 *Harishankar Rastogi Vs Girdhari Sharma S.C. 1979 Cr.L.J 778; AIR 1978 SC 1019 Section 32 of the Advocates Act 1961 also empowers the Court to permit any person to appear before it.*

90 *Sama Ram v. State of Rajasthan, (2002) 2 Raj LW 1302: 2002 Cr. LJ 3134(3137) (Raj)*

91 *Sama Ram v. State of Rajasthan*

92 *Manharlal Shah v. Yogeshkumar Kanaiyalal Saraia, 1988 920 Crimes 13, 16 (Guj-DB)*

93 *Asaram Dadaro Giram v. State of Maharashtra, 1995 (4) Crimes 34 (Bom)*

Using the services of private pleaders to research the law and to assist in trial can prove to be effective in human trafficking cases. However, the onus of the entire case will be upon the Public Prosecutor.

Under POCSO Act 2012, the victim (u/s 40 POCSO Act) has a right to engage a private counsel of their choice often than the Spl.PP.

## **G. Evidence in a Trial**

While establishing human trafficking offences, proving abuse and exploitation (physical, sexual, etc.) is an important part of the trial. Several types of documents can be produced during a trial on trafficking for proving charges against the accused.

**1. Medical Records:** Medical documents are the best and most potent tool for establishing physical, sexual and other forms of abuse/ exploitation. It is well settled that non-examination of doctor and non-production of the medical report would not be fatal to the prosecution case if the evidence of the prosecutrix and other witnesses is worthy of credence and inspires confidence<sup>94</sup>. If the other side challenges the veracity of a medical certificate, the burden lies on the party producing it to prove the correctness of the statements made therein. In the absence of any challenge, it should be accepted as correct<sup>95</sup>. Medical certificates cannot be rejected simply because they are not printed on plain paper if an adequate explanation is given for why the proper form was not used<sup>96</sup>.

**Below is a list of documents that a Prosecutor may deal with during a trial:**

- Age verification certificates
- Sexually Transmitted Disease (STD) certificate
- Medical records of pregnancies/ abortion
- Medical records of accused
- Medical documentation of sexual assault

<sup>94</sup> *State v. Dayal Sahu (2005) Cr. LJ 4375: AIR 2005 SC 3570*

<sup>95</sup> *Ratanlal at 551, citing Navnitlal v. Hasmukhlal, AIR 1988 Guj 34*

<sup>96</sup> *170 Ammini and others v. State of Kerala, 1998 AIR (SC) 260, 1998 (104) Cr. LJ 481 (Supreme Court)*

## Age Provisions in Various Statutes

Law	Section/ Provision	Girls	Boys
Constitution of India	Article 24	<14*	<14
Indian Penal Code	361- Kidnapping from lawful guardianship	<18	<16
	366A- Procuration of a minor girl	<18	-
	366B- Importation of girl from foreign country	<21	-
	372- Selling minor for prostitution	<18	<18
	373- Buying minor for prostitution	<18	<18
	375 (6)- Rape with or without consent	<16	-
	376 (2)- Rape punishable by 10 years to life	<12	-
ITPA	(ca)- Major	<18**	>18
	cb)- Minor	16-18	16-18
	(aa)- Child	<16	<16
Juvenile Justice Act	(k)- Juvenile or child	<18	<18
Child Labour Act	(ii)- Child	<14	<14
Children Pledging of Labour Act		<15	<15
Factories Act	(a) Adult	>18	>18
	(b) Adolescent	15-18	15-18
	(c) Child	<15	<15
Minimum Wages Act	(bb) – Child	<14	<14
	(a) – Adolescent	14-18	14-18
Mines Act	(b) – Adult	<18	<18
Motor Transport Workers Act	(a) Adolescent	14-18	14-18
	(b) – Adult	<18	<18
	(c) Child	<14	<14

\* < denotes less than, > denotes more than

**1. Photographs:** Contemporaneous photographs of an alleged incident are admissible as evidence. The accuracy of photographs must be established by oral evidence given by either the photographer or of any other person who has knowledge regarding the accuracy of the photograph<sup>97</sup>.

**2. Video Evidence:** Audio and video tape recordings are admissible if proper safeguards are taken to ensure their reliability<sup>98</sup>. Tape records possessing evidentiary value, are documents as defined in Sec. 3 of the Evidence Act<sup>99</sup> and are on no different footing than photographs; both are admissible as primary<sup>100</sup> or secondary evidence<sup>101</sup>.

**All audio evidence must pass the following tests:**

- 1) The voice on the record must be identified;
- 2) The accuracy must be proved by satisfactory evidence, either direct or circumstantial;
- 3) Every possibility of tampering with the tape must be ruled out;
- 4) It must be relevant;
- 5) The tape must be carefully sealed and kept in safe or police custody; and
- 6) The voice should be clearly audible<sup>102</sup>.

Even in cases in which tape records are illegally obtained, such records may still be admitted as evidence. Regardless of the means or manner in which the document is obtained, even if by improper or illegal means, it will not be a bar to its admissibility as long as it is relevant and trustworthy<sup>103</sup>. However, the way in which the evidence was obtained will be a factor in assessing its genuineness.

97 *Yusuf Ali Nagree v. State of Maharashtra* 1968 AIR (SC) 147, 1968 (74) Cr. LJ 103

98 *Ram Singh v. Col. Ram Singh*, 1986 AIR (SC) 3 (Supreme Court 1985)

99 Sec. 3 states that a document means "any matter expressed or described upon any substance, by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording the matter."

