CHAPTER 4

INDIAN LAWS ON CHILD PROSTITUTION

– AN APPRAISAL
"Law in every country has tried to regulate prostitution so that it may be kept within its legitimate bounds without unduly encroaching upon the institution of marriage and family."

— Report of the Law Commission of India

4.1 Introduction

Indian laws, procedures and methods of investigation have remained static to a large extent. The laws and legislations do not seem to be adequate or comprehensive in dealing with various forms of trafficking and often frees the culprit and penalises the victim. India is a signatory to several international covenants, conventions and treaties dealing with exploitation of children. A list of various international mechanism that can be used to deal with the issues of child prostitution has been elaborately discussed in the previous chapter.

As regards the national scheme, it must be pointed out that we have a constitution that is applauded all over the world. As children are considered as weaker section of this society, the constitution following the principle of protective discrimination, allows for making and implementing laws specific to them, for their protection and well being. The Immoral Traffic (Prevention) Act of 1956, is in line with this principle. Unfortunately, this Act deals, only with trafficking of girls and woman for prostitution. Besides these laws there are also other laws which deals with curbing of prostitution like Indian Penal Code, 1860, Criminal Procedure Code 1973, Juvenile Justice (Care and Protection of Children) Act, 2000, The Indecent Representation of Women (Prohibition) Act, 1986 etc.
4.2 The legal framework

4.2.1 The Constitution of India

A Constitution is the vehicle of a Nation’s progress. It is a legal and social document which contains the basic, the fundamental, the first law of the country. All the laws in the country are enacted under this document and within this document is known as the Constitution of the country. The Constitution of India requires positive steps to be taken by policy makers for the protection of the weaker sections of the society. The fundamental rights enshrined in the Constitution also take care of special position of women and children. Article 23 provides right against exploitation.\(^1\) This article embodies two declarations. First, the traffic in human beings, beggar and other similar forms of forced labour are prohibited. The prohibition applies not only to State but also to private persons, bodies and organisations. Second, any contravention of the prohibition shall be an offence punishable in accordance with law. Under Article 35 of the Constitution laws punishing acts prohibited by this article shall only be made by Parliament, though existing laws on the subject, until altered or repealed by Parliament, are saved. The judiciary in Raj Bahadur Vs. Legal Remembrancer\(^2\) held that traffic in women for immoral purposes is prohibited under Article 23.

The Directive Principles of State Policy serve as the guiding star for various social welfare legislation passed in favour of women. They assert that all the citizen have the right to adequate means of livelihood. According to article 39 (e) the

\(^1\) Article 23: Prohibition of traffic in human beings and forced labour:
(i) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
(ii) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

\(^2\) AIR 1953 Cal 522.
health and strength of workers, men, women and the tender age of children should not be abused.\(^3\) It tries to ensure that citizens are not forced by economic necessity to enter into vocations unsuited to their age or strength. Article 38 which is more social welfare oriented states that the State is to secure a social order in which justice social, economic and political shall inform all the institutions of the national life.\(^4\) It is a directive to the State to give effect to the objectives expressed in the Preamble to the Constitution, by securing a social order for the promotion of the welfare of the people. It is the star by which we are expected to chart our course. It is to achieve the goals echoed in Article 38 that Part IV contains various provisions. The concept of social justice, which the constitution engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. Thus, social justice is a dynamic device to mitigate the sufferings of the children who are trafficked for commercial sexual exploitation in the society.

The philosophy underlying the directive principles of the state policy is very progressive. It endeavours to prohibit every kind of exploitation of woman and children in all walks of life. Article 39(f) insists that children be given opportunities to develop in a healthy manner so that childhood and youth are protected.\(^5\) Article 39 (e) and (f), the Supreme Court laid the procedural and normative safeguards for adoption

\(^3\) Article 39(e) of Indian Constitution: The State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength.

\(^4\) Article 38: State to secure a social order for the promotion of welfare of the people – (i) The State shall strive the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. (ii) The State shall, in particular, strive to minimize the inequalities in income, and endear our to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

\(^5\) Article 39 (f): The State shall, in particular, direct its policy towards securing – that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
of children by foreign parents. Referring to Article 39 in State of Rajasthan Vs. Om Prakash⁶, the Supreme Court said that the Courts would have a sensitive approach when dealing with cases of child rape. It being crime against humanity, the Court said that, in such cases, responsibility on the shoulders of the Courts, was more onerous so as to provide proper legal protection to these children. Article 15(3) enables the state to make special provisions for woman and children even if they are discriminatory.⁷ This clause is an exception to the rule against discrimination embodied in Clause (1) as well as Clause (2) of Article 15. While both these Clauses prohibit discrimination on the ground of sex, Clause (3) enables the State to confer special rights upon women and children, since women and children are well defined class, and children constitute the weaker sections of the society.

