CHAPTER 5

THE ROLE OF INDIAN JUDICIARY

- A REVIEW
"The judiciary is one of the most important sectors that need to be sensitised on gender issues and violations of rights of women due to trafficking. An analysis of the attitudes of judges reveals a protectionist approach rather than a substantive approach in their judgment of criminal cases against trafficking."

— Combating Human Trafficking in Asia

5.1 Introduction

In governance of a democracy, judiciary plays a very important role which is second to none. In fact, by virtue of its very important task of sitting on judgement on the actions of the two other constituents – and enjoying the privilege of interpreting the constitutional provisions, the judiciary assumes a significant and special importance. The aim of securing a just society is one such aim which has been with us long before the Christian calendar began. Indian Judiciary lies today at the centre of the endeavour of securing a just society. As an institution, the Indian Judiciary has always commanded considerable respect from the people of this country. Law laid down by the Legislature is not able to ensure complete justice in all causes of our society. Judiciaries with their innovative vision have endeavoured to fill up the blank existing between law and just by way of pronouncing their new interpretations. Supreme Court in the process laid down

several new legal principles to alive and activates the system of justice in order to ensure protection of human rights and social justice.

One very significant structure of the legal system is represented by the courts. Courts are a body that is in authority to take decisions. Provisions in various laws, which are presently in practice, guide these decisions. Children in India can come in direct contact with the courts and the legal system in various contexts, for example as offenders and witness to crimes. There are ordinary civil and criminal courts based on the adversarial model. The system uses formal procedural justice to obtain binding decisions and remedies. Besides these ordinary courts and legal procedures, there are specialized courts. Two most commonly accessed courts by children are the Juvenile Courts or the Juvenile Justice Boards and family courts. Conciliation, counselling and individualised treatment based on casework approach with expertise and inputs from law, psychiatry and social

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2. Juvenile courts have been replaced by the Juvenile Justice Boards under the new Juvenile Justice (Care and protection of Children) Act 2000, for dealing with children in conflict with law. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government may, by notification in the Official Gazette, constitute for a district or group of districts specified in the notification, one or more Juvenile Justice Boards for exercising the powers and discharging the duties conferred or imposed on such Boards in relation to Juveniles in conflict with law under this Act.

(2) A Board shall consists of Metropolitan Magistrate of a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the code of criminal Procedure, 1973 (2 of 1974), on a Metropolitan Magistrate of, as the shall case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the principal Magistrate.

(3) No Magistrate shall be appointed as a member of the Board unless he has special knowledge of training in child psychology or child welfare and no social worker shall be appointed as a member of the Board unless he has been actively involved in health, education, of welfare activities pertaining to children for at least seven years The term of office of the members of the Board and the manner in which such member may resign shall be such as may be prescribed. The appointment of any member of the Board may be terminated after holding inquiry, by the State Government, if—

(i) he has been found guilty of misuse of power vested under this Act,
(ii) he has been convicted of an offence involving moral turpitude, and such conviction has been reversed or he has not been granted full pardon in respect of such offence,
(iii) he fails to attend the proceedings of the Board for consecutive three months without any valid reason or he fails to attend less than three - fourth of the sittings in a year - See 4 of Juvenile Justice Act.
work has been envisaged for these courts. Simplicity, informality, and flexibility have been attempted in these courts.

Children are unable by definition to petition the courts themselves, they have had to rely on the *parens patriae* role of the state. The courts have on several occasions responded to the needs of children through public interest litigation, especially in the areas of improvement of conditions of children in institutions, prisons, illegal confinement, treatment of physically and mentally disabled children, child labour, adoption, juvenile justice, prevention of trafficking of young girls and welfare of children of prostitutes. Several of these issues were raised before the courts by social activists, journalists or newspaper reports or taken up *suo motu* by courts.

The problem of child prostitution was thoroughly discussed by the Supreme Court in *Vishal Jeet-Vs-Union of India.* Through a Public Interest Litigation, the petitioner, who was an advocate, brought to the notice of the court the sordid details on the basis of which certain preventive and protective directions were prayed for. The ugly facts can be summarized as follow: “Many unfortunate teenaged female children and girls in full bloom are been sold in various parts of the country for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping that their children could be engaged only in household duties or manual labour. But those who are acting as pimps or brokers in the ‘flesh trade’ and brothel keepers who hunt for these teenaged children and young girls to take money either purchase or kidnap them by deceitful means and unjustly and

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forcible inveigle them into 'flesh trade'. Once these unfortunate victims are taken to the
dens of prostitutes and sold to brothel keepers, they are shockingly and brutally treated
and confined in complete seclusion in a tiny claustrophobic, room for several days,
without food until they succumb to the vicious desires of the brothel keepers and enter
into the unethical and squalid business of prostitution. These victims though unwillingly
have to lead this obnoxious way of life and have no other way except to surrender
themselves retreating into silence and submitting their bodies to all the dirty customers
including even sexagenarians with plastic smile."

The Supreme Court has generally taken the view the problem of child prostitution
in our country is one of the great concerns warranting a comprehensive and searching
analysis and requiring a humanistic rather than a purely legalistic approach. The question
involved caused considerable anxiety to the court in reaching a satisfactory solution in
eradicating such malady. The Supreme Court observed: “It is highly deplorable and
heart rendering to note that many poverty stricken children and girls in the prime youth
are taken to “flesh market” and forcible pushed into flesh trade which is been carried on
utter violation of all canons of morality, decency and dignity of human mankind. There
can be two opinions -- indeed there is none -- that this obnoxious and abominable
crime committed with all kinds of unthinkable vulgarity should be eradicated at all
levels by drastic steps.”

The Supreme Court of India in a public interest litigation passed an order on
2.5.1990, after hearing various parties on the subject of “Child Prostitution” which

\[4. The order was passed regarding case of Vishal Jeet Vs. Union of India AIR 1990 SC 1412\]
stated that the Central and State Government should set up Advisory Committees to make suggestions for:

- The measure to be taken in eradicating child prostitution;

- The social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims and mainly children and girls rescued either from the brothel houses or from the vices of prostitution;

- To make suggestions of amendments of the existing laws or for enactment of any new law if so warranted for the prevention of sexual exploitation of children;

- The examination of the Devadasi and Jogin traditions and give suggestions for their welfare and rehabilitation;

- Devising suitable machinery for implementing the suggestions made by the committees.

The Supreme Court gave these directions to the Union of India and all States and Union Territories in the country. These were also communicated for taking appropriate action in accordance with the Court order.

In pursuance of the court directives, the Government of India constituted a Central Advisory Committee on Child Prostitution. The recommendations made by the Central Advisory Committee have been sent to the concerned Central Ministries/Department and to the State Government to notify special police officers, set up Advisory Boards of
social workers and NGO's in red light areas, conduct regular raids and take measures for the protection and rehabilitation of rescued persons.

