"NO SINGLE HAND CAN PRODUCE CLAPS": A FEMINIST EVALUATION OF CUSTOMERS' LIABILITY FOR AVAILING SEXUAL SERVICES UNDER INDIAN LAW

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I. INTRODUCTION

Sex work debates around the world are saturated with normative questions around the commodification of women's bodies and whether selling sexual services is an assault on women's dignity and human rights or whether it is merely an expression of their economic and sexual agency in a world where a range of intimate services is routinely sold on the market.[1]

For feminists who have styled themselves after the crusaders campaigning for the abolition of transatlantic slavery (like William Wilberforce) in that they treat sex work as yet another form of slavery, namely, sexual slavery, the role of the male customer in accessing sexual services is particularly key. These neo-abolitionist radical feminists have for long argued that sex work is a manifestation of patriarchal power and that in economic terms, the most effective way for eliminating sex work would be to clamp down on the demand for sex work. This position is in line with their consistent critique of anti-sex work laws which are invariably implemented against sex workers themselves rather than against customers of sex workers. Hence, they make the demand for decriminalising sex workers while criminalising customers of sex workers, a policy also known as partial decriminalisation. Sweden was one of the first countries to explicitly operationalise this position, and thereafter the "Swedish model" as it came to be known, has been taken up with enthusiasm in several countries including South Korea (in 2004), Finland (2006), South Africa (2008), Iceland (2009), Norway (2009), Canada (2014), Northern Ireland (2015), Spain (2015), France (2016), the Republic of Ireland (2017), and Israel (2018).

Sex workers' groups and advocates of sex workers' rights meanwhile have repeatedly pointed to how the Swedish model has rendered sex workers more vulnerable to various forms of physical

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[1] For recent summaries of the state of these debates, see ELIZABETH BERNSTEIN, BROKERED SUBJECTS: SEX TRAFFICKING AND THE POLITICS OF FREEDOM (2018); NICOLA MAI, MOBILE ORIENTATIONS: AN INTIMATE AUTOETHNOGRAPHY OF MIGRATION, SEX WORK, AND HUMANITARIAN BORDERS (2018); CARISA R. SHOWDEN AND SAMANTHA MAJIC (EDS.), NEGOTIATING SEX WORK UNINTENDED CONSEQUENCES OF POLICY AND ACTIVISM 2014.

and sexual violence. They argue that criminalising customers invariably also adversely affects sex workers and that the Swedish model is therefore just another way of abolishing sex work, including voluntary sex work performed by sex workers without the latter's consultation or consent. Normatively, they do not find the sale of sexual services for money to be problematic in and of itself and therefore advocate for reduced state interference in the form of complete decriminalisation where the sale and purchase of sexual services are not crimes and are governed by other general laws applicable to the public at large. They are however against trafficking which involves coercing anyone into selling sexual services.

The oppositional perspectives of abolitionists and sex work advocates have been reflected in the passage of laws governing sex work at various levels including at the international level, the transnational level (e.g. 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, ("Protocol")[2] supplementing the UN Convention against Transnational Organised Crime 2000,[3] the national level (The Immoral Traffic (Prevention) Act, 1956 (ITPA)) and the provincial levels. Indeed, these positions played out once again when the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill (Trafficking Bill) was proposed in 2016 and passed by the Lok Sabha in July 2018 before it lapsed later that year prior to being presented to the Rajya Sabha. While this Bill is being reworked for presentation before Parliament, courts have been adjudicating cases involving customers of sex workers. In this article, I ask what exactly is the status of a customer who engages the sexual services of a sex worker under Indian law?

This article begins with a brief overview of the relevant legal provisions relating to sex work. I then identify the provisions that have been used by prosecutors against customers of sex workers and how these have been interpreted by the various High Courts around the country. An interpretation of recent court cases on customers' liability for accessing sexual services reveals a distinct divide between High Courts. There is nevertheless a preponderance of cases that suggest that customers cannot be held liable under various provisions of the ITPA. There is instead a willingness to hold customers liable under anti-trafficking provisions of the Indian Penal Code, 1860 ushered in in 2013. Based on my analysis, I examine the implications of these decisions for the regulation of sex work in India, particularly in light of the impending introduction of the Trafficking Bill. If judicial

[2] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter *Trafficking Protocol*].
[3] Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003).

trends *vis-à-vis* customer liability are shifting away from the use of anti-sex work laws like the ITPA to anti-trafficking laws such that the ITPA continues to be enforced only against sex workers, I argue in conclusion that it is time to consider repealing the ITPA and decriminalise sex work.

II. LAWS PERTAINING TO SEX WORK AND TRAFFICKING

Laws relating to sex work in India encompass both general criminal laws such as the Indian Penal Code, 1860 (IPC) and special and local laws such as the ITPA, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Juvenile Justice Act, 2015 and various state specific versions of the Goondas Act. The choice of law to target sex work however, varies according to states. Some states like Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra use the ITPA extensively[4] while states like Madhya Pradesh and West Bengal use relevant provisions of the IPC such as Sections 366A, 372 and 373.[5]

A. GENERAL LAW: THE IPC

Provisions within the IPC relate to kidnapping or abducting with the intent to secretly or wrongfully confine a person (Section 365), procuration of a minor girl (Section 366A), importation of a girl from foreign country (Section 366B), kidnapping or abducting in order to subject person to grievous hurt, slavery, etc. (Section 367), buying or disposing of any person as a slave (Section 370),[6] habitual dealing in slaves (Section 371), selling a minor for the purposes of prostitution (Section 372), buying a minor for purposes of prostitution (Section 373) and unlawful compulsory labour (Section 374).[7] Recent amendments to the IPC in 2013 have ushered in Sections 370 and 370A which deal with trafficking; Section 370 relates to trafficking in general but Section 370A is focused on engaging the services of a trafficked minor or person for sexual exploitation.

B. SPECIAL AND LOCAL LAWS: THE ITPA

Although there are several special and local laws which are invoked against sex workers, I focus on the ITPA in particular. The ITPA has a long and complex history but suffice it to say for our purposes, that it was passed by the Indian Parliament as a result of India's ratification of the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the

[4] NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2019 STATISTICS VOLUME 1, 58 (2020) https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf [hereinafter *NCRB 2019 report*].
[5] *Id.* at 30, 100, 254.
[6] This was replaced in 2013 by a new Section 370 under the Criminal Law (Amendment) Act, No. 13, Acts of Parliament, 2013.
[7] Indian Penal Code, No. 45, 1860.

Prostitution of Others.[8] Anti-trafficking laws in India however have a longer lineage and were passed by various provincial Indian governments as a result of the international movement against trafficking for sex work, also known as "white slavery" at the turn of the 20th century.[9] The ITPA was originally the Suppression of Immoral Traffic Act, 1956. It was amended in 1986 to increase certain penalties. Section 2(f) of the ITPA defines prostitution as "the sexual exploitation or abuse of persons for commercial purposes".[10] The act of sexual intercourse for consideration therefore is not illegal per se; however, every other act required to carry out sex work, as listed below, is a crime. The aim of the legislation, as made abundantly clear from the Preamble to the 1956 version of the ITPA, is "to inhibit or abolish commercialised vice namely, the traffic in women and girls for the purpose of prostitution as an organised means of living".[11] Note the conflation here between trafficking and sex work.

