

CFLR MEMORANDUM

On

LAW REFORM

Of

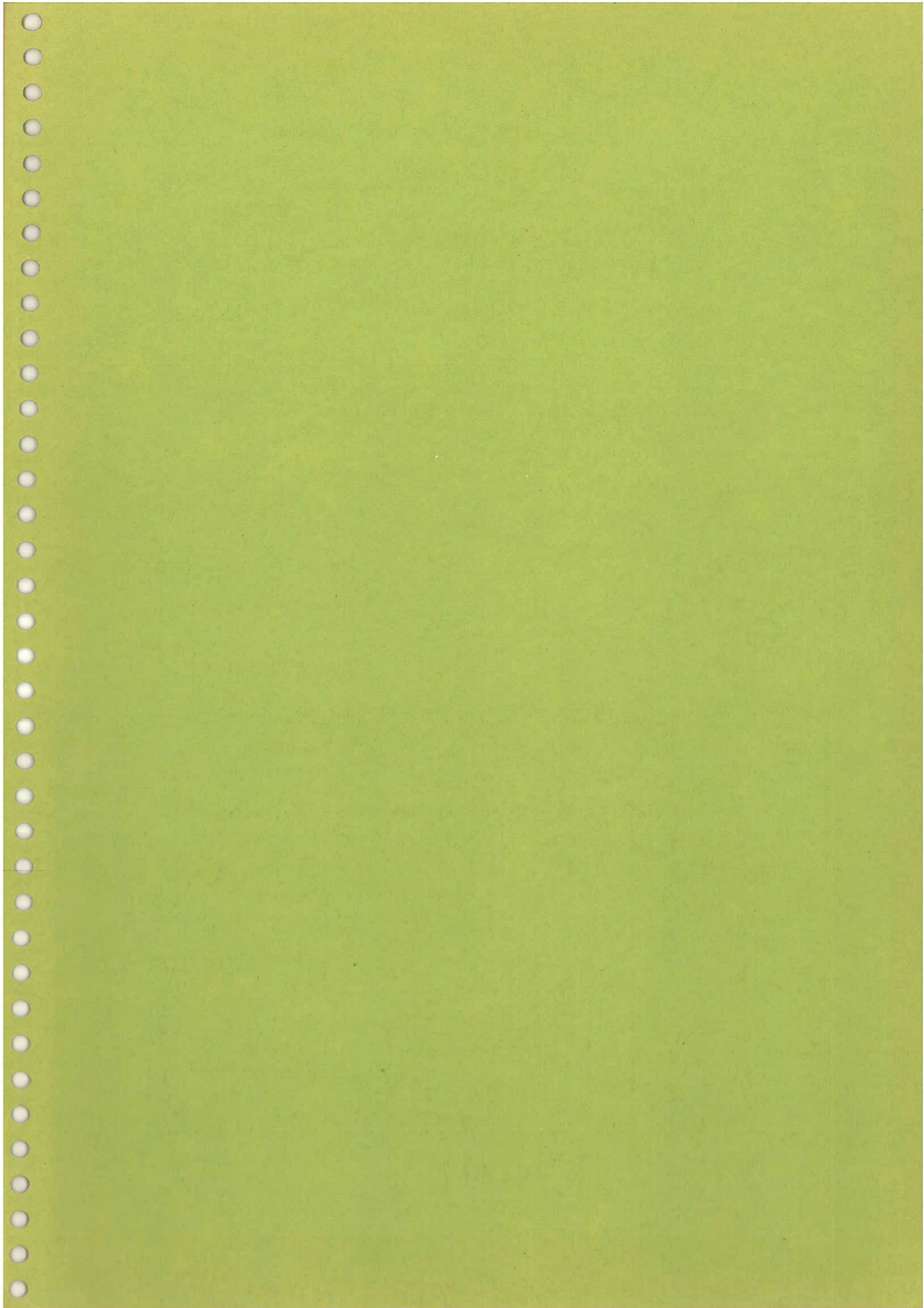
SEX WORK/PROSTITUTION

IN INDIA

(WORKING DRAFT)

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Hustling for Rights: The Legal Regulation and Representation
Of the Sex Trade in South Asia

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ANNEXURE I **The Prevention of Immoral Traffic and Rehabilitation of Prostituted Persons Bill, 1993**

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Chapter I- Critique of Existing Law and Analysis

Introduction

The legal regulation of prostitution in India is governed primarily by the Immoral Traffic Prevention Act, 1986 (hereafter referred to as ITPA). Some related provisions are found in the Indian Penal Code, 1860, which contains general sections against the trafficking and slavery of women and children, as well as state-level police, railway, beggary, health and public order statutes. The Constitution also contains certain provisions that address the issue of trafficking in human beings.¹ In this chapter we examine the ITPA provisions and the extent to which they achieve the objectives of, and reasons for the act

ITPA was initially enacted as the *Suppression of Immoral Traffic in Women and Girls Act 1956* in pursuance of the *International Convention for the Suppression in the Traffic in Persons and the Exploitation of the Prostitution of others* signed in New York in 1950. The primary objective of the statute is to criminalize activities such as trafficking and the keeping of brothels, rather than to abolish prostitution or criminalize the prostitute per se. It does however contain certain welfare measures that are directed towards the rehabilitation of prostitute women.

Prostitution is defined in section 2(f) of the Act as "the sexual exploitation or abuse of persons for commercial purposes". This definition has been construed by the courts to mean "promiscuous and indiscriminate sexual intercourse for hire." A single act of sexual intercourse for hire, or indiscriminate sexual intercourse without payment does not constitute prostitution under the existing statute.

ITPA is concerned with at least six different categories of people who are in some ways connected with the commercial sex industry. Each category is treated differently, subjected to different legal processes and punishments. The six categories addressed by the law include:

1. The procurer/ seducer
2. The brothel Keeper/manager or his /her assistant
3. Any person who allows or lets premises to be used for prostitution
4. Any person who lives on the earnings of a prostitute.
5. The prostitute
6. The children of prostitutes

In the following section, we review the provisions of the law, and examine the policy that informs the law.

A THE PROCURER / SEDUCER:

1.01 Existing Law:

Section 5 of ITPA punishes the act of "procuring, inducing or taking a person, or attempting to do so, for the purpose of prostitution, whether with or without their consent," with rigorous imprisonment (RI) of not less than three years and up to seven years and a fine as well. The sentence can be increased to 14 years when the offence is committed against the will of a person

¹ See article 23 which prohibits the traffic in human beings and all forms of forced labour; article 39 which states that the State should direct its policy towards securing, among other things, a right to adequate means to livelihood for men and women equally and equal pay for equal work for both men and women so that citizens are not forced by economic need to enter vocations unsuited to their age or strength; and article 42 which directs the State to make provision for securing just and human conditions of work and for maternity benefits

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or involves a minor between the age of 16 to 18. In the case of a child below the age of 16, the sentence can be extended to life imprisonment.

Similar provisions are also contained in the Indian Penal Code, 1860 (IPC). In the chapter entitled *Of Kidnapping, Abduction, Slavery and Forced Labour*, "kidnapping, abducting or inducing a woman to compel her or knowing that it will be likely that she will be compelled, forced or seduced to illicit intercourse," is punishable with imprisonment up to 10 years and a fine. (section 366) Similar penalties apply in the case of a girl who is below 18, or is imported from a foreign country and is under the age of 21. (sections 366A and 366B)

Section 367 of the IPC makes it an offence to "kidnap or abduct a person in order to subject such person to the unnatural lust of another or to subject such person to slavery". The offence carries a sentence of imprisonment as well as a fine. It is also an offence to import, export, remove, buy, sell, dispose of, accept, receive or detain a person as a slave which is punishable with imprisonment up to 7 years. (section 370)

The IPC also makes it an offence to hire, sell, buy or otherwise obtain possession of a minor below the age of 18 years with the intention or knowledge that they are to be used for the purpose of prostitution or illicit intercourse or for any unlawful and immoral purpose. (sections 372 and 373) The offence is punishable with imprisonment up to ten years and a fine.

1.02 Comment

The concern of ITPA is to penalize the traffickers/procurers. However, the courts have construed the words "for the purposes of prostitution" very narrowly. There must be evidence of several instances of prostitution in order for a charge under section 5 to be successful. The provisions of the IPC are much broader in so far as they include situations outside of prostitution. If a woman is induced into illicit sexual intercourse, even if it is not paid, then it constitutes an offence. Thus, there is much more incentive to invoke the provisions of the IPC than ITPA.

B. THE BROTHEL KEEPER/ MANAGER AND HIS/HER ASSISTANT

2.01 Existing Law:

A brothel is defined as including any "house, room, conveyance or place" which is used for sexual exploitation, or abuse for the gain of a person or for the mutual gain of two or more prostitutes (section 2(a)). Any person who maintains or helps to maintain such a place is liable to imprisonment ranging from one to three years and a fine. (section 3(1)). The punishment is more severe in the case of repeat offenders.

It is also an offence to detain a person in a brothel with the intention that they engage in sexual activity with someone other than their spouse. (section 6) This offence can result in imprisonment anywhere from seven years to life imprisonment and a fine. If a person is found with a child on the premises (section 6 (2)) or a child found on the premises has signs of sexual abuse, (section 6 (2-A)) there is an automatic assumption that the child has been detained on the premises for the purposes of prostitution. The latter provision would seem to be redundant in light of the former provision. There is also a presumption that a woman has been detained in a brothel or on a premise for the purpose sexual intercourse with a man other than her husband, if her jewelry, clothes money or other belongings are withheld from her or she is threatened with legal proceedings if she takes away any property or apparel supplied to her. (Section (3))

Magistrates are empowered to initiate summary eviction proceedings upon receiving information that a premise is being run as a brothel. (section 18) We will elaborate on this provision below.

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2.02 Comment:

Under the law, in order for a place to be deemed a brothel, it must be used for the purposes of prostitution. As stated earlier, if there is only one solitary instance of prostitution within a house or place, then it would not be deemed to be a brothel. (*In re Unni Kumar*, 1975 Madras Law Journal 22, *Suseela v. State*, 1982 Criminal Law Journal 702, Madras) The proof required to establish that a place is being used for the purposes of prostitution is not easily acquired, and thus successful prosecutions under this provision are rare. There is however, one Supreme Court decision which states if a single instance of prostitution is proved and the surrounding circumstances are such as to lead to the conclusion that the premises were generally used for the purposes of prostitution, this would be sufficient to establish that the place was being used as a brothel. (*Krishnamurthy v. Public Prosecutor*, Madras, A 1967 SC 567)

A further limitation of this provision is it assumes that any children found on the premises are being used for prostitution. Such a provision places a burden on the prostitute woman to establish that her child or children have not been used for prostitution.