The Supreme Court in the case of *Vishaal Jeet Vs Union of India* directed that the law enforcement agencies should implement the law and at the same time, bring such rescued child prostitutes to rehabilitation homes maintained by well qualified and trained social workers, psychiatrist and doctors. In view of this, as when child prostitutes are rescued from such premises it would be necessary to shift them to juvenile’s homes and ensure their protection in such homes. Such homes have been set up under the Juvenile Justice Act and numbers of such homes are established in the various states. Prior to the placement of the children in such homes, enforcement authorities will have to coordinate with the social welfare officers of the state government who are locally available, and seek the orders of Juvenile Welfare Board. A child prostitute, by definition is a neglected juvenile and the homes in which they are to be lodged should provide the delinquent juvenile with accommodation, maintenance and facilities for education and rehabilitation.

The child prostitutes will also have to be afforded due protection in the juvenile home. For this, the home authorities and social welfare authorities will have to join hands with the State Police and ensure that there is enough protection in the Homes so as to - (a) present outside elements including vested and criminal interests from attempting to forcibly take the rescued child prostitute away; and (b) present the child prostitute from running away on her even violation, in case she is unable to adjust to the situation in the juvenile home.

^ Supra note 4
After the *Vishal Jeet* case another case where the Supreme Court delved into the malady of prostitution, especially child prostitution, with extreme sensitivity was *Gaurav Jain v. Union of India*. In the initial PIL which dealt with prostitution in general and the plight of children of prostitute women in particular Ramaswamy, J. interpreted certain provisions of the ITPA without pronouncing on the constitutionality of several other offending ones. Wadhwan, J. felt that such a course was not correct since the parties had not been informed or heard or and there were no pleadings. Ramaswamy, J., nevertheless issued directions. The entire judgments was thereafter reviewed and recalled by a Bench of three judges in *Gaurav Jain v. Union of India*. Dwelling on the causes of prostitution the court said:

"The Mahajan Committee Report indicates that in two villages in Bihar and some villages in West Bengal, Parents send their girl children to earn in prostitution and the girls in turn send their earnings for maintenance of their families. It further indicates that certain social organization have identified poverty as the cause for sending children for prostitution in expectation of regular remittance of income from prostitution by the girls who have already gone into brothels.

It is also an inevitable consequence that over the years the fallen women are accustomed to a certain lifestyle and in terms of expenditure they need a certain amount of money for their upkeep and maintenance. When they bear children it becomes an additional burden for them. They are led or caught in the debt traps. The managers of the brothels are

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6. AIR 1997 8 SCC114
7. AIR 1998 4 SCC 277
generally ladies. They do not allow the girls to bear children. In case of birth against their wishes, the unfortunate are subjected to cruelty in diverse forms. In the process of maintaining children again they land themselves in perpetually growing burden of debt without any scope to get out from the bondage. Thereby this process lends perpetuality to slavery to the life of prostitution. Those who want to remain in prostitution have given absence of alternative source of income, their social no acceptability, family customs, poverty, ill health and their despondence as the reason and, thus, they want to continue in prostitution as the last resort for their livelihood. They do not like to remain in the red light area but lack of alternative source of livelihood is the prime cause of their continuation in the profession."

Referring to the plight of prostitutes the Court observed:

"The prostitute has always been an object and was never seen as a complete human being with dignity of person; as if she has had no needs and aspirations of her own, individually or collectively. Their problems are compounded by coercion laid around them and torturous treatment meted out to them. When they make attempts either to resist the prostitution or to relieve them from the trap, they succumb to the violent treatment and resultantly many settle for prostitution. A prostitute is equally a human being, despite that trap she is confronted with the problems to bear and rear children. Their children are equally subjected to discrimination, social isolation . . . . In recent times however, there has been a growing body of opinion by certain enlightened sections of the society advocating the need to no longer treat the fallen women as criminals or as objects of shocking sexual abuse. They are victims of circumstances and hence should be treated as human beings like others so as to bring them into the mainstream of the social order without any attached stigma."
Trying to answer the question as to what procedure is efficacious to prevent prostitution and bring the fallen women and their children into the social mainstream by giving care, protection and rehabilitation, the court observed:

"Three C’s, viz., counselling, cajoling and coercion are necessary to effectively enforce the provisions of ITP Act and JJ Act ... It is the duty of the State and all voluntary non-government organizations and public spirited persons to come to their aid to retrieve them from prostitution, rehabilitate them with a helping hand to lead a life with dignity of person. Self employments through provisions of education, financial support developed marketing facilities are some of the major avenues in this behalf. Marriage is another object to give them real status in society. Acceptance by the family is also another important input to rekindle the faith of self respect and self confidence. Housing, legal aid, free counseling, assistance and all other similar aids and services are meaningful measures to ensure that unfortunate fallen women do not again fall into the trap of red-light area contaminated with foul atmosphere. Law is a social engineer. The Courts are part of the State steering by way of judicial review. Judicial statesmanship is required to help regaining social order and stability. Interpretation is effective armoury in its bow to steer clear of the social malady, economic reorganization as effective instruments removing disunity and prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of law and pragmatic directions pave way for social stability, peace and order. This process sustains faith of the people in rule of law and democracy becomes useful means to the common man to realise the meaningful right to life guaranteed by Article 21."
Making its observations on the customary initiation of women into the practice of *devadasis*, *jogins* and *venkatasins*, the court said:

“...It is an affront to the human dignity and self respect but the pursuit of customary beliefs traps the fair sex into this glorified self sacrifice and ultimately leads to prostitution service in the temples and charitable institutions, etc, which is a crime against humanity, violation of human right and obnoxious to the Constitution and Human Rights Act. They are void under the Constitution of India and punishable under the law. They are anti ethical to the Constitutional scheme. Fundamentalists and proponents of these practices are constitutional criminals. The unfounded customs can not have legal sanction. On the other hand penal enactment provide for abolition thereof. Instead of progressive outlook, regressive unfortunate tendency of late is raising its ugly head to glorify these ignominious practices which are leading not only to abetment of commission of the crime, but also misleading the unfortunate illiterate and weaker sections of the society, to be taken in seriously by later by their false promises or false theories such as God’s ordain which finds easy acceptance by the poor and illiterate and is acted upon. Every right-thinking person should condemn such attempts apart from keeping and helping strict implementation of the law prohibiting forced into prostitution initiation of the nasty practice wherein the eldest girl in particular families is forced into prostitution.”

The problem faced, thus, is humane. The solution has to be with a humane touch too and not by viewing the person involved in trafficking to be a nuisance from whom the rest of the people in society must be protected.
The case of Upendra Baxi Vs. State of Uttar Pradesh shows how deeply entrenched is the market for sex trafficking. The Agra Protective Home was constituted by and functioned under the penal law, The Immoral Traffic (Prevention) Act, 1956. In a letter to the Indian Express a member of the Board of Visitors of the Agra Protective Home described the pathetic condition of the Home in which the girls were kept. According to this letter, a letter was written to the then Justice P.N. Bhagwati who treated it as a writ petition.

The judgment transcending from 1989 to 1998 saw three phases and ultimately the Supreme Court transferred the case to the National Human Rights Commission with certain guidelines recorded by the Supreme Court. The guidelines were far reaching in the changes they proposed to the existing framework while staying within the framework of the Immoral Traffic Prevention Act and the Constitution. They required the person who is either “removed” under Section 15(4) or “rescued” under Section 16(1) of ITPA and produced before a Magistrate to be heard either in person or through a lawyer (assigned by the Legal Aid Committee of the District Court concerned) at every stage of proceedings including admission to a Protective Home, Intermediate custody as well as discharge.