The ITPA punishes anyone maintaining a brothel (Section 3), living off the earnings of prostitution (Section 4), procuring or detaining a woman for the sake of prostitution (Sections 5 and 6), and seduction of a person in custody (Section 9). The Act also punishes any person who solicits or seduces for the purpose of prostitution (Section 8) or who carries on prostitution in the vicinity of public places (Section 7). Moreover, Section 15 allows the police to conduct raids on brothels without a warrant, based on the mere belief that an offense under the ITPA is being committed on the premises. As such, under Section 20, which is vaguely worded, a magistrate can order the removal of a prostitute from any place within his jurisdiction if he deems it necessary to the general interest of the public. In addition, the Act provides for the establishment of corrective institutions in which female offenders are detained and reformed. There is no specific section punishing the customer, but customers can be prosecuted under Sections 7 and 8 for prostitution in a public place, and soliciting, respectively. As a result, the legal sale of sexual services under the ITPA would be restricted to scenarios where a sole sex worker sells sexual services for her own benefit in a discrete manner in a place that is not in or near any public place, but even she can be evicted by a magistrate under Section 20, in the interests of the general public.

[8] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *adopted* Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951).
[9] STEPHEN LEGG, PROSTITUTION AND THE ENDS OF EMPIRE: SCALE, GOVERNMENTALITIES, AND INTERWAR INDIA (2014).
[10] DR. G. B. REDDY, PREVENTION OF IMMORAL TRAFFIC AND LAW 35 (2004).
[11] B. R. BEOTRA, THE SUPPRESSION OF IMMORAL TRAFFIC IN WOMEN AND GIRLS ACT, 1956, WITH STATE RULES 10 (2nd ed. 1981).

C. THE SWEDISH MODEL PROPOSED IN INDIA

After the adoption of the Protocol in 2003, many countries revisited their anti-sex work laws. After all, trafficking was then routinely (and continues to be) conflated with trafficking for sex work and with sex work itself. In India, a further amendment to the ITPA was proposed in 2006 which effectively sought to introduce the Swedish model in India. The 2006 Amendment proposed by the Ministry of Women and Child Development (MWCD) criminalized the customers of sex workers. First, Section 5A introduced an offence of trafficking with language from Art 3 of the Protocol.[12] Then, Section 5C provided that any person who visited or was found in a brothel for the purpose of sexual exploitation of any victim of trafficking would be punished for up to three months, or receive a fine of up to twenty thousand rupees, or both; the fine alone was forty times the amount currently imposable under the ITPA. In the case of a second or subsequent conviction, the customer could be imprisoned for up to six months and be made to pay a fine of up to fifty thousand rupees. Sexual exploitation was not defined but note that Section 2(f) of the ITPA defines prostitution as "the sexual exploitation or abuse of persons for commercial purposes." Trafficking was broadly defined to include a wide range of means by which a person can be trafficked, so arguably all sex workers could have been viewed as trafficked and almost all customers liable for prosecution under Section 5C. In addition, the proposed amendment sought to repeal Section 8 of the ITPA, which was disproportionately used against female sex workers for soliciting, as well as Section 20, which grants magistrates wide powers to evict sex workers from any place in their jurisdiction. The proposed amendment exponentially increased the existing penalties for brothel keeping and detaining a person in premises where prostitution was carried on. In effect then, the 2006 Amendment sought to decriminalize the sex worker while further criminalizing the customer and other stakeholders; this was in effect partial decriminalization. For a range of reasons including the importance of HIV prevention programs to the government and differences of opinion within the government, the Amendment was not passed.[13]

[12] "Section 5A: Whoever recruits, transports, transfers, harbours, or receives a person for the purpose of prostitution by means of (a) threat or use of force or coercion, abduction, fraud, deception; or (b) abuse of power or a position of vulnerability; or (c) giving or receiving of payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons. *Explanation*. Where any person recruits, transports, transfers, harbours or receives a person for the purposes of prostitution, such person shall, until the contrary is proved, be presumed to have recruited, transported, transferred, harboured or received the person with the intent that the person shall be used for the purpose of prostitution"
Immoral Traffic (Prevention) Amendment Bill, No. 47, Gazette of India, pt. III, sec. 2 (2006).

[13] *See* Prabha Kotiswaran, *Sword or Shield?, Interventions: International Journal of Postcolonial Studies*, 15(4) INTERNATIONAL JOURNAL OF POSTCOLONIAL STUDIES 530, 530-548 (2013).

D. THE INTRODUCTION OF ANTI-TRAFFICKING OFFENCES IN 2013

After the 2006 Amendment lapsed before Parliament, India ratified the Protocol in 2011 and contemplated introducing anti-trafficking offences mirroring the Protocol into Indian law. Meanwhile, in the aftermath of the rape and murder of Jyoti Pande in 2012, the Verma Committee was formed to recommend changes to laws against sexual violence. In the course of suggesting amendments to the rape law, the Committee also turned its attention to trafficking. Thus, the second longest chapter in the Justice Verma Committee Report after rape was on trafficking. This resulted in the Committee's proposal to introduce a stand-alone trafficking offence. However, when the Justice Verma Committee first proposed the offence of trafficking, it formulated trafficking as being equivalent to voluntary sex work, much in the vein of the 1949 Convention. This proposed offence was in fact included in the Criminal Law (Ordinance) 2013.[14] It was only after the National Network of Sex Workers sought clarification on the scope of the section that the Verma Committee responded to the effect that it would exclude voluntary sex work. Section 370 as it was introduced in the Criminal Law (Amendment) Act, 2013 reflects this understanding.

E. SECTION 370 ANALYSED

The new Section 370 on trafficking replaces the previous Section 370 offence of buying or disposing off a slave. Section 370 more or less replicates the definition of trafficking in the Protocol. It reads:

370. (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—
First. — using threats, or
Secondly. — using force, or any other form of coercion, or
Thirdly. — by abduction, or
Fourthly. — by practising fraud, or deception, or
Fifthly. — by abuse of power, or
Sixthly. — by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.
Explanation 1. — The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

[14] Criminal Law (Amendment) Ordinance, No. 3, Acts of Parliament, 2013.

Explanation 2. — The consent of the victim is immaterial in determination of the offence of trafficking.

However, there were some significant departures from the Protocol's definition. The Protocol defines trafficking to cover three components which must be proved in the case of adults, an action element, means used for trafficking and the purpose of trafficking.[15] The definition of trafficking in Section 370 omitted a key means of trafficking, namely abuse of a position of vulnerability. This is a term with no legal precedence in international or domestic law but which is thought to have been inserted by abolitionists into the Protocol to bring women who voluntarily take to sex work within the ambit of the offence of trafficking.[16]

Furthermore, Section 370 dropped a key form of exploitation, namely, forced labour, possibly because of the Indian Supreme Court's broad understanding of forced labour as any labour paid less than the minimum wage.[17] Finally, paragraph (b) of Article 3 of the Protocol notes that the consent of a victim of trafficking in persons to the intended exploitation set forth in Article 3(a) shall be irrelevant where any of the means set forth in that clause have been used. In other words, where a person has used threats, coercion, force, deception, fraud, abuse of power and abuse of a position of vulnerability to recruit a trafficked person, then the person's consent to the resultant exploitation will not matter. Preparatory notes to the Protocol suggest that this was by way of clarification to preclude traffickers from claiming that the victim consented to exploitation where

[15] Article 3 reads
"(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
(d) "Child" shall mean any person under eighteen years of age."
Trafficking Protocol, *supra* note 2, art. 3.