C. PERSON ALLOWING PREMISES TO BE USED FOR PROSTITUTION

3.01 Existing Law:

If a person knowingly allows his/her premise to be used as a brothel they are liable to imprisonment for up to two years and a fine. (section 3 (2)) The punishment can be enhanced in case of a subsequent conviction. Section 7 (2) creates a further offence where such premises are within 200 meters of a notified public place.

A further provision (section 2-A) states that an owner is presumed to have knowingly allowed the premises to be used as a brothel if a newspaper publishes information that such premises have been used as a brothel as a result of a search, and a list of all the things found in the search has been given to the owner.

3.02 Comment:

In order for there to be a prosecution under section 3, there must first be sufficient evidence that the premise was being used as a brothel or commercial sexual services. The problem with proving this has been addressed above.

In addition, if a prostitute woman uses her residence for the purposes of prostitution she can be charged under this provision. This would seem to undermine the basic objective of the act that it is not directed at criminalizing prostitute women. *

D. PERSON LIVING ON THE EARNINGS OF A PROSTITUTE

4.01 Existing Law:

A person who is above the age of 18 and knowingly lives off the earnings of a prostitute can be charged under section 4 of the Act and punished with imprisonment of up to two years or alternately with a fine. In case a person lives off the earnings of a minor in prostitution, the punishment is a minimum imprisonment of seven years which can extend to 10 years. There is a presumption that an offence under section 4 is committed where (i) such person is living with, or is habitually in the company of a prostitute, (ii) exercises such control over her movements so as to show that such person is aiding and abetting the prostitution, or (iii) is acting as her tout or pimp.

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4.02 Comment:

Not all earnings of a prostitute would be covered by this provision. Only those goods and services that are connected with the practice of prostitution would be covered. For example, where a person publishes a directory that contains the names and addresses of a large number of prostitutes for which he collects a fee from each woman who advertises, he would be found to be living off the earnings of a prostitute. (see an English case, Shaw vs. Director of Public Prosecutions [1961] 2 All ER 446)

However, the statute would also make it an offence for a prostitute woman to support her family from her earnings where her children and other family members are not minors. This provision would betray ITPA's objective in not targeting the prostitute woman.

Is this objective so obvious?

E. THE PROSTITUTE

5.01 Existing Law: Penal Provisions

Most of the provisions discussed above have an impact on the legal status of the prostitute woman. There are also some provisions that deal specifically with her rights. Section 2 (f) defines prostitution as "the sexual exploitation or abuse of persons for commercial purposes." The person who is exploited is referred to as a prostitute.

Anyone who carries on prostitution within close proximity to a **public place**, including a hospital, nursing home, place of religious worship, hostel, educational institution, or in an area notified under the provisions of the act, can be punished with imprisonment for a term of three months. (section 7) This provision also applies to the client of the prostitute. If the prostitute is a child or minor, then the client can be punished with a term of imprisonment for seven years or more and liable to pay a fine.

Seducing or soliciting for the purpose of prostitution is also deemed to be an offence under section 8 of the act and punishable with imprisonment for up to six months or a fine up to five hundred rupees, in the case of a first conviction. In case of a subsequent conviction, the prison sentence can be extended up to one year including a fine of five hundred rupees. However, if the person soliciting is a man, the statute provides that he shall be punishable with not less than seven days imprisonment that can be extended to three months.

unequal treatment of men & women under ITPA

A female offender found guilty of an offence under sections 7 or 8 can, in lieu of a sentence of imprisonment, be placed in a corrective institution instead of in prison. (section 10(A)) In such a case the minimum period of detention is 2 years which can be extended to 5 years. However, after a period of six months, the state government can order her release if satisfied that she will lead a "useful and industrious life".

A magistrate can order the immediate closure of a place that is being used for prostitution and is within two hundred metres of a public place and direct the eviction of the occupier. If a woman is convicted under section 7 she can be evicted from the premises from where she is ostensibly carrying out prostitution. (section 18)

Section 20 empowers a magistrate on receiving information that any person residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, to initiate proceedings against that person requiring him to remove himself from such place and be prohibited from re-entering it.

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5.02 Comment:

The statute is not intended to criminalize prostitution or women who engage in prostitution. As mentioned above, its objective is to punish trafficking and commercialized vice. However, sections 7, 8 and 20 penalize the prostitute woman for soliciting or for practicing prostitution near a public place. These sections are the most frequently invoked provisions of the act. Jean D'Cunha conducted a sample survey of prosecutions under the Act in Bombay between 1980-86. Her study revealed that a few hundred madams and procurers were arrested under the provisions of the Act between 1980-84, while over two thousand prostitutes were prosecuted for practicing near a public place (section 7) and over three thousand prosecuted for soliciting under section 8. D'Cunha has also documented that between 1980-86, over forty-four thousand prostitute women were arrested for indecent behaviour under the state Police Act. These statistics reveal that the Act is operating against its declared objectives of treating the prostitute woman as an offender.

Secondly, the stricter sentence given to a woman for soliciting as distinct from a man is not explained in the Act. This differential treatment in terms of sentencing needs to be questioned. Furthermore, section 10-A which provides for detention in a corrective institution is only applicable to female offenders and not male offenders. A corrective institution is a place where a person can be detained if found by the magistrate to be in need of correction. And the sentence is considerably higher than the maximum sentences under either section 7 or 8 of the Act.

These provisions are based on the assumption that prostitute women must be removed from prostitution. Although the prostitute woman is not supposed to be criminalized, as soon as she chooses to get involved in prostitution, and is detected, she is to be removed from the area and placed into rehabilitative care. The operation of this provision exemplifies how the Act ultimately ends up criminalizing prostitution and penalizing the prostitute woman.

The cases that come under sections 7 and 8 of the act are usually tried summarily, rendering them extremely oppressive in their application. A summary procedure is one where the woman is entitled to plead guilty to the charge and the magistrate accepts the plea on its face without further evidence. There is an immediate conviction. The prosecution does not have to prove the elements of the crime that she is charged with if she has confessed to the crime. In ordinary trials, a plea of guilty would not be sufficient to convict a person charged of a crime. The onus would be on the prosecution to prove its case against the accused through the presentation of evidence other than the confession. Women will often confess to the charge rather than be remanded to a protective home to await trial. As a result, they can chalk up a number of convictions through the summary procedure, and thus reinforce the broader public perception of prostitutes as bad women and criminals. The criminalization of the prostitute through this process undermines the basic objectives of the act and ultimately, also disempowers her.

The most troublesome provision of the act is section 20. This section empowers a Magistrate to evict a person from the local limits of his jurisdiction and forbid her from re-entering it on the sole ground that he has information that she is a prostitute. The very fact that she is a prostitute thus disentitles her to the most basic right to residence in an area of her choice even if she has not violated any of the other provisions of the Act. In addition, a complaint can be made against any woman who is suspected of being a prostitute and the onus is then on the woman to prove that she is not in fact a prostitute. The broad scope of this provision acts as a form of surveillance over the sexual conduct of all women in a public place.

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5.03 Conclusions:

This brief analysis of the existing law and its application reveals that the legislation ends up targeting the prostitute and prostitution rather than the traffickers or procurers. The offences against the traffickers, brothel keepers and procurers are hard to sustain in light of the strict requirements in terms of proving that prostitution has taken place, as well as the fact that evidence against these individuals is often hard to acquire. Decoy or trap witnesses have been used to entrap traffickers, however, such evidence is treated with skepticism by the court and frequently requires corroboration.

The statistics reveal that the prostitute woman is the person most frequently arrested, charged and convicted under the provisions of ITPA. The brothel owners, traffickers, pimps and procurers are rarely arrested let alone charged or prosecuted. ITPA does little in terms of punishing those who exploit the prostitute and is severe in its impact on the rights of the prostitute, the person that the act is ostensibly intended to protect. The law ends up compounding the victimization of the prostitute rather than protecting her from the exploitation that victimizes her.]

6.01 Existing Law: Welfare Provisions

Section 15 of ITPA empowers a special police officer to search a premise where he believes that an offence under the act is being committed. Any persons found on these premises can be removed immediately and produced before a magistrate. In addition, they are to be subjected to a mandatory health check up to determine their age, whether they have been sexually abused or ~~are~~ have a sexually transmittable disease.

The search is to be carried out in the presence of two *respectable* persons from the locality including one woman and by a special police officer together with two women police officers. If a woman police officer cannot be found, then a *lady* from a social or welfare organization shall help in the search.

Under section 16, a magistrate can order a police officer to enter a brothel and *rescue* any person believed to be carrying on prostitution or living in the brothel. Such persons are to be immediately produced before the magistrate.

A person removed or rescued under sections 15 or 16 can either be prosecuted or placed in a protective home. When persons are produced before a magistrate under sections 15 or 16, the magistrate can initiate an inquiry into the age, character, antecedents, *suitability of the parents* of such persons, their home situation as well as their personality and the possibility of these persons being rehabilitated. (section 17) ?

After the inquiry is completed, the magistrate can order the persons rescued to be placed into a *protective home* for a minimum period of one year which can be extended to three year, or into the custody of a suitable person

6.02 Comment

The prostitute is either treated as a criminal or a victim in need of rehabilitation and as having no agency of her own. As discussed above, if a woman is charged under sections 7 and 8 she can be sent to a 'corrective' institution. Under section 17, a prostitute woman can be placed in 'protective' care. Under the garb of protection, the act empowers the law enforcement machinery to arrest, search without warrant, charge and detain the prostitute for long periods. ✓

The conditions in protective homes have been documented and have been considered barely habitable (see the Agra Homes case). The provisions that enable a magistrate to inquire into the

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personal history of those rescued points to the assumptions about morality that inform the law. The purpose of placing prostitute women in protective homes seems to be directed more towards protecting the public from the potentially 'immoral' or 'depraved' influence of such persons rather than protecting them from exploitation and harm. ✓

F CHILDREN OF PROSTITUTES

7.01 Existing Law:

The Juvenile Justice Act, 1986, provides that a juvenile who lives in a brothel or with a prostitute or visits places used for prostitutes or associates with prostitutes or any other person leading "an immoral, drunken, or depraved life", is a neglected juvenile. (section 2(1)(iv)). As mentioned earlier, section 6 (2) of the IPTA creates a presumption that a child is being detained in a brothel for the purpose of prostitution "where any person is with a child in a brothel".

Section 15 and 16 of IPTA also permit the police to search a brothel without a warrant and rescue minors found on the premises.

7.02 Comment:

Children of prostitute women are by definition neglected children under the Juvenile Justice Act. The law empowers the State to intrude into the privacy of the home of the prostitute woman and remove her children from her custody and even guardianship. Such provisions end up destroying the family of a woman in prostitution and hence, penalize her for the work in which she engages.