The Supreme Court further lay down that in camera trial be held and that it should be the duty of the court to ensure the presence of lawyers of both sides. If under section

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8. AIR 1983 2SCC 308
9. Dr. Upendra Baxi and Dr. Lotika Sarkar sent the letter on report in Indian Express.

15(4) and section 16(1) it was a child, the child should be placed in an institution recognized or established under the Juvenile Justice Act, 1986. The guidelines also required Magistrates to maintain a list of those who have been given safe custody of persons rescued or removed on furnishing undertakings. In the event of it being brought to the Magistrates’ notice that such person has returned to prostitution, the giver of the undertaking, after an enquiry, would be debarred from furnishing any undertaking in any proceeding under the ITPA.

It was further suggested that the post of special police officer shall, wherever possible, be held by a woman police officer and that there should be in place an Advisory Board consisting of five leading social workers to be associated with the special police officer.

Apart from the Agra Protective Home case, in Radha Bai Vs. Union Territory of Pondicherry,11 the petitioner’s protests against the Home Minister of Pondicherry alleging that he was misusing the protective home for women for immoral purposes landed her in deep trouble. The Commissioner suggested the closing down of such homes immediately. Two decades later she got relief from the Supreme Court.

In Bholanath Tripathi Vs. State of U.P.,12 a public interest litigation was filed alleging that a woman was held in confinement and was being used for earning money by prostitution. The Supreme Court directed the Commissioner Appointed to make enquiry

and if satisfied prima facie about the allegations, to remove her to a safe place and secure her production before the Court. The Police and the other authorities of the State Government concerned were also directed to afford assistance to the Commissioner.

Section 20 of the ITPA was challenged on several occasions. Section 20 permits the removal of prostitutes from any area in the interests of the general public. The Magistrate is further empowered to prohibit the prostitute women from re-entering the place from which she has been removed. In Shama Bai vs. State of Uttar Pradesh, Section 20 was challenged by a prostitute woman. She argued that prostitution was hereditary trade. It was her only means of livelihood and the members of her family were economically dependent on her. The writ was filed primarily to prevent her landlord from using the provisions of the ITPA for evicting her from the premises. The court held that the unfettered discretion conferred on the Magistrate, remove any woman believed to be a prostitute from his jurisdiction by Section 20, violated Article 14. The court further held

13 AIR 1959 All 57

14 Removal of prostitute from any place. (1) A magistrate on receiving information that any person residing in or frequenting any place within in local limits of his jurisdiction is a prostitute, may record the substance of the information received and issue a notice to such person requiring him to appear before the magistrate and show cause why he should not be required to remove himself from the place and be prohibited from re-entering it.
(2) Every notice issued under the service of the notice referred to in sub-section (1) shall be accompanied by a copy of the record aforesaid, and the copy shall be served along with notice on the person against whom the notice is issued.
(3) The magistrate shall, after the service of the notice referred to in sub-section (2), proceed to inquire into the truth of the information received, and after giving the person an opportunity of adducing evidence, take such further evidence as he thinks fit, and if upon such inquiry it appears to him that such person is a prostitute and that it is necessary in the interests of the general public that such person should be required to remove himself there from and be prohibited from re-entering the same, the magistrate shall by order in writing communicated to the person in the manner specified therein, require him after a date (to be specified in the order) which shall not be less than seven days from the date of the order, to remove himself from the place to such place whether within or without the local limits of his jurisdiction, by such route or routes and within such time as may be specified in the order and also prohibit him from re-entering the place without the permission in writing of the magistrate having jurisdiction over such place.
that prostitutes were subject to a punitive form of surveillance to which other women were not, and that this differential treatment constituted discrimination between persons who were similarly situated.

In the State of Uttar Pradesh Vs. Kaushaliya, Section 20, ITPA was again challenged as violating Article 14. The Supreme Court, in adopting the reasonable classification approach, held that the difference between a prostitute and non-prostitute was a reasonable classification. Further, the court ruled that there were real differences between a prostitute who does not demand, in public interest, any restrictions on her movement, and a prostitute, whose action demand restrictions.

In the case of The Public at Large Vs State of Maharashtra and Others, the petition arose due to suo motu notice taken by the court of a newspaper article which indicated that the minor girls were illegally confined and forced to be sex workers. The respondents were directed by the court to show cause as to why action had not been taken under Sections 366 and 339 of Indian Penal Code, and Sections 5 and 6 of the

(4) Whoever –
(a) fails to comply with an order issued under this section, within the period specified therein, or whilst an order prohibiting him from re-entering a place without permission is in force, re-enters the place without such permission, or
(b) knowing that any person has under this section, been required to remove himself from the place and has not obtained the request permission to re-enter it, harbours or conceals such person in the place, shall be punishable with fine which may extend to two hundred rupees and in the case of a continuing offence with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the offence. Sec 20 of ITPA, 1956.

1. Article 14 of Indian Constitution says: The State shall not deny to any person equality before law or the equal protection of the laws.
2. (1964) 4SCR 1002
3. AIR 1997 4 BOM. CP 171
4. Section 336 of IPC 1860 says – Act endangering life or personal safety of other. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others shall be punished.
Suppression of Immoral Traffic in Women and Girls Act 1956. The Court passed directions as under:

- To frame a proper scheme so that the women including minors who are produced for sexual slavery are released from the confinement of their procures;
- For implementing this scheme, a proper cell, also involving social workers, be created so that by regular checking, minors and others can be released and rehabilitated in the society; and
- Considering the spread of the dreaded disease of AIDS, the state of Maharashtra shall frame a proper scheme with the active assistance of the Municipal Corporation of Greater Mumbai for carrying out HIV tests for the willing sex workers so that the disease may not spread like wildfire in the city.

On the basis of the directions passed by the courts, raids were carried out and about 487 minor girls and child sex workers were rescued by the police and kept in the custody of juvenile homes etc. The respondents pointed out and about 487 minor girls and child sex workers were rescued by the police and kept in the custody of juvenile

with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred any fifty rupees, or with both.

Section 339 of Indian Penal Code 1860 says – Kidnapping, abducting, or inducting women to compel her marriage etc: whoever kidnaps or abducts any women with intent 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 be forced or reduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine, and whoever, by means by criminal intimidation as defined in this code, or of abuse of authority or any other method of compulsion, induces any women to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or reduced to illicit intercourse with another person shall also be punishable aforesaid.

For reference see Chapter 4.
homes, etc. The respondents pointed out in their affidavit that a majority of the girls and had come to Mumbai from the neighbouring states of Karnataka, Kerela, Tamil Nadu, Andhra Pradesh etc. and the North Eastern states of Assam etc., and also from countries like Nepal and Bangladesh. The court constituted a committee for the rehabilitation of the rescued girls. The court gave the following directions:

- The respondent State Government to see that strict vigilance is maintained in the areas where sex workers normally operate and to rescue the child sex workers. Further, adequate steps should be taken to see that those who indulge in trafficking of women should be suitably punished. For this purpose, appropriate directions should be issued to the investigating agencies to take immediate steps. Sometimes, it is noticed that a police officer who detects this type of activity does not take immediate action of the ground that such duty is assigned to some other officer. In the view of the Court, this was not the proper approach because all police officers are bound to take immediate action in those cases where cognizable offences are committed. They may not investigate those cases but they can certainly report them to the proper officer and during such time take preventive measures. Section 107\(^\text{21}\) of Indian Penal Code 1860 provides that a person abets the doing of a thing if he intentionally aids, by any or illegal commission, the doing of that thing.