100 See Indian Evidence Act, 1872, Sec. 62 ("Primary evidence means the document itself produced for the inspection of the Court."). See also *N. Sri Roma Reddy, v. V.V. Giri*, 1971 (1) SCR 399 (Supreme Court 1970) - holding that the tape recording itself is "primary and direct evidence admissible as to what has been said and picked up by the recorder." See also *R.M. Malkani v. State of Maharashtra* AIR 1973 SC 157 and *State of Maharashtra v. Prakash Vishnurao Mane* (1977) 79 Bom LR 217

101 See Indian Evidence Act, 1872, Sec. 63(2) ("copies made from the original by mechanical process which in themselves ensure the accuracy of the copy"). Illustration (a) under Sec. 63 states that "a photograph of an original is secondary evidence of its content, though the two have not been compared, if it is proved that the thing photographed is the original." See also *State of Maharashtra v. Prakash Vishnurao Mane* (1977) 79 Bom LR

102 *Ram Singh v. Col. Ram Singh*, 1986 AIR (SC) 3 (Supreme Court 1985) Copies of the tape record must be given to the accused pursuant to Cr. PC Sec. 173(5). But see *State of Maharashtra v. S.P. Munje*, 1999 Cr. LJ 1510 (Bombay High Court 1998) (holding that the actual tape cassettes did not have to be given, but only the transcripts of the cassettes).

103 *Magraj Patodia v. R.K Birla*, 1971 AIR (SC) 1295, 1970 (2) SCC 888. The SC held that even though files that contained correspondence against the accused may have been obtained improperly, the evidence was still admissible as long as its relevance and genuineness was proven. *Malkani v. State of Maharashtra*, 1973 AIR (SC) 157, 1973 (79) Cr. LJ 228 The SC held that evidence obtained by secretly taping the accused person's conversation was not illegal; the court affirmed the principle that even if evidence is illegally obtained, it is still admissible.

## H. The Trial Process

### Land mark judgments for use of prosecutors at a glance

- (1) Vishal Jeet vs. Union of India in CrI.W.P.No.421 of 1989 dated 2.5.1990
  - Asked Government to set up advisory committees to make suggestions for the eradication of child prostitution.
  - Asked the central Government to evolve schemes to ensure proper care and protection to the victim girls and children.
- (2) Prerana versus State of Maharashtra and others in CrI.WP No.788 of 2002 dated 7.10.2002
  - Asked Government to set up advisory committees to make suggestions for the
  - Children rescued from brothels should be treated as “children in need of care and protection “under the Juvenile Justice (Care and Protection of Children) Act, 2000.
  - A lawyer representing the accused should not represent the victims.
  - Draw parallels between the Immoral (Traffic) Prevention Act and the Juvenile Justice (Care and Protection of Children) Act, 2000.
- (3) Chairman, Railway Board & others vs. Chandrima Das & Ors.
  - Established the rights of foreign nationals in Indian land, under the constitution.
  - Extended the ‘tort’ principle of vicarious liability even to a case of rape.
- (4) Delhi Domestic Working Women’s Forum vs. Union of India (UOI) and Ors., Writ Petition in W.P (CrI) No.362 of 1993 dt.19.10.1994.
  - Laid down parameters under which a case of rape has to be tried by taking into consideration the plight of the victims during and after the trial.
  - For the first time recognized the need for legal representation for the victim;
  - Laid down parameters about the treatment of the victims in police station;
  - Made it mandatory for the victim to get the help of a social worker;
  - Made it mandatory to maintain the anonymity of the victim to get the help of a social worker;
  - Made it mandatory to maintain the anonymity of the victim’s identity.
- (5) State of Punjab vs. Gurmit Singh and Others in CrI.Appeal No.616 of 1985 dated 16.1.1996
  - Established that in camera trials are mandatory in rape cases.
  - Recognized that a delay in filing the FIR is not fatal to the case of the prosecution, given the social context.
- (6) Balwant Singh and Ors. Vs. State of Punjab in CrI.A Nos.131 and 273 of 1978 dated 10.2.1987.
  - Held that the mere absence of an injury does not prove that no resistance was offered by the rape victim.
- (7) State of Andhra Pradesh vs. Gangula Satya Murthy in CrI.Appeal No.455 of 1996 dated 19.11.1996
  - Recommended courts to focus on the broader probabilities of a rape case and not be swayed by minor contradictions or insignificant discrepancies.

- (8) P. Rathinam vs. Union of India (UOI) and Ors, Writ Petition in W.P (Crl) No.381 of 1988 dated 28.10.1988
- Expanded the concept of compensation to be made available even when the trial is going on.
- (9) Vishaka and Others vs. State of Rajasthan and Others dated 13.8.1997.
- Acknowledged sexual harassment at workplace as a violation of a right.
  - Defined sexual harassment at the workplace.
  - Established a set of guidelines for ensuring a safe work environment for women
  - Made it mandatory for the employer to take responsibility in cases of sexual harassment.
- (10) Apparel Export Promotion Council vs. A.K. Chopra in CA Nos.226 and 227 of 1999 (out of SLP © Nos.15099-15100 of 1997 dated 20.01.1999.
- Established that sexual harassment may not necessarily involve physical contact.
- (11) Rajendra Thapalia vs. General Manager (personnel) T.R. Bhatta on behalf of the Management of the Royal Casino Royal
- Established sexual harassment at the workplace as a crime through the constitution and international instruments, in the absence of a law.
- (12) Sakshi vs. Union of India and Ors in WP (Crl) No.33 of 1997 with SLP No (Crl) 1672 to 1673/2000 dated 26.5.2004
- Expanded the circumstances where in-camera trials should be used.
  - Established procedures that would help child victims to testify at ease in court.
- (13) Sheba Abidi versus State of Delhi and another in WP (Crl) No.356 of 2003 dated 28.7.2004
- Established that child victims can testify outside the court environment.
  - Child victims are entitled to get a support person during trial.
- (14) CEHAT and Ors. Vs. Union of India (UOI) and Ors (India) in WP (Civil) No.301 of 2000 dt.10.9.2003
- Was instrumental in bringing into focus the issue of female foeticide and also direct the Government to make amendments in the law;
  - Monitored the problems relating to foeticide and law enforcement against it in the country.
- (15) Hem Chand versus State of Haryana
- Interpreted the circumstances where Sec304B, IPC can be admissible, to include suicide.
- (16) Dr G.M. Natarajan versus State and others
- Emphasised that in the case of harassment and death of a women under unnatural circumstances, the burden of proof is on the accused, and not on the prosecution.
- (17) Sanaboina Satyanarayana vs. Government of Andhra Pradesh and Ors in Crl. Appeal No.1227 of 2002 dated 29.7.2003.
- Established that those charged with crime against women and children should not be eligible for a remission of sentence.