4.2.2 The Indian Penal Code

It is one of the important functions of a modern State to protect peaceful and law abiding citizens from anything that upsets smooth operation of the economic life of the country. In the event of its failure to properly discharge this onerous responsibility, there is insecurity of life and property tending to breed lawlessness and arrest growth of economic activities. The criminal law of India has been codified in the Penal Code and in the Criminal Procedure Code; the former Code deals specifically with offences and states what matter will afford an excuse or a defence to a charge of an offence. The Penal Code is the substantive law and Criminal Procedure Code, the adjective law. Section 5 of the latter Code says “All offences under the

⁶ AIR 2002 SC 2235.
⁷ Article 15(3) : Nothing in this article shall prevent the state from making any special provision for women and children.
Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.” The Indian Penal Code lends a helping hand to the special laws enacted to curb prostitution by attacking the source of this evil.

Section 366 A makes procreation of a minor girl from one part of place to another is punishable and section 366 B, which makes importation of a girl below the age of twenty one years punishable. These sections try to prevent prostitutions by strict penal action. Section 372 and 373 makes selling and buying of girls of any age for purpose of prostitution a heinous crime for which even ten years imprisonment and fine can be awarded. These sections conjointly punish both the giver as well as the receiver of minor girls for immoral purpose, illicit sexual intercourse or prostitution. Section 372 protects the minors even against her own parents or other

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8. Procurator of minor girl : Who ever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine - Section 366 A of IPC 1860.

9. Importation of girl from foreign country – whoever imports into (India) from any country outside India [or from the state of Jammu and Kashmir] and girl under the age of twenty – one years with intent that she may be or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine – Section 366B of IPC, 1860.

10. Selling minor for purposes of prostitution, etc. – Whoever sells, lets to hire, or otherwise disposes of any ‘person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

Explanation 1. When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation -2. – For the purposes of this section ‘illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or , where they belong to different communities, of both such communities, as constituting between them a quasi – marital relation. – Section 372 of IPC.
lawful guardians. Section 373\textsuperscript{11} strikes at the keepers of brothels and all others who rely on the profits arising from the general prostitution of girls. The Section is primarily intended to prohibit the purchase of minors from third parties, and it is unquestionable that the buying or hiring does not ordinarily import purchase or hire of an object as distinct from the vendor. The two sections are however intended to save young persons below the age of eighteen from being trafficked for the purpose of prostitution. Section 374\textsuperscript{12} provides punishment for compelling any person to labour against the will of that person. So no child can be allowed to work forcefully even if the employment of the person is for immoral purpose.

Rape is violation of the private person of women – an outrage by all canons. It is deathless shame and should be treated as the greatest crime against human dignity and entire society. Though all sexual assaults on female children are not reported and do not come to light, yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reason that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms.

\textsuperscript{11} Buying minor for purpose of prostitution, etc - Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any purpose, shall be punished within imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation -1. Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possessions of such female with the intent that she shall be used for the purpose of prostitution.

Explanation-2. "Illicit intercourse" has the same meaning as in section 372 – Section 373 IPC.

\textsuperscript{12} Unlawful compulsory labour – Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. Sec 374 of IPC.
Section 375 and 376 deals with rape and punishment of rape. Judges who bear the sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end of the gravity of the offences so demand. The offence under Section 293 and 294 is essentially in doing an obscene act or in uttering obscene words in or near any public place to the annoyance of others. Section 317 is intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such manner that the children are not being able to take care of themselves.

13. **Rape** – A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

- **First** – Against her will.
- **Secondly** – Without her consent.
- **Thirdly** – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
- **Fourthly** – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- **Fifthly** – With her consent, when at the time of given such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent.
- **Sixthly** – With or without her consent, when she is under sixteen years of age.

**Explanation** – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

**Exception** – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape – Sec 375 of IPC.

14. **Punishment for rape.** – whoever, except in the cases provided for by sub-section (2) commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

Provided that the court may, for adequate and special reasons to be mentioned in life judgment, impose a sentence of imprisonment for a term of less than seven years.

15. **Sale of obscene objects to young person** – Whoever sells, lets to hire, distributes, exhibits to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees – Sec 293 of IPC.

16. **Obscene acts and songs** – Whoever, to the annoyance of others –

- a) does any obscene act in any public place, or
- b) sings, recites or utters any obscene song, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both – Sec 294 of IPC.

17. **Exposure and abandonment of child under twelve years, by parent or person having care of it.** – Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both – Sec 317 of IPC.
themselves. Section 339 and 340 deals with the wrongful restraint and wrongful confinement. Wrongful restraint means that whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person and wrongful confinement means whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said “wrongfully to confine” that person. The restraining of a person in a particular place or the compelling him/her to go in a particular direction by force of an exterior will overpowering or suppressing in any way his/her own voluntary action is the imprisonment on the part of him who exercises that exterior will.