\(^{21}\) Abetment of a thing: A person abets the doing of a thing, who —

First : Instigates any person to do that thing; or

Second : Engages with one or more person in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of the thing, or

Third : Intentionally aid, by any act or illegal omission, the doing of that thing.

Explanation: A person who, by willful misrepresentation, or by willful concealment of a material fact which he is of bound to disclose, voluntarily causes or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
- It is high time that the state governments taken serious steps to prevent forcible pushing of women and girls into prostitution and to prevent the trafficking in women, i.e., buying and selling of young girls. These girls may be victims of kidnapping, they may be victims of various deprivations, and they may be victims of circumstances beyond their control. For this purpose, regular raids should be carried out in the area where sex workers operate. On numerous occasions, it is reported in newspaper that persons from social organizations who dare to rescue these girls are manhandled, beaten or threatened. To prevent such situations, for time being the government must have a squad of police officers who can take immediate action.

- The State government shall set up an advisory committee, if not already set up, within four weeks from the date of the order in terms of direction No. 2 of Paragraph 15 of the judgment of the Apex Court in the case of Vishal Jeet to comply with the objects set out therein and to further take steps to implement the suggestions made by the advisory committee.

- The State is to set up homes for rehabilitation of rescued sex workers including children so as to enable these rescued sex workers to acquire alternative skilled in order to enable them to have alternative source of employment. In a civilized state, it is the duty of the state of take preventive measures to eradicate child prostitution without giving room for any complaint of culpable indifference. One should not forget that these rescued girls' also fellow human beings who require some support and treatment for getting out of the immoral activities.

22. AIR 1990 SC 1413
• To regularly carry out AIDS awareness programmes in the areas where sex workers normally operate.

• The State Government is to submit periodic reports by taking out notice of motion either through the learned advocate-general or the learned government pleader stating what steps are taken pursuant to the aforesaid directions and how many girls are rescued from the clutches of middlemen, whether medical treatment is given, and whether rehabilitation facilities are made available to them. Even recent newspaper report indicates that pimps or middleman are raising their muscle strength to prevent NGO’s from receiving illegally confined girls.

• The state government is further to place before the court the compliance report of these directions.

In the case of Public at Large Vs. State of Maharashtra and Others, the petition was relating to the rehabilitation of rescued girls. After hearing the various parties and the representations on behalf of various women’s social organizations, consensus on the following points was arrived at:

• There was unanimity on the point that the rescued girls should not be subjected to HIV test.
• If HIV tests have already been carried out on some of the girls, their identity should not be disclosed and they should not be informed of the result of the test.

• All the rescued girls must be subjected to medical examination for finding out their age and also given treatment if they are suffering from any other diseases.

• If the girls are found to be adult and are not covered by the Juvenile Justice Act, and if they do not desire to remain in the present institutes, they must be allowed to leave the said homes.

• The other State governments should be contacted and if those state governments were ready and willing to make arrangements for reception of these girls, the Chairman of Juvenile Justice Board would pass necessary orders. The police should give then necessary escort and the girls must be handed over to the respective States on receipt of the request made by such States.

• Rehabilitation of these girls is possible if they are segregated in groups of ten or fifteen and thereafter counselling work is done.

• Parents of four minor girls who have been traced and who and who have been pleading that the police have wrongly taken them in custody should be released.

• Until the girls are sent back to their respective states, the state government will direct adequate number of probation officers to carry out the counselling job. The management in charge will permit the police to record statements of the girls. The police should trace the belongings of the girls and restore the same to them.

Again, in the case of State Vs. Shri Freddie Peats and Others, the Supreme Court played an important role. In this case, the accused Freddie Peats, then sixty years old, claimed to be a Man of God ('Father' Peats), a medical doctor and social worker who ran a 'boarding' or 'orphanage' for boys generally from broken homes and deprived families. Peats used to sexually abuse and assault the boys. On his arrest there

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were 2305 photographs found in his flat. These photographs recorded different acts of sexual assault, abuse, exploitation, repulsive remarks and other brute and silent violence against the children and their privacy. These photographs covered a period of about seventeen years and were of boys from the neighbourhood and from school all over Goa. Some of them were of foreign visitors. Apart from photographs, there were negatives, drugs, syringes, torture paraphernalia, several passports and bankbooks. In many photographs, the man in the criminal act of sexual assault on children was Peats himself.

The session court held Freddie Peats guilty of offences punishable under sections 292, 293, 342, 355, 339, 323 and 337 of the Indian Penal Code; Section 20 and 43 of the Juvenile Justice Act; Section 9 of the Immoral Traffic (Prevention) Act 1956; Sections 27 of the Drugs and cosmetics Act 1940. Freddie Peats was ordered life imprisonment and fine. He appealed against the order but the appeal was dismissed.

Due to intervention of child rights activist Sheela Barse, the trial in the Freddy Peats Case followed some child friendly procedures like the following.

25. Sale etc. of obscene books. Pamphlets etc.
26. Sale etc, of obscene objects to young person.- Whoever sells, lets to hire, distributes, exhibits or circulates 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.
27. Punishment for wrongful confinement.
28. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.
29. Wrongful restraint.
30. Punishment for voluntarily causing hurt.
31. Causing hurt by act endangering life or personal safety of others.
• All persons in the trial were in informal dress.

• No police officer was present inside the chamber or at the place where the trial was conducted.

• While recording evidence, the child was directed to face the judge so that he will not have occasion to look at the accused and be frightened.

In the case of, Perna Vs. State of Maharashtra and Others, the Mumbai High Court looked into the issue of violation of rights of trafficked children by various authorities who are supposed to implement the law. Perna, the petitioner is a registered organization which works in the red-light areas of Mumbai and Navi Mumbai with the object of preventing the trafficking of women and children and rehabilitating the victims of forced prostitution. This petition was filed in public interest to protect children and minor girls rescued from the flesh trade against the pimps and brothel keepers keen on re-acquiring possession of the girls. On May 16, 2002 the social service branch of Mumbai police raided a brothel at Santa Cruz. Four persons who were alleged to be brothel keepers/pimps were arrested. Twenty four females were rescued. On conducting an ossification test, ten of them were found to be minors. In this case the Mumbai High Court passed the following directions which are of great significance for the children rescued from the brothels.

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32. Criminal Writ petition no. 788 of 2002, Mumbai High Court.
- No magistrate can exercise jurisdiction over any person under eighteen years of age whether that person is a juvenile in conflict with law or a child in need of care and protection, as defined by sections 2(1) and 2(d) of the Juvenile Justice (Care and Protection of Children) Act 2000. At the first possible instance, the magistrate must take steps to ascertain the age of a person who seems to be under eighteen years of age. When such a person is found to be under eighteen years of age, the magistrate must transfer the case to the Juvenile Justice Board if such a person is a juvenile in conflict with law, or to the Child Welfare Committee if such a person is a child in need of care and protection.