- (18) Smt. Shanti and Anr. Versus State of Haryana.
- Interpreted the circumstances under which section 304B is admissible.
  - Established section 304B is inclusive of 498A.
- (19) State of Rajasthan vs. Hat Singh
- Interpreted the two sections 5 and 6 of the Rajasthan Sati (Prevention) Ordinance / Act, 1987 mutually exclusive.

### **i. Victim pre-preparation**

There is little defined law that governs the code of conduct when preparing witnesses or victims for trial. The Bar Council of India has defined a general code of professional conduct and etiquette<sup>104</sup>, which gives general guidelines of duties that the advocate owes to the client and to the court. The Prosecutor may involve NGOs that have had experience in dealing with trials of trafficking and in counseling victims. These organizations can serve as facilitators and can help in extending support services to the Prosecutor.

When victim is unable to be traced, trial need not come to a halt. In state of H.P vs B Mohan Mishra 1995 Cr.L.J 3845, the Supreme Court held that merely become the victim girl is not examined, this can never be the ground to acquit an accused if there is evidence otherwise available for proving the criminal act of the accused.

### **ii. Duties to the court and client**

The advocate owes a duty to the client to fearlessly uphold the interests of the client by all fair and honorable means<sup>105</sup>. However, at the same time, an advocate owes a duty to the court to not influence

A decision by any illegal or improper means<sup>106</sup>. An advocate appearing for the prosecution must not conduct the prosecution so as to lead to the conviction of the innocent and shall scrupulously avoid suppression of material capable of establishing the innocence of the accused<sup>107</sup>. Based on these principles, an advocate has wide discretion in preparing a witness as long as it is done by "fair and honourable means," does not influence the court improperly, and does not suppress evidence that exonerates the accused.

**Accordingly, it seems acceptable to<sup>108</sup>:**

1. Seek to put the victim-witness at ease about the ordeal of giving evidence.
2. Explain to the victim-witness court procedures, the role of the prosecutor, defence counsel, judge and witnesses in a court proceeding, the layout of the court and the order in which people will speak.
3. Explain to the victim-witness the special procedures which may be requested. For example, a petition for an in camera hearing or a screen, if necessary, to put the witness at ease.

104 [http://lawmin.nic.in/la/subord/bci\\_index.htm](http://lawmin.nic.in/la/subord/bci_index.htm)

105 Bar Council Rules of India, Part VI, Chapter II, Section II, Rule 15

106 Bar Council Rules of India, Part VI, Chapter II, Section I, Rule 3

107 Bar Council Rules of India, Part VI, Chapter II, Section II, Rule 16

108 These are observations/practices which have been deemed to be good practices, established after consultations held with several NGOs working on the issue of anti human trafficking.

4. Organize for the victim-witness to visit a court and to observe an ongoing trial.
5. Allow the victim-witness to refresh her memory with a contemporaneous note (if Sec. 159 Indian Evidence Act applies) when giving evidence in court.
6. Advice about the manner in which the victim-witness should give evidence, such as: speak loudly and slowly, address the judge, answer the question, keep answers short, try to keep composure under cross-examination, listen carefully to questions and to speak up if s/he does not understand or cannot remember.
7. Ask the victim-witness possible questions that may be asked during direct and cross examination. However, the Prosecutor must be careful not to influence what the victim-witness might say.

**Conversely, it does not seem acceptable to:**

- 1) Tell the victim-witness what she should say.
- 2) Question the victim-witness with a motive to encourage her to change her view or obscure her recollection.

**iii. Using Sec. 161 Cr. PC - police statements to refresh a victim's memory**

It is not permissible to prepare a victim-witness by using a police statement obtained u/s. 161 Cr. PC<sup>109</sup>. Generally, a victim-witness may refresh her memory during examination by referring to any writing which she made at the time the transaction occurred or immediately afterwards (the Court must consider it likely that the statement was made when the subject matter was still fresh in the witness' memory)<sup>110</sup>. However, Sec. 162 Cr. PC states that a police statement obtained by police u/s. 161 Cr. PC may not be used to refresh the memory of the witness while testifying at trial. The use of statements that come within Sec. 161 Cr. PC should not be used to prepare a witness. "Preparing" and not "tutoring" is the key to the truth in all trials. It would be both unethical and unacceptable for any Public Prosecutor to place words in a victim's mouth. The duty that all

advocates owe to the courts warrants that there should be no form of tutoring to the victim-witness. However, the law does not forbid anyone from preparing a victim-witness for putting the victim-witness at ease, going over the process and preparing the person of what twists and turns to expect. This will go a long way in ensuring that the testimony of the victim-witness is accurate, consistent and cogent.

109 Cr. PC Section 161 states: "(a) Any police officer making an investigation...may examine orally any person supposed to be acquainted with the facts and circumstances of the case...(c) The police officer may reduce into writing any statement made to him during the course of examination; and if he does so he shall make a separate and true record of the statement of each such person whose statement he records."

110 Indian Evidence Act, Sec. 159. In addition, the witness may use a document created by another person, and read by the witness, at the time of the transaction or immediately afterwards. Furthermore, a witness may u/s. 160 testify to facts mentioned in such a document, even though he or she may not actually remember the facts themselves, if the witness knows that the facts were correctly recorded at the time they were drafted.