An indecent assault upon a women is punished under Section 354.\textsuperscript{19} Any act done to or in presence of a woman is clearly suggestive of sex according to the common notions of mankind, that act must fall within the mischief of this section. Modesty is the attribute of female sex and she possesses it from her very birth. Section 361 is there to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons.\textsuperscript{20} Section 362 says of kidnapping, abducting or inducing woman to compel her marriage. Whoever kidnaps or abducts any woman that she may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will

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\textsuperscript{19} Assault or criminal force to women with intent to outrage her modesty – whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely, that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

\textsuperscript{20} Punishment for kidnapping. – Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine - Sec 361 of IPC.
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be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Other relevant provisions under the Indian penal Code are Sections 496\textsuperscript{21}, 498\textsuperscript{22}, 506\textsuperscript{23}, 509\textsuperscript{24}, 370,\textsuperscript{25} 371\textsuperscript{26}.

4.2.3 Suppression of Immoral Traffic in Women and Girls Act, 1956

Trafficking was first dealt with by the Suppression of Immoral Traffic in Women and Girls Act 1956, which was passed on 31 December 1956.\textsuperscript{27} The

\textsuperscript{21} Marriage ceremony fraudulently gone through without lawful marriage. – Whoever dishonestly or with a fraudulent intention goes through the ceremony of being married, knowing that he is not thereby lawfully married shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine – Sec 496 of IPC.

\textsuperscript{22} Enticing or taking away or detaining with criminal intent a married woman – Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description or a term which may extend to two years or with fine or with both – Sec 498 of IPC.

\textsuperscript{23} Punishment for criminal intimidation – Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both; If threat be to cause death or grievous hurt, etc. – and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire or to cause an term which may extend to seven years or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years or with fine or with both – Sec 506 of IPC.

\textsuperscript{24} Word gesture or act intended to insult the modesty of a woman- Whoever intending to insult the modesty of any woman utters any word makes any sound or gesture or exhibits any object shall be seen by such word or sound shall be heard or that such gesture or object shall be such woman or intrudes upon the privacy of such woman shall be punished with simple imprisonment for a term which may extend to one year, or with fine or with both – Sec 509 of IPC.

\textsuperscript{25} Buying or disposing of any person as a slave. – Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine - Sec 370 of IPC.

\textsuperscript{26} Habitual dealing in slaves. - whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with imprisonment for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine – Sec 371 of IPC.

\textsuperscript{27} The Suppression of Immoral Traffic in Women and Girls Bill having been passed by both Houses of Parliament received the assent of the President on 30th December, 1956. It came on the Statute Book as the Suppression of Immoral Trafficking in Women and Girls Act, 1956 (104of 1956). By Section 3 of the Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986 (44 of 1956) the nomenclature of the Act has been changed with effect from 26th January, 1987. Now it stands as THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956 (104 of 1956).
legislation was enacted in pursuance of the U.N. Conventions of 1950. The Act was enacted under Article 35 of the Indian Constitution with the object of inhibiting or abolishing the immoral traffic in women and girls. The Act aimed to rescue exploited women and girls, to prevent deterioration of public morals and to stamp out the evil of prostitution which was rampant in various parts of the country. There were provisions within the Act to penalise soliciting for clients and loitering by prostitutes, but the clients were not penalised. The practice of prostitution individually, independently and voluntarily does not constitute the offence. This means that prostitution behind the closed doors is ignored as a hypocritical veneer of morality and public decency is maintained. Under SITA actual intercourse was not required, it is the act of offering the body for hire which satisfies the definition of prostitution.

According to SITA prostitution is not illegal per se. The prostitute can carry on her trade wherever she likes subject to certain restrictions. These restrictions force the woman to live in an environment which is unhealthy and highly degrading for any human being. Frankly speaking Section 7 (1) of SITA operated against the interest of the prostitution — the sexual partner who brings her for sexual gratification gets away because of the inherent defects of the Act. Section 8 (a) was the most common cause of police harassment, ‘Merely to indulge to in some flirting with a stranger or to behave in such a way as to attract the attention of persons of the opposite sex may be immodest or regrettable, but per se it does not amount any offence under the Act’. The purpose of the Act was to abolish inhibit commercial vice, namely the

28. UN Convention for the Suppression of Traffic in Persons and of Exploitation of the Prostitution of Others. This was approved by the General Assembly resolution 317(iv) of 2 December 1949. In 1950, the Government of India ratified this Convention.

29. Seducing or soliciting for purpose of prostitution — Whoever in any public place or within slight of and in such manner as to be seen or heard from any public place whether from within any building or house or not —
traffic in women and girls for purpose of prostitution as an organised means of living.
The idea was not to render prostitution a criminal offence or to punish a woman merely because she prostitutes herself.

No where in the Act, has reference been made to juvenile prostitutes, either for their effective protection or for more deterrent handling of pimps or procurers. These young child prostitutes form a class by themselves and cannot be treated at par with the adult prostitutes. The tender age, total economic dependence, low level of education, and ignorance of long term ill-effects of promiscuous living makes these prostitutions more vulnerable to the trap of pimps and procurers. If timely help is not given, these child prostitutes becomes so entrenched in prostitutions that they cannot leave the profession. Various children’s Acts dealing with journals in general cannot deal with this peculiar problem. It requires more expert handling in order to rehabilitate them and to make them acceptable to the society and their own relations.

