

Delinking Prostitution A Look at India's Immoral

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La « .Loi sur la protection du trafic immoral ». en Indes manque de clarté dans son concept en laissant entendre

the largest number of trafficked victims come from Asia, with over 225,000 victims each year from

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que le trafic sexuel est différent de la prostitution. L'auteure dit que la Cour a pris une attitude moraliste envers la prostitution et le trafic et a occulté les éléments d'exploitation auxquels les femmes dans ces situations doivent faire face.

The *Immoral Traffic Prevention Act* (ITPA), 1956, is the specialized legislation dealing with trafficking in India, a country that receives, supplies, and transits numerous trafficked individuals. In spite of a few amendments to the legislation in 1986 it remains an ineffective and ideologically unsound piece of legislation to deal with trafficking.¹ It suffers primarily from a lack of conceptual clarity on the issue of trafficking, which has led to injustice being rendered to many trafficked victims. One of the main conceptual problems in the *Act*, which will be discussed in this paper, is the misplaced moralistic criminalization of prostitutes at the cost of dealing adequately with the issue of trafficking itself.

It is extremely difficult to arrive at the number of individuals being trafficked in, to, or from India due to the secretive and sensitive nature of the subject. The U.S. has reported that

Southeast Asia and over 150,000 from South Asia (Congressional Research Service). The United Nations (UN) reported in 2002 that up to 700,000 children were trafficked in Asia each year and of them about 100,000 in India (cited in Vetticatil and Krishnan). According to another report there are an estimated 2.3 million women in prostitution, of which a quarter are minors. There are over 1,000 red-light districts all over India, where cage prostitutes are mostly minors often from Nepal and Bangladesh (CATW-Asia Pacific). Several studies in India have also pointed out the extreme magnitude of the problem and its impact specifically on women and children. Significant among these are a study by Rita Rozario on trafficking in women and children in India in 1998, a study on the implementation of trafficking laws and prostitution from 1980-87 by Jean D'Cunha, and studies carried out by non-governmental organizations (NGOs) such as Sanlapp (Calcutta), Prajwala (Andhra Pradesh) (see Vetticatil and Krishnan), the Joint Women's Program (Delhi, Karnataka) (see Shalini and Lalitha), Bailancho Saad (Goa) and others.

India is said to have adopted a tolerant approach to prostitution whereby an individual is free to carry on prostitution provided it is not an organized and a commercialized vice. However, it commits itself to opposing trafficking as enshrined in Article 23 of the Constitution which prohibits trafficking in human beings. India is also a signatory to international conventions such as the Convention on Rights of the Child (1989), Convention on Elimination of all forms of Discrimination Against Women (1979), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) and the latest South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002). The ITPA, enacted following the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in New York, criminalizes the keeping of brothels (Sec. 3, ITPA 4), living on the earnings of prostitution (Sec. 4, ITPA 6), procuring and inducing a person for the sake of prostitution (Sec. 5, ITPA 6) and detaining a person in premises where prostitution is carried on (Sec. 6, ITPA 7). However there are other sections where the *Act* criminalizes prostitutes thereby diffusing the focus on the exploitative elements of the process and the violations suffered by the trafficked women.

Criminalizing the act of prostitution in the *Immoral Traffic Prevention Act* begins in Sec. 7 where prostitution in or in vicinity of public places is punishable. Here the law is

From Trafficking Traffic Prevention Act, 1956

governed by a moralistic base whereby it aims to protect “public decency” aiming at the “moral clean up” of public places. The *Act* also defines public place in ambiguous terms and in most states is not supported by official gazette.² This section has been used against women in prostitution regardless of whether they have been trafficked or not.

A clear indicator of criminalizing the victim and interfering with the act of prostitution is the inclusion of Sec. 8 which punishes seducing and soliciting for the purpose of prostitution. The construction of this offence is extremely patriarchal and reflected in the “willful exposure of her person (whether by sitting by a window or on the balcony of the building or house or in any other way) or otherwise tempts or endeavours to tempt, or attracts or endeavours to attract the attention of any person for the purpose of prostitution.” When, under the so-called gender-neutral act, the same offence is committed by a man it carries much less punishment (three months compared to one year imprisonment). Several studies across India have shown that this is the most abused section of the ITPA, used more as a tool for harassment and extortion by the law enforcement.³ Women are apprehended from known red-light areas whereas their brothel keepers and pimps are left untouched. In cases of organized prostitution, this results in continual debt bondage for the amount paid by her keepers as a fine or as a bail amount. In fact, sometimes the brothel keepers collude with policemen and arrange the arrests of “their” women so they can continue to serve in bondage. When-

ever the police decide to present the woman before the courts, she is tutored by the police to plead guilty and then fined anywhere from 20 rupees (US\$0.42) to 500 rupees (US\$10.42). In some courts the women are even imprisoned for several months for the offence though it is not mandatory. Thus the *Act* itself directly encourages the continuation of a vicious cycle of exploitation of the woman. The increased use of this section of the *Act* has not changed the picture of trafficking even a little bit. Judges on the other hand are either moralistic and happy to punish these women not realizing the reality of their situations or feel sympathetic but helpless. Surprisingly Sec. 8 is also used against women removed after a raid under Sec. 15 (search without warrant). Though these women could be trafficked victims,