The courts have reinforced this position. In *Gaurav Jain v Union of India*, (A 1990 SC 292), the Supreme Court stated that it was in the interest of the children of prostitutes and the society that they "should be segregated from their mothers and be allowed to mingle with others and become part of society." The Court was opposed to the establishment of separate hostels and schools for children of prostitutes. However, it was of the view that "accommodation in hostels and other reformatory homes should be adequately available to help segregate these children from their mothers living in prostitute homes as soon as they are identified." (p 292)

CHAPTER II – The Supreme Court and ITPA [to be developed]

In this chapter we analyze some of the judicial decisions under the ITPA provisions. We reveal how women in prostitution are treated as a separate and distinct category, denied some of the basic fundamental freedoms that are available to all other citizens, simply because of the nature of their work. These decisions belie the claim that ITPA is intended to target traffickers and that women in prostitution are not per se the targets of the Act.

We also examine the court's interpretation of the rehabilitation provisions in IPTA and the extent to which they treat women in prostitutes as both victims as well as threats to public morality.

1.01 The Right to Equality –

Article 14 of the Indian Constitution provides that every person has a right to equality. This provision has been interpreted by the courts as treating likes alike – that is – those who are similarly situated will be treated the same. Virtually any distinction between two groups of people can be a basis for justifying the difference in treatment between them. Within such a constitutional framework, it has not been difficult for the stigma attached to prostitute women to operate as a legitimate difference, and thereby justify the ways in which the law treats these women differently. The ostensible moral difference between non-prostitute women and prostitute women has been used to justify the difference in treatment between them.

The leading case on this issue is *The State of Uttar Pradesh v. Kaushaliya*, (A 1964 SC 416) where section 20 was challenged as violating the equality clause under article 14 of the Constitution as well as the right to liberty, under article 19. Several women had been declared to be prostitutes and ordered to be removed from the jurisdiction where they operated and prohibited from re-entering, in the exercise of the powers given to the local magistrate under section 20 of ITPA. The petitioners argued that the procedure violated their fundamental rights to mobility under Article 19 as well as their right to equality under Article 14. The case ultimately went to the Supreme Court.

The Supreme Court held that the difference between prostitute women and non-prostitute women created by the Act was reasonable, without providing any further explanation. It further held that there were real differences between a prostitute woman who did not demand in the public's interest any restrictions on her movements, and a prostitute woman, whose actions in public places called for the imposition of restrictions on her movements and even deportation. The object of the Act was not only to suppress immoral traffic in women and girls, but also to improve public morals by removing them from busy public places in the vicinity of religious and educational institutions. The Court stated that,

"A prostitute who carries on her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may not be so dangerous to public health or morals as a prostitute who lives in a busy locality or in an over-crowded town or in a place within the easy reach of public institutions like religious and educational institutions. Though both sell their bodies the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralize public morals, but what is worse, to spread diseases not only affecting the present generation, but also the future one. Such trade in public may also lead to scandals and unseemly broils. There are, therefore, pronounced and real differences between a woman who is a prostitute and one who is not, and between a prostitute, who does not demand in public interests any restrictions on her movements and a prostitute whose actions in public places call for imposition of restrictions on her movements and even deportation." (p.421)

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The Supreme Court recognized that there was no right more important than the right to personal liberty – that is “to select his or her home and to move about in the manner he or she likes. Even a depraved woman cannot be deprived of such a right except for good reasons.” The Court held that the reasonableness of this restriction depended on the peculiar circumstances of each case. It stated that if

“ [I]n a particular locality the vice of prostitution is endemic, degrading those who live by prostitution and demoralizing others who come into contact with them, the legislature may have to impose severe restrictions on the right of the prostitute to move about and live in a house of her choice. If the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. It cannot be gainsaid that the vice of prostitution is rampant in various parts of the country.” (p.422)

Section 20 regulated the freedom of movement and residence. The court held that the restrictions were in the interests of the general public and as the imposition of these restrictions were done through judicial process on the basis of a clear policy, that is controlling the growing evil of prostitution in public places, the restrictions were reasonable.

In the *Kaushaliya* decision, the differences between prostitute and non-prostitute women, and between women working in busy localities and those working discretely, were seen to justify the difference in treatment. Because prostitute women working in ‘busy areas’ are simply assumed to be different, they are not entitled to equal treatment. There was no interrogation of the basis for the ostensible differences. Rather, prostitute women were simply deemed to be different from other women because of their inherent immorality. The approach not only stigmatizes prostitute women by justifying the criminalization of their work, but also uses moral considerations to distinguish them from all other women. Prostitute women were thus treated as inherently bad and immoral, and required to be controlled by harsh penal provisions.

In *Shama Bai v. State of Uttar Pradesh*, (A 1959 Allahabad 57), the petitioner challenged the constitutional validity of section 20. Her landlord was trying to use this provision to evict her from the premises. Shama Bai argued that prostitution was her hereditary trade, and was the only means of livelihood. She stated that her family members, which included her cousin sister and two younger brothers, were economically dependent on her. Shama Bai further argued that she knew no other type of work and wanted the Court to restrain the landlord and chief tenant from interfering in her trade and the visits of customers to her place. She stated that this was the only source of her livelihood, and that the “chances of her being rehabilitated as a good housewife in society are nil.” (p.59)

The Court recognized that there were many reasons why women turned to prostitution for their livelihood. These included, amongst others, the difficulties in finding employment; the excessively laborious and ill-paid work; the hard treatment of girls at home; the promiscuous and indecent mode of living among the overcrowded poor; and the bad example set by the loose manner of the upper classes. However, the court also went on to hold that in dealing with the constitutionality of a provision, it could not take into consideration the hardship of the prostitute woman. It recognized the basic objective of the Act was to tolerate prostitution, while at the same time protect the interests of the general public.

The Court was doubtful about the validity of section 20 and tentatively concluded that the unfettered discretion conferred on the magistrate to remove any woman believed to be a prostitute from his jurisdiction would violate Article 14. It stated that prostitute women were subject to a punitive form of surveillance to which other women were not and therefore that this differential treatment constituted discrimination between persons who were similarly situated. The Court was further of the view that section 4(2) which penalized those who lived off the earnings of a

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prostitute, bore no relation to the main objective of the act, that is the suppression of immoral traffic in women. It could also be regarded as violating her fundamental rights. However, the Court rejected the petition on the grounds that it was premature as neither the landlord nor the chief tenant had filed any legal proceedings against Shama Bai, but had only threatened her with eviction.

The Courts statements are nevertheless important in revealing that there are several provisions within ITPA that do not promote the objectives of the Act, but instead, target the prostitute woman and her family.

1.02 The Right to Life: Entitlement to Free Legal Aid

In *Khatri (II) v. State of Bihar*, (AIR 1981 SC 928), the Supreme Court addressed the issue of the duty of the State to provide free legal aid to those who could not afford it. The Court held that the State could not deny such aid to anyone on the grounds of its financial or administrative inability to do so. The provision of free legal aid was held to be integral to a person's fundamental right to life. The case had nothing to do with the issue of prostitution per se. However, the Court went on to hold that there were instances "involving offences such as economic offences or offences against the law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State." This position was followed in a later decision of the Supreme Court, *Suk Das v. Union Territory of Arunachal Pradesh*. (A 1986 SC 991).

The qualification on the right to free legal aid has serious implications for prostitute women who can be prosecuted without legal representation on the grounds that they cannot afford it and the State has no duty to provide such assistance. Furthermore, it is unclear how such a qualification will affect child prostitutes, partners of women in prostitution, or parents who have sent their daughters into prostitution. The courts comments would result in providing unfettered free legal aid to murderers, but not to prostitutes. Regardless of our position on the issue of prostitution, the denial of the right to free legal aid constitutes a human rights violation and one that seems difficult to justify. The qualification amounts to curtailment of a fundamental right on the basis of purely moral considerations under the guise of social justice considerations.

1.03 Policy of Rehabilitation:

One of the underlying purposes of the Act as discussed in Chapter I, is to remove women from prostitution and place them in either a corrective institution or a protective home for the purpose of rehabilitation. In this section, we examine the meaning, definition and purpose of the ITPA provisions dealing with rehabilitation as interpreted by the courts. As discussed earlier, the purpose of ITPA is not to make prostitution itself an offence.

The nature and scope of section 10-A, which permits the magistrate to direct that a female offender be placed in a corrective institution, was discussed in *Re Saroja*². The Court stated that the provision was:

"... a welfare measure in favour of the convicted person and such a measure imposed a heavy burden on the state by way of expenditure, therefore it should be resorted to only if it be beneficial to the person concerned. For that purpose the law requires that the court should give the offender the opportunity of being heard and consider the representation which the offender may make to court as to suitability of the case for treatment in a corrective institution."

² 1989 CrLJ 1165

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In deciding whether a person should be sent to an institution for treatment, the court held that the relevant factors to be taken into account, included:

“... the character, state of health and mental condition and other circumstances of the case such that the offender is likely to benefit by such instruction and discipline.”³

While the court recognizes the prostitute woman’s right to be heard, its reasoning has strong moralistic undertones. The purpose of a corrective institution is to correct a person’s behaviour or conduct. With respect to a prostitute woman, the purpose is to reform her behaviour, that is soliciting or seducing for the purposes of prostitution. Rehabilitation in this instance involves disciplining the prostitute woman. It ends up punishing her even though this is, ostensibly, not one of the objectives on ITPA. In attempting to rehabilitate the prostitute woman the law ends up removing her from prostitution and disciplining her.

Rehabilitation under the Act, does not involve provision of a space a woman can treat as a temporary home where she can think about her situation and take steps to improve or alter it. Its primary purpose is to reform the prostitute woman rather than to provide her with a temporary space and safeguard her from the exploitative aspects of her work.

³ Id.

CHAPTER III - Policy Options

The analysis of the existing law and its application reveals that it ends up penalizing the prostitute woman and criminalizing prostitution although these are not the purported objects of the act. The prostitute woman who works on the street is particularly at risk. The soliciting provisions target streetwalkers.

At the same time, the welfare or rehabilitation measures included in the Act, treat the prostitute woman either as a victim, in need of being rescued or protected; or as a morally corrupt woman who must be removed from the public sphere to prevent the deterioration in public morality. In the former case, she can be removed to a protective home, where she is ostensibly protected from the exploitative aspects of the work. However, as discussed above, protective care is also intended to protect the public interests by removing the women from prostitution whenever she attempts to engage in it. In the latter case she can be removed to a corrective institution where her behaviour is to be reformed into a 'good', morally upright woman.

The ITPA provision further operates against the prostitute woman by targeting her family. If a child is found with her, he or she is presumed to have been used for the purposes of prostitution. Her child can be arbitrarily removed from her custody during 'rescue' operations. If her partner or adult child is dependent on her income for survival, then they will be deemed to living of the earnings of a prostitute and liable to prosecution.

