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The Immoral Traffic (Prevention) Act: The Problems

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ABSTRACT

Human trafficking essentially means the trade of human beings for various exploitative purposes. They can be for prostitution, unpaid labour, etc., It has transformed itself into a global menace. It has victimised scores of unknowing people which has compelled nations across the globe to form major legislations and treaties to tackle this menace. The Indian government after the ratification of the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949 brought legislation named The Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) which after going through an amendment in 1986 was renamed as Immoral Traffic (Prevention) Act (ITPA). This act has been criticised widely and is marred by problems and arbitrary assumptions made by the legislators. One major problem and an arbitrary assumption at the same time in this act is that it presumes that all trafficking is done for the purpose of prostitution only. This opens the Pandora's box and gives rise to a slew of loopholes. This act has not only failed to curb the menace of trafficking but has also made it arbitrarily impossible to practise prostitution even though it is legal to practise prostitution in India. These are the reasons why the statistics from the National Crime Records Bureau (NCRB) show an upward trend in the incidents of trafficking. This paper aims to enlist, analyse and criticise such problems and arbitrary assumptions.

Keywords: Human Trafficking, ITPA Act, Problems, Problematic Assumptions.

I. INTRODUCTION

“There is a reason fairy tales most commonly end with happy endings. It is because nobody wants to face the realisation of human depravity.”

— Asa Don Brown³

According to United Nations Office on Drugs and Crime (UNODC), “Human Trafficking is the recruitment, transportation, transfer, harbouring or receipt of people through force, fraud or deception, intending to exploit them for profit. Men, women and children of all ages and

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³ Destiny Rescue Editor, *Human Trafficking Quotes*, Goodreads (July 19, 2020, 8.40 PM), <https://www.goodreads.com/quotes/tag/human-trafficking>.

backgrounds can become victims of this crime, which occurs in every region of the world. The traffickers often use violence or fraudulent employment agencies and fake promises of education and job opportunities to trick and coerce their victims.”⁴ This essentially means that living human beings are traded as non-living commodities for profit at the hands of the tyrannical few. This is a great and glaring violation of human rights and causes the victim to go through a great deal of trauma and loss of self-dignity. This menace of human trafficking is not only limited to a few countries but has become a global crime, with the source and destination countries throughout the world.

Therefore to tackle this menace the Government of India brought a law namely, The Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). It was passed after the ratification of the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, addressing trafficking in the context of sex work (UN 1949).⁵ It was further amended in 1986 and renamed the Immoral Traffic (Prevention) Act (ITPA) (hereinafter, “Act”). It was done to enhance penalties and bring up the existing act’s effectiveness to a better standard. However, despite the amendments and stricter penalties, this act has still proven to be ineffective in curbing and tackling the menace of Human trafficking in India. “Incidents of human trafficking are showing a rising trend during the period from 2011 – 2015. A total of 3,517 cases were registered in 2011, which rose to 3,554 cases in 2012, to 3,940 cases in 2013, to 5,466 cases in 2014, and 6,877 cases in 2015.”⁶ This upward trend in the cases indicates the presence of major loopholes in the Act, which this paper aims to bring out. This paper is further divided into two sections. The first section aims to bring out the assumptions which the act is based upon, and the second deals with the problems in the act.

II. ASSUMPTIONS

The primary object of the act is not to curb prostitution or punish a person who willingly practices prostitution but it is to criminalise the offence of trafficking for the purpose of prostitution. It aims to criminalise trafficking in women for the purpose of prostitution as a commercial vice and make it a means of living.⁷

⁴ United Nations Office on Drugs and Crime, *Human Trafficking*, United Nations Office on Drugs and Crime (July 19, 2020, 8.40 PM), <https://www.unodc.org/unodc/en/human-trafficking/Human-Trafficking.html>.

⁵ Prabha Kotisaran, *How Did We Get Here? Or A Short History of the 2018 Trafficking Bill*, Engage EPW (July 21, 2020, 8.38 PM), <https://www.epw.in/engage/article/how-did-we-get-here-or-short-history>.

⁶ National Crime Records Bureau, *Chapter 6A, Crime in India -2015*, National Crime Records Bureau (July 21, 2020, 8.56 PM), http://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Chapter%206A-15.11.16_2015.pdf.

⁷ Poonam Pradhan Saxena, IMMORAL TRAFFIC IN WOMEN AND GIRLS: NEED FOR TOUGHER LAWS AND SINCERE IMPLEMENTATION, Vol. 44, No. 4 (October-December 2002) J.I.L.I., 504, 508 (2002).