#### **iv. Non-appearance of a witness**

Sec. 299 of Cr. PC allows for the recording of evidence where the accused has absconded and there is no immediate prospect of his arrest and where the offender is unknown. In the first instance the Court may record depositions of prosecution witnesses. These can be offered at trial when the accused is arrested in the following situations: if the witness/ deponent is dead; if the witness/ deponent is incapable of giving evidence; or if the attendance would cause unreasonable delay, expense and inconvenience. Secondly, where the offender is unknown and the offence is punishable with death or imprisonment for life, the High Court or the Session's Judge may direct any Magistrate of the First Class to record prosecution evidence. Depositions so recorded may be used at the trial if the witness is dead, or incapable of giving evidence, or is beyond the limits of India.

This section can be used in the frequent event of the accused persons absconding and thus evading the course of justice in cases involving trafficking of persons. This will also help expedite the repatriations of trafficking victims especially, if they belong to different nationalities. For the application of this section there should be a definite finding to the effect that witnesses died at the time of trial or became incapable of giving evidence<sup>111</sup>.

Many times the repatriation of the victim-witness takes place pending the final decision of trials. Sometimes the process is not accurately documented, which causes difficulties in finding out addresses of such victim-witness for sending summons. In situations like this the likelihood of a conviction reduces. However, this is not to say that it is impossible to obtain convictions in these situations. The depositions of all the other participants of the raid/ rescue operation become prominent. If a statement of the victims is taken u/S. 164 Cr. PC and its contents are corroborated by other witnesses then this too can lead to a conviction.

#### **v. Compensation**

Under Sec. 357 of Cr. PC an order for compensation can be passed when a Court imposes a sentence of fine or a sentence of which fine forms a part. Such compensation may be ordered when passing judgment, by the trial court, Appellate Court, the High Court or a Court of Session when exercising its powers of revision. The compensation may be ordered, inter-alia: -

a) For meeting expenses properly incurred for the prosecution; and b) to any person, who has suffered loss or injury by the offence, when the compensation can be recovered in a civil court. Sec. 357 (3) empowers the court to order compensation to a person who has suffered any loss or injury, even in cases where the substantive sentence of imprisonment only is awarded, of which fine does not form a part.

111 *Nirmal Singh v. State of Haryana, AIR 2000 SC 1416:2000 Cr. LJ 1803*

The power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. Awarding of compensation to a trafficked victim provides the basis for an effective rehabilitation. The Supreme Court has recommended to all courts to exercise this power liberally so as to meet the ends of justice<sup>112</sup>.

A Prosecutor may pray to the Court in all trials involving trafficking to exercise the powers vested in it u/S. 357. Prosecutors can also guide the victims to obtain compensation awarded by some state governments, even before the trial<sup>113</sup>.

## vi. Interim relief

The Supreme Court has stated in a case<sup>114</sup>: “If the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should be provided in the scheme.” The jurisdiction to pay interim compensation can be treated to be part of the overall jurisdiction of the courts trying offences of rape.

In the heinous crime of gang rape repeatedly committed upon a Bangladeshi national, by the Indian railway employees, the SC granted her compensation holding that 'rape' is an offence which is violative of the Fundamental Rights of a person guaranteed under Article 21 of the Constitution of India; even those who are not citizens of this country will be entitled to the protection of their lives in accordance with the Constitutional provisions. The court also applied the doctrine of vicarious liability of the state<sup>115</sup>. A Prosecutor may refer to this precedent in praying for compensations to trafficked victims who are foreign nationals.

## I. The Victim-Witness Protection Programme

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, States vide Article 2 (b), that one of the purposes of the Protocol is to “protect and assist the victims of trafficking with full respect for their human rights”.

### i. Pre Trial

The period between post-rescue and pre-trial is very crucial for the rescued victim. A Prosecutor may not have a full-fledged role to play at this stage, but he may whenever possible, liaise with the Investigating Officer to ensure that certain steps are taken towards ensuring victim-witness protection measures.

112 *Jacob George v. State of Kerala, 1994 SCC (Cri) 774; Harikishan and State of Haryana v. Sukhbir Singh, AIR 1988 SC 2127; Balraj v. State of U.P. AIR 1995 SC 1935. Mangilal v. state of Madhya Pradesh, AIR 2004 SC 1280; Suganthi Suresh Kumar v. Jagdeeshan AIR 2002 SC 681.*

113 *For instance, the Andhra Pradesh government has made orders granting interim relief/ compensation to rescued trafficked victims even before the commencement of a trial. Other states may have similar practices.*

114 *Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922: (1996) 1 SCC 490:*

115 *Chairman, Railway Board v Chandrima Das (2000) 2 SCC 465: AIR 2000 SC 988*

116 *Inputs taken from SARIQ - Regional Victim/ Witness Protection Protocol to Combat Trafficking, Commercial Exploitation and Sexual Abuse of Women and Children in South Asia, 2005*

117 *Supplementing the United Nations Convention Against Transnational Organized Crime, 2000*

### **The suggested good practices are:**

1. The victim must be separated and segregated from the accused from the point of rescue to the point of appeal (if any by the accused).
2. Immediate counselling will help the victim comply with the 'new situation' and also prepare her/him to give statement before the police<sup>120</sup>.
3. The presence of the representative of an NGO or a counsellor at the time of interviewing the victim by the police will help relax the victim.
4. The statement of the victim should be taken when the victim is ready to give the statement.
5. If the victim does not speak the local language, an interpreter may be arranged.
6. The prosecutor may, based on the inputs of the NGO / counsellor draw a list of the questions to be asked to the victim.
7. The Prosecutor may pray to the court to ensure timely medical examination and age verification of the victim.
8. Providing safe custody to the victim post rescue is of critical importance. A formal plan as to where the victim is to be kept pending inquiry and final determination of best alternative for the victims may be formulated and presented to the appropriate magistrate so that he may authorize it.
9. The Prosecutor may pray to the court to order for Home Investigation Report u/S. 17 (2), 17 A of ITPA, 1956 or u/S. 33 of the Juvenile Justice Act, 2000.
10. The Prosecutor may pray to the Court for imposition of conditions u/S. 437 (3) of Cr. PC whilst granting bail to an accused. The Prosecutor should also ensure that the surety who stands for the accused furnishes a declaration to the court, regarding the number of persons for whom he has earlier stood surety, including traffickers (s. 441 A Cr. PC).
11. The Prosecutor may explore links with the NGOs working on anti human trafficking and get a victim familiarized with court procedures and the nature of the trial.
12. The Prosecutor through his timely intervention may ensure that the identity of a victim of trafficking is not revealed and that anonymity is maintained. In this regard Sec. 21 Juvenile Justice Act and Sec. 228 A of IPC are relevant. An interpretation of both these provisions ensures statutory prohibition on the disclosure of identity of trafficked victims.