Section 20 is the most pernicious provision of the Act. Any woman can be subjected to its provisions and be forced to prove that they are not prostitutes or risk been removed from the jurisdiction. Nor is there any restriction on the number of times a woman can be removed from one jurisdiction to the next.

While it is important to recognize that women may enter into prostitution as a result of economic need, the existing law tends to operate more against the rights of the prostitute than the causes of prostitution.

Prostitute rights activists and feminists have over the years developed different, often opposing approaches to prostitution. The classic feminist approach, which follows the United Nations approach, regards all prostitution as inherently exploitative, violent and a form of sexual slavery. This approach recommends that the object of any legislative reform should be to rid society of prostitution. Women in prostitution are therefore regarded as victims in need of rehabilitation and protection from the pimps, brothel owners, and traffickers who are identified as offenders in the eyes of the law. This position has been adopted by policy makers in India and it is this approach which largely informs the law in India as well. (see Rajeswari Sunder Rajan)

The international prostitutes rights movement has challenged the notion of prostitution as inherently violent and as constituting a human rights violation. The movement has sought to focus on the violence that prostitute women face as a result of the lack of rights. They recognize the diversity of experience of women in prostitution, and the need to address different situations differently, rather than treat all prostitutes as one homogenous victimized group. This movement draws a distinction between forced prostitution and voluntary prostitution. It argues that all prostitution is not slavery and there are different forms of labour ranging from forms which can be termed exploitative slavery to other forms which are based on individual decisions and can be described as self employment. Women in prostitution are therefore seen to have the same rights as persons in other socially acceptable forms of labour and also demand that the labour they perform be recognized as socially productive and useful. (see Heather Dell)

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These different positions on prostitution have in turn given rise to different positions on the appropriate form of legal regulation. These positions are divided between the view that recognizes women in sex industries are making the best economic choices among those available, and the view which does not eschew exploitation, but eschews it in the nude and advocates the closure of sex industries and the outlawing of sex work. Between these two ends of the spectrum are other positions that deal with prostitution. It is important to delineate the different positions that have emerged on this issue in South Asia and South East Asia. The approaches are briefly stated as follows:

1.01 Criminalization:

This approach takes two different forms: abolition or toleration. Both approaches have a moral basis, that is, they view prostitution as a social evil. They also promote the idea that immoral conduct should be criminalized.

The toleration approach is based on the assumption that prostitution is an inevitable social evil and cannot be banned. Legislation based on this approach, is generally silent about whether the activity itself is legal or illegal. It criminalizes the outward manifestations of prostitution such as soliciting, brothel keeping and trafficking and is the approach on which ITPA is based.

1.02 Legalization:

This strategy involves legalizing and then heavily regulating prostitution through a whole host of zoning and licensing laws. The legalization approach is based on the assumption that a balance must be drawn between 'public' health and 'public' need. Its objective is to curb what it defines as the worst side effects of prostitution, such as the spread of sexually transmitted diseases, including the HIV virus. The features of this approach include the following:

Zoning – this keeps the women in a working women's ghetto. It segregates them into a separate part of the town or locality. It restricts their private spaces because they are considered to be public women. Even if they venture out of the zone their civil liberties are restricted.

Licensing – which involves the state issuing licenses, registration and disbursement of health cards to the women.

Mandatory check-ups – this practice has received greater emphasis in light of the HIV pandemic and the myth women working in prostitution are responsible for transmission of the virus. The woman is compelled to submit herself for check ups or else face imprisonment.

Legalization implies the recognition of prostitution as a lawful activity by the State. However, the experience of those jurisdictions which have introduced zoning and licensing laws, suggests that the impact of this approach is excessive State control, the ghettoization of prostitution and a resultant loss of movement, and stringent medical and health surveillance which is often mandatory rather than voluntary. This policy approach is not new and was in operation in several countries at the beginning of this century, including in India. The interest of the State in any regime permitting such legalization is not the prostitute and her rights, but rather to ensure that prostitution remains within manageable bounds and invisible to mainstream society, and the prevention of the spread of disease. This approach is not supported by the international prostitutes rights movement.

1.03 Decriminalization [Query: should this be renamed?]

The decriminalization approach is similar to legalization insofar as it involves taking the issue of prostitution outside of the criminal code. The difference is in the ways each approach seeks to regulate prostitution once it has been decriminalized. This approach is based on the assumption that prostitution is a personal choice and that it is therefore a personal matter between consenting adults. This approach seeks complete decriminalization of voluntary prostitution and all related

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activities and the abolition of laws that criminalize such activities. Therefore voluntary relationships between pimps and prostitutes, brothel owners, and landlords as well as the practice of prostitution must be removed from the scope of criminal law. It involves the repeal of all specific criminal laws that apply to prostitution and subject it to the realm of general laws. The approach also recognizes that forced prostitution has to be dealt with as a separate issue, and recommends that existing legislation relating to trafficking, especially in minors, fraud, coercion, and forced labour be strengthened.. It is an approach that has been advocated by many prostitute rights groups in India.

1.04 Legalization for Empowerment

This approach emphasizes the need to protect the legal rights of prostitute women. And in so doing, it attempts to address the specific abuses that women in prostitution face. This approach would support the introduction of various civil remedies, such as employment standards, and occupational, health and safety standards. It might also favour the specific recognition of the civil liberties of prostitute women such as the right to liberty; not to be kept in quarantine or isolation; not to be forcibly medically examined; not to be denied access to health care facilities; to retain custody of her child, to minimum remuneration; to social security in the form of a welfare fund, and to solicit. The last right is important to guarantee to protect prostitute women from police harassment.

This approach emphasizes the need to protect a prostitute woman's legal rights. It advocates that merely because a woman is a sex worker, she cannot be picked up for being a public nuisance, as her work will be considered lawful. It addresses the specific abuses that women working in prostitution experience and provides a remedy. It provides that the civil law can be used to address the harms that these women experience, rather than depending on criminal remedies which involve the State. It also incorporates some specific health provisions that are for the woman's benefit and makes provision to protect her civil liberties in this context.

CHAPTER IV - Proposals for Reform: National Law School, Bangalore

In 1993 the National Law School in Bangalore produced several law reform proposals seeking to mitigate the harm as well as reduce the ambiguity found in the existing ITPA provisions. Below we briefly analyze two of these proposals and provide our comments.

A- The Prevention of Immoral Traffic and the Rehabilitation of Prostituted Persons Bill (see Appendix 1):

This bill is described as “a Bill to prohibit immoral trafficking especially in women and children and to mitigate the suffering of victims of prostitution”. The statement of objects and reasons declares that the purpose of the bill is to prevent immoral trafficking, and prevent women and young girls from being driven into the trade. The necessity for the legislation is justified on the grounds that ITPA and its subsequent amendments have not been effective in dealing with the problem of immoral traffic. The emergence of the problem of AIDS as a major threat to public health is also cited as a reason for the recommended reform. However, a close examination of the proposed legislation reveals that there is little difference between the existing law and the proposed bill. The bill approaches the issue of prostitution as a form of sexual slavery that must be abolished. It adopts a protectionist approach towards the prostitute woman who is regarded as a victim in need of rehabilitation. Yet this protection is conditional. If a woman participates in any of the crimes recognized under the bill she is denied legal protection and transformed into a criminal. The bill has strong moralistic overtones, and is replete with terms such as “immoral” traffic, “victims” of prostitution, and persons in “moral” danger. Women and children are also treated as one category.

1.01 Criminalizing Prostitution and all related work:

The Bill defines prostitution as “sexual abuse and exploitation for commercial purposes or for consideration in money or in kind” and severely punishes all activities related to prostitution (buying, selling, and procuring). Prostitution is seen as an offence and the question of consent is irrelevant.

The Bill makes a significant departure from the existing law by collapsing all the offences related to prostitution such as procuring, seducing, trafficking, and pimping under one generic term - immoral trafficking. Immoral traffic therefore means and includes any buying, selling, procuring, seducing or otherwise causing women and children to be used for prostitution. It creates three related offences, namely, committing prostitution on women and children with or without consent, and facilitating prostitution (sections 3, 4, and 5). The penalties under these provisions are severe and offenders are to be tried summarily thus denying them the procedural protections given to other accused under the Criminal Procedure Code.

The Bill suffers from the same limitations as the existing law in so far as it ends up targeting the prostitute woman. The Bill appears to reject the specific offences of soliciting and prostitution in public places that exist in the present Statute. However, the offences it defines are vaguely drafted and are likely to be over broad in their application. Arguably the bill leaves sufficient scope for the law enforcing agencies to continue with the existing regime where the prostitute woman bears the brunt of the law.

2.01 Welfare and Rehabilitation

Chapter three of the bill deals with the Welfare of Prostituted Persons, who are defined as *victims* of prostitution. This is purported to be the main focus of the bill. Yet when read with the other

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provisions in the bill, the chapter results in the disempowerment of women in prostitution and, arguably, dismantles the few rights they enjoy under the existing law.

The first provision in this chapter directs the government to conduct periodic surveys of prostitution and the problems encountered by prostituted-women. It also provides that a special effort should be made to identify the extent of HIV/AIDS cases among them, their children and their spouses (section 7). Section 9 provides for mandatory health checkups of prostituted women. There is no requirement of informed consent when women and their children or partners are subjected to such testing. This provision is based on a concern for the welfare of society rather than of the prostitute woman or her family.

These provisions are not dissimilar to the ones under the Contagious Diseases Act of the last century that was concerned with clean and safe prostitutes and the prevention of venereal disease. The bill also fails to recognize how prostitute women and other stigmatized groups, such as gay people, blood donors, and intra- venous drug users suffer discrimination, surveillance and violent attacks as a result of being identified by the State as the main vectors for the spread of AIDS and HIV. Such a recommendation is all the more insupportable in the context of present day understanding of the AIDS pandemic which recognizes that mandatory testing and surveillance do not prevent the spread of the virus. On the contrary it forces the disease underground as a result of the increased stigmatization. Given the impact of these provisions they would likely be regarded as unconstitutional.

3.01 Special Procedures

Chapter IV provides for a Special Police, Special Court and Special Procedure for dealing with offences and offenders under the bill. It therefore removes the prostitute women from the purview of the procedural laws that apply to those persons accused of ordinary crimes. There is no provision for bail under the proposal, the powers of the police have been increased dramatically, and medical examination for signs of sexual abuse and STDs at the time of arrest is mandatory.

Under Section 19, the Special courts are given the power to adopt a summary procedure in all cases under the bill where punishment of up to two years imprisonment is likely, notwithstanding any provision contained in the Criminal Procedure Code (Cr.PC). Under the Cr.PC the maximum sentence which can be given in a summary procedure is three months (section 262(2)). ITPA has already been severely criticized by lawyers for giving courts the power to summarily try cases where imprisonment of up to one year is likely. The offences described in the Bill are treated in the same way as traffic violations that can be tried summarily. Where the offences are of a serious nature and the penalties are so severe, provisions for a summary procedure are unsustainable.