[16] UNODC, ISSUE PAPER: ABUSE OF A POSITION OF VULNERABILITY AND OTHER "MEANS" WITHIN THE DEFINITION OF TRAFFICKING IN PERSONS 22 (2013), www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf (last visited May 30, 2021).

[17] PRABHA KOTISWARAN, *AN INNOCENT OMISSION? FORCED LABOUR AND INDIA'S ANTI-TRAFFICKING LAW*, LONDON SCHOOL OF ECONOMICS (JUNE 10, 2013), HTTPS://BLOGS.LSE.AC.UK/SOUTHASIA/2013/06/10/AN-INNOCENT-OMISSION-FORCED-LABOUR-AND-INDIAS-ANTI-TRAFFICKING-LAW/.

force or fraud was used to recruit them thereby thwarting any attempts at prosecuting them.[18] However, Section 370 alters this to state that the consent of the victim is immaterial in determining the offence of trafficking. So even where a victim may have voluntarily agreed to be subject to a certain form of exploitative work, his or her consent would be immaterial. In the case of contentious forms of labour such as sex work, there is a risk that prosecutors will discount a sex worker's consent and conflate voluntary sex work with trafficking. This takes us back to the position of the 1949 Convention wherein the consent of a woman to doing sex work is irrelevant. Note that Section 5(a) of the ITPA which drew on the 1949 Convention prohibits procuring or attempting to procure a person whether with or without his/her consent, for the purpose of prostitution.

Since the Criminal Law (Amendment) Act, 2013 was passed, an analysis of a total of 62 appellate cases between April 2013 and August 2017 revealed that section 370 has often been invoked in conjunction with various other legislations. The break-up of such laws as of 2017 was: The Immoral Traffic (Prevention) Act, 1956 (17); The Bonded Labour System (Abolition) Act, 1976 (8); The Child Labour (Prohibition and Regulation) Act, 1986 (8); IPC Provisions on Rape, Sexual harassment and Outraging modesty (17); The Protection of Children from Sexual Offenses Act, 2012 (17); Juvenile Justice (Care and Protection Of Children) Act, 2000 (17) and other provisions (45).

Some of the cases related to sex work but a few also dealt with the exploitation of workers in other sectors, such as brick kilns, leather factories, domestic work, and Indian migrants to other countries (*e.g.*, Malaysia). Appellate court judges have so far typically dealt with Section 370 in a procedural context; there has been little elaboration of the substantive provisions of the law. Interestingly, Section 370 is used extensively beyond trafficking cases. It often appears as an additional charge in criminal law cases relating to rape and sexual harassment, as well as in completely unrelated cases (e.g. where a wife left her husband and took her child to live with another man). Section 370 is also frequently used as a proxy offence for wrongful confinement. Exploitation for the purposes of Section 370 is thus understood rather broadly and the true scope and application of Section 370 is therefore dynamic.

[18] Anne Gallagher, *The International Legal Definition of "Trafficking in Persons": Scope and Application*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOUR AND MODERN SLAVERY (Prabha Kotiswaran ed., 2017).

F. SECTION 370A ELABORATED

In addition to Section 370, the Criminal Law (Amendment) Act, 2013 introduced a new section, Section 370A which criminalised those who engaged trafficked persons or minors for *sexual* exploitation. Notably, the Criminal Law (Amendment) Ordinance, 2013 proposed to criminalise anyone who engaged trafficked persons *irrespective* of the sector in which they worked. Yet, the fact that those engaging a minor or adult for sexual exploitation alone are punished but not those who engage others for labour exploitation is not surprising considering that the Justice Verma Committee had the ear of several neo-abolitionist Indian groups.[19] Section 370A reads as follows:

> (1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.
>
> (2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.

The term "sexual exploitation" is not defined in the IPC. The ITPA defines prostitution as sexual exploitation but there is no definition of the term in international law either. In 2003, the UN Secretary General issued Special Measures for Protection from Sexual Exploitation and Sexual Abuse that defined sexual exploitation as: *"any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another".*[20]

One might argue that Section 370A criminalises demand for sex work in a way that is not so different from the proposed amendment to the ITPA in 2005. However notably in 2005, the proposed Section 5C criminalised anyone who visited a brothel or was found in a brothel for purposes of sexual exploitation of a trafficked person. Section 370A is a more circumscribed

[19] For an account of how these reforms were achieved by abolitionist activists, *see* Prabha Kotiswaran, *Governance Feminism's Others: Sex Workers and India's Rape Law Reforms, in* GOVERNANCE FEMINISM: NOTES FROM THE FIELD (Janet Halley et. al. eds., 2019).

[20] U.N. Secretariat, Special measures for protection from sexual exploitation and sexual abuse, Secretary General's Bulletin, Int'l Law Comm'n, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003).

offence in that it criminalises the actions of a person who knowingly engages a trafficked minor/person for sexual exploitation. I will discuss its interpretation later in this article.

III. CUSTOMERS' (LACK OF) LIABILITY UNDER THE ITPA/SECTION 370, IPC

As mentioned earlier, the ITPA does not prohibit the sale of sexual services per se but it does criminalise the exploitation of sex workers by third parties or any aspect of sex work that is likely to cause public nuisance. The ITPA does not explicitly mention the customer's liability but the wording of Sections 7 and 8 suggest that customers can also be held liable under the Act. In fact, Section 8 provides for a differential penalty for men and women which suggests that men might be apprehended for causing public nuisance in the course of engaging sex workers.[21] In a 2004 interview with P.M. Nair, one of the lead researchers of the 2001 National Human Rights Commission study of trafficking,[22] he clarified that although Section 8 was misused by authorities in certain states like Tamil Nadu, it had been used in states like Bihar, Madhya Pradesh, Himachal Pradesh and Jammu and Kashmir to arrest men soliciting on behalf of female sex workers and customers at least 50% of the time that the section had been used.[23] Since 2013, customers have also been prosecuted under Sections 370 and 370A of the IPC. I now turn to how the courts have interpreted these provisions of the ITPA in cases over the past 15 years.

At the outset, it should be mentioned that in many cases that come up before the High Courts, customers are usually apprehended at the site of the flat, apartment or lodge where a police raid is being conducted. Customers are charge-sheeted for a range of offences under the ITPA (Sections 3,4,5,6,7) and sometimes Section 370 of the IPC which they contest in courts, either applying for anticipatory bail or bail along with a petition to quash criminal proceedings against them. As such, these cases do not offer courts an occasion to elaborate on the substantive aspects of these offences in any depth. Nevertheless, the cases reveal how difficult conviction under these sections is likely to be.