### **ii. During Trial**

1. The victim should be protected at all times and separated from the accused.
2. In-camera trials should be facilitated.
3. The Prosecutor should ensure non-disclosure of identity of a victim.

<sup>118</sup> *These are merely indicative and not exhaustive.*

<sup>119</sup> *For further details see: Standard Operating Procedures on Investigating Crimes of Trafficking for Commercial Sexual Exploitation, UNODC, 2007 and Standard Operating Procedures on Investigating Crimes of Trafficking for Forced Labour, UNODC, 2008*

<sup>120</sup> *For further details see: Journey to Justice: Manual on Psychosocial Intervention, UNODC, 2008*

4. Reasonable breaks may be given to the victim, especially child victims during the period of cross examination<sup>121</sup>.
5. Questions may be put to the victim, especially child victim, during cross-examination through the medium of the Presiding Officer of the court<sup>122</sup>.
6. The Prosecutor may pray to the Court for providing an interpreter if the victim does not speak the local language.
7. The Prosecutor may also pray that police or NGOs be directed to provide periodic reports of the victim during the pendency of the trial. This will act as cross check on the progress of the victim's rehabilitation process.
8. The Prosecutor may also pray to the Court to order the police for identification, seizure and attachment of unlawfully acquired property by the accused (S. 105 D and E of Cr. PC).

### iii. Post Trial

The role of the Prosecutor especially with the victim-witness protection program at the post trial stage will be limited. However, ensuring the inclusion of substantial conditions in the final order/ judgment will ensure that the victim is protected, rehabilitated and reintegrated into society.

**Challenge:** Continuing victim-witness protection after acquittal of accused

This is a significant factor to be considered by a Public Prosecutor. In cases of acquittal of the accused, for any reason whatsoever, the Public Prosecutor may pray to the court to mention specific details of procedures that may be adopted towards victim-witness protection. For e.g. a prayer may be made to the court that the accused should be directed not to initiate contact with the victim; that the accused may be restrained from coming within the vicinity of the victim's location. If the accused has been

Convicted, appropriate orders may be taken from the court u/S. 106 of Cr. PC. These orders will ensure that the victims are not susceptible to any threat/ harm or re-trafficking from the accused traffickers.

In cases of conviction, the Prosecutor may also pray the Court for procedures to be initiated u/ S. 18 of the ITPA for closure of brothels and eviction of offenders in cases of sex-trafficking. In cases of trafficking for labour the provisions of the Criminal Procedure Code or the Criminal Law Amendment Ordinance, 1944 may be utilized for closure of the illegal factories and cancellation of registration of legal factories/ places of work.

### Confiscation of assets of traffickers

The Prosecutor should cause investigation into the assets from the crime acquired by the traffickers and other offenders in accordance with the procedure in Sec. 105 A L of Cr. PC. The Criminal Law Amendment Ordinance 1944, the Prevention of Money Laundering Act, 2002, etc. should be utilized as and when applicable.

121 *Sakshi v. Union of India, 2004 (5) SCC 518 (Supreme Court 2004)*

122 *Sakshi v. Union of India*

## **Sentencing Policy – Supreme Court Guidelines**

- In *Sanaboina Satyanarayana vs Govt. of AP and Orissa* in Criminal Appeal No 1227 of 2002 dtd. 29-7-2003, the supreme court established that those charged with crime against women and children should not be eligible for a remission of sentence.
- In *State of Karnataka vs Krishnappa* 2000 CrL J. 1793(SC) AIR 2000 SC 1470, The Supreme Court directed the lower courts that socio – economic status, religious, race, caste or creed of the accused or victim are irrelevant considerations in sentencing policy. Protection of societies and deterring criminal is the avowed object of law and that it is required to be achieved by imposing appropriate sentence. Sentencing has to be commensurate with the gravity of offence. Courts must hear the loud cry for justice by the society in case of heinous crime & rape.

## **Liability of Prosecutor and the Investigating officer .**

- The Supreme Court in its Judgment in CrL. Appeal No 1485/2008 dtd 7-1-2014 in *State of Gujarat vs Krishnbhai* ) pertaining to slip shod/Perfunctory investigation in a case of rape and murder of a 6 years old girl in Navarangpura PS limits of Ahmedabad city that occurred on 27 -2-2003. has given a detailed judgment regarding role of police and prosecutor. The Supreme Court directed state governments to formulate a procedure for taking action against all erring investigating and prosecuting officers. All such erring officials/officers should be identified as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must snuffer departmental action. State government should ensure that investigation and prosecution are purposeful and decisive.

# POST TRIAL

The post-trial stage is the last stage of prosecution which begins immediately after the trial ends with either conviction or acquittal of the accused and the passing of sentence upon conviction. This stage usually comprises of appeal against or revision of the sentence passed in the trial stage.

## Appeals

Chapter 29 Cr. PC gives out details of the procedure to be followed for appeals.

Sec.372 Cr.PC	Victim has a right to prefer appeal
Sec. 374 Cr.PC	Appeals from Convictions
Sec. 375 Cr.PC	No appeals when accused pleads guilty
Sec. 378 Cr.PC	Appeal in case of acquittal
Sec. 379 Cr.PC	Appeal against conviction by High Court in certain cases.