Even though the name of the act is “Immoral Trafficking Prevention Act”, the act does not contain the definition of trafficking. The first and primary assumption it makes is that all human trafficking is done for prostitution.⁸ This act, instead of focusing on curbing trafficking, focuses on its purpose of it. This act instead of tackling all purposes for which human trafficking is done limits itself to tackling only one of the many purposes for which human trafficking is done. This act works like medicine that works on one cause of the disease but claims to cure the disease altogether which it never does. The act completely omits to take into cognisance other purposes for which trafficking is done. The act also fails to criminalise traffickers or perpetrators, although it attempts to do so by criminalising the following activities⁹:

1. Section 3(1) - Keeping or managing or acting or assisting in the keeping or assisting or management of a brothel.
2. Section 3(2) - Using or allowing the use of premises as a brothel of which the accused is the tenant, lessee, occupier, or person in charge.
3. Section 4 - Knowingly living on the earnings of prostitution.
4. Section 5. Procuring, inducing, or taking a person for prostitution.
5. Section 6. Detaining a person in a brothel or in premises where prostitution is carried on.

The researcher has identified the aforementioned sections ,which bring out the researcher’s point that the sole objective of the act is to curb human trafficking done for the sole purpose of prostitution. This act totally overlooks or rather fails to take into consideration any other purpose for which trafficking can be done, for example, the beggary mafia, the child labour mafia, etc. the researcher shall now explain the problem with each of these above-mentioned provisions and how they erroneously assume that prostitution is the only purpose of human trafficking.

III. PROBLEMATIC ASSUMPTIONS MADE IN THE ABOVE SECTIONS

Section 3(1) and 3(2) - Criminalize the keeping and maintenance of brothels as well as lending space for brothels. The irony here is while India does not criminalise prostitution it criminalises all of the means which help a prostitute earn a living. For example in this section, brothels are illegal then there is no other way for prostitutes to run their business. It presumes that brothels are a place where illegally trafficked people are forced into prostitution while it completely

⁸ Rajalakshmi, *Delinking Prostitution from Trafficking: A Look at India’s Immoral Traffic Prevention Act, 1956*, *CANADIAN WOMAN STUDIES/LES CAHIERS DE LA FEMME*, July 21, 2020.

⁹ The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India)

overlooks the possibility of a brothel serving as a means of livelihood for a prostitute who has entered prostitution at his/her own will.

Moreover, in the absence of brothels, the whole profession is bound to go underground. The reason is that if brothels are criminalised then, then there would be no way for a prostitute to manage his or her business which would totally kill the prospects of her gaining more clients and thereby earning a reasonable living. It has been seen time and again that extreme compulsions and circumstantial coerciveness have pushed individuals to do illegal acts, and this criminalising of brothels would result in the same rise of illegal brothels, thereby resulting in the increase of such crimes. This would not only again hamper the basic human rights of consenting prostitutes but also start the vicious cycle of re-victimising the victims of the human trafficking; that is to say, who were trafficked but now are consenting prostitutes, will be punished twice once they when there were undergoing trafficking and now at the hands of the unjust legislation and legal system.

Sections 4 and 6 - criminalize any person who knowingly lives on the earning of a prostitute. Through this section, the act aims to punish the tout or the pimps of such prostitutes, which in turn, the act again assumes is punishing the traffickers. The act does not make a distinction between such touts or pimps and traffickers. Therefore the traffickers thus evade the penalty, while those touts or pimps who may be working for voluntary prostitutes are punished. Also, section 6 criminalises the act of detaining persons in brothels, which again presumes only victims of human trafficking are kept in brothels and again overlooks voluntary prostitutes alike. The clients of such prostitutes are also criminals if prostitution is practised inside such brothels. Therefore, making prostitution even more difficult to practice.

Further, it is a common practice among police officials that whenever a brothel is raided, all sex workers are detained or arrested. This further leads to the re-victimisation of the trafficked individuals who are being coercively made to practise prostitution while simultaneously violating the right to life under article 21 of the prostitutes who practice prostitution voluntarily out of their own accord., in the case of *Udhaya Kumar v The State and Others*¹⁰. In this case, the court opined that since there was no evidence to show that there was coercion by the petitioner on the sex workers to commit the act, he could not be penalised for his mere presence at the place. The court reiterated that as per the decision of the Supreme Court in the above case, *any sex worker, being an adult and indulging in a sexual act with his/her own consent, the police authorities should refrain from taking action against such individuals.*

¹⁰ *Udhaya Kumar v The State and Others*, 2022 LiveLaw (Mad) 257.