Being a penal statute SITA should have had at least some welfare provisions. Section 19 is the only section which says that if a women or a girl wants to go out of the profession she should be placed in a protective home or under the care of the court; but the prostitutes are, in the majority of cases, the unfortunate victims of circumstances. They are mostly illiterate and ignorant of their rights and are in such a

(a) by words gestures willful exposure of his person (whether by sitting by a window or on the balcony of a 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, or
(b) solicits or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by such public place or to offend against public decency for the purpose of prostitution, 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. Section 8 of ITPA.
web that it is very difficult for them to come out and seek the shelters provided for them under the Act. The irony of the situation is that even if they are sent to protective homes their conditions is no better. These homes, according to various surveys and the reports of the investigation teams appointed by the Supreme Court from time to time in various states, are dens of vice. Women living there are diseased and ill-clad, most of them plead to be freed, some go mad and some are sold back to the brothels, clandestinely by authorities. They are also used as domestic labour. In Upendra Bakshi Vs. State of U.P. it was found that the inmates of Agra Protective Homes were living in inhuman and degrading conditions in blatant violation of Article 21 of the constitution.

This Act had several loopholes. Some of the drawbacks were

- The Act did not conform fully to the international convention the subject.
- The definition of prostitution was unsatisfactory
- No provisions for dealing with policing and punishment of criminals who have set up inter state and international networks to procure children.
- No specific provisions to deal with prostitution of children
- No provision for dealing with sexual exploitation of boys
- Lesser sentence compared to that in the Indian Penal Code to offenders who induct children and woman into prostitution.
- Customer not made accountable
- Protective homes set up under the Act were mainly custody homes and not properly staffed.

AIR 1983, 2SCC 308.
• No provisions for the children of prostitutes
• No accountability placed on the superintendent of the protective homes.

4.2.4 The Immoral Traffic (Prevention) Act, 1956

The Suppression of Immoral Traffic in Women and Girls Act 1956, proved to be inadequate to combat the increasing commercialization of trafficking. Parliament amended the law in 1970 and later in 1986. The Suppression of Immoral Traffic in Women and Girls Act 1956 was amended by:

The Suppression of Immoral Traffic in Women and Girls (Amendment) Act 1978 (46 of 178) w.e.f. 2 October 1979; and


As a result of substitution of the words “Immoral traffic (Prevention) Act” for the words “Suppression of Immoral Traffic in women and girls Act” made by section 3 of the amending Act No 44 of 1986, the principal Act was short titled as the Immoral Traffic (Prevention) Act, (104 of 1956).

It took years for the government to frame rules to enforce the amendments in full vigour so much that cases were booked under the old Act for several years. The enforcement of this amended Act seen to be on class and gender bias, in favour of prims and racketeers and against the female prostitutes right from the stage of arrest to court hearing, bail conviction and penalties.

This Act does not makes prostitution per se a criminal offence or punish a person because the person prostitutes himself or herself. The purpose of the enactment
is to inhibit or abolish commercialized sexual abuse and exploitation and the traffic in persons as an organized means of living. The object is attempted to be achieved by two major strategies, namely, by punishing those who are guilty of such conduct and by rescuing and rehabilitating the victims of such exploitation.\(^{32}\)

Prostitution under this Act means the sexual exploitation or abuse of person for commercial purposes and the expression “prostitute” should be construed accordingly.\(^{33}\) This definition is wider and includes sexual exploitation and abuse of any person—female, eunuch, or male—for commercial purpose. This Act has introduced the concept of child victims as against minors and majors\(^{34}\) and imposes higher degree of criminality to sexual exploiters of children.

Under section 8 of PITA the prostitute is treated as a criminal. Fortunately this Act recognizes that children and even men can be sexually abused for commercial purposes and should be protected. Section 2 of this Act makes the definition of brothel\(^{35}\) wider to include any place used for the purpose of sexual exploitation or abuse. This broader definition of brothel will make it easier to prosecute the brothel keeper under section 3 of the Act. Now landlords, tenants and other occupants of the premises may not escape punishment for brothel keeping under the defence of ignorance. The punishment for living on the earnings of child prostitute has been increased. There is an increased in the prison term for offenders convicted of


\(^{33}\) The Immoral Traffic (Prevention) Act, 1986, Section 2(f).

\(^{34}\) Child means a person who has not completed the age of sixteen years—Sec 2(aa) ITPA 1986. Minor means a person who has completed the age of sixteen year but has not completed the age of eighteen years—Sec 2(cb) ITPA 1986. Major means a person who has completed the age of eighteen years—Sec 2(ca)ITPA 198

\(^{35}\) 'brothel' includes any house, room, conveyance, on place or any portion of any house, room, conveyance, or place which is used for purpose of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes—Sec 2(a) ITPA 1986
procuring minors. Life imprisonment is the maximum punishment ordained when it is committed against minors or children. Section 9 of this Act provides greater punishment to persons who cause, aid or abet the seduction of women and girls, over whom they have authority or who are in their care and custody, for prostitution.