4.01 Conclusion:

The proposed Bill falls very much within the existing policy framework of ITPA. The prostitute remains the focus of the law. The penal provisions may not impact on her directly, but the rehabilitation and surveillance regime that it seeks to establish, does nothing to empower the prostitute woman.

B Prohibition of Immoral Traffic and Empowerment of Sexual Workers Bill (see Appendix II)

This Bill is described as "a Bill to prohibit immoral trafficking especially in women and children and to confer rights on sexual workers with a view to prevent sexual exploitation and protect health and hygiene in sexual work". In its statement of objects and reasons it claims to adopt a prostitutes rights approach. Its objective is to severely punish people involved in immoral trafficking and child prostitution. The Bill also proposes the de-criminalization of voluntary sex

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work equating it with other kinds of labour. Prostitution is thus recognized as a legitimate activity. According to the preamble of the proposal, this is the “only sensible position which law can adopt if it intends to empower the women involved and to effectively regulate the health risks of prostitutes, their customers and of the public at large”.

The bill recommends stringent punishment for trafficking, decriminalizes all other activities related to prostitution, recognizes certain enforceable rights of prostitute women and also provides for a policy of rehabilitation. A redressal mechanism is also suggested to deal with situations of violation of these rights. A brief examination of the proposal is presented below.

1.01 Trafficking:

The bill defines immoral trafficking as “buying, selling or procuring women and children for sexual abuse, prostitution or such other forms of sexual exploitation”. This definition includes women who are so abused by fraud or deceit, fake marriages, or dedication for religious purposes.

Trafficking carries stringent punishment, and is more severe where the offence is committed against a minor or in case of repeat offenders. Abetting and attempting to commit trafficking are also considered to be offences.

Query: The major question that needs to be addressed with regard to this proposal is whether the continued criminalization of trafficking will empower women?

2.01 Women in Prostitution:

The bill recognizes prostitution as legitimate work and recommends the decriminalization of all activities related to prostitution. Therefore, the running of brothels, living off the earnings of a prostitute, and the leasing of premises for this purpose which are presently offences under ITPA are removed from the ambit of the criminal law.

Query: how can it do this while simultaneously criminalizing procuring and trafficking?

Under the proposal, sex work is treated as any other work where prostitutes are the workers and the brothel owners are regarded as managers. Certain rights are conferred on prostitute women that are legally enforceable against the management and society in general. These include rights to: safe conditions of work; refuse sexual intercourse on certain grounds; know the health status of the customer and insist on the use of condoms; a sanitary and hygienic work environment; medical assistance; and claim damages in case of injuries and compensation if she contracts a sexually transmitted disease as a result of her work. She is also given the right to claim damages against a customer who sexually abuses her, knowingly transmits a disease to her, refuse to practice safe sex, or refuses to pay the consideration in part or in full. The bill also indirectly recognizes the right of prostitute women to unionize.

The proposal recommends the setting up of tribunals similar to a consumer forum in every metropolitan area. It provides that complaints can be filed by the sex worker in person or by a trade union of which she is a member. No court fee is required on such complaints and the complainant is entitled to legal aid.

2.02 Comment:

This second proposal is one of the first to support a rights approach to the issue of prostitution. It attempts to move away from moralizing about and punishing the women involved in prostitution. As discussed above, the existing law as well as the first proposal place a great deal of reliance on criminal sanctions to fulfill the objectives of the law. Yet criminal sanctions have been used

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primarily to harass and harm individual prostitutes; to worsen their conditions; to subject them to great violence from pimps, customers, domestic partners, and the police; and to contribute to their poor health conditions, which in the context of today's AIDS crisis is nothing short of unconscionable. Our comments are directed towards pushing the analysis contained in this bill a bit further.

The basis for these recommendations is pragmatic. The statement of objects and reasons which is based on the World Health Organization's Global Programme on AIDS provides that "in order for prostitutes to protect themselves from HIV infection, AIDS and other sexually transmitted diseases, they must have safe working conditions." Health and hygiene are the main concerns of this proposal.

This proposal attempts to set out positive rights that women involved in prostitution ought to have. These rights may be difficult to enforce, but that is true of most legislation dealing with socio-economic rights. This does not mean that we ought not aspire to these rights.

The other significant feature of this proposal is the decriminalization of solicitation which will assist in the decrease in police harassment of women in prostitution.

At the same time, the proposal does have some shortcomings. For instance, the chapter which delineates the rights of prostitute women, is concerned with rights that are enforceable against either the brothel owner or the customer. It does not refer to any other relationship. The bill is restricted in its application only to prostitution carried out in brothels as defined in the Bill. However prostitution takes myriad forms, ranging from unorganized prostitution in the form of street walkers operating individually or under the control of a single pimp, to highly sophisticated escort services. In failing to address this diversity, many women in prostitution are denied the benefits accorded under the bill. Alternative sites of prostitution are excluded from its purview.

Nor does the bill deal with the ways in which the existing labour laws can be applied to women in prostitution.

Queries: Should women working in small brothels (of less than say 10 workers) be governed by the Industrial Disputes Act and related statutes? And how can existing labour laws be enforced against the management in the unorganized sector? How can the existing labour legislation be used to empower these workers and avoid the crippling procedures that make it impossible to sustain struggles over long periods of time?

There are also several changes and amendments that are required to be made to existing statutes such as the Trade Unions Act and the Evidence Act (s.155(4)). Thus this proposal requires further elaboration.

3.01 Exit from Prostitution:

Chapter IV of the proposal makes provision for a Welfare Fund to be set up by State governments for the rehabilitation of sex workers and their children. The fund is to be administered by the Department of Women and Child Development of each state. Children of sex workers shall be entitled to receive free medical and educational services from the fund till they attain majority.

3.02 Comment:

Having dispensed with the detention and custody regime set up under ITPA, the proposal does not specify what is to replace this system. In fact the bill merely states that the State has a responsibility to rehabilitate.

The word rehabilitation itself has uncomfortable connotations that have been addressed elsewhere in this memorandum. **Query:** We need to question to what extent rehabilitation should remain a primary objective of the legislation? Is it an effective exit policy?

CHAPTER V- CFLR LAW REFORM PROPOSAL (Working Draft)

In this memorandum we have sought to critically examine the existing statutory and judge made law relating to prostitution, as well as some of the proposals for law reform that have recently emerged. We have further explored the limitations with regard to the implementation of this law. On the basis of these insights, in this section we propose a law reform that is committed to the empowerment of prostitute women in particular and all women in general. Feminists and prostitutes rights groups have frequently found themselves acting in opposition to one another. Our proposal is one effort in bridging this gap and to consolidate and integrate the experiences of the women's movement with law in India well as the experiences and needs of the prostitutes rights movement. We therefore propose the repeal of ITPA and its replacement with a three pronged law reform strategy:

1.01 Decriminalization:

This entails the complete decriminalization of voluntary prostitution as well as all related activities that are presently offences under the ITPA, insofar as they relate to consenting adults.

The criminalization of prostitution and related activities such as running of brothels, living on the earnings of prostitution, soliciting and so on have operated against prostitute women rather than the persons whom the law identifies as exploiters. The existing laws drive the prostitute woman deeper into debt and reinforce rather than remedy her victim status. The demand for decriminalization has come from within the prostitutes rights movement, not only at the international level but in India as well.

It is our submission that decriminalization of prostitution, and the consequent diminishing of the day to day harassment from the law enforcers, local thugs and society in general that prostitute women face, will empower women in the profession as well as those women who wish to leave the profession. Certain rights groups have also advocated decriminalization for the reason that once the structures of oppression which rely so heavily upon the continuing illegality of prostitution are dismantled, forced prostitution and trafficking will actually decline as it will no longer be financially viable.

Trafficking in persons, that is, buying, selling and procuring for the purpose of forcing into prostitution, is a violation of fundamental rights under the Constitution of India and to make this constitutional mandate into law certain provisions have been made in the IPC.

Queries: The question arises whether these provisions of the IPC ought to be retained? The IPC provisions are better equipped than the existing IPTA provisions to deal with the prevention and punishment of such offences. Yet this would mean retaining some degree of criminalization over prostitution by focusing on the traffickers. This would amount to little more than a revised version of some of the intention of ITPA – that is – punishing the traffickers. Would it not be more appropriate to bring these provisions in line with prevention of slave labour or indentured labour (for example, the Bonded Labour System (Abolition) Act, 1976)? Could such a rewriting help in redirecting the nature of the inquiry away from moral concerns to issues specifically of economic exploitation and coercion

2.01 Rights of Prostitutes and women in the sex industry:

Query: The question to be addressed is whether it is necessary to demand legislation that recognizes certain rights of women in prostitution or whether mere decriminalization is sufficient in itself to ensure that women in the sex industry are able to enforce legal rights in the same way as other citizens?

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The experience of the women lawyers, activists and scholars have demonstrated the extent to which a woman's ability to successfully assert her legal rights is tied to her status as a chaste wife, a self-sacrificing mother or a virginal daughter. Women's sexual chastity and purity has often operated as a prerequisite to her legal rights to maintenance, custody of her children, divorce, or bodily integrity. Conversely, her inability to demonstrate her sexual purity has been inevitably seen to disentitle her from enforcing her rights as a citizen. This bias exists not only in the implementation of the law in police stations and courtrooms, but is very often codified in statutes. (for example the rule of evidence which allows a defence counsel to introduce evidence into a rape trial regarding the previous sexual history of a raped woman as a way to discredit her testimony) Therefore, women who have a tainted sexual history are seen as unworthy mothers, inefficient workers, unreliable witnesses and generally regarded as second class citizens. This bias in the justice system, is particularly detrimental to women who have chosen prostitution as a profession.