- A magistrate before whom such persons rescued under the Immoral Traffic (Prevention) Act 1956 or found soliciting in a public place are produced should, under Section 17(2) or the said Act, have their ages ascertained the very first time when they are produced before him. When such a person is found to be under eighteen years of age, the magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law or to the Child Welfare Committee if such a person is a juvenile in conflict with law or to the child welfare committee if such a person is a child in need of care and protection.

- Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the probation officer.

- The said juvenile should be released only to the care and custody of a parent/guardian after such parents/guardian has been found fit by the child welfare committee, to have the care and custody of the rescued juvenile.
• If the parent/guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the Juvenile Justice (care and protection of children) Act 2000 should be followed for the rehabilitation of the rescued child.

• No advocate can appear before the child welfare committee on behalf of a juvenile produced before the child welfare committee after being rescued under the Immoral Traffic (Prevention) Act 1956 or found soliciting in a public place. Only the parents/guardian of such juvenile should be permitted to make representations before the child welfare Committee through themselves or through an advocate appointed for such purpose.

• An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (prevention) Act 1956.

Again, Sheela Barse Vs. Union of India,\textsuperscript{33} emphasized the significance of the dignity of youth and childhood in a civilized society. It was stated that Article 39(f) of Indian Constitution mandated that children be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. In earlier case of Sheela Barse Vs Union of India,\textsuperscript{34} the petitioner have moved the Supreme Court seeking the release of all the children below 16 detained in Jails in different states.

In People’s Union for Democratic Rights Vs. Union of India,\textsuperscript{35} the court held: “But apart from the requirement of ILO convention No: 59, we have Article 24\textsuperscript{36} of the constitution which even if not followed up by appropriate legislation must operate

\textsuperscript{33} AIR 1982 SC 1420
\textsuperscript{34} AIR 1982 SC 1420
\textsuperscript{35} AIR 1982 SC 1420
\textsuperscript{36} Article 24 says that no child below the age of fourteen years shall be employed to work in any other hazardous employment.
proprio vigore and construction work being plainly and undoubtedly a hazardous employment. It is clear that by reason of constitutional prohibition no child below fourteen years can be allowed to be engaged in construction work”. The term ‘slavery’ as well as related terms such as ‘bondage’, ‘forced labour’, and ‘beggar’ find no definition in the IPC, their meanings have been clarified over the years by the Supreme Court. In this case the Supreme Court observed: “where a person provides labour or service to another for remuneration which is less than the minimum wage fixed by minimum wages Act, 1948, he renders forced labour as beggar within the meaning of Article 23”.37

Children of sex workers are by definition ‘neglected children’ under the Juvenile Justice Act. The law empowers the state to intrude into the privacy of the home of the sex worker ad remove her children from her custody and even guardianship. Such provisions end up destroying the family of a woman in sex work, and penalize her for the work in which she engages. In a recent judgment in the case of Gaurav Jain, dealing with the children of sex workers the Supreme Court, after examining constitutional provisions, various international conventions as well as the Convention for Elimination of all forms of Discrimination Against women (CEDAW), has reiterated that “eradication of prostitution in any form is integral to social weal and glory of womanhood”.

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37. Article 23 says that (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. (2) 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.
In *Khatri II Vs. State of Bihar*, the Supreme Court held that the provision of free legal aid by the state to those who cannot afford legal representation is integral to a person’s fundamental right to life. Although the case had nothing to do with the issue of prostitution *per se*, the Court went on to hold that there were instances “involving offences such as economic offences or offences against the law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the state.” This position was followed in a later decision of the Supreme Court in the case of *Suka Das Vs Union Territory of Arunachal Pradesh*.

This legal position has been rectified to some extent after the *Legal Services Authorities Act, 1986*, was notified in 1995. The Act under section 12(c) provides for legal aid to women and children, and under section 12(g) provides that persons in protective custody under the ITPA are also entitled to legal aid. Even so, the Supreme Court’s observations qualifying the right to free legal aid has serious implications for sex workers, their children, child sex workers, partners of women in sex workers, or parents who have sent their daughters into sex work.

Recently, a committee was appointed by the Mumbai High Court in relation to the case of *Jayesh Thakker and Another Vs. State of Maharashtra and Others and Internet Users Association of India (Intervenors)*. The High Court laid down several restrictions on cyber Cafes to provide for an adequate degree of supervision and

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38. AIR 1991 SC 928  
39. AIR 1986 SC 414  
control so that minors are protected from being exposed to pornographic sites on the Internet in the cyber cafes. The committee has given recommendations to make a child-friendly or child-safe ‘cyber zone’ where minors could safely access and use the internet for information, education, communication and entertainment.

In the case of Krist Pereira Vs. The State of Maharashtra and others, the judiciary has used innovative methods to ensure justice to the child. This was a public interest litigation, which was filed after the death of a child in a remand home in Bhiwandi under mysterious circumstances. The Mumbai High Court constituted a committee of experts to examine the conditions in different juvenile remand houses, children’s homes, and special homes in the state of Maharashtra and to make appropriate recommendations for improving their standards. The report of the committee brought to light the extremely distressing and pathetic conditions prevailing in the various homes in the state.

The High Court constituted a state Committee on Juvenile Justice which shall be consulted in matters of appointments as well as removal of personnel in the remand homes. The other significant directions were:

- Establishment of more juvenile and special homes;
- Establishment of rehabilitation committees in districts;
- Appointment of at least one social worker in each juvenile court;
- Appointment of duty counsellors and visitors;

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41. Writ petition No. 1107 of 1996 Mumbai high Court.
Superintendent of institutions to be given powers to suspend caretakers and other members of the staff for misbehaviors, and
Training programmes for judge and other staff.

A public interest petition was filed in the Allahabad High Court and the Supreme Court in the case of Munna Vs. State of U.P., when reports of sexual abuse in Kanpur Central Jail appeared in newspaper based on a social activist's findings. The High Court asked the session's judge of Kanpur to visit the jail and find out whether they are maltreated. The jail authorities meanwhile released a large number of boys. Therefore, when the session's judge visited the jail, there were only some six children there. But there were eighty-four under trial who were between sixteen and twenty-one years of age. The judge also reported that there was general ignorance about the U.P. Children's Act among the jail authorities. There were parallel proceedings on the same issue in the High Court and the Supreme Court.

The case of Sanjay Suri Vs. Delhi Administration, protected the children against sexual exploitation in jails. A news report described the ill treatment meted out in the Tihar Jail in Delhi in connivance with the jail staff. The writers of this report then moved the Supreme Court seeking the relief on behalf of the child prisoners'. The court them appointed the district judge to make an inquiry and report to it. His report disclosed a shocking state of affairs', according to the judgment. Adult prisoners subjected children

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42. AIR 1982 SC 806
43. AIR 1986 SC 414
to sexual assault. They feared that if their names were disclosed, they would be victimized.

The court passed several orders based on the report. Some juvenile undertrial prisoners were ordered to be released immediately. Some convicted minors were freed on parole for one month. The judgement stressed the need to generate a sense of humanism in jail administration.