This Act empowers the Central Government to appoint trafficking officers. These special police officers can search without warrant any premises where this offence is suspected of being committed, and they can rescue any person who is being forced into prostitution or is carrying on or is being made to carry on prostitution. Discretionary powers have been given to the magistrates for interim placement of children and minors who are rescued, in an institution recognized under the Children's Act. Provisions for protective and corrective homes for the safe custody of children and special courts for their speedy trial are some of the encouraging changes that are sought to be achieved by the new Act.

By the use of presumptions, the burden of the prosecution is lightened by the IPTA 1986. There are certain presumptions under the Act in form of the child victims. These are:

- If a child is found in a brothel or under suspicious circumstances in the custody of a person, other than the parent or lawful guardian who is unable to explain satisfactorily the presence of such a child, that person shall be presumed to have procured the child for the purposes of prostitution.

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36. Seduction of a person in custody - Any person who having the custody, change or care of, or a position of authority over any person, cause or aids or abets the seduction for prostitution of that person shall be punishable on conviction with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine: Provided that the court may for adequate and special reasons to the mentioned in the judgment impose a sentence of imprisonment for a term of less than seven years – Sec 9 of ITPA.

37. Suspicious circumstances in this section includes situations in which (i) the mother tongue of the accused is different from that of the child or the language is different from that generally spoken in the locality, (ii) where the child is wrongfully spoken in the locality, (ii) where the child is wrongfully confined without access to others, and (iii) where the child is married to a foreigner.
• A report in a newspaper on the use of certain premises as a brother is deemed to be sufficient proof of the landlord, occupier or tenant knowingly allowing such use.

• If a child is found accompanying in suspicious circumstance, a person who is neither its parent or lawful guardian and who is leaving the country, that person is committing the offence of immoral trafficking.

Rescue and Rehabilitation of children and minors under the ITPA, 1986.

When a magistrate has reason to believe from information received from the police or from any other person authorised by the state government that any person is living on, or is caring on, or is being made to carry on prostitution in a brothel, he may direct a police officer not below the rank of a sub-inspector to enter such brothel and to remove such person and produce the person before him. A minor as a child rescued under the Juvenile Justice Act 1986, is treated as a neglected child which is also known as Child in need of care and protection, now the Juvenile Justice (Care and Protection of Children) Act, 2000, and has to be produced before the Juvenile

38 Rescue of person- (1) Where a magistrate has reason to believe from information received from the police or from any other person authorized by the state Government in this behalf or otherwise that any person is living on, or is carrying on, or is being made to carry on prostitution in a brothel, he may direct a police officer not below the rank of a sub-inspector to enter such brothel and to remove there from such person and produce him before him; (2) The police officer, after removing the person shall forthwith produce him before the magistrate issuing the order.

39 “Child in need of care and protection” means a child —
Who is found without any home or settled place or abode and without any ostensible means of subsistence,
Who resides with a person (whether a guardian of the child or not ) and such person — (a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or (b) has killed abused or neglected some other child or children and there is a reasonable likelihood of the child in question killed abused or neglected by that person,
Who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,
Who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,
Who does have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,
Who is being or likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
Who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
Who is being or is likely to be abused for unconscionable gains.
Welfare Board,\textsuperscript{40} now the Child Welfare Committee for reception and rehabilitation, and placing in safe custody. The Committee shall consist of a Chairperson and four other members as the state government may think fit to appoint, of whom at least one shall be a woman and another an expert on matters concerning children. The qualifications of the Chairperson and the members and the tenure for which they may be appointed shall be such as may be prescribed. The appointment of any member of the committee may be terminated after holding inquire, by the state government, if --- he has been found guilty of misuse of power vested under this act; he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence; he fails to attend the proceedings of the committee for consecutive three months without any valid reason or he fails to attend less than three forth of the sittings in a year. The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the code of criminal procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a judicial Magistrate of the class – Sec 29 of Juvenile Justice Act. There is a provision for providing for intermediate custody in a shelter home or corrective institution after rescue pending detailed inquiry.

4.2.5 The Criminal Procedure Code, 1973

The Criminal Procedure Code of 1973, also protects girls from sexual exploitation. It states that a presiding Judge or District Magistrate may, upon

\textsuperscript{40} Child welfare committee – The state Government may be notification in official Gazette, constitute for every district or group of district, specified in the notification, one or more child Welfare Committees for exercising the powers and discharge the duties conferred on such committees in relation to child in need of care and protection under Juvenile Justice Act.
complaint that a female child under the age of eighteen years is abducted or unlawfully detained, order the immediate restoration of the girl to her liberty or to her parent, guardian or husband. Section 98 is intended to give immediate relief to a woman or girl abducted or detained for any lawful purpose. An action under this section cannot be taken except upon complaint made an oath.