[21] An offence under this section "shall be punishable on first conviction with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and in the event of a second or subsequent conviction, with imprisonment for a term which may extend to one year, and also with fine which may extend to five hundred rupees; A woman who is guilty of this offence is liable for imprisonment of up to 6 months and fine of 500 Rs whereas a man "shall be punishable with imprisonment for a period of not less than seven days but which may extend to three months."

[22] SANKAR SEN AND P. M. NAIR, A REPORT ON TRAFFICKING IN WOMEN AND CHILDREN IN INDIA 2002-03, (National Human Rights Commission, UNIFEM and Institute of Social Sciences eds., 2004). [hereinafter SEN AND NAIR]. My interview with PM Nair was conducted on June 27, 2004.

[23] In fact, under SITA, courts have held that both sex workers and their customers could be held to be liable under Section 7. State of Mysore v. Susheela and Others, 1965 SCC Online Kar 119, ¶ 27.

A. THE NEED TO PROVE SEXUAL INTERCOURSE AND EXCHANGE OF MONEY

For one, customers' mere presence does not justify a prosecution for prostitution which according to Section 2(f) of the ITPA involves "sexual exploitation" which in turn requires some sexual intercourse to have transpired. In *Sushanta Kumar Patra alias Hemanta Kumar Das and others* v. *State of Orissa*,[24] the court in considering a petition to dismiss proceedings under Section 7 of the ITPA referred to Section 2(f) of the ITPA to note that it required "an element of commercial purpose which means offer of money by the customer and acceptance of the same by the person who offers her body in lieu of consideration received." Predictably, there was no proof of the exchange of money in this case. This is likely to be the case in numerous such scenarios where sex work happens.

B. THE NEED TO PROVE SEXUAL EXPLOITATION

Further, there is unanimous agreement on the part of various High Courts around the country that there is no specific provision in the ITPA that is directed towards customers.[25] Consequently, some courts have clarified that "A person who visits brothel house only as a customer is not covered by any of the above provisions or any other provision of the ITP Act, 1956."[26] Thus, in *Arjun Rao and Ors. v. The State of A.P.*[27] the Andhra Pradesh High Court dismissed proceedings under Sections 3, 4, 5 of the ITPA but gave thought to whether the customer could be booked under Section 7(1) of the ITPA. The court looked at the definition of prostitution under Section 2(f) and decided that "mere (sic) having sexual intercourse by paying money does not attract "prostitution" mentioned in Section 7 of the Act" since prostitution involved "sexual exploitation or the abuse of persons for commercial purposes". In *Z. Lourdiah Naidu and Ors. v. State of Andhra Pradesh*,[28] the Andhra Pradesh High Court while dismissing proceedings under Sections 3 and 4 of the ITPA held that

[24] The Oriental Insurance Co. Ltd.. Bhubaneswar v. Sri Purna Shaw and Another, 2000 SCC OnLine Ori 224.

[25] Suraj v. State of Karnataka, Crl. P. 7110/2011 (Kar.); Arjun Rao and Ors. v. State of A.P., Crl. P. 1326, 1786, 1909 and 5715/2013 (Andhra Pradesh); Santana Nagaraju v. State of A.P., Crl. P. 5993/2013 (Andhra Pradesh) Sahil Patel and Others v. State Of A.P. Rep. by Its Public, Crl. P. 2572/2014 (Andhra Pradesh) [hereinafter Sahil Patel]; Mahesh Hebbar alias Mahesh v. The Station House Officer, Banaswadi Police Station, W.P. 56504/2015 (Kar.); State of Karnataka v. Samuel Tamburaj, Crl. R. P. 1107/2015 (Kar.); Sanaulla v. State of Karnataka and Ors., Crl. P. 54250/2016 (Kar.); Mohammed Rafi v. State of Karnataka, 2016 (2) AKR 263; Pravesh Chatri v. State of Karnataka, Crl. P. 5808/2016 (Kar.); Aswath alias Naveen v. State of Karnataka, Crl. P. 9682/2016 (Kar.); Raghavendra alias Raghu v. State of Karnataka, Crl. P. 8055/2016 (Kar.); Shivaraj v. State of Karnataka, Crl. P. 200782/2016 (Kar.); Ashwath @ Naveen v. State of Karnataka, Crl. P. 9682/2016 (Kar); Srinivasa Babu v. State of Karnataka, Crl. P. 7632/2017 (Kar.); Abhijit Kallianpur v. State of Karnataka, Crl. P. 1959/2017 (Kar.); Poornachandra S. v. State of Karnataka, Crl. P. 3760/2017 (Kar.); Chandan v. State of Karnataka and Ors., Crl. P. 9276/2018 (Kar.); Sri Neelesh Kumar and Another v. State of Karnataka, Crl. P. 8817/2018 (Kar.); Hidhaytulla v. The State by Indiranagara P.S., Bengaluru and Another, Crl. P. 971/2018 (Kar.); Halesh v. State of Karnataka Crl. P. 315/2019 (Kar.); Tasleem v. State of Karnataka, Crl. P. 8985/2019 (Kar.); Viswanath Hiremath v. State of Karnataka, Crl. P. 2164/2019 (Kar.); Denin Baby v. State of Karnataka, 2019 SCC OnLine Kar 3068.

[26] Abhijit Kallianpur v. State of Karnataka, Crl. P. 1959/2017 (Kar.).

[27] Arjun Rao and Ors. v. State of A.P., Crl. P. 1326, 1786, 1909 and 5715/2013 (Andhra Pradesh).

[28] Z. Lourdiah Naidu and Ors. v. State of Andhra Pradesh, 2013 (2) ALD Crl 393.

Section 4 of the Act would be attracted only if a person knowingly lives on the earnings of the prostitution of any other person. The activity carried out in a given premises will amount to prostitution within the meaning of Section 2 of the Act only if sexual abuse by exploitation of the person is done for commercial purposes. Neither the brothel keeper, sex worker or customer could be held liable under this Section. This was followed by the High Court in *Goenka Sajan Kumar* v. *The State of A.P.*[29] where proceedings against the customer under Sections 3,4,5 of the ITPA were quashed. This implies that even if the police were to apprehend a customer in a brothel engaging in sex with a sex worker, that he could not be penalised. "..Put it differently, engaging in sexual activity even in brothel is not made an offence punishable under the Act.."[30]

In the 2015 case of *Naveen Kumar*,[31] the Andhra Pradesh High Court agreed with its own previous decisions in *Goenka Sajan Kumar v. The State of A.P.* and *Z. Lourdiah Naidu v. State of Andhra Pradesh* that a customer could not be held liable under Section 4 of the ITPA. In the same year, in the case of *Katamoni Nagaraju v. State of Telangana*,[32] the court relied on *Sajan Kumar* and *Lourdiah Naidu* to hold that Sections 3-5 are not applicable to a customer.
The court observed

> It is interesting to note that none of the other penal provisions in the Act either describe him as an offender. Therefore, there is any amount of force in the submission of learned counsel for petitioner that a customer to the flesh trade cannot be treated as an offender under the Act.

The Telangana High Court confirmed this position in 2018 [33] and relied on *Sahil Patel v. The State of A.P.*[34] and *Vinod v. State of Gujarat*[35] to hold that the customer was not liable under Sections 3-5 of the ITPA.