The court passed certain orders to protect children. It called upon the magistrates and trial judges to specify the age of the person ordered to be detained. We call upon the authorities in jails throughout India not to accept any warrant of detention as a valid one unless the age of the detainee is shown therein, the judgment emphasized. Thus the jail authorities can refuse to honour a warrant if the age of the person remanded to jail custody if not indicated. The warrant may be returned to the issuing court for rectifying the defect. The age is to be shown so that the detainee could be directed to an adult prison or a juvenile jail. The judgment said that, the youth shall not be assigned any work in the same area where regular prisoners are made to work. Care should be taken to ensure that there is no scope for their meeting and having contact. Wardens should be shifted every three years. The visitor’s board should consist of a cross section of the society.

The Lucknow High Court in a judgment on Wednesday dated 13-10-95, not only directed the release of a 13 year old girl forcibly engaged in the flesh trade but also issued writ of mandamus directing the state of Uttar Pradesh and the Bara Banki
District Magistrate to admit her to a primary school and sanction Rs. 10,000 for her rehabilitation. The Court was of the view that the child should be immediately restored to her parents, whose primary responsibility will be the upbringing and development of the child. The judiciary have also played an important role in protection of minor/child prostitution by saying that “no lawyer can appear on behalf of minor girl rescued from the flesh trade market” — the Bombay High Court.

Then, there is illegal adoption of children for commercial sexual exploitation purposes which is said to be most sensitive aspect in various parts of the globe. The Supreme Court in the case of, Lakshmi Kant Pandey Vs. Union of India and others, have taken the view that no malpractices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian Children in adoption to foreign parents, must not in any manner be involved. The following directions were given:

- The social or child welfare agency sponsoring the application must undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the social or child welfare agency concerned in India, and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the social or child welfare agency concerned in India to the secretary, ministry of social welfare, Government of India.

44. He secures future of minor weaned out of Flesh Trade” The Pioneer, October 10th 1995
45. Shibu Thomas: Lawyer cannot represent minor girls; The Asian Age, October 10th, 2002.
46. Supra Note 7
• In the event of disruption of the family of the foreigner before adoption can be affected, the agency shall give intimation of this fact to the Indian Embassy or High Commission, as the case may be, and the Indian Embassy or High Commission shall also be kept informed about the whereabouts of the child so that they can take the necessary steps for ensuring that the child is properly taken care of and a suitable alternative placement for it is found. The primary responsibility for ensuring that the child is legally free for adoption must be that of the social or child welfare agency processing the application of the foreigner for guardianship of the child.

• No court in a state will entertain an application for appointment of a foreigner as guardian of a child which has been brought from another state, and if there is a social or child welfare agency in that other state which has been recognized by the Government of India for inter-country adoption. If there is no recognized social or child welfare agency in the state where the child is found or obtained, the child shall be transferred to a recognized social or child welfare agency at the nearest place in the immediate neighbouring state.

• Progress reports shall be submitted by the social or child welfare agency sponsoring the application of the foreigner until adoption is effected.

• A foreign social or child welfare agency having a representative in India, should have such a representative who is an Indian citizen with a degree or diploma in social work coupled with experience in child welfare.
• The execution of a bond would ordinarily be sufficient. The bond should be by way of security for repatriation of the child to India in case it becomes necessary to do so as also for ensuring adoption of the child within a period of two years.

• Where it is not possible for the foreigner to complete the adoption process within two years, an application should be made to the court for extension of time for making the adoption and the court may grant appropriate extension of time.

• Notice of the application for guardianship of a child should in no case be published in the newspapers, because then the biological parents would come to know who the person is taking the child in adoption.

• The recognized social or child welfare agency processing the application must also be entitled to recover from the foreigner who is sought to be appointed guardian of the child, costs incurred in preparing and filing the application and processing it in court.

In a writ petition No.365 of 1997 by an NGO Savera and Others Vs State of Goa and Others, the High Court of Bombay delivered a judgment on 21st July, 2003. The object of the petition was primarily to seek the direction of High Court to the concerned agencies in the “readjustment and rehabilitation” of the persons in the Red-Light area of Baina. The High Court took into consideration the various views in the replies filed by the petitioners, respondents, etc., as well as the report of the Kamat Committee. The High Court directions included the following:

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47. Shibu Thomas: lawyer cannot represent minor girls; The Asian Age, October 10th, 2002.
• State government to ensure necessary action as per Kamat Committee Report.

• Ensure effective implementation of the judgment of the Apex Court in *Gaurav Jain Vs Union of India.*

• Ordered that the District Collector take steps under ITPA and other relevant laws to close down the *cubicles (250 cubicles being used for sex trade in Baina beach).* If the said 250 cubicles constructions are illegal, and are on government land and land belonging local authorities, then to take steps to evict the illegal occupants and then demolish them by following due process of law”.

• State government to take adequate steps to prevent the CSWs (Commercial Sexual Workers) being brought into the state of Goa on contract basis, as noted by the Justice Kamat Committee.

• Since the CSWs are being brought from outside Goa, the Government of Goa is not bound to rehabilitate them except to the extent mentioned by specific directions in the judgments of the Apex Court. The rescued CSW’s be deported to the state where they came from. The Goa State Commission for Women, along with the National Commission for Women to take steps, so that the said women are rehabilitated in the state from where they hail with the assistance of the perspective state governments.

• The National Commission for Women to report in ninth months the action taken on the implementatation of the Kamat Committee Report.
As of November 2003, the concerned agencies were in the process of initiating necessary steps in the light of the High Court order. NGOs like Arz which have been working in this area for long have drawn attention to the fact that eviction without appropriate mechanisms of rehabilitation would be tantamount to further violations of the rights of the hapless victims.

The Supreme Court issued notices to the central Government and all states on a PIL petition seeking guidelines for rehabilitation of victims of immoral trafficking after they are rescued. A three-judge bench comprising the Chief Justice V.N. Khare, Justice S.B. Sinha and Justice S.H. Kapadia, issued the notices on a petition from a NGO, Prajwala, engaged in rehabilitation of sex workers. The judiciary through its judicial pronouncement in the area of proper rehabilitation to sex workers rescued from the brothels and have played an important role.

5.2 Decision by Trial Court

In the context of unprecedented developments in response to anti-trafficking, both the Apex Court and the High Courts, have underscored the cardinal principle of Human Rights in justice delivery. But even efforts were made by the judgements delivered by various trial courts across India.

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48. ‘Rehabilitation of sex workers: notices issued’, The Hindu, New Delhi, Feb 28, 2004 Pg-8
A Swiss couple arrested and accused of child pornography in 2000 on the Madh Island, a beach in Mumbai is a case where besides having abnormal sex with a number of slum children by the side of the Mumbai beach in the rooms of a star hotel, the couple also made pornographic films on these children for sale and circulation in Europe and USA. The Sessions Court in Maharashtra, trying the pedophile couple from Switzerland, delivered the judgment on 29 March 2003, convicting both the accused under Sections 363, 367, 354, 292, 293, 341 and 201 of the IPC. The court also ordered compensation worth Rs. 5,000 each to the girl victims. While appreciating the role of police officers in taking prompt steps to arrest the accused, the court adopted child friendly procedures to protect the dignity of the child victim. The judgment underlines the importance of child psychology in understanding a child victim. In this particular case, the victims were girls less than 10 years of age. The court held that 'their embarrassment and refusal to speak and remember the incident was evident through their body language.'