Where a person is wrongfully confined the Magistrate has jurisdiction to issue search warrant to search for a person wrongfully confined beyond the local limits of his jurisdiction. The warrant issued under Section 97 is in the nature of a writ of habeas corpus for rescue of a wrongfully confined person by the police under an order of the magistrate. Generally it is said that the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them. But a provision has been made that if the presiding Judge or Magistrate thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court. The inquiry into and trial of rape or any offence under section 376, section 376A, section 376B, section 376 or section 376D of the Indian Penal Code (45 of 1860) shall be

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41. Power to compel restoration of abducted females – Upon complaint made on both of the abduction or unlawful detention of a woman or a female child under the age of eighteen years for any lawful purpose a District Magistrate, sub-divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty or of such female child to her husband parent guardian or other person having the lawful charge of such child and may compel compliance with such order using such force as may be necessary – See 98 of Cr.P.C.

42. Search for persons wrongfully confined - If any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.
conducted in camera. Section 327 (2) makes provisions where the inquiry or trial of certain cases can be held in *camera* for reasons of privacy, if the Presiding Judge thinks fit.

### 4.2.6 The Juvenile Justice (Care and Protection of Children) Act, 2000

The Act was passed in consonance with the Convention on the Rights of the Child, to consolidate and amend the law relating to the 'juveniles in conflict with law' and 'children in need of care and protection'. This Act has elaborate provisions for the care, protection, treatment, education, vocational training, development and rehabilitation of children rescued from those procuring, inducing or taking person for the sake of prostitution and detaining person in premises where prostitution is carried on.

The definition specifically includes the child who is found vulnerable and is therefore, likely to be inducted into trafficking. The focus of the Act is to provide for proper care, protection and treatment by catering to the child's development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interests of children and for their ultimate rehabilitation through various institution established under the Act. 'Child means a person, either male or female, who has not completed his or her eighteenth year of age. Section 29 of the act empowers state government to constitute child welfare

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43. The Juvenile Justice Act of 1986 contained provisions relating to delinquent juveniles and neglected juvenile which were derogatory and carried stigma. Therefore the use of these words has been avoided in the new Act of 2000 and instead of delinquent juvenile such person has been called as 'juvenile in conflict with law'. Likewise the term neglected Child has been substituted by the term 'child in need of care and protection'.

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committees for such area as they may deem fit. It also outlines the powers of the committee and the procedures to be followed.

The procedure adopted in inquiry or proceeding of the Juvenile Justice Board are informal so that the juvenile in conflict with law who is brought before the Board has not to undergo the process of normal criminal trial which involves arrest, prosecution, trial, defence, burden of proof conviction etc. which would have defeated the very purpose of the Act for which it was meant. That apart, prisonisation of the juvenile or child on his conviction would have brought him in contact with the hardened offenders of the prison and there was every likelihood of their becoming a professional criminal. It is for this reason that a juvenile in conflict with law is sent to Observation Homes during the period of inuring in his case by the Juvenile Justice Board. And if is found guilty of having committed an offence, he is sent to Special Home instead of jail. These Homes are reformatory institution which ensure rehabilitation and re-integration of the juvenile.

Therefore, the problem that was raised in the case of Gaurav Jain Vs. Union of India, seem to have been solved to a large extent. Obviously, with the setting up different institutions such as the Children’s Home, special Home and Shelter Home and participation of the Government and also the non government voluntary social service organizations and agencies in the scheme of reformation and rehabilitation of juveniles and children who need care and protection, there is hardly any justification for separate hostel or school for the prostitute’s children.

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44. AIR 1990 SC 292. In a public interest litigation Writ Petition the question of justification of establishing separate hostels and schools for the children of prostitutes came up. The children of prostitutes, if not segregated from their mothers, may lead into the career of prostitution which may eventually aggravate juvenile delinquency.
Section 31 gives them ultimate authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights. Under Section 34, a state government may establish and maintain children’s homes for the care and protection of children. Under Section 39, the primary objective of the children’s home or shelter is the restoration and protection of childhood.

4.2.7 Information Technology Act 2000

Digital technology has also allowed child pornography to be produced without a child actually being present, introducing into the review of laws on child porn issues that are complex and that go beyond the argument that child pornography records a criminal act. Producers of child porn are now able to use the special effects available on computer software programmes to morph adult images to make them look like children, or even create ‘virtual’ children. Since child pornography may be complicit in promoting child sex, many argue that morphing too should be criminalised even if no real child is involved. The demands for victims in the flesh market was also related to the explosion in information technology. In fact, the growth in the demand is closely linked with the spread of the Internet. The sex industry is among the top five groups buying state of the art computer equipment.

In general, the sex trade has become an integral part of the Internet and Internet based sex trade thrives on pornography, which increasingly comprises of child pornography. Trafficking, Commercial Sexual Exploitation, Sex Tourism, and Pornography are all interrelated crimes. The Information Technology Act, 2000

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extends throughout India and also has extra-territorial jurisdiction. Under Section, publication and transmission of pornography is an offence.