- ***Earlier only state was to prefer appeal. None the victim can. It is a great leap forward***

Sec. 386 of Cr. PC provides for powers of the Appellate Court in cases of conviction or acquittal of the accused.

Appellate powers also include setting aside an order of acquittal or enhancement of sentence<sup>123</sup>. The Supreme Court has held, "It is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice"<sup>124</sup>. An Appellate Court may enhance a sentence (after giving show cause) when the sentence given by the trial court is "wholly unsatisfactory, irrelevant, unreasonable or perverse"<sup>125</sup>.

123 Sec. 401 (1) in reference to Sec. 386 Cr. PC

124 K. Chinnaswamy Reddy v. State of Andhra Pradesh, 1962 AIR (SC) 1788.

125 George Thomas v. State of Kerala, 1995 Cr. LJ 3645 (3646) (SC)

# Possible alternative methods in Tackling human trafficking

## A. Closure of brothels and eviction of offenders from a brothel

### Eviction before conviction

- Under Sec. 18 (1) ITPA power lies with a Magistrate (District Magistrate (DM) or Sub-Divisional Magistrate (SDM)) to order eviction of places of commercial sexual exploitation. This process can be initiated by the DM or SDM on receipt of information from the police, any other persons or otherwise. This eviction u/s. 18 (1) ITPA is possible even before conviction in the case and even without an FIR. Eviction order will be passed upon satisfaction of the Magistrate and after hearing the person concerned. The order should be complied within seven days of its passing.
- **No appeal a stringent provision in law:** Orders passed by the Magistrate u/S. 18 (1) ITPA, for eviction of places of CSE shall not be subject to appeal and shall not be stayed or set aside by the order of any civil or criminal court (vide s. 18 (3) ITPA). Prior permission of the Magistrate needs to be taken before letting out such premises again for a period of one year wherein major girls have been recovered and three years wherein minor girls have been recovered under a search carried out u/S. 15.
- **Preventive action:** U/s. 133 (1) (b) Cr. PC the District Magistrate/ SDM/ or any other Executive Magistrate has the power to pass a conditional order on any person who conducts any occupation which is injurious to the health or physical comfort of the community, to desist from carrying on such trade.

Under Sec. 18(1), a summary procedure for closing down places of prostitution, without going through a detailed process of a criminal prosecution is provided. It is a quick acting mechanism, for closing down a place of exploitation. It deals with the premises and it is not required for the prosecution to establish intention or knowledge.

A significant ruling was given in a case by the Supreme Court<sup>128</sup>. The question that was raised before the Supreme Court was whether the notification issued by the state of Maharashtra empowering the

Commissioner of Police, with the powers of District Magistrate for the purposes of Sec. 18 and 20 of the ITPA, had been validly made. The Supreme Court considered the purpose for which the appointment was made and while harmoniously interpreting legislations held that the government was capable of appointing the Commissioner of Police as an Executive Magistrate who can exercise the powers of a District Magistrate.

126 Sec. 18(1) (b) ITPA

127 A.C Aggrawal, Sub divisional Magistrate, Delhi v. Ram Kali, AIR 1968 SC 1 and Chitan Vaswani v. State of West Bengal, AIR 1975 SC 2473

128 AN Roy v. Suresh Sham Singh, (Cri) Appeal 702 of 2006

## ***Eviction after conviction***

Under Sec. 18 (2) ITPA, a court which convicts a person of an offence u/S. 3 (keeping a brothel or allowing premises to be used as a brothel) or u/S. 7 (prostitution in or in the vicinity of public places) of ITPA may pass orders to close the brothel and/ or evict offenders **without any notice** to any convicted person. Therefore, upon conviction of a person u/S. 3 or 7 ITPA, the Prosecutor should immediately move the court for an order of closure/ eviction u/S. 18 ITPA.

**Note:** The order passed by a judicial authority u/S. 18 (2) ITPA cannot be stayed or set aside or appealed against, vide s. 18 (3) ITPA.

## **Suspension/ cancellation of hotel licence**

Under Sec. 7 (2) ITPA licence for carrying on business of a hotel (where CSE is being conducted) may be **suspended** for a period of 3 months to 1 year. If offences under this provision are committed against a 'child' or 'minor', licence of such hotel may also be cancelled.

## **B. Attachment and forfeiture of property under Sec. 105-D to Sec. 105-J of the Criminal Procedure Code**

Property that may be attached or forfeited u/S. 105-D to Sec 105-J of the Criminal Procedure Code is as follows: -

1. Property and assets of any kind whether owned by an individual, group of individuals, Hindu Undivided Family or by a corporate entity.
2. The property could be movable or immovable. i.e. cars, flats etc.
3. Property that can be described clearly i.e. the car or flat is owned by the prime accused or which can't be entirely or clearly described such as "benami"<sup>129</sup> properties or property owned jointly by other individuals or which can't be easily measured.
4. Any title deed such as leave or licence papers, registration papers for a flat or a car or a legal document showing the financial interest of the accused person in any property or asset.
5. The property may be obtained as a result of the crime i.e. cash or belongings or valuable items of a trafficked victim, which has been detained by the accused.
6. The property may be used in the crime i.e. mobile phones used by pimps or traffickers, vehicles or other transport vehicle used in the crime.
7. The property may also be purchased from the proceeds of the crime, i.e. often the perpetrators or accused persons in trafficking related offences purchase movable or immovable properties from the earnings accumulated through the earnings of the exploitation of the victim.

*129 Under The Benami Transactions (Prohibition) Act, 1988 "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person*

## ***Jurisdiction***

The provisions of Sec. 105-D to 105-J can be applied within India<sup>130</sup> and also outside India where there exists a bilateral agreement<sup>131</sup>. International requests for attachment may also be undertaken when the Central Government receives a request from overseas that criminal assets are located in India.