In a case of Pondicherry, a child of 15 years old was subjected to sexual assault for several months, by the accused A-1 and A-2. A charge was framed by the Police Inspector under IPC. The judgment in Pondicherry (Reddiarpylam) Crime No. 70/98 from the court of the Additional Assistant Sessions Judge speaks about evidence to show that the girl victim is 15 years old. The court awarded seven years imprisonment to both the accused and also fined them after convicting them under section 5 of ITPA as well as Sections 363, 372, 373, 368, 109 of IPC. The court observed, "The police could have invoked Section 367 IPC instead of 363 IPC against one of the accused, because 367 incorporates within itself section 363 IPC." It is to be noted here that the charge sheet by
the police was only under IPC and not under ITPA. However, while framing charges, the
trial court invoked Section 5 ITPA too. The judgment shows a high level of sensitivity
towards the plight of girl children and said, "White slavery is still being practiced. The
worst aspect of the crime is that a female child of 15 years was made to suffer excoriating
and excruciating mental as well as physical torture at the hands of both the accused. If
any leniency is shown in imposing punishment, it would be deleterious to the society at
large." The sensitivity conveyed through the judgment could be an eye opener for all
those who are dealing with such issues.

In V.P. Road (Mumbai) police station *Crime No. 279/2000*, the police filed a
charge sheet against two accused persons u/s 366A, 372, 373 IPC and Sections 4,5,6 and
9 ITPA. One accused was absconding and, therefore, the other person was put to trial.
The court of the Additional Sessions Judge convicted the accused for offences under
Section 366 A, 372 IPC and Section 5(a) and 9 ITPA, and awarded rigorous
imprisonment for seven years and fine of Rs. 10,000. It is heartening to note that the
fine amount was ordered to be paid to the victim as compensation. In this case, the
investigators have done a good job in tracing the trafficker from Mumbai city to a village
in Andhra Pradesh and, thereafter, arrested the accused and brought the person to trial.
The court has rejected the contention of the defence against the police, that the FIR was
registered after the arrest. The court held that cryptic information cannot be considered
an FIR and, therefore, the police did the right thing by getting it verified and in that
process, the minor girl had to be rescued, which also led to the arrest of the accused.
Therefore, the delayed registration of FIR was justified. Since the victims were speaking in Telugu and the case diary was in Marathi, the police had to use the service of interpreters in interviewing, understanding and translating the victim’s version into case records. The court has appreciated the ‘cogent and convincing evidence on record’. The court also commended the role of NGOs in not only rescue and rehabilitation, but also in counselling as well as in assisting the court in the trial process. The judgment mentions that the medical reports have confirmed that the victim was 14 – 15 years old and that she was subjected to assault, abuse, illegal confinement, intimidation and repeated rape for a long time. Yet, no charge was framed under rape or abetment to rape. Therefore, the fact remains that the larger issue of child rape was not attended to.

Crime No. 255/01 of Police Station (P.S.) Kamala Market, Delhi. In this case the trial was concluded in a short time and the accused who was kotha owner convicted was for the offences under Sections 363, 366, 366B, 368, 373 IPC and 3, 4, 5, 6 ITPA. The convicted person has been awarded rigorous imprisonment for seven years and has also been fined. The judgment speaks in details about the saga of torture and violation of human rights of several victims in the process of trafficking as well as during their confinement in the brothels.

In Crime No. 69/2001 of Goa, the court of the Judicial Magistrate, Mapusa, which tried the case, held the accused woman guilty under section 8 ITPA and awarded a sentence of “paying a fine of Rs. 250”. Enquiries revealed that the prosecuted and
convicted person were trafficked earlier. Moreover, the differences in the fine amount also need to be noted.

In the case of Calangute P.S. Crime No. 112/98, under section 363, 377 of Indian Penal Code, on 27-08-1998 P.I. Umesh Gaonkar the then P.I. Calangute lodged state complaint that between 22-08-1998 to 27-08-98 at Hotel Goan Heritage Calangute, accused Brinkman Helmut, German national brought a minor boy aged 15 years, Mangesh Kishan Nandulkar from Mumbai without permission of his parent, Sexually abused and exploited him by committing unnatural sexual offence. The accused was arrested on 27-08-1998 and the victim boy was admitted in Bal Niketen as his parents were not traceable. The accused was convicted to undergo rigorous imprisonment for five years u/s 377 IPC on 12-01-1999.

In the Court of the Additional Deputy Commissioner, East Khasi Hills District, Shillong, the trial proceedings in G.R. case No. 12(a) 2002, u/s 366 IPC brought to light several important features, viz. the role of a hotel where minor victims were sexually assaulted and the role of two men who had lured the victims. Apparently, no effort has been made to arrest these two men (despite their being the traffickers) or to bring the hoteliers to book, despite the evidence on record that minors were sexually assaulted in the hotel. In such situations, ITPA has provisions for taking stringent action against the hotel, even amounting to the cancellation of license. These steps have not been initiated at all.
In Kamala Market (Delhi) Crime No. 11/95, an adult male was charged u/s 3, 4, 5 and 6 ITPA on charges of living on prostitution, using the premises for prostitution and for detaining two girls for the purpose of sexual intercourse. The accused pleaded not guilty and claimed trial. The judgment of the court is: “Four witnesses are official witnesses (police officers) who reached the spot on receiving information. Their evidence is ‘hear-say’. Three public persons, who are the most important witnesses, have turned hostile and have not supported the case of prosecution at all. Under these circumstances the accused deserves the benefit of doubt, which must be given to the accused. Even otherwise, the complainant are one the same person which is in violation of the judgment of the Hon’ble supreme court in, **Megha Singh Vs State of Haryana.** In these circumstances the prosecution has not been able to prove the case against the accused beyond reasonable doubt . He is acquitted accordingly”. This judgment shows that the exploiter/trafficker escaped conviction because of poor prosecution and investigation. The judgment also question on the quality of supervision of investigation of these cases.

In Kamala Market (Delhi) crime No. 459/01, the accused woman was charged u/s 363, 365, 368, 372, 373, 376, 342, 506, 109 IPC and 3, 4, 5, 6 ITPA. The charges were framed u/s 368, 366, 109, 376, 373, 34 IPC and 3, 4, 5 ITPA. The accused pleaded not guilty and claimed trial. The prosecution case was that she was lured and trafficked from Nepal, drugged and thereupon, pushed into commercial sexual exploitation in the brothel for a period of three years, after which she was rescued. However, during trial, she did not support the prosecution story. The court held that “The solitary prosecution witness, the victim, has not supported the prosecution case. She is 17 years of age and states that
she indulged in prostitution of her own free will. The prosecution has failed to get any convincing evidence to support its allegations against the accused... Hence giving benefit of doubt to the accused, she is acquitted of the charges leveled against her.” The judgment is well received because despite the police charge sheet, the trafficked girl victim has got reprieve from the court from being convicted. However, the judgment brings out an important point – that the victim is still not above 17 years and, therefore, by definition, is a child under the Juvenile Justice Act. There was clear evidence before the court that she was being sexually exploited for the last three years. Therefore, the exploitation commenced when she was just 14 years old. Under Section 375 IPC, sexual intercourse with a child under 16 years of age, even with consent, amounts to rape. Despite this, no charge was framed under Section 376 IPC and no investigation was done in this direction. Perhaps, the court could have asked for further investigation since the work done by the police suffers from other drawbacks too. Since the girl had stated that she was trafficked from Nepal, the Nepali link should also have been promptly investigated and the traffickers brought to book. This was not done by the concerned police officials.