4.2.8 Indecent Representation of Women (Prohibition) Act, 1986

To prevent indecent representation of women in numerous forms, Parliament passed the Indecent Representation of Women (Prohibition) Act, 1986. The object of the Act was to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner. It defines 'indecent representation of women' as the depiction in any manner of a figure of a woman, her form of body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating of women, or is likely to deprave, corrupt or injure public morality. The Act puts a restriction on the publishing or sending by post, of books, pamphlets, etc. containing indecent representations of women, and prohibits all person from getting involved directly or indirectly in the publication or exhibition of any advertisement containing indecent representations of women in any form.

4.2.9 The Young Person (Harmful Publications) Act, 1956

The Act defines the term 'harmful publication' as any book, magazine, pamphlets, leaflet, newspapers or other like publication which consists of

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47. Sec 67 of Information Technology Act 2000: Whoever publishes or transmits or causes to published in the electronics form, any material which is lascivious as appeals to the prurient interests or if its effect is such as to tend to deprave and corrupt persons who are likely, having regret to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

4.2.10 The Child Labour (Prohibition and Regulation) Act, 1986

The child Labour (Prohibition and Regulation) Act 1986 (CLPRA) is an outcome of various recommendations made by a series of committees. From a reading of the recommendations made by various Committees, there was a national consensus in favour of a uniform comprehensive legislation, to prohibit the engagement of children in certain other employment. To achieve this goal, Parliament enacted the Child Labour (Prohibition and Regulation) Act 1986 which came into force on 23 December 1986. The Act prohibits employment of children in the specific occupations set forth in Part A of the Schedule of the Act. The Act lays down the conditions of work of the children. The preamble of the Act states that it is an Act to prohibit the employment of children in certain employment and to regulate the conditions of work of children in certain other employment.

4.2.11 Bonded Labour System (Abolition) Act 1976

In this Act, bonded labour system is defined in Section 2(g) as the system of forced, or partly forced, labour which a creditor extracts from a debtor by virtue of an agreement between the two. The Bonded Labour System (Abolition) Act purports

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50 Section 3 of Child Labour (Prohibition and Regulation) Act, 1986
to abolish all debt agreements and obligations. It is the legislation fulfillment of the Indian Constitution's mandate against beggar and forced labour.\textsuperscript{51} It frees all bonded labourers, cancels any outstanding debts against them, prohibits the creation of new bondage agreements, and orders the economic rehabilitation of freed bonded labour. It also prescribes a penalty of up to three years in prison and rupees two thousand also fine for any violators.\textsuperscript{52}

4.2.12 Regulation of Cyber Cafes

Attempts to regulate cyber pornography are being made. For instance, the Government of Maharashtra and the Mumbai Police have attempted to bring cyber cafes within the purview of the Rules for Licensing and Controlling places of Public Amusement (Other than Cinemas) and performances for Public Amusement including Cabaret performances, Melas and Teammates Rules 1960 ('The Amusement Rules') framed under Section 13 of the Mumbai Police Act 1951.

4.3 State Measures to prohibit the Devadasi System

State Governments have taken some steps towards curbing the system, but they do not seem to be adequate so far. Mysore was the first state in pre-independent India to take steps against this practice. In 1924, the Indian Penal Code was amended. Section 372\textsuperscript{53} and 373\textsuperscript{54} declared as illegal, the practice of dedicating girls

\textsuperscript{51} Consequently, post-act social action litigation on behalf of bonded labours is brought under both Bonded Labour System (Abolition) Act and the Constitution of India.

\textsuperscript{52} The Bonded Labour System (Abolition) Act 1976, Sec. 4, 5, 6 and 14.

\textsuperscript{53} Selling minor for purposes of prostitution, etc. - Whoever sells, lets to hire, or otherwise disposes of any 'person under the age of eighteen years with intent that such person shall at any
for the ultimate purpose of engaging them in prostitution. The Karnataka Devadasi (Prohibition of Dedication) Act, 1982 declares unlawful, the very act of dedication, whether the dedication is done with or without the consent of the dedicated woman. Under the Andhra Pradesh Devadasi (Prohibiting Dedication) Act, 1989, whosoever performs, promotes, abets or takes part in a dedication ceremony is liable to punishment with imprisonment for three years and fine.