Similarly, the Karnataka High Court has noted that although a customer is virtually encouraging prostitution, in the absence of a specific provision directed against a customer, whether he goes to

[29] Goenka Sajan Kumar v. State of A.P., 4161/2014 (Andhra Pradesh).
[30] Vijayakumar and Ors. v. State of Kerala and Ors. Crl. M.C. 7778/2015, ¶ 7 (Ker.).
[31] S. Naveen Kumar @ Naveen v. State Of Telangana, 2015 SCC OnLine Hyd 154 [hereinafter S. Naveen Kumar @ Naveen].
[32] Katamoni Nagaraju v. State of Telangana, Crl. P. 1536/2015 (Tel.).
[33] Mohammad Riyaz v. State Of Telangana, Crl. P. No. 5803/2018 (Tel.) [hereinafter Mohammad Riyaz].
[34] Sahil Patel, *supra* note 25.
[35] Vinod v. State of Gujarat, Crl. M.A. 8156/2017 (Guj.) [hereinafter Vinod v. State of Gujarat and Ors.].

a brothel or a massage parlour, prosecution cannot be sustained under Sections 3-7 of the ITPA and Section 370 of the IPC.[36]

C. JUDICIAL DISSENT ON LACK OF CUSTOMER LIABILITY

Most judges do not express an opinion on the absence of a provision penalising the customer but some judges find this position problematic when in fact customers were *de facto* encouraging prostitution and exploiting the female victim.[37] Justice Durga Prasad Rao of the Telangana High Court noted for instance:[38]

> .., no doubt the Immoral Traffic (Prevention) Act, 1956 is a piece of legislation aimed at preventing trafficking of women. However, the point is whether the said noble aim can be achieved by merely making organisers of brothel house and pimps as offenders while leaving the customers of flesh trade scot free. As the saying goes no single hand can produce claps, vicious circle of immoral trafficking will not be completed without active participation of the flesh customers. In my considered view, it is unwise to say that a customer who lurks in day and night in search of hidden avenues to quench his sexual lust is a hapless victim of a crime to place him out of the reach of the tentacles of the law which is intended to eradicate the pernicious practice of immoral trafficking of women. Such an unwarranted sympathy on a criminal will not help achieve desired results though aimed at high. After all, the Court can only describe the law as it is but cannot dictate what it ought to be. Yet, through this judgment I appeal to the Legislature to ponder over the possibility of bringing the flesh customers within the fold of Immoral Traffic (Prevention) Act, 1956.

This decision is notable for its ready conflation of trafficking with sex work. Indeed, the Andhra Pradesh legislature and the executive have at various points considered criminalising customers of sex workers on this very basis. The first proposal came in 2003 even before the central government contemplated criminalizing demand. More recently, in 2018, the government considered punishing "sex buyers of minors", dependents on the earnings of minors in sex work, public servants buying sex from minors, gang rapists and landlords renting out premises.[39]

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[36] Hidaytullah v. State of Karnataka, Crl. P. 971/2018 (Karnataka); *see* Mahadeva C. v. State of Karnataka Crl. P. 1728/2017 (Karnataka) for a similar decision; also Sarvan v. State of Karnataka, Crl. P. 2187/2018 (Karnataka); Santana Nagaraju v. State of A.P., Crl. P. 5993/2013 (Andhra Pradesh).

[37] Chandrashekar v. State of Karnataka, Crl. P. 2413/2017 (Karnataka).

[38] Mohammed Shaeed v. State of Telangana, Crl. P. 16593/2014 (Telangana).

[39] Workshop, Criminalization of Sex Buyers, A.P Secretariat, Amaravati (July 5, 2018) (on file with author); Note also that the National Crimes Record Bureau Report for 2019 shows how the state of Andhra Pradesh initiates by far, the most number of cases under Section 370A. *NCRB 2019 report*, *supra* note 4, at 30, 102.

The exceptions to the judicial trend of exonerating customers under the ITPA are however limited. One could argue that Section 5 of the ITPA which prohibits procuring a woman for sex work irrespective of her consent (and thus conflates trafficking and sex work) could be interpreted broadly to make a customer liable for engaging sexual services. However, the Gujarat High Court in *Vinod* v. *State of Gujarat* observed:

> The word "procure" is not defined under the Act, but we were referred to its dictionary meaning which says "To bring about by care or pains; also (more vaguely) to bring about, cause, effect, produce; to obtain by care or effort; to acquire; to obtain (women) for the gratification of lust; to prevail upon, induce, persuade (a person) to do something." Giving the normal meaning to the use of the word "procure" in clause (a) of sub-section (1) of Section 5, *what is required is only that he must have obtained a woman or a girl for the purpose of prostitution for a particular individual.*
> (italics mine)

In other words, it is only where a customer performs this role of procuring for another, that prosecution under Section 5 is possible.[40] In a Kerala case involving a widespread network of agents and a brothel keeper who managed a beauty parlour as a façade for facilitating sex work and recruiting women into sex work, the Kerala High Court reproduced this understanding of customers' liability under the ITPA.[41] Here, customers would often take women to different places and would sometimes introduce them to others who the women sold sexual services to. The petitioners in this case demanded quashing of criminal proceedings against them by citing pre-1986 cases to show that the petitioners were not liable but the court rejected these contentions. The court's decision turned on whether women had been procured for 'prostitution'. The court considered the definition of prostitution in the 1956 SITA[42] and in the 1986 ITPA and arrived at the conclusion that the 1986 Amendment had a broader definition of prostitution[43] holding that:

[40] This can be usefully contrasted with the law under the predecessor statute to the ITPA, namely SITA. Here in Cheriyan v. State, 1972 SCC Online Ker 205, ¶ 10. Justice Khalid held that the verb 'procure' could be extended to include obtaining a sex worker's service for oneself.
[41] Baijunath v. Station House Officer, Nadakkavu and Ors., CRP. R.P. 661, 782, 865 etc./2003 (Ker.).
[42] The 1956 Act defined a prostitute as "a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind." Suppression of Immoral Traffic In Women And Girls Act, No. 104, Acts of Parliament, 1956.
[43] The definition reads "prostitution" means the sexual exploitation or abuse of persons for commercial purposes, and the expression "prostitute" shall be construed accordingly, Immoral Traffic (Prevention) Act, 1986, No. 44, Acts of Parliament, 1986.