The Supreme Court case of *Budhadev Karmaskar v The State of West Bengal*¹¹ iterated that sex workers have all rights enshrined in the constitution of India and should not be deprived of them on the pretext that they are sex workers. The court held “...iii) *Whenever there is a raid on any brothel, since voluntary sex work is not illegal and only running the brothel is unlawful, the sex workers concerned should not be arrested or penalised or harassed or victimised.(v) It has been noticed that the attitude of the police to sex workers is often brutal and violent. It is as if they are a class whose rights are not recognised. The police and other law enforcement agencies should be sensitised to the rights of sex workers who also enjoy all basic human rights and other rights guaranteed in the Constitution to all citizens. Police should treat all sex workers with dignity and should not abuse them, both verbally and physically, subject them to violence or coerce them into any sexual activity.*”

Section 5- Another similar assumption is made in Section 5, where people who induce, procure, or take willing people for prostitution are criminalized.

The major observation that the researcher has made is that in this section above sections the act completely overlooks the consent part of a prostitute and treats both the consenting and non-consenting prostitutes and people related to prostitution alike. The Supreme Court in the case of *Budhadev Karmaskar v The State of West Bengal*¹² iterated that “(i) *Sex workers are entitled to equal protection of the law. Criminal law must apply equally in all cases, on the basis of ‘age’ and ‘consent’. When it is clear that the sex worker is an adult and is participating with consent, the police must refrain from interfering or taking any criminal action. There have been concerns that police view sex workers differently from others. When a sex worker makes a complaint of criminal/sexual/any other type of offence, the police must take it seriously and act in accordance with the law.*”

Another assumption made in the act is all women involved in prostitution are criminals. The act starts criminalizing prostitution from Section 7.

Section 7 of the ITPA reads as follows:

“1) Any person, who carries on prostitution and the person with whom such prostitution is carried on, in any premises,—

(a) which are within the area or areas, notified under sub-section (3), or

(b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as

¹¹ *Budhadev Karmaskar v The State of West Bengal*, 2022 LiveLaw (SC) 525.

¹² *Supra* note 9.

may be notified in this behalf by the Commissioner of Police or magistrate in the manner prescribed, shall be punishable with imprisonment for a term which may extend to three months.....”¹³

This section aims at public decency and maintaining public morality by criminalizing prostitution at public places. Now this section instead of preventing human trafficking aims at the moral cleansing of society, at the cost of a prostitute’s living and assumes the prostitutes have a defiling public presence, which will defile the public environment. Making such assumptions against prostitutes violates Article 14 right to equality, as this section degrades the reputation of prostitutes in the eyes of the public.

IV. PROBLEMS IN THE ACT

The Act, though first enacted in the year 1958, has not been effective against human trafficking. An analysis of the number of cases¹⁴ from 2011 to 2015, shows an upward increasing trend in the number of cases. The researcher contends that this is due to the Act being plagued by various problems, some of which stem from the above-mentioned assumptions. The problems listed below are in the context of the problematic sections of the act, in conjunction with the overall legislative intent of the Act.

➤ Section 10A of ITPA seems to be violative of Article 14 of the Indian Constitution as the term “female offenders” has been used to discriminate against women on sexual grounds. On the contrary, the term “persons” has been inserted in section 2(f) after the amendment, replacing the term “women and children” from the purview. Female sex workers, in the name of rehabilitation, are being portrayed as the guilty counterpart and are punished for the same.

➤ Section 4 of ITPA states that if an individual above the age of 18 years is found to be dependent on the earnings of a sex worker, then he/she shall be punished with imprisonment of 2 years. The section here is ignorant of the children of sex workers above the age of 18 trying to pursue higher education. According to this act, children of sex workers above the age of 18 must work in order to make a living or to study further. (They are not at par with other children belonging to parents in a normal profession -this act is discriminatory and unfair to the children of prostitutes. The children of prostitutes above the age of 18 have every right to lead a normal life.)

➤ Section 7(b) of ITPA states that prostitution cannot be carried on in and around 200

¹³ Id. note no. 5.

¹⁴ Supra note 2.

meters of a public place of “any kind”. This raises the question of whether prostitutes should carry out their business outside the limits of the city. The main objective of this act is to eliminate the trafficking of people for the sake of prostitution and not to eliminate prostitution as a profession.