On May 16, 2002, the city police raided a brothel in Santacruz and rescued 24 victims and arrested four brothel keepers. After a Medical examination, it was established that 10 victims were minors and their matter were transferred to the Juvenile Justice Board. Advocate V.P. Jaiswal appeared on behalf of the four accused at the magistrate’s court and moved a bail plea. The Bombay High Court has ruled that lawyers could represent minor girls rescued from the flesh trade market.
These discussions on the judgments and orders by the court discussed above bring to light certain issues that need to be considered in ensuring proper delivery of justice and law enforcement. They are listed below:

- Victim perspective should be the key in justice delivery. The violation of rights of these persons should be taken into consideration before arriving at any conclusion.

- Every criminal act should have not only actus reus, but also mens rea. If mens rea is absent, the person cannot be held guilty under ITPA. Therefore, investigation and prosecution should see whether the person being charged under section 8 ITPA, the most commonly used section, did have the required intention or not. It is known that the trafficked woman/girl is made to solicit under duress, coercion, lure, deceit or compulsion by the trafficker or other exploiters. In such cases, the woman should be treated only as a witness and not as an accused. If these was no informed intention, the person cannot and should not be prosecuted for soliciting.

- Investigation and trial process need to be concluded in a specified timeframe. If the trafficked victim is an outsider, she may have to be detained in an after-care home till her evidence recording is completed and cross-examination is over. If she has been repatriated, she may have to be called to the court and off. This causes a lot of inconvenience to the witnesses. Therefore, expeditious disposal is a must.

- The functioning of protective homes and corrective institutions, where the victims and the accused, respectively, are to be sent, needs to be streamlined. Moreover,
the distinction between the two types of homes has to be clear to those involved in the delivery of justice.

- Vocational training facilities in the protective homes should be wide ranging and focused on the interests and choices of the persons concerned, with a view to empower them.

- Counseling should be integrated with rescue and rehabilitation. The criminal justice system should be victim-friendly, sensitive to the rights of the victims and also proactive in ensuring their dignity and human rights. Court must adopt such an approach even during the trial. Effective victim-friendly procedures, like video-conferencing, etc., need to be brought about. Model court and police stations could be established, at least on an experimental basis, to ensure expeditious disposal of such crimes and effective partnership should be formed between the various government agencies and NGOs in addressing the issue.

- Investigation has to go into the roots of trafficking. The police should be oriented and trained to be professional in their work. Investigation should be able to expose the entire trafficking nexus. Moreover, the procedures adopted by police have to be sensitive, responsive and victim-friendly, keeping the human rights perspective in view. Prosecution should ensure timely appearance of witnesses so that the trial is not delayed. Court have an important role in ensuring the compliance of these by the police and prosecutors.

- Judicial discretion in deciding cases and awarding punishment/fine should be exercised keeping the best interest of the victim or survivor. Victim compensation should be given due consideration in cases of human rights violations. Trafficking
being an extreme from of violation of several rights, due weightage needs to be
given to compensation for the victim/survivor.

- The child in the profession of prostitution works against its will. If she wants to
lead a normal life she is at first persuaded against this idea and if she does not
agree she is repeatedly raped and thereby forced to adopt the profession as career.
They are sexually exploited which is against the norms of the International labour
Organization regarding their age as to the entrance into this profession. The
judiciary in the country has shown its great concern for the working children by
bringing occupations as processes under the judicial scrutiny by directly applying
the constitutional previous relating to children

- Through the above case reference we can say that the judiciary has provided
remedial justice to weaker section of people. The Supreme Court could no longer
remain silent, indifferent or neutral witness to the grave injustice to the poor and
deprived. Divergent remedies are provided by the court in different cases, suitable
in the circumstance of the case.

Summary:

Courts play a very important role in promoting the rights of Children. Public
interest litigations has been used beneficially to realize the protection rights of children.
Courts have ensured the implementation of progressive laws and interpretation of
restrictive laws in the best interest of the Child. Courts have used innovative methods to
ensure justice to the child. Judicial activism, emerging from the concern for protection of
human rights, specially of women and children, has been instrumented in bringing about a paradigm shift in the delivery of justice. This has led not only to protection of victims and vulnerable person, but also to the prosecution of exploiters and eventually has been instrumental in leading to prevention of trafficking.

In the Bhiwandi remand home case in Mumbai, the courts permitted the inspection of institutions and then formulated an expert committee to visit all the children’s institutions in Maharashtra and submit a report. A Committee has been formed under the directions of the Supreme Court to monitor institution. In another matter relating to the custody, the judge played an important role in putting the child at ease. A Division Bench of the Mumbai High Court comprising justice A.P. Shah and Justice J.A. Patil also gave directions for incorporating training programmes on child rights for judicial officers of the State of Maharashtra. A child centered approach stimulated by the standards of the constitution and connection on the Rights of Child can help to create spaces for providing justice to the child even within the constraints of the existing laws and to promote the realization of the rights.

The Child’s future is at stake but his/her interests are never separately represented in Indian Courts. The Child’s interests are considered to coincide with the parents or as the court think fit relying on the probation or welfare officer’s report, or counselor’s report. There is a need to introduce the concept of guardian ad litem or child’s legal counsel or a child’s representative involved throughout the Court proceedings in

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which children are involved. This is especially required as child-friendly court procedures and personnel have yet to be evolved. To protect the children best, independent child advocates must be appointed by the courts. These advocates will not only represent the children but also hear their problems and concerns, work with their families, and prepare them for the court proceedings. Because child’s own interest may be in conflict with the court’s judgment, specially trained child advocates are required to play the roles of fact finder, legal representative, case monitor, mediator and information and resource persons.\textsuperscript{50}

The Children’s Code Bill 2000 provides for the constitution of a National commission for Children for the better protection of child rights and for promoting the best interests of the child within the larger context of promoting and upholding values to strengthen the family, society and the nation. The National Code Bill has provided for the formation of Children’s Court\textsuperscript{51} for the purpose of providing speedy trial of offences against children or of violation of children’s rights. For every children’s Court, the state government shall, by notification, specify a public prosecutor or appoint an advocate who has been in practice for not less than seven years, as a special public prosecutor for the purpose of conducting cases in that Court.\textsuperscript{52}

\textsuperscript{50} Bapai, Asha, ‘Child Rights in India –Law, Policy and practice, Oxford University Press, Pg. 470.
\textsuperscript{52} The Children’s code Bill 2000, Section 30, The National Commission for Children Bill 2001 (NCC).