We need to examine how prostitute's rights should be articulated in law. Women in prostitution have been historically disadvantaged because of the nature of the work they do. Apart from stating that prostitute women are entitled to all the civil, political and economic freedoms accorded to all other citizens, it may be important to articulate some specific rights in their favour in order to redress this disadvantage. Some examples could include the following:

- I. The right to work: no person shall be discriminated against in any manner whatsoever for the reason that they are engaged in sex work. Any person that so discriminates shall be liable under this statute to pay compensation ?
- II. The right to safe conditions of work. A corollary to such a right would be the right to claim damages/compensation from any person who causes her physical harm during the course of her work. This would be in addition to any remedy already existing under the criminal law.
- III. Women working in brothels should be entitled to all the benefits available under the existing industrial laws and to the facilities and protections available to workers under the existing labour laws.
- IV. The right to health, which would include the right to refuse to have sexual contact with any person who refuses to practice safe sex; the right to avail of health insurance and government health facilities for herself and her family without discrimination.
- V. The right to freedom of association amongst and by prostitute women and sex workers. They would have the same rights to form collectives, societies, associations, and trade unions and have the same registered and recognized under the law.
- VI. The right to education for herself and her children. This right would entitle her to the right of access to educational and other vocational facilities without discrimination. Applications to schools should not require the name of the father. Such a provision would benefit both prostitute and non-prostitute women.
- VII. The right to freedom of movement and residence in the place of her choice. Proposals that ghettoize the practice of prostitution and sex work by confining it to a specific locality would not be acceptable. These women would have the right to move freely within the territory India as well as to migrate to other countries in the same manner as all other citizens. They should not be denied the right to reside and carry on their trade in the place of their choice.
- VIII. The right to privacy would be important to guarantee. This right would include the right not to be subject to surveillance of any sort by the State or to a regime of compulsory registration or licensing. It would also include the right to confidentiality and to the protection of her identity.

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Nor would she be subject to any form of mandatory health check-ups or tests. Testing could only be conducted with her informed consent and with the provision of proper counselling and support. A violation of this right would entitle the woman to claim damages based on the grounds that her privacy has been invaded.

Query: Would it be more appropriate to introduce a specific labour regulation for the sex industry, which sets out the rights and duties of employers and employees, rather than have a declaration or statute of rights? We need to examine the advantages and disadvantages of these different options.

3.01 Redressal Mechanisms:

In order for the rights of women to be enforceable, a redressal mechanism will need to be made available to them. One alternative would be to provide a special forum set up at the trial court level to deal with complaints and damages filed under the statute of rights or the special labour legislation.

Queries: Would such special treatment would help redress the historical disadvantage that such women have experienced or reinforce the stigma against them and naturalize their position as immoral or bad women? The other option would be to provide that such complaints be filed before existing legal forums. To what extent would this help in redressing the specific abuses, harms and discrimination that women in prostitution experience?

4.01 Other Amendments:

The police frequently resort to the IPC, police acts and other provisions to harass women in prostitution rather than resorting to the ITPA provisions. This situation has arisen primarily because of the difficulties of acquiring evidence and securing prosecutions under ITPA. We propose that a specific provision be included in the new law reform which states that neither the vagrancy laws, police acts, obscenity provisions under the IPC or beggary laws should be used to arrest or otherwise harass women in prostitution.

It will be necessary to identify specific provisions in the law which violate the rights of women in prostitution and must therefore be repealed. Some examples include section 155(4) of the Indian Evidence Act which provides that when a man is prosecuted for rape, the defence can introduce evidence pertaining to the previous sexual history of the raped woman in order to discredit her testimony. This provision assumes that women who are not chaste lie, particular when it comes to the issue of sex.

Another example is the definition of the 'neglected juvenile' under the Juvenile Justice Act, which includes a child of a prostitute. There is an immediate assumption that such a child will be neglected per se because he or she is the child of a prostitute. It discriminates against prostitute woman's family unit and also provides the grounds for depriving her of the custody and guardianship of her child.

5.01 Duty of the State to Provide Alternatives:

The current policy of rehabilitation recognizes the role of the State as *parens patriae* over women in prostitution. We propose that existing rehabilitation policies which permit the State to place women in "corrective" and "protective" custody with or without their consent, purportedly for their own good, be dismantled completely. The involuntary incarceration of women in these institutions must be rejected as a policy and also as constitutionally impermissible.

Instead, we would emphasize the duty of the State to provide economically viable alternatives for those who wish to leave the profession, including the provision of safe houses and half way

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homes, which women in distress can turn to on a voluntary basis. Such establishments must be based on a policy of openness and accountability and all steps must be taken to prevent the duplication of existing institutions that make no attempt to hide their affinity to prisons and are deliberately shielded from public scrutiny. At present, protective and corrective homes provide redundant vocational training to inmates, if at all, in sewing and stitching etc., and no follow-up support is provided. It should be the duty of the State to provide economically viable alternatives to women who wish to leave the profession. These should include the provision of vocational training courses, access to subsidized education for the women as well as for their children, accompanied by special loan facilities from nationalized banks to enable the women to obtain viable employment alternatives and even self-employment.

One question that requires further debate is whether this strategy requires statutory endorsement, or should it be left open to lobbying by prostitutes rights and feminist groups.

**THE PREVENTION OF IMMORAL TRAFFIC AND
THE REHABILITATION OF PROSTITUTED
PERSONS BILL, 1993**

**A Bill to prohibit immoral trafficking especially in women and
children and to mitigate the suffering of victims of prostitution**

*Be it enacted by Parliament in the Forty-fourth Year of the Republic of
India as follows:*

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Statement of Objects and Reasons

An increasingly large number of young girls and women are driven to the flesh trade every year. Finding an expanding market, more and more victims are lured from the countryside and even from neighbouring countries. Immoral trafficking which the Constitution has prohibited from the beginning of the Republic is continuing unabated in different forms and shades violating human rights and dignity. Often these practices have led to atrocities against women and children. Furthermore, it has led to spread of dreaded disease including AIDS threatening public health generally and the life of prostituted persons in particular. It is a complex problem which the State is obliged under the Constitution and under International Instruments to find satisfactory solutions. While voluntary sexual relations is the right of every adult citizen, it cannot be commercialised to the detriment of innocent victims, immature children, destitute women, and at the cost of social hygiene and public health.

The Suppression of Immoral Traffic in Women and Girls Act, 1956 was enacted in pursuance of the International Convention for the Suppression of the Traffic in persons and of the Exploitation of the Prostitution of Others signed at New York on 9th May, 1950. It was amended in 1978 and again in 1986 to make good some inadequacies in the implementation of the Act. Despite the amendments to the Act, it has been felt that the enforcement of the Act has not been effective enough to deal with the problem of immoral traffic in all its dimensions.

Human rights groups and women's organizations have been seeking amendments to make penal provisions more stringent and to make people who indulge in prostitution (customers) also liable under law. Others have been demanding to empower prostituted women with a view to minimise exploitation by intermediaries and to seek better conditions for "sex workers". The question of the welfare of children of prostituted women also posed certain problems. Finally, the spread of sexually transmitted diseases including the dreaded AIDS demands new approaches and strategies from the law for effective regulation of the harmful effects of prostitution in society. The proposed Bill aims to respond to these problems and perspectives.

The main objects of the Bill are as follows:

- (1) The name of the Act is to reflect the twin objectives intended to be achieved by the law, namely,
 - (a) the prevention of immoral trafficking in human beings, and (b) the protection and rehabilitation of victims of prostitution, particularly of girls.
- (2) It is proposed to prevent the exploitation of sex for commercial purposes (prostitution) by making the exploiters including the customers pay exemplary fine and do compensatory work.
- (3) It is proposed to make offences against children under the Act punishable very severely.
- (4) Sentences under the Act are proposed to be diversified in order to make it deterrent and effective in different situations.
- (5) It is proposed to involve voluntary organizations in the investigation of offences under the Act and in the implementation of objects under the Act.
- (6) It is proposed to empower women with certain rights for protection from exploitation and to provide for them effective rehabilitation.
- (7) Enabling provisions are included in the Act to authorise appropriate governments to constitute special investigation machinery for enforcing the provisions of the Act and to set up special courts with civil and criminal jurisdictions for trial and disposition of cases under the Act.

1. Title, extent and Commencement:

- (i) This Act may be called the Prevention of Immoral Traffic and the Rehabilitation of Prostituted Persons Bill, 1993.
- (ii) It extends to the whole of India.
- (iii) The Act shall come into force on such date as the Central Government may by notification in the Official Gazette appoint.

2. Definitions:

- (a) 'Immoral traffic' means and includes any buying, selling, procuring, seducing or otherwise causing women and children to be used for prostitution;
- (b) 'Prostitution' means sexual abuse and exploitation for commercial purposes or for consideration in money or in kind;
- (c) 'Customer' means a person who sexually abuses or exploits another for purposes of prostitution;
- (d) 'Child' means a person of either sex who has not completed the age of eighteen years;
- (e) 'Brothel' means and includes any house, room, conveyance or a portion thereof used for the purposes of prostitution;
- (f) 'Brothel keeper' is a person who owns, controls, manages or otherwise is associated with the organization and conduct of the activity of prostitution.
- (g) 'Prostituted Women' means women who are victims of prostitution.
- (h) 'Persons in moral danger' means women and children who are destitutes or living in fear of sexual abuse in circumstances where there are reasons to believe that they may be prostituted.

CHAPTER II OFFENCES

3. Punishment for Immoral Traffic:

Notwithstanding anything contained in any other law for the time being in force, immoral trafficking in women and children shall be punishable with rigorous imprisonment which may extend to three years and with fine of not less than fifty thousand rupees.

Provided that on conviction for a second or subsequent time, the offence will carry a minimum imprisonment of seven years and fine of not less than rupees two lakhs.

Provided further, that the court may when the victim involved is a child of tender age increase the punishment appropriately to make it deterrent enough for prevention of such serious offences.

4. Punishment for Prostitution:

Persons who commit prostitution on women with or without consent are liable to be punished with fine which may extend to rupees fifty thousand if the prostituted women prefer a complaint of sexual abuse, exploitation, physical harassment or refusal to use medically advised hygienic procedures.

Provided where prostitution is committed on children, anyone on their behalf can prefer a complaint of sexual abuse or exploitation which is liable to be punished with imprisonment which may extend to five years and fine of not less than rupees one lakh.

5. Punishment for Facilitating Prostitution:

(1) Those who abet in making people go for prostitution, those who detain persons in premises where prostitution is carried on and those who allow premises or vehicles to be used for the sake of prostitution, are guilty of facilitating prostitution and are liable to be punished with fine of not less than rupees fifty thousand and in appropriate cases, for a period of correctional or compensatory work.

(2) In public interest, the court may decide to get the names, addresses and guilty practices of persons convicted under clause (1) to be circulated among such agencies in government and outside as it may find appropriate.

Explanation: Correctional or compensatory work in this connection means and includes non-paid work such as (a) instruction in adult education programmes if the person is educated; (b) service to the aged and handicapped persons; (c) service in traffic and public security duties; (d) service in public works projects of the State/local government, etc.

6. Presumptions under the Act:

Notwithstanding anything to the contrary in the Evidence Act, in prosecution under Sections 3, 4 or 5 of this Act, the Court may presume:

(a) that a child found in a brothel or under suspicious circumstances in the custody of a person other than the parent or lawful guardian who is unable to explain satisfactorily the presence of such child has procured the child for purposes of prostitution;

(b) that a child found accompanying in suspicious circumstances a person who is neither its parent or lawful guardian and who is leaving the country is committing the offence of immoral trafficking.