The procedure to be followed for attachment or forfeiture of unlawfully acquired property or assets is as follows:

### **STEP 1. Identifying the property:**

The court based on an application or information from a police officer, Investigating Officer, Prosecutor or any person that convinces the court that certain assets or property has been used in a crime, obtained from a crime or from the proceeds of a crime will order the police officer to do the following:

1. Tracing and identifying the property: Tracing a property will require the police officer to determine the nature of the property i.e. what kind of property it is, movable or immovable.
2. Secondly, what is the source of the property i.e. past and present owners and the funds that they used to purchase the assets and where does the monetary trail come from?
3. Thirdly, the disposition and movement of the property i.e. what state the property is in currently, for example in case of perishables. The term movement is associated with the attempts made by the accused persons to sell the property or transfer the property especially when they know that there is a high degree or chance of the property being attached.
4. Fourthly, the title and ownership of the property and the connection in case of benami properties to the accused person.
5. After tracing the property the police officer must gather evidence or proof that establishes as a prudent man would establish that the property was used in the crime or obtained as a result of the crime or derived from the proceeds of the crime.
6. The police officer may undertake or implement the directions in a court order of identifying criminal assets in the form of an inquiry, investigation or survey.
7. The inquiry, investigations or survey may involve any person, place, property, assets, documents, books of accounts in any bank or public financial institutions or any other relevant matters required to identify and trace a criminal asset.

### **STEP 2: Attempt to conceal, transfer, or dispose the property during an inquiry, investigations or survey of a property:**

The property concerned should be the object of the inquiry, investigation or survey by the police officer. The officer can make an order to seize such property or where it is not possible to seize the property i.e. in case of a house or any immovable property then an order of attachment can be served on the concerned person who is making an attempt to conceal, transfer or dispose off the property.

The order of attachment will stipulate that the concerned person cannot transfer or deal with the property without the prior permission of the police officer. The police officer on his/her part must confirm the order with an order of the court within 30 days of making an order of seizure or forfeiture that authorised the police officer to undertake the inquiry, investigation or survey.

### **STEP 3: Management of properties seized or forfeited**

The court may appoint the District Magistrate of the area or any other officer nominated by the DM to manage the properties seized under the provisions of section 105C to 105-J.

### **STEP 4: Show Cause Notice:**

If during the inquiry, investigations, or survey the police officer brings forth evidence that convinces the court that all or any of the properties are from the proceeds of the crime then a show cause notice is issued to the person concerned. The person affected by the notice will within 30 days of receiving the written notice provide evidence to the contrary and unless the court is satisfied otherwise, it will proceed to declare the assets as proceeds of crime. In the case the property is held in trust on behalf of the person affected or if it's a benami property then the person who holds the property on behalf of the person affected shall also be served with a copy of the notice by the court<sup>136</sup>.

### **STEP 5: Final Order:**

After notifying the person affected and giving the person the right to a fair hearing or a reasonable opportunity to be heard the court shall record its finding whether all or any of the properties shall be declared as proceeds of crime. If the person affected does not appear before the court within 30 days of issuing the show cause notice of attachment and forfeiture then the court has the powers to pass an ex-parte judgement based on the evidence placed before the court.

The property shall be forfeited to the Central Government free of any encumbrances. In the event of the assets being in the nature of shares of a company the Central Government shall be registered as the transferee of the shares<sup>137</sup>.

### **STEP 6: Fine in lieu of forfeiture**

After the court has passed orders forfeiting any property to the Central Government and it is a case where the source of only a part of such property has not been proved to the satisfaction of the court, then the court may after giving the person affected an opportunity to be heard ask the person affected to pay a fine in lieu of the forfeiture. After payment of the fine the declaration of forfeiture shall stand revoked and the property will be released to the person affected.

133 Sec.105-D(2) (3)

135 Sec. 105 F

137 Sec. 105-H (1) to (4)

134 Sec.105-E (1) (2)

136 Sec. 105-G (1)(2)

138 Sec. 105-I

139 Sec. 105-J

Once an order is passed u/S. 105-E or notice is issued u/S. 105-G, then any subsequent transfer of property made by the person affected shall be null and void once the declaration of forfeiture is made to the Central Government.

### **C. Seizure of suspicious property**

In addition to the powers u/S. 105-C to 105-J, a police officer also has the powers u/S. 102 of Cr. PC to seize any property which may be found in circumstances which create suspicion of the commission of any offence. More importantly, informing the Enforcement Directorate after registration of a case under the scheduled sections of Trafficking / ITP Act, the Ss P/Cs P may write to Asst/ Dy. Director of Enforcement Directorate for asset forfeiture of the brothel keeping by registering ECIR (Enforcement Crime Information Report)

If the seizing officer is below the rank of an officer in charge of a police station he/she shall immediately report the seizure to the concerned officer. The seizure shall be reported immediately to the Magistrate within whose jurisdiction the property was seized. The court shall give further directions on the disposal of the property. Sec. 102 is wide enough to cover offences either in the Indian Penal Code or any penal statute but the key is that the property must be either suspected to be stolen or be found under circumstances which leads suspicion of an offence having been committed. The property that has been seized or frozen should have some nexus with the alleged offence which is under investigation of the police officer concerned. This would cover chance recovery under a special Act such as Immoral Traffic (Prevention) Act, 1956 provided the procedures are properly followed.

### **D. Bond Proceedings**

Chapter VIII (Security for Keeping the Peace and for Good Behaviour) of Cr. PC, especially Sec. 109 and 110 read with 116 should be initiated for ensuring that the accused person does not continue to commit fresh offences after the first crime against a trafficked person.

### **E. Notification of address of previously convicted offenders**

Sec. 11 of the ITPA provides that when a person once convicted in India of an offence punishable under ITPA or punishable u/S. 363, 365, 366, 366-A, 366-B, 367, 368, 370, 371, 372 or 373 of the IPC with imprisonment for a term of two years or upwards OR once convicted in any country of a like offence is, within a period of five years of release is again convicted of the aforesaid offences, the court may at the time of passing the sentence of imprisonment on such a person also order him to notify his/ her residence or absence from residence or change of residence for a period not exceeding five years in accordance with prescribed rules of the concerned state.