“character,” “state of health,” and “mental condition” of the woman to decide whether to send her to the corrective home in lieu of the prison. None of the three concepts are defined in the *Act* and all are extremely gender-biased. Nowhere does the *Act* seek to constitute specialized centers to reform traffickers or men. Release from these corrective institutions is again based on the woman’s capacity to prove that she can lead a “useful and industrious” life. Thus the victim of organized trafficking becomes an offender under the eyes of the law and is burdened to correct herself.

Nothing can be more moralistic and hate-filled against the women than Sec. 20 of ITPA where a magistrate can order an eviction from his jurisdiction of a prostitute and also prevent her re-entry for simply being a prostitute. According to this sec-

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they are treated as criminals and arrested along with the brothel keepers and the pimps. Thus whether or not the woman may be actually soliciting, because of the very fact that she is in prostitution, she becomes a convenient target.

The *Act* continues to punish prostitutes by providing a corrective institution to reform the “offenders” for soliciting and for carrying on prostitution in a public place. The court has the discretion to judge the

tion a magistrate, upon receiving information that a woman is a prostitute, can issue notice to the woman to show cause and it is then up to the woman to prove that she is or is not a prostitute and why her existence does not damage the interests of the general public. The purpose of this section or its effect clearly has nothing to do with trafficking, whereas there is no comparable deterrent measure in the entire *Act* for the traffickers and their right to resi-

dence or mobility is not a cause of concern! This section is so loosely constructed that it can be used against any woman who may have to prove that she was not engaged in prostitution (Flavia). In *State of Uttar Pradesh v Kaushaliya*,⁴ in response to the question whether Sec. 20 of ITPA infringes on Article 14 (equality) and Article 19 (freedom of movement) under the Constitution of India, the court differentiates between a prostitute “who carries on her trade on the sly or in the unfrequented part of the town ... [and] may not be as dangerous to public health or morals” and those who carry on prostitution in a public or crowded place, and rules that the power given to the Magistrate is a reasonable restriction imposed on the freedom of movement and also justifies deportation. This judgment alone stands as testimony to the perception of the courts of these women as criminals and immoral. It indicates a partial acceptance to the “need” (of men) for existence of prostitution but enforcing the individual women to be invisible.

The ITPA has been twisted and used against the women also by “creative” use of Sec. 4, which is supposed to penalize those who live through the earnings of sexual exploitation. But in our country there is a tendency to arrest the victims themselves under this offence as they are seen as “consenting” parties. This implies that even if the proposed amendments to the *Act* (which include adopting the definition of trafficking as outlined in the UN Protocol) are adopted, newer ways of interpreting and implementing the *Act* will not result in total decriminalization of the women in prostitution. It is shocking to see the inability of the courts to differentiate criminals from the victims of the crime. Thus, the trafficked women’s criminal status overshadows her victim status and the onus falls on her to prove her innocence and victimhood (Sanghera).

Case laws on ITPA reveal that often the terms prostitution and traf-

ficking are used interchangeably. Even when it is not warranted, there has been a tendency for the courts to discuss the “evils” of prostitution and call for its abolition because of their moralistic attitude. For example, in *Vishal Jeet v Union of India*,⁵ in responding to a writ petition on the devadasi⁶ system, the court equates prostitution and not trafficking to a “running sore on the body of civilization and destroys all moral values” and calls for “appropriate action to eradicate this evil.” In *Gaurav Jain v Union of India*,⁷ where the main issue was the rehabilitation of children of prostituted women, the court states “eradication of prostitution in any form is integral to social well and glory of womanhood” and “the right of the child to development hinges upon elimination of prostitution.” Such interchange of terminologies in the judgment is not only reflective of the mindset of the judiciary but also likely to influence the mindset of the public. Most other cases on ITPA are trapped in discussing the procedural issues laid down by the *Act* thus leaving much to be desired for those who look up to the courts for a better understanding of trafficking.