➤ If brothels are criminalised, the main source of income for the prostitutes vanishes. If prostitutes cannot publicise their work or seduce a person for sexual advances, how are they supposed to make a living for themselves?

➤ The Bombay HC, (in the case of *Navjeevan Mahila Vastigruha, Deonar*), has stated that “Adult women who are victims of trafficking cannot be detained as “victims are major and have a right to reside at the place of their choice.”- hence, this section is to be amended for adult women.

➤ Section 8 of ITPA states that if any person by words, gestures or wilful exposure of her person (whether by sitting by the window/balcony), attempts to attract another person for the sake of prostitution would be punishable with imprisonment for a term of 1 year with fine.

Section 7 criminalises prostitution in public places - The problem with such a provision is that it takes away the livelihood of the prostitutes without taking into consideration that they also have the right to perform their business according to Article 19(1)(g)¹⁵. Now, while this right is not absolute and is subject to reasonable restrictions, such does not seem reasonable from the researcher’s point of view. Asking a person not to carry on his/her business in a public place is essentially choking out resources to carry out one's profession.

“In *State of Uttar Pradesh v Kaushalia*, 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.”¹⁶

The researcher disagrees with the above decision of the court as the courts, while somehow assuming that they must preserve the moral fabric of the country, are taking away their

¹⁵ INDIA CONST. art. 19, cl. 1.

¹⁶ *Supra* note 4.

livelihood by prostitution.

Now Section 8 criminalizes seducing or soliciting in a public place for the purpose of prostitution.¹⁷

Now again, this section is very vague as it fails to mention which activity of the person who is a prostitute, comes under seducing.¹⁸ In a few cases, it has been observed, that this section has been used with a patriarchal mindset¹⁹ to determine what counts as seducing, for example, acts like sitting by the window or standing on the balcony have been counted as acts of seduction. Moreover, another problem that points towards the gender biases of this act is the applicability of different terms of punishments to men and women, with men getting lesser punishment (up to 3 months) than women (up to 6 months). Such is the state of gender bias in the act.

Moreover, Section 20 of the act gives power to the magistrate to evict a person just for the reason he/she is a prostitute. Such powers not only make the lives of the prostitutes miserable but also make it a challenge for them to earn their living. If they are to be evicted from every jurisdiction of a magistrate, where do they live, where do they practise their trade are the main glaring questions which should have crossed the minds of the legislators while drafting such legislation.

Moreover, the absolute criminalization and eviction of prostitutes not only makes it impossible for prostitutes to survive in such conditions but also criminalizes victims.²⁰ Since the law does not make a distinction between willing prostitutes and trafficked victims, in many cases the victims of human trafficking are also punished under the sections. Hence criminalization of prostitution as mentioned in the Act only further leads to the criminalisation of victims.

Moreover, this act gives immense power to the police which results in police misusing their powers in the absence of a check on it. This often results in rent-taking practices of the police from the brothels and therefore, defeating the purposes of the act.²¹

V. CONCLUSION

The researcher on a concluding note would like to point out that, even though this act is named

¹⁷ Supra note 5.

¹⁸ Supra note 4

¹⁹ Jean D'Cunha, *Prostitution in a Patriarchal Society: A Critical Review of the SIT Act*, Vol. 22, No. 45, EPW 1919, 1919, (1987).

²⁰ Rishabh Garg & Ritwik Sneha, *Prostitution: Criminalization or victimization of women*, N. (2013), Proceedings of the Second

International Conference of the South Asian Society of Criminology and Victimology (SASCV) Tirunelveli, India: SASCV & Department of Criminology and Criminal Justice, Manonmaniam Sundaranar University 131, 132, (2013).

²¹ Supra note 12.

the Immoral Trafficking Prevention Act, it does not do so, what it actually does is regulate prostitution with an underlying assumption to somehow automatically curb trafficking. Such assumptions are not only logically fallacious, but such a fallacy makes the lives of subjects of this act miserable as many sections are misused to extort money, etc. Moreover, such law is also used to punish the victims as mentioned earlier in the paper and therefore, the traffickers and perpetrators curb the attempts of such victims to go to the police as they tell the victims that even the police are going to arrest the victims themselves even if they go to the Police, therefore, leaving no choice for the victims, except to surrender themselves to evil will of traffickers. There needs to be more strong and dedicated legislation in place to curb trafficking, and its misuse needs to be prevented by the courts by keeping a check on the misuse of the power by the police. Also, sections like section 20 need to be abolished to enable the victims to be rescued instead of them being evicted from the locality.