Explanation: "Suspicious circumstances" in this section includes situations in which (i) the mother-tongue of the accused is different from that of the child or the language of the child is different from that generally spoken in the locality; (ii) where the child is wrongfully confined without access to others; and (iii) where the child is married to a foreigner.

CHAPTER III : WELFARE OF PROSTITUTED PERSONS

7. Government to conduct periodic survey of prostitution:

The appropriate Government shall conduct with the help of social action groups working for welfare of women in the area, a survey every five years of prostitution and the nature of problems prostituted women suffer from. Special effort should be taken to identify in such surveys the extent of HIV/AIDS cases among them, their children and their spouses.

8. State to set up adequate number of protective homes:

a) It shall be the duty of the State Government to set up adequate number of "protective homes" with facilities for vocational training and rehabilitation of prostituted women and girls.

b) The appropriate Government shall frame uniform rules in consultation with the National/State Commission for Women for the maintenance and management of such protective homes in the State.

c) It shall be the policy of the Government to associate local NGOs working for the welfare of women in the maintenance and management of protective homes and rehabilitation of prostituted women and the policy shall be reflected in the rules framed under clause (b) of this Section.

9. State to provide health care for Prostituted Women:

Health care services to prostituted women deserve priority attention in health care planning. Towards this end, the appropriate Government shall set up a special cell in the health Administration to organise mandatory health check ups on prostituted women. The services rendered should consist of health schemes for the children of prostituted woman as well.

10. 'Protective Homes' to accommodate women in "moral danger":

(a) Every "protective home" shall receive, besides those sent by a court or welfare board, all women who either on their own submission or on written statement of an NGO working for the welfare of women, seek admission to a protective home on grounds of "moral danger".

(b) Their stay in the protective home will be regulated by rules specially made for the purpose by the State Government.

11. Rehabilitation to be community-based with NGO assistance.

(1) No Protective Home shall keep a person beyond a maximum period of two years after which community-based rehabilitation shall be arranged if necessary in association with NGOs of the area.

(2) Every State Government shall develop one or more community-based rehabilitation schemes for prostituted women who need long-term attention and assistance.

(3) The rules applicable in this regard shall be framed by the State Government in consultation with the State Social Welfare Board.

12. Welfare Fund for Women and Children in "Moral Danger":

a) Every State Government shall create a separate fund for utilisation towards supporting rehabilitation schemes for prostituted women and those in "moral danger".

b) The fines collected under this Act shall be remitted to this Fund by the State Government.

c) The Fund shall be administered by a Board of Trustees appointed by the Government from among persons who have special skills and experience in the rehabilitation of prostituted women and children.

d) The Fund shall receive special grants from the Government and other sources for the prevention and treatment of sexually transmitted diseases especially of HIV/AIDS among the prostituted women.

e) Children of prostituted women will be entitled to receive free medical and educational services out of the Fund till they attain the age of eighteen years.

13. Liability to pay compensation for injuries caused in Prostitution:

Notwithstanding anything in any other law for the time being in force, prostituted women and children are entitled to claim against their sexual exploiters damages for injuries suffered in the Special Court constituted under the Act. Such damages may cover injuries, physical or mental, suffered in the sexual activity or prostitution.

Explanation

The injury for which special damages are allowed under this section includes:

a) Physical torture or sexual abuse including intercourse after being refused and intercourse in an intoxicated condition;

b) knowingly transmitting diseases;

c) refusal to practise safe sexual conduct.

CHAPTER IV SPECIAL POLICE, COURT AND PROCEDURE

14. *Special Police Officer and Panel of Voluntary Police:*

1) There shall be for each area to be specified by the State Government in this behalf a Special Police Officer of the rank of an Inspector appointed for dealing with offences under this Act in that area.

2. The special police officer shall be assisted by a panel of honorary police officers, preferably women, drawn from among social welfare workers of the area, retired police, military and judicial officers, public interest advocates and professors of law, social work, psychology and women studies departments. The panel to be prepared by the District Magistrate will serve for a period of three years according to rules framed by the State Government for the purpose. The honorary police officers thus empanelled will discharge all or any of the functions delegated to him/her by the Special Police Officer and generally advise him on the efficient enforcement of the provisions of the Act.

3) The State Government shall prepare a handbook containing guidelines for investigation of offences under the Act including welfare proceedings of the prostituted women. Such handbook should not only incorporate the relevant provisions of the Criminal Procedure Code, Police Act and the Evidence Act, but also the standard of conduct expected from police officers in dealing with women and children involved in sexual exploitation and "moral danger". The twin objects of the Act, namely, punishing the traffickers and exploiters on the one hand, and rehabilitating the prostituted women and children on the other must be adequately reflected in the hand book.

4) The State Government shall arrange periodical training courses at the State level with assistance from Social Welfare department to the Special Police Officers and honorary police officers involved in enforcement of the Act.

15. *Offences to be cognizable*

Notwithstanding anything contained in the Code of Criminal Procedure, any offence punishable under the Act shall be deemed to be a cognizable offence within the meaning of the Code.

Provided that arrest without warrant may be made only by the Special Police Officer or under his direction.

16. *Search Without Warrant:*

(i) Notwithstanding anything contained in any other law for the time being in force, the Special Police Officer can conduct a search without warrant any premise in which he has reason to believe that an offence under the Act is being committed.

(ii) Before making a search under sub-section (1), the Special police officer shall record the grounds as to why an immediate search (without warrant) is necessary and shall also take with him at least one woman honorary police officer so designated under the panel.

(iii) The Special Police Officer who apprehends anyone during search under sub-section (1) has to produce such person forthwith before the appropriate Magistrate.

(iv) Any person who is produced before a Magistrate under sub-section (iii) shall be examined by a registered medical practitioner for the purposes of determination of age, for detecting symptoms of sexual abuse or of any sexually transmitted diseases.

17. Special Courts to try offences under the Act:

(i) The State Government shall set up a Special Court of the rank of a district judge in every metropolitan area to deal with offences under the Act.

(ii) Notwithstanding anything contained in any other law for the time being in force, all proceedings (civil and criminal) under the Act shall be disposed off expeditiously and the Court should record reasons if any proceeding is unable to be decided within a period of one year from the date of framing of charge.

(iii) The Special Court besides having powers of a Sessions Court under Criminal Procedure Code for the trial of offences under the Act, shall also have civil jurisdiction under the Civil Procedure Code to process claims under Section 13 of the Act.

18. Special Court to commit women to Protective Homes:

(1) Notwithstanding anything contained in any other law for the time being in force, the Special Court is empowered to commit upto a period of two years, women and girls to protective homes within the area who have either approached the court with an application for such protective custody on the ground of being compelled into prostitution or have been rescued in the course of search under Section 16 or have been referred as cases involved in moral danger by voluntary organisations working for women's welfare.

(ii) The procedure for confinement in the protective home shall be determined by rules framed by the appropriate Government in this regard.

19. Power of Special Court to try cases summarily

Notwithstanding anything contained in the Code of Criminal Procedure, the Special Court has the authority to try offences under the Act in a summary way.

Provided in the course of summary trial, it appears to the judge that the nature of the case is such that a sentence of imprisonment for a term exceeding two years may have to be passed or for any other reason it is undesirable to try the case summarily, the judge shall record an order to the effect and thereafter recall any witness, who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

20. Power to make rules:

(1) The State Government may, by notification in the Official Gazette, make rules for carrying on the purposes of this Act.

(2) All rules made under this Act shall, as soon as may be after they are made, be laid before the State Legislature.

21. Repeal and Savings:

(1) As from the date of the coming into force in any State of the provisions of this Act, all State Acts relating to prohibition of immoral traffic and prevention of prostitution, in force in that State immediately before such date shall stand repealed.

(2) Notwithstanding the repeal by this Act referred to in sub-section (i), anything done or any action taken under the provisions of such State Act shall in so far as such thing or action is not inconsistent with the provisions of this Act be deemed to have been done or taken under the provisions of this Act as if the said provision were in force when such action was taken and shall continue in force accordingly unless superseded by any action taken under this Act.

**THE PROHIBITION OF IMMORAL TRAFFIC AND
EMPOWERMENT OF SEXUAL WORKERS
BILL, 1993**

A Bill to prohibit immoral trafficking especially in women and children and to confer rights on sexual workers with a view to prevent sexual exploitation and protect health and hygiene in sexual work

Be it enacted by Parliament in the Forty-fourth Year of the Republic of India as follows:

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Statement of Objects and Reasons:

An increasingly dominant perspective in public discourse on prostitution in recent times reflect the concern for women's rights. It is argued that women should have the option to choose sexual work without being exploited by intermediaries and in conditions of occupational safety and security. Today, the society looks down upon prostitutes and penalise them along with traffickers and sexual exploiters. The interests which appear to deserve legal protection in the business of prostitution are those of the public and of the prostitutes themselves. While law should severely punish people involved in immoral trafficking and those indulging in child prostitution, it should de-criminalise totally the voluntary sexual work of prostitutes (prostitution is a legitimate activity even today) equating it with any other manual labour. This view, though apparently obnoxious to contemporary public morals, is said to be the only sensible position which law can adopt if it intends to empower the women involved and to effectively regulate the health risks of prostitutes, their customers and of the public at large. In international circles this view is known as the "prostitutes' rights approach".

It is reported that Australia, Netherlands and Germany have adopted policies to develop a legal regime reflecting the prostitutes' rights approach. This approach is being canvassed in some agencies of the United Nations, by associations of prostitutes, and even by the W H O. According to a paper prepared for the W H O, a major concern in prevention of A I D S is "how to enable prostitutes to avoid becoming infected, and if they already are infected, to avoid passing the virus on to their clients and other sex partners". The Global Programme on AIDS is said to be evolving certain guidelines on the basic premise "that in order for prostitutes to be able to protect themselves from HIV infection, AIDS, and other sexually transmitted diseases, they must have safe working conditions, including the right to turn down abusive or unco-operative clients, and the right to refuse to engage in practices likely to transmit HIV and other STD, including any penetrative sex performed without a condom". The Global Programme on AIDS of WHO has therefore urged governments to review the impact of existing laws and policies on the ability of prostitutes to protect themselves and their partners from HIV and other STD. They are urged by WHO experts to repeal existing prostitution laws, de-criminalise the activity and extend occupational safety and health regulations which govern the workplace to prostitution business as well!