The lack of understanding of trafficking by the legal system could arise from one or more of these factors: first, there is no definition of “trafficking” or “trafficker” under the *Act*. Therefore, the police and the judiciary do not have an understanding of the complexities involved when a woman is trafficked, the different types of traffickers, and their strategies. Neither does the court attempt to hear the trafficked woman and her experiences. Second, the *Act* also focuses on establishing “the purposes of prostitution” for every offence which conveniently takes the attention away from trafficking. For example, even to convict a trafficker for the act of keeping a brothel, it becomes important to establish that prostitution was taking place. So, when a woman who is trafficked is kept in captivity for a period of time, it cannot amount to an offence under

Sec. 3 unless the place satisfies the criteria of a “brothel.” Similarly we find that in every case involving a raid there is also an elaborate description of how the woman was clothed when the raiding party found her⁸ in order to prove that she was getting ready for sexual intercourse with the decoy witness and thus her existence for the “purpose of prostitution” could be established beyond “reasonable doubt.” That the clothing or actions of a woman at that point of time should not negate the fact that she was trafficked seems to slip away from the adjudication process. The *Act* thus misses out on what actually constitutes trafficking—the elements of force, deception, and coercion, which go on overtly and covertly over a period of time. Third, in spite of the definition of prostitution having changed from “the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind, and whether offered immediately or otherwise” to “sexual exploitation or abuse of persons for commercial purpose,” there is no perceptible attitude shift in the lawmakers and enforcers from taking efforts to curb prostitution to curbing trafficking.

There is a need for a specialized legislation in India to deal with trafficking even though the existing *Indian Penal Code* (IPC), 1860, deals with the offences of kidnapping, abduction, and buying and selling of minors (Sections 359-373 of IPC). The IPC is narrower in scope to deal with the wide range of activities involved in trafficking which do not neatly fit into “kidnapping” or “abduction.” For example luring, coaxing individuals in vulnerable positions with false promises of better jobs,⁹ contract work as domestic workers, mail order brides, and situations where the women are sold in connivance with the parents or husband. The IPC is thus less adept in dealing with the nuances involved in organized trafficking.

Hence, the new legislation must define trafficking apart from prosti-

tution and include trafficking for other purposes such as domestic work, marriage, etc. It also needs to take into account the various human rights violations that occur in the process of trafficking (sometimes even in rescue attempts) and provide redress for the victims as well as ensure access to basic rights. In this new law the burden of proof must lie on the accused to show they have *not* trafficked. There is a need to sensitize and train the judiciary to deal with the complexities involved in trafficking offences.

More importantly the new legislation should be backed by a comprehensive policy to combat trafficking—prevention, rescue, repatriation, re-integration and rehabilitation set on the lines of international principles and standards laid out in Conventions and treaties (such as the Human Rights Standards for treatment of Trafficked Persons brought out by Global Alliance Against Trafficking in Women) and must be accompanied by state rules which will take into account local realities.

It is unfortunate that there is a lack of perspective on trafficking in the legislation which is supposed to curb trafficking itself. This is reflected in the judgments arising from the courts where prostitutes as well as traffickers are criminalized. There is need for a comprehensive jurisprudence on trafficking with respect to Indian courts. The *Act*, instead of disempowering women, should aim to render justice to them and prevent further exploitation. Since the existing *Act* carries with it a moralistic base, there is a need for a different legislation exclusively dealing with trafficking so that traffickers are criminalized and not the trafficked women.

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¹The most comprehensive definition of Trafficking so far has been laid out in Art. 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

²An official gazette is a document released by the Commissioner of Police or Magistrate to demark areas in a particular jurisdiction that are to be considered "public places" for the purposes of the *Act*. Sec. 7(b) of ITPA (prostitution in or in the vicinity of public places) requires the publication of this notification.

³For example D'Cunha reports that compared to 596 brothel keepers 9,240 sex workers were arrested between 1980-87 in Mumbai. Shymala Natraj's study reveals that 90 per cent of cases in TamilNadu were under Sec. 8. Indrani Sinha quotes 80 per cent under Sec 8 among arrests in West Bengal under ITPA in 1989.

⁴AIR 1964 SC 416 (v 51 c50)

⁵(1990) 3 SCC 318

⁶The devadasi system is an age-old practice in certain states in India where young women are dedicated to the Goddess Yellamma and then used in the community for sexual purposes. Though there has been legislation to prohibit this practice, it persists and these women continue to work as prostitutes.

⁷(1997) 8 SCC 114

⁸For example in *Bai Radha v State of Gujarat*, AIR 70 SC 1396 (V57 C297).

⁹A survey carried out by the Anti-Trafficking Network in 2002, involving 16 NGOs, has revealed that over 35 per cent of the sex workers in Delhi were sold to pimps or *kotha* owners by middlemen who had "good" jobs (Pandey).

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