> *A reading of the word prostitution" after the amendment makes it very clear that it is very wide and there need not be any offering of a female for promiscuous sexual intercourse for hire.*" In *Gaurav Jain v. Union of India*,[44] the Supreme Court held as follows: It has been brought within its frame, by amendment, the act of a female and exploitation of her person by an act or process of exploitation for commercial purpose of making use of or working up for exploitation of the person of the women taking unjust and unlawful advantage of trapped women for one's benefit or sexual intercourse. *The word "abuse" has a very wide meaning everything which is contrary to good order established by usage amounts to abuse.* Physical or mental maltreatment also is an abuse. An injury to genital organs in an attempt of sexual intercourse also amounts to sexual abuse.
>
> It has also held by the Supreme Court that the women found in flesh trade should be viewed more as victims of adverse socio economic circumstances rather than offenders in our society. If there is sexual exploitation or abuse, that will amount to prostitution. (italics mine)

A plain reading of the definitions of prostitution under the 1956 Act and the 1986 Act would suggest that Parliament introduced a narrower definition of "prostitution" in 1986 by requiring sexual exploitation or abuse. However, the Kerala High Court in *Baijunath* offered a contrary interpretation through a wide interpretation of the term 'abuse', one which is even wider than what a radical feminist/neoabolitionist would argue for—namely, that everything contrary to good order established by usage is abuse. Thus, the facts for conviction under Section 5 (procuring for the sake of prostitution) were prima facie made and the High Court in this case left the matter to the trial court to ascertain if in fact the various sub-sections of Section 5 were attracted. As I noted earlier, the facts of this case were somewhat atypical. In cases involving customers who visited brothels, the Kerala High Court agreed with other High Courts that the customer would not be liable under sections 3, 4, 5(a) or 5(c) of the Act.[45]

D. CUSTOMERS' LIABILITY UNDER SECTION 370, IPC

For the most part, the understanding of the lack of customers' liability under the ITPA has been extended to Section 370 of the IPC.[46]

[44] Gaurav Jain v. Union of India, AIR 1997 SC 3021.
[45] Jith Joy v. State of Kerala, CRL. M.C. 218/2018 (Ker.).
[46] Sanaulla v. State of Karnataka and Ors. W.P. 54250/2017 (Kar.); where Sections 370, 370A and 294 were used against customers in a dance bar, the Karnataka High Court exonerated the customers on the basis that the police were being zealous in characterising dancers as 'prostitutes' when in fact they were dancers and waitresses serving

In the 2017 case of *Vinod v. State of Gujarat and Ors.*,[47] the Gujarat High Court came close to holding that the customer of a sex worker could be held liable under Section 370. It observed that:

> 24. Thus, the plain reading of Section 370 of the Indian Penal Code makes it clear that the same has been enacted by the Legislature with the avowed object of preventing sexual exploitation of a girl or woman. The provision makes it very clear that whoever, for the purpose of exploitation, recruits, transports, harbours, transfers or receives any girl or woman for the purpose of sexual exploitation, such person is guilty of the offence under Section 370 of the Indian Penal Code. The provision also makes it very clear that the consent of the victim is not material in determination of the offence of traffic. The expression 'exploitation' includes any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.
>
> 25. *I find it extremely difficult to take the view that a customer at a brothel is not covered within the provision of Section 370 of the Indian Penal Code. A customer at a brothel could be said to receive the victim. I see no good reason why the customer should be kept out of Section 370 of the Indian Penal Code.* (italics mine)

The High Court was making its way through the three elements of the offence of trafficking. The action element was satisfied ("receives") and the means did not matter for the High Court because consent of the victim was considered immaterial. The court finally considered the term "exploitation" and read it broadly, not unlike how the Kerala High Court interpreted the term "abuse" in *Baijunath*. However, the resultant conflation of trafficking with sex work was averted when the court went on to cite the clarification issued by the J.S. Verma Committee to the National Network of Sex Workers to the effect that Section 370 was not meant to cover sex workers "who engage in prostitution of their own volition" and their customers. It then directed the investigating officer to determine whether the sex workers were engaged in selling sexual services of their own

food and drink. See also Sri. Manjunath P v. State of Karnataka, CRL. P. 8764/2016 (Karnataka HC). In Mohammad Riyaz v. The State of Telangana, CRL. P. 5803/2018 (Telangana HC), the Telengana High Court relied on an unreported decision of the Karnataka High Court in "Chandru. S v. The State by Malleshwaram P.S., Bengaluru (Criminal Petition No.5059 of 2017 Karnataka High Court), and "Vinod v. State of Gujarat" to hold that the customer is not liable to the prosecuted for the offence punishable under Section 370 of I.P.C. Courts have also sometimes mistaken Section 370A for Section 370. Thus, in *Neelesh Kumar* v. *State of Karnataka* (Neelesh Kumar v. State of Karnataka, Crl. P. 8817/2018 (Kar.)) the court noted that Section 370 was not applicable because the customer was not indulged in the trafficking of minor girls whereas it is Section 370A that deals with engaging trafficked minor girls.

[47] Vinod v. State of Gujarat and Ors., *supra* note 35.

volition. Thus, the question of liability of the customer turned on whether sexual services were offered willingly by the sex workers at hand.

IV. CUSTOMERS' LIABILITY UNDER SECTION 370A, IPC

Courts have adopted a different interpretation of customer liability under Section 370A when compared to Section 370. The Andhra Pradesh High Court in the 2015 case of *Naveen Kumar*[48] upon an examination of Section 370A of the IPC held as follows:

> "c) The phraseology engages such minor/such person for sexual exploitation in any manner employed in sub-sections (1) and (2) of Section 370A IPC in clear terms indicates that the flesh customer *who hires the victim woman for sexual exploitation also falls within the fold of Section 370A as an offender*.
>
> d) It shall be noted that in the wake of gang rape of Nirbhaya in Delhi which arose an unprecedent public furore, Government considered it fit to drastically amend several provisions of IPC and in that direction appointed a Committee under the Chairmanship of late Justice J.S. Verma, the former Chief Justice of India. The Committee after interacting cross sections of stake holders submitted its detailed report suggesting amendments and introduction of various provisions in penal laws like IPC, Cr.P.C., Evidence Act etc. Consequent upon the said report sub-clause (2) of Section 370 IPC was amended and Section 370A IPC was introduced. Having regard to the avowed object with which report was submitted and amendments and new provisions were introduced in several acts, it cannot be presumed for the moment that Legislators considered customer as an innocent victim in the flesh trade. Therefore, Section 370A takes in its fold the customer also."
>
> (italics mine)

The Andhra Pradesh High Court here made no attempt to clarify what knowledge of trafficked status might mean or what the meaning of "sexual exploitation" was under domestic or international law. There was no attempt to entertain the clarification issued by the Verma Committee against conflating trafficking and voluntary sex work. The High Court instead adopted an abolitionist worldview that equated availing of sexual services with hiring for sexual exploitation.

[48] S. Naveen Kumar @ Naveen, *supra* note 31.

However, elaborating on the elements of the offence is crucial not only because its interpretation could be over-inclusive (through the conflation of trafficking and voluntary sex work) but also because it can be under-inclusive. Consider the case of *Muskan and Ors. v. The State of Maharashtra*, where a customer was prosecuted for sex with a minor for rape under the relevant provisions of the IPC and POCSO.[49] The trial court had already acquitted the customer for offences under Sections 3,4 and 5 of the ITPA, so customer liability under the ITPA was not discussed by the court. However, in relation to the offence of rape, the court repeatedly noted that there was no obligation on the part of the customer to check on the age of the minor. Although the ITPA was not discussed by the court, one could argue that given the expansive understanding of abuse by the Kerala High Court of customer liability under Section 5 in *Baijunath*, the age of the female should affect the determination of whether there was abuse or not committed by the customer. In this case, however, Section 5 was not discussed. Yet a broad understanding of abuse is essential in cases where minors are engaged in sex work. The case law reveals that courts sometimes overlook the culpability of the customer by arguing that the underage girl was close to majority anyway.