A person ordered u/S. 11 of ITPA to notify his/ her address shall immediately after release from prison, report at the police station having jurisdiction over the place of his/ her residence and leave his/ her correct address there. When the offender intends to change his/her place of residence, he/she must notify such intention to the police officer and also furnish the correct address of the intended place of residence. The police officer shall communicate the intended change of residence together with full particulars of the offender to the police station having jurisdiction over the intended place of residence. The offender must report to the police station once a month till the expiry of the period during which he is required to notify his/her address. Temporary absence must also be reported at the police station as soon as the offender returns to the usual place of residence. Once a conviction is obtained the Prosecutor can petition u/S. 11 of the ITPA that the detailed information of the offender is made known to the police and also seek conditions for the offender's presence. This is an effective way of keeping a track of those who habitually deal in trafficking of women and children.

# PROBLEM TREE

**Trunk of the tree:** 18-Year - Old Girl Victim of Trafficking Does Not Support Prosecutor



## **Branch one: Refusal to testify**

Apples for branch 1: No testimony from prime witness

## **Branch Two: Refusal to come to court**

Apples for branch 2: trafficker not convicted

## **Branch Three: May lie in court**

Apples for branch 3: End up helping trafficker/exploiter

## **Branch Four: May mix up facts and fumble in court**

Apples for branch 4: Case falls apart

## **Roots:**

1. Fear of court system or of trafficker
2. Lack of information
3. Lack of security
4. Belief that trafficker is more powerful
5. No knowledge of the law
6. Not secure about future
7. Psycho-social trauma
8. Dependency on drugs and alcohol
9. Demand by commercial sexual exploiter
10. Power of organized crime networks
11. No transport
12. Lack of safe shelter

## **Possible measures:**

1. Acknowledge the exploitation of the victim, validate the harm done to her, make her understand that she is a victim and never an accomplice
2. Build her self-esteem and empower her by briefing her on court procedures and her case
3. Ensure she gets safe shelter and adequate counseling
4. Connect her to a social worker/counselor
5. Ensure her rights during trial to privacy and briefing
6. Explain what future options may be available to her and discuss rehabilitation programmes, if available
7. Take steps to get order of the court to concerned agencies
8. Make her feel safe from trafficker, provide security to her by police/NGO
9. Take steps to carry out mock trial to empower victim/witness in court procedures
10. Ensure appropriate translators are provided wherever required
11. Bring to the notice of the court all the challenges (including trauma of the victim, fears, apprehensions ,etc. of the victim)and seek directions to appropriate authorities for immediate relief

# CHECK LIST FOR PROSECUTORS

Role of prosecutor	Suggested Arguments	U/S Cr. PC
Opposing anticipatory and bail of the accused	Magnitude of the crime and the role played by the accused- applicant in the crime	U/S 436-439
Asking for remand of the accused	Profile of trafficker including criminal antecedents (whether on bail in earlier crimes): chances of intimidation of victim - accused: chances accused indulging in other crimes: chances of accused going underground.	U/S 436-439
Statement of victim U/S164Cr.PC	Advice victim of rights, the manner in which s/he is expected to depose before the magistrate, right to know contents of deposition and the legal implications of the statement in justice delivery	Prosecutor can request in writing to the magistrate/ judge
Custody application By parents or relatives by others	Oppose or support the application depending on the facts and circumstances that emerge from the home verification including the parenthood of the applicant and considering the best interest of the victim.	JJ Act or ITPA
Comments on charge sheet submitted to prosecutor by police before charge is framed	Can ask for new sections to be applied: more accused to be added: gaps in investigation to be filled; can seek to amend /alter sections which may not be applicable (for example, if the victim has been charge sheeted U/S. 8 ITPA, the prosecutor should bring it to the notice of the court) so that court can a) Direct police to investigate further b) ask for special team to investigate c) after charges and sections according to the facts of the case and drop charges against the victim, if any.	a)SC directive insists on charge sheet if prima facie case is established b)U/S 211-223 Cr. PC

Punishment of offenders/ sentencing	Ask for enhanced punishment; state any history of previous conviction; manner in which offence was committed; ask for re-examination of witness if necessary; make separate charge for every offence listed; ask for maximum punishment wherever prescribed (for example Section 7,ITPA); Ask for mandatory fine wherever prescribed; ask for enhanced punishment for repeated offenders; ask for post- conviction steps U/S.7(1)A,ITPA (suspension or cancellation of hotel license)U/s 18, ITPA (eviction of offender); etc.	U/S 173,211, 213-224 as well as ITPA provisions.
Evidence	Link evidence with FIR, witness statement and allegations. Make a matrix for easy presentation before court	
Victim-witness protection	Ensure witness are not intimidated; insist on in camera or video conferencing wherever possible; ask for all support (security, etc.) for the witnesses; request for directions to appropriate agency for rehabilitation of victims by government or non-governmental agencies.	Sakshi v/s Union of India, Sheba Abidi v/s Sate (NCT) of Delhi and Anr., Perna Vs state of Maharashtra, Gaurav Jain v/s Union of India, Vishal Jeet v/s State etc. and provision of special laws including ITPA and labour laws.
Defence witnesses	Cross examine in great detail to prevent sabotage of case	
Arguments	Prefer to submit written argument, besides oral argument	

*HELP founded in 1993 by a group of service professional from different areas of interest committed to protection of women & children from violence, sexual exploitation, abuse and trafficking. The vision of HELP is to create a safe, supportive and responsive society that upholds the protection, rights and dignity of every child in Andhra Pradesh. HELP is one of the pioneering organizations working against human trafficking through prevention strategies, direct services to the trafficked victims for their rehabilitation and re-integration and advocacy for speedy legal redressal of the trafficked victims. HELP as one of the important policy – influencing organizations in the State of Andhra Pradesh is the nodal NGO for the Department of Women Development and Child Welfare and the Criminal Investigation Department (CID) in Andhra Pradesh.*



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