4.4 Goa’s Children’s Act, 2003

The Government of Goa has brought out the Goa Children’s Act, 2003 notified in the official Gazette of 14 July 2003. This addresses several child rights issues in an integrated manner. Under the new legislation, the owner and manager of a hotel or other establishment will be held solely responsible for the safety of the child on the premises as well as all the adjoining beaches and parks. The owner and manager are also held accountable if any child is allowed to enter a room without registration. It provides for strong action against making children available for commercial exploitation including posing obscenely, selling or abetting sale of age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.
Explanation 1. When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.
Buying minor for purpose of prostitution, etc. - Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any purpose, shall be punished within imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Explanation -1. Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possessions of such female with the intent that she shall be used for the purpose of prostitution.
children even under the garb of adoption or dedication of a girl child as a Devadasi, same of the salient features of the Act are:

- trafficking has been given a legal definition, for the first time in India's jurisprudence;
- the definition of sexual assault has been expanded to incorporate every type of sexual exploitation.
- responsibility of ensuring safety of children in hotel premises has been assigned to the owner and manager of the establishment.
- photo studios are periodically report to the police that they have not shot any obscene photographs of children.
- stringent control measures have been introduced to regulate access of children to pornographic materials.

Summary:

In this fast changing world even though societies are making appropriate adjustments in their attitudes and activities, legal system are lagging behind everywhere. This leads to miscarriage of justice and the victims of crime feel cheated by a system that ignores the ground and social reality but otherwise claims to have been designed to protect them. In India, the ITPA and the Juvenile Justice Act have been revamped in consonance with the International instruments of the time. The Juvenile Justice Act recognizes a child, who is found vulnerable and is likely to be inducted into trafficking, as a child in need of care and protection and includes elaborate provisions for rescue and rehabilitation. It gives NGO's powers and position in the Child Welfare Committees and the Juvenile Justice Board. It covers all
issues relating to children below eighteen years but even does not mention about sexual abuse and child prostitution. The only provision under which a case against an offender could be filed refer to punishment for cruelty to juveniles which is hardly appropriate.

When the Indian Penal Code, 1860 was enacted by the British, their socio-cultural historic legal roots belonged to another environment, another society. the socio-economic-political organisation of the period was different. Moreover, developments in the fields of psychology, significant evolution in concepts and techniques that have helped to understand the functioning of the human mind in a more precise and detailed way, were not available to the then draftsmen. The concept of right of children was nascent. The contemporaneity of the information system was absent. However, our laws and procedures and method of investigation have remain static to a very large extent and this, apart from leading to unmerited acquittals, has also contributed to further intensify the hurt of the victim. One such area is pertaining to child sex abuse and child prostitution. It seems that most of the laws and procedures for trial are designed to regulated adult behaviour and the means to adduce evidence is largely confined to the testimony of the adult. In free India changes in legal provisions have come in response to lobbies whose representatives contented them selves with price meal legislative effort. Hence, vital amendments have been temporary. It would, therefore, not be advisable to seek a solution by inserting new provision in the Indian Penal Code or by amending the definition of rape as is widely suggested. It is more likely to complicate law on the subject.

The Immortal Traffic (Prevention) Act, 1986 has indeed taken into consideration some of the needs of suffering children. Under this Act, the word
'child' means a person who has not completed the age of sixteen years and the word 'major' means a person who has completed the age of eighteen years. The minor refers to a person who has completed the age of sixteen years but has not completed the age of eighteen years. Prostitution means the sexual exploitation or abuse of persons for commercial purposes. Any person who keeps or manages or acts or assists in keeping and managing a brothel is liable. Law also presumes in certain specified circumstances unless contrary is proved that an occupier of premises is knowingly allowing his premises to be used as a brothel.

Where living on the earnings of child / minor prostitutes is proved, enhanced punishment of seven to ten years is provided under the said Act. Procuring, inducing or taking a person for the sake of prostitution is an offence but in case the offence is in respect of a child, the punishment may extend to life. Where any person is found with a child in a brothel, it shall be presumed, unless the contrary proved, that he has committed an offence and where a child or minor found in a brothel, and is, on medical examination detected to have been sexually abused, it shall be presumed, unless the contrary is proved, that the child or minor has been detained for commercial sexual purpose. However, under the Act, the court has discretionary powers to reduce the punishment in certain offences below the seven years minimum period provided it mentions its reasons for doing so in the judgment. Besides, the onus of proof on the landlord is placed conditional, which is generally used to circumvent prosecution.

The IPTA provides for the setting up of special converts by state governments, as well as by the Government of India. Rape laws have undergone judicial scrutiny and interpretation several times in the supreme court, with the result
that the law today is gender-friendly and child-friendly. The uncorroborated
testimony of a rape victim provides for compensation to victims after conviction. The
supreme court has brought out child-friendly procedures in trial process involving
girl children who has been sexually assaulted.

However, ‘trafficking’ has not been defined under the Indian laws except in
the Goa Children’s Act, which is specific to the state of Goa. The ITPA has not made
mandatory provisions regarding the role of NGO’s and the integration of
rehabilitation with rescue. The age verification of the victim, which is an important
issue in deciding the culpability of the accused, often meets with difficulty, because
the law has not made specific and time bound provisions in this regard. Although the
ITPA is a special law, it has no express provisions for victim protection. These
points need to be considered by the concerned authorities so that the laws and
provisions are made victim-friendly, gender sensitive, child sensitive and are in
complete resonance with human rights.