In 2016, in *Sahil Patel And Others v. The State Of A.P. Rep. By Its Public*,[50] the Andhra Pradesh High Court relied on *Saleh Mahfooz v. State of Telangana*[51] to hold that once Section 370 and 370A IPC applied, there were no grounds to quash the respective crime proceedings much less to stay investigation. In that case, although no charges had been framed under Sections 370 or 370A, the court was reluctant to quash proceedings against the petitioners who were customers.

In 2018, the Telangana High Court in Mohammed Riyaz[52] took into consideration the varying opinions of the High Courts on customer liability under the ITPA and Sections 370 and 370A of the IPC and held that the customer was not liable to be prosecuted under Sections 3-5 of the ITPA or Section 370 but that he could be held liable under Section 370A.[53]

However, in arriving at this conclusion, the High Court made several errors in understanding the law. To illustrate, Justice Satyanarayana noted:

[49] Muskan and Ors. v. State of Maharashtra, 845, 848, 941/2015 (Bom.) [hereinafter Muskan].
[50] Sahil Patel v. The State of A.P., *supra* note 25.
[51] Saleh Mahfooz v. State of Telangana, Crl. P. 4193/2015 (Andhra Pradesh).
[52] Mohammad Riyaz, *supra* note 33.
[53] The relevant paragraph of the decision reads: "Thus, persuaded by the law declared by different High Courts including this Court the customer is not liable to be prosecuted for the offence punishable under Sections 3 to 5 of the Act and under Section 370 of I.P.C., but he is liable to be prosecuted for the offence punishable under Section 370A(2) of I.P.C."

> "This Court in "S.Naveen Kumar @ Naveen v. State of Telangana" and "Sahil Patel v. The State of A.P." (referred supra), consistently held that the customer is also liable to be prosecuted for the offence punishable under Section 370-A of I.P.C. The same view is also expressed by the High Court of Gujarat at Ahmedabad in "Vinod v. State of Gujarat" (referred supra), which is as follows:"

The Court is right in relation to its interpretation of the decision in *Naveen Kumar*. However, the court in *Sahil Patel* did not offer a substantive interpretation of customer liability under Section 370A. It merely noted that where charges under Sections 370 and 370A are attracted and are under investigation, it was not willing to give bail to the defendants. Furthermore, the Gujarat High Court in *Vinod* did not uphold the liability of the customer under Section 370A. It is true the Gujarat High Court quoted the decision of *Naveen Kumar* in its judgment but it pronounced decision only on the applicability of Section 370 which depended on whether the sex worker was coerced into sex work or not. Hence the decision of the Telangana High Court in *Mohammed Riyaz* in interpreting the current state of the law on customer liability is incorrect. The single judge bench then opined that:

> "it is clear that the petitioner allegedly came to brothel house and found in a room along with Sex (sic) worker, but the purpose is only to participate in sexual intercourse (prostitution) with sex worker. Such person is said to have engaged in sexual exploitation and the said sex worker is trafficked person. Therefore, the petitioner is liable to be proceeded in trial for the offence punishable under Section 370 A (2) of the IPC."

Here Justice Satyanarayana reinforced an abolitionist reading of Section 370A. He conflated participation in sexual intercourse with "prostitution" although the definition of prostitution under the ITPA requires sexual exploitation or abuse. He then conflated sexual intercourse with sexual exploitation and presumed that the sex worker was trafficked although the facts recounted in the decision do not support this conclusion. This abolitionist reading is once again aligned with the decision in *Naveen Kumar* and with the broad understanding of the term "abuse" offered by the Kerala High Court in *Baijunath* under Section 2(f) of the ITPA.

V. IMPLICATIONS OF JUDICIAL PRONOUNCEMENTS ON CUSTOMERS' LIABILITY

The use of anti-sex work laws against sex workers, one of the most marginalised sections of Indian society is well documented. For instance, of the 65,602 persons arrested between 1997 and 2001, 87 percent were females.[54] Also, 90 percent of those arrested, mainly under Section 8 of the ITPA, and 90 percent of those convicted were women.[55] The number of females arrested under the ITPA is roughly four times that of males.[56] Sixty-six percent of the cases against sex workers in Kamathipura, Mumbai, and 56 percent of the cases in G. B. Road, New Delhi, were registered under Section 8 of the ITPA with a 90 percent conviction rate against sex workers.[57] Convicted sex workers end up doing more sex work to pay off penalties imposed under the ITPA.[58] The police rarely use the law against brothel keepers, traffickers, and customers.[59] Catharine MacKinnon has rightly noted that "criminal prostitution laws make women into criminals for being victimized as women, so are arguably arbitrary in the first place".[60] Further, MacKinnon notes that "..compared with customers, prostitutes also more often fail to satisfy the gender-neutral conditions of release: good money, good name, good job, good family, good record, good lawyer, good three-piece suit.."[61]

These trends are confirmed by the latest NCRB report of 2019. Although more men than women were arrested under the ITPA,[62] far more men (817) are acquitted under the ITPA than women (333).[63] This pattern is replicated for cases filed under Section 5, 6 and other sections of the ITPA. For cases filed under Sections 7 and 8, more women are convicted than men. For cases under Section 7, in 2019, 15 men were convicted in the states while 26 women were convicted. For cases under Section 8, 42 women were convicted in the states while only 18 men were convicted.[64] These patterns are replicated for the enforcement of ITPA in the metropolitan cities as well, whether it is in terms of arrests, charge-sheeting, convictions or acquittals.[65] Interestingly, more women were

[54] SEN AND NAIR, *supra* note 22.
[55] Although the data does not differentiate these women as sex workers or brothel keepers, Sen and Nair (2004) assume that it is sex workers, or "victims of commercial sexual exploitation", who suffer from discriminatory enforcement patterns. *Id.* at 5.
[56] GOVERNMENT OF INDIA, PLAN OF ACTION TO COMBAT TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION OF WOMEN AND CHILDREN (1998).
[57] LAWYERS COLLECTIVE, LEGISLATING AN EPIDEMIC: HIV/AIDS IN INDIA (2003).
[58] Muskan, *supra* note 50, at 78.
[59] *Id.* at 199.
[60] Catharine MacKinnon, *Prostitution and Civil Rights*, 1(1) MICHIGAN JOURNAL OF GENDER & LAW 13, 15 (1993).
[61] *Id.* at 19.
[62] *NCRB 2019 report*, *supra* note 4, at 240.
[63] *Id.* at 241.
[64] *Id.* at 241.
[65] *Id.* at 292.

convicted of offences under Sections 7 and 8, while more men were acquitted of offences under these two sections than women.[66]

My study of the case law involving customers reiterates these enforcement patterns. The case law on the lack of customers' liability under the ITPA is more or less settled despite the fact that Section 8 does contemplate liability of a man for soliciting publicly for purposes of prostitution. Numerous cases were filed by customers before appellate courts in various states either for quashing proceedings or for granting of bail, including, anticipatory bail. Even though I studied only cases involving the liability of customers, even in these cases, sex workers rarely contested the charges. The lop-sided nature of this case profile suggests that either the police have become more sensitive and are less likely to arrest sex workers or that sex workers simply do not have the resources to take their cases to appellate courts. It seems that the latter is more likely. A recent report by the sex workers' group SANGRAM *Raided,* notes in its summary of cases how access to appellate courts presumes availability of resources and how positive outcomes depended on the ability of sex workers to access appellate courts.[67] Due to the consistent ability on the part of customers to approach appellate courts however, they are able to capitalise on favourable precedent that exonerates customers under the ITPA. Customer-friendly precedent is the result of their repeat litigation. Conversely, the occasional law-suits by sex workers has meant that even where the appellate courts uphold the rights of sex workers (usually pertaining to prolonged deprivation of their personal liberty in correction homes), the consistent thread of precedent is not discernible.