The Draft Bill is proposed for public discussion so that the best possible legislative policy can be evolved on the subject promoting women's rights and preventing serious health risks to people involved. It is unnecessary to discuss the pros and cons of the **Prostitutes' rights** approach as there are valid arguments in support and against it. For legislation, it is a matter of public opinion, a question of adopting the lesser evil and a method for getting better results in enforcement. Health is indeed a major concern and if the existing laws are posing a serious risk, there is every reason to change the policy however unacceptable it be on moral grounds. Similarly, sexual autonomy for women is an aspect of women's rights. If prostitution perse is legitimate, then why not the activities associated with it be so regulated as not to victimise the women? If the prosperous flesh trade growing under the cover of corruption and secrecy and now under a privatised/globalised economy, were to be brought under some effective control, the best strategy in the given circumstances appear to be to bring it to the surface, make the trade uneconomical and regulate it under a rights regime where the victims are empowered to be their own policemen. Hence the Bill.

Title, Application And Commencement

1. (i) This Act may be called "The Prohibition of Immoral Traffic and Empowerment of Sexual Workers Bill, 1993."

(ii) The Act extends to the whole of India.

(iii) The Act shall come into force on such day as notified by the Central Government in the Official Gazette.

CHAPTER I DEFINITIONS

2. (a) Immoral Trafficking means and includes buying, selling or procuring women and children for sexual abuse, prostitution or such other forms of sexual exploitation.

Explanation:

(i) Causing a child or woman to be so abused, prostituted or exploited by force, fraud, deceit, undue influence, or misrepresentation is trafficking within the meaning of this Section.

(ii) Fake marriages and dedication of girls which compel them to give up their dignity even if done ostensibly for religious purposes would amount to trafficking under this Section.

(b) 'Sex Worker' means a woman who has taken to prostitution voluntarily and is doing the activity as an occupation.

(c) Prostitution means sexual intercourse for monetary consideration or for consideration measurable in monetary terms. Sexual activity short of copulation would also amount to prostitution if carried out for monetary consideration.

(d) 'Children' means persons of either sex below the age of eighteen years.

(e) Child Prostitution is the use of children in whatever manner employed to fulfil the sexual urges of persons with or without consideration.

(f) Customer means any person who engages in prostitution.

(g) Brothel means and includes any house, room, conveyance or any portion thereof used for the purpose of prostitution.

(h) Brothel-keeper is a person who owns, controls, manages or in possession of the brothel and includes those associated in whatever capacity with the organization and management of the activity of Prostitution.

Explanation:

Any agent of the brothel-keeper is deemed to be a brothel-keeper for the purposes of this Act.

(i) Collective or Union means association of sex workers established for purposes of protecting their rights and for rehabilitation of sex workers under this Act.

(j) Prescribed means as prescribed under this Act and under the Rules framed thereunder.

CHAPTER II RIGHTS OF SEX WORKERS AND DUTIES OF BROTHEL KEEPERS

3. *Right to Safe Conditions of Work:*

Every sex worker has the right to demand from the customer as well as the brothel-keeper safe and hygienic conditions of work and reasonable remuneration for her services in Prostitution.

4. *Right to refuse on certain grounds:*

A sex worker shall be entitled to refuse to entertain any customer on grounds of health, safety or hygiene and no brothel-keeper or customer shall force such woman to do so.

5. *Duty to ensure safe conduct:*

(a) Every brothel-keeper has a legal duty to seek and obtain the health-status of customers visiting the brothel particularly in respect of sexually-transmitted diseases and to disclose such information to the woman entertaining such customer.

(b) Every sex worker shall have the right to insist on the customer wearing condoms and no such woman shall be forced to participate in sexual activity with any customer who refuses to wear such condoms.

6. *Duty to provide safe work place:*

Every sex worker has the right to demand hygienic environment and necessary sanitary facilities provided to her by the brothel keeper.

7. *Right to Medical Assistance:*

(a) Every brothel keeper has a legal duty to provide medical treatment to the sex worker in the brothel. Every sex worker is entitled to seek monthly medical check-up at the expense of the brothel-keeper from a registered medical practitioner.

(b) If and when a sex worker becomes pregnant while continuing to be in the brothel, she is entitled to refuse sexual activity with any customer and can refuse to abort her pregnancy. In such an event, she has the right to get her reasonable medical expenses for delivery and for three months thereafter from the brothel-keeper.

8. *Right to claim damages in case of injuries:*

Every sex worker has the right to seek damages as prescribed under the Rules from the brothel-keeper for injuries suffered as a consequence of violation of her rights under the Act.

9. *Right on incapacitation due to S.T.D.:*

Every sex worker or a union on her behalf will have the right to receive from the brothel-keeper a sum of not less than rupees one lakh in case she contracts in the course of her occupation any of the diseases given in the Schedule to the Act.

10. *Rights against customers:*

Without prejudice to her rights against the brothel-keeper, every sex worker will have the right to claim damages against a customer who:-

(a) Physically tortures or sexually abuses her including unnatural intercourse, intercourse after being refused and intercourse after getting intoxicated;

- (b) Knowingly transmits diseases given in the Schedule to this Act;
- (c) Willfully suppresses information which he has a duty to disclose under the Act;
- (d) Refuses to practise safe sexual conduct including use of condom; and
- (e) Refuses to pay either partly or fully the amount agreed to as consideration for the sexual activity.

CHAPTER III SPECIAL TRIBUNAL AND PROCEDURE

11. *Special tribunal for processing complaints:*

- (a) The State Government shall set up a special tribunal in every metropolitan area with powers of a civil judge under the Civil Procedure Code, 1908 to receive and settle expeditiously complaint under the Act.
- (b) Complaints on behalf of the Sex worker may be filed either by herself or by the trade union of which she is a member. Subject to the consent of the tribunal, such complaints may also be filed by a voluntary agency working in the State for women's welfare.

12. *Procedure for processing complaints:*

- (a) The procedure for filing and processing complaints before the tribunal set up under the Act shall be as nearly as possible to that prescribed for District Forum under the Consumer Protection Act, 1986.
- (b) The State Government may from time to time prescribe under Rules such modifications in procedure for easy access to the tribunal and expeditious settlement of disputes.
- (c) There shall be no court fee payable for claims for damages filed under the Act.
- (d) It shall be the duty of the Commission for Women and/ or the Legal Aid Authority of the State to arrange for proper legal assistance free of charge to women sex workers both before the tribunal and outside.
- (e) When damages are awarded by the tribunal it shall be the duty of the Commission for Women and/or the Legal Aid Authority to take all necessary steps to get the sum paid to the sex worker without delay and expense.
- (f) The tribunal shall have the power to grant interim compensation to the complainant pending final settlement of the claim.
- (g) The tribunal will have the power to get the substance of the complaint and the nature of settlement arrived at published in stated newspapers at the expense of the brothel-keeper or the customer as the case may be as part of the settlement.

13. *Settlement outside litigation:*

A complaint can also be settled through mediation at the instance of the union, the legal aid authority or the Commission for Women either before its filing in the special tribunal or afterwards with the permission of the tribunal.

14. *Award to be final:*

The award given by the tribunal shall be final and shall not be called in question in any court, excepting when a reference is made to the High Court by the tribunal itself.

CHAPTER IV WELFARE FUND FOR SEX WORKERS AND THEIR CHILDREN

15. *Welfare Fund for sex workers:*

- (a) Every State Government shall create a welfare fund for the benefit or rehabilitation of sex workers and of their children.
- (b) The Fund which shall be administered by the Department of Women and Child Development of the State Government according to the rules framed for the purpose will receive grants from the Central and State Governments as well as from private trusts, foundations and charitable institutions. Tribunals set up under the Act will also have authority to order payment of part of the compensation or costs awarded to the Fund whenever considered appropriate.

16. *Children of sex workers to get support from Fund:*

Children of sex workers will be entitled to receive free medical and educational services from out of the Fund till they attain the age of eighteen years. The collectives (Unions of sex workers), the State Commission for Women and voluntary agencies working for women's welfare will have the right to intervene on behalf of children of sex workers to get their entitlements under this provision.

CHAPTER V OFFENCES

17. *Punishment for Trafficking:*

Trafficking on women is punishable with imprisonment which may extend to seven years and with fine.

Provided that on conviction for a second or subsequent time, the offence will carry a minimum imprisonment of ten years and fine of not less than rupees five lakhs.

18. *Punishment for trafficking of children:*

Persons involved directly or indirectly in the trafficking of children shall be liable for imprisonment which may extend to ten years and with fine.

Provided that on conviction for a second or subsequent time, the offence will carry a minimum imprisonment for life and fine of not less than rupees ten lakhs.

19. *Attempt and Abetment also punished:*

Persons who abet or attempt in trafficking of children shall be liable to be punished with imprisonment which may extend to five years and with fine.

Explanation:

- (i) When a person not being the parent or lawful guardian, is found having the custody of a child under circumstances which tend to make a reasonable person believe that the child is about to be sexually abused, it may be presumed as attempt under this section.
- (ii) When a person not being the parent or lawful guardian, is found taking a child out of the country may also be presumed to have committed the offence of attempt under this section even if the taking is after an apparent marriage with that child.

20. *Presumptions in prosecutions under the Act:*

- (a) In a prosecution for trafficking under the Act, the Court may presume on production of prima facie evidence, that the accused got involved with the woman or child as the case may be for purposes of trafficking.
- (b) The court will be justified in raising the above presumption in situations such as the following:
 - i) Where the mother-tongue of the accused is different from that of the victim or where the woman's language is different from that spoken in the city where trafficking took place;
 - ii) Where the woman is wrongfully confined in a brothel;
 - iii) Where an adult person lives on the earnings of a sex worker;
 - iv) Where the sex worker's jewelry or other property are withheld from her while in a brothel, and
 - v) Where a sex worker is not allowed to leave the brothel.

CHAPTER VI MISCELLANEOUS PROVISIONS

21. *Advisory Committees and NGO involvement in Enforcement:*

- (a) The State Commission for women and voluntary organizations specially empowered by the State Commission for Women, will be entitled to assist and monitor the investigation of offences under this Act.
- (b) Every State Government shall constitute a special enforcement cell in the police with as many women officers as possible for investigation of offences under the Act.
- (c) Every State Government shall constitute an Advisory Committee for effective implementation of the provisions of the Act with the Chairperson of the State Commission for women as the Chairperson of the Committee and representatives of collectives of sex workers and women's welfare organizations as its members.

22. *Powers of State Government to frame rules:*

- (a) The State Government shall frame rules under different sections of the Act in consultation with the State National Commission for women and the Advisory Committee constituted under the Act.
- (b) Rules required to be framed under the Act includes
 - i) the norms and procedures for registration of collectives under Section 2(i);
 - ii) the procedure for receipt and processing of petitions under Section 12(b);
 - iii) the procedure for administering the Welfare Fund under Section 15(b);
- (c) Rules framed under the Act shall be placed in the next session of the legislature for its approval.

23. *Repeal and Savings:*

- (a) This Act when notified will repeal the Prevention of Immoral Traffic Act, 1956.
- (b) Prosecutions already initiated under the 1956 Act will however continue and such cases will be dealt with and disposed of according to the provisions of that Act only.