Significantly, the ITPA is targeted towards a particular mode of sex work, namely brothel-based sex work. Several of its provisions track the various stakeholders who might be involved in brothel-based sex work, likely in a red-light area. The empirical reality of sex work in India today is however that although sex work continues to be conducted in red-light areas of large cities (and the case law on customers' liability is testament to this), the case law I studied also revealed the sheer diversity of contexts in which sex work is performed. Sex work is conducted in massage parlours, beauty parlours, lodges, hotels, resorts and rooms in houses in residential areas. Thus there is good reason to ask if the ITPA is suited at all to addressing the dynamic and varied conduct of sex work in India.

[66] *Id.* at 293.

[67] SANGRAM, RAIDED: HOW ANTI-TRAFFICKING STRATEGIES INCREASE SEX WORKERS' VULNERABILITY TO EXPLOITATIVE PRACTICES (2018), https://sangram.org/upload/news/newsPdf/raided-e-book-4.pdf (last visited May 30, 2021).

Beyond the ITPA, the IPC is often invoked to pin liability on customers. The unfolding interpretation of customers' liability under Sections 370 and 370A warrants closer attention. At the heart of both sections are the core concepts of coercion and exploitation. After all, the key aim of the Protocol is to prevent the recruitment, movement or harbouring of a person through coercive means for purposes of exploitation. However, these concepts are almost impossible to define with any accuracy yet they straddle a vast continuum of empirical scenarios. It is not unusual therefore that the ITPA and IPC do not define the term "sexual exploitation" or "abuse of power". In the case of sex work, there are deep social contestations over whether selling sexual services is coerced per se (because it is assumed that no one would ever consider selling sexual services unless they were coerced) or can be done voluntarily. Further there is disagreement over whether selling sexual services is exploitative per se (because selling sexual services negates human dignity) or not (because sex workers can retain dignity even when selling intimate labour). Consequently, courts also choose between these positions when deciding cases before them.

Some courts have been guided by the seemingly bright line of 'force' in deciding when to invoke Section 370. Thus, the Gujarat High Court in *Vinod* was persuaded by the clarification issued by the Verma Committee to the National Network of Sex Workers that a customer receiving a sex worker who engaged in sex work of her "own volition" cannot be held guilty under Section 370. But what does of "one's own volition" mean? Will dire economic necessity negate volition?

The Andhra Pradesh High Court meanwhile has been persuaded by the abolitionist line of thinking wherein the mere fact of selling sexual services has been understood to amount to sexual exploitation and trafficking. The weight of this threshold question is so significant that courts often do not hold forth on how various elements of these offences must be interpreted for purposes of prosecution and conviction. As I have shown, the lack of clarity on the scope and component elements of the offence means that its interpretation might be over-inclusive but also under-inclusive and thus not target the sexual exploitation of minors against whom prosecution under the IPC for rape and under the Protection of Children from Sexual Offences Act, 2012 should also lie.

Finally, the Trafficking Bill aims to build out the anti-trafficking provisions of the IPC in quite substantial ways which I have detailed elsewhere.[68] Suffice it to say for now, that the Trafficking

[68] RETHINKING THE 2018 TRAFFICKING BILL, EPW ENGAGE, https://www.epw.in/rethinking-2018-trafficking-bill (last visited May 31, 2021); Prabha Kotiswaran, *Criminal Law as Sledgehammer: The Paternalist Politics of India's 2018*

Bill envisages an offence of aggravated trafficking meant to capture various instances of extreme exploitation. Although exploitation in the sex work context is not covered by this offence (much to the disappointment of abolitionist feminists), many of the regulatory techniques of the ITPA find expression in the Trafficking Bill such as the closure of places of exploitation and the expansion of the institutional mechanisms of rehabilitation and protection homes. Interestingly however, the MWCD Minister Smt. Maneka Gandhi who introduced the Trafficking Bill in Parliament in 2018 clarified repeatedly that the Bill would not target voluntary sex workers.[69] Although the Bill itself does not envisage the repeal of the ITPA nor did Mrs. Gandhi offer to initiate the repeal of the ITPA, abolitionist commentators suggested that accepting the Trafficking Bill will help pave the way to decriminalization.[70]

VI. CONCLUSION

In conclusion, we need to put together the enforcement profile of anti-sex work and anti-trafficking offences alongside judicial trends and legislative proclivities. When we do this, it becomes clear that the ITPA is not geared towards addressing sex work in India in all its complexities. The incidence of crimes under the ITPA seems to have come down over time; there were 2127 cases in 2017, 1882 in 2018 and 1645 in 2019.[71] The ITPA is disproportionately enforced against sex workers but not customers and customers are better equipped to gain judicial precedent in their favor than sex workers. Furthermore, the NCRB report of 2019 suggests that the number of cases under Section 370 (trafficking) of the IPC has increased slightly over time with more cases in 2019 than in 2018 and more cases in 2018 than in 2017.[72] Further, courts are resorting to the anti-trafficking provisions of the IPC to adjudicate liability of customers for availing of sexual services. Also, the government seems keen to keep voluntary sex workers out of the ambit of the Trafficking Bill so that its passage could pave the path for the repeal of the ITPA. This suggests that the ITPA has outlived its original purpose and that we should now consider repealing the ITPA and turn our attention to building a fair jurisprudence around Sections 370 and 370A of the IPC such that sexual abuse is targeted rather than voluntary sex work which is a means of

Trafficking Bill, OPEN DEMOCRACY, (July 9, 2018) https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/criminal-law-as-sledgehammer-paternalist-politics-of-india-s-2018-tr/ (last visited May 30, 2021).

[69] Maneka Gandhi, *Why I pushed for passage of the anti-trafficking bill*, TIMES OF INDIA (July 30, 2018). https://timesofindia.indiatimes.com/india/why-i-pushed-for-passage-of-the-anti-trafficking-bill/articleshow/65190751.cms (last visited May 30, 2021).

[70] Abza Bharadwaj, *Anti-trafficking Bill: No, it does not take away sex workers' rights. Here's how*, DAILY O (Dec. 20, 2018) https://www.dailyo.in/user/15015/abza_bharadwaj (last visited May 30, 2021).

[71] *Id.* at 6.

[72] *NCRB 2019 Report*, *supra* note 4, at 3; there is an increased uptake of Section 370 cases by many states including Assam, Chattisgarh, Bihar, Andhra Pradesh, Kerala, Haryana, Jharkhand, Telangana and Karnataka Madhya Pradesh, Maharashtra Manipur Odhisha and West Bengal. *Id.* at 29, 201.

livelihood for a significant and highly marginalized group of Indian women.