



VOLUNTARY SEX WORKERS *RIGHT TO CHOICE & CONSENT*

The law and Supreme Court
Recommendations

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Foreword

There are an estimated 1.5 million sex workers in India. The vast majority are adult women, who voluntarily offer sexual services in return for payment, in order to support themselves and their children/families. However, existing laws and policies including the Immoral Traffic Prevention Act (ITPA 1956), view *all* sex workers as victims of sexual exploitation who need to be rescued and rehabilitated, irrespective of their own choice and consent. This conflates voluntary sex work with trafficking.

In 2011, the Supreme Court of India (SC), set up an expert panel to examine the situation of sex work in India and recommend legal and other measures to (i) enable sex workers to live with dignity, (ii) to prevent forced entry into sex work, and to (iii) rehabilitate women who wanted to leave sex work. After 55 meetings and 15 interim reports, the panel submitted its recommendations in 2016. Chief among them was the need to make a distinction between voluntary sex workers and trafficked victims, and to uphold their rights to consent and choice of livelihood.

In 2020, the Bombay High Court ordered the Maharashtra government to release three women sex workers who had been forcibly detained in a government shelter. The court

observed that prostitution was not a crime, and adult women had the freedom to choose sex work as livelihood.

In this booklet, we provide an overview of the laws that affect sex workers, and current recommendations by courts. Our focus is on women sex workers who practice the trade voluntarily, and we use case examples and discussion questions to highlight the distinction between voluntary sex work and trafficking. Our objective is to sensitize policy makers and law enforcement agencies to understand this distinction, and to interpret existing laws so that they uphold the right to dignity and livelihood choice of voluntary sex workers.

We invite your comments/ questions and will respond as early as possible.

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Laws related to sex work

The Immoral Traffic Prevention Act (ITPA 1956) governs the commercial exchange of sexual services in India. According to its title, ITPA's focus is to prevent trafficking. However, this is not defined in the law. Instead, ITPA addresses "prostitution" which it defines as "sexual exploitation or abuse of persons for commercial purposes". The law was last amended in 1986 to enhance penalties related to trafficking.

While ITPA criminalizes sexual exploitation and abuse, it is noticeably silent about voluntary sex work by adults, with their consent, and without exploitation and abuse. Does this mean that voluntary sex work is exempt from ITPA's scope, or does it mean that the law does not acknowledge the possibility that some people may choose to offer sexual services in exchange for payment as a way of earning a livelihood? An analysis of different sections of the law suggest that ITPA conflates voluntary sex work with sexual exploitation and abuse, and voluntary sex workers as victims who need to be rescued and rehabilitated, with or without their consent.

Criminal Law (Amendment) Act 2013 (Section 370 IPC) is based on the recommendations of the Verma Commission* to include an expanded definition of trafficking within the scope of the Act. It criminalizes the trafficking of persons for all forms of exploitation including "physical exploitation, sexual exploitation, slavery, servitude, or the forced removal of organs" (The Criminal Law (Amendment) Act). Trafficking is defined as recruiting, transporting, harbouring, transferring, or

receiving one or more persons for the purpose of exploitation, by using threats, force, abduction, fraud, deception, abuse of power, or by using inducement through payments or benefits {The Nirbhaya Act, 2013 Sec8}¹. The consent of the “victim” is deemed immaterial in all cases.

Like ITPA, Sec 370 appears to conflate voluntary sex work with trafficking by criminalizing exchange of money for sexual services offered by a person voluntarily and with consent.

However, the Verma Commission clarified that Section 370 “ought not to be interpreted to permit law enforcement agencies to harass sex workers who undertake activities of their own free will, and their clients”*.

¹ *Trafficking of person 370: whoever for the purpose of exploitation a)recruits, b) transports, c) harbours, d)transfers, or e)receives a person or persons by- using threats, or using force or any other forms of coercion or by abduction or by practising fraud or deception or by abuse of power or by inducement i.e. by giving or receiving payments or benefits*



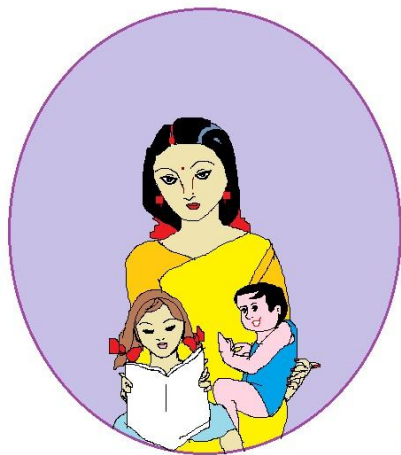
ITPA Sec 2 – Definition of brothel

“...any house, room, [conveyance] or place or any portion of any house, room, [conveyance] or place, which is used for purposes [of sexual exploitation or abuse] for the gain of another person or for the mutual gain of two or more prostitutes”.

Supreme Court Panel recommendation: This definition should not apply to a place used for mutual gain of two or more sex workers.

Case study: I am Sarala, a sex worker from Nagercoil. I live in my own house. It has two rooms. Sometimes, I allow friends to bring a client to my house. They use one room for sex work and pay me some money when they go. Though it is my own place, the police are harassing me for running a brothel.

Discussion question: Do you think that Sarala should be punished? How does the SC panel recommendation influence your decision?



ITPA Sec 4: Criminalizes living on the earnings of prostitution

Definition: Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable.

SC Panel recommendation: Exclude children, old/infirm parents, and partners unless there is proof that the woman is being forced to part with her earnings.

Case study: I am Shanthi from Madurai. I live with my husband and three children. Eight years ago, my husband met with an accident and lost one of his legs. Then he had other health complications and had to give up his work. One of my friends introduced me to sex work. Initially, I was uncomfortable, but now I am quite happy. The money I earn is enough to take care of my family and to pay for my husband's medical treatment. I will continue in this as long as I can.

Discussion question: According to you, should Shanti's husband be punished for living on his wife's earnings? Do you think Shanti is exploited by her husband and children? How did you arrive at your answer? How would you interpret the Verma Commission clarification in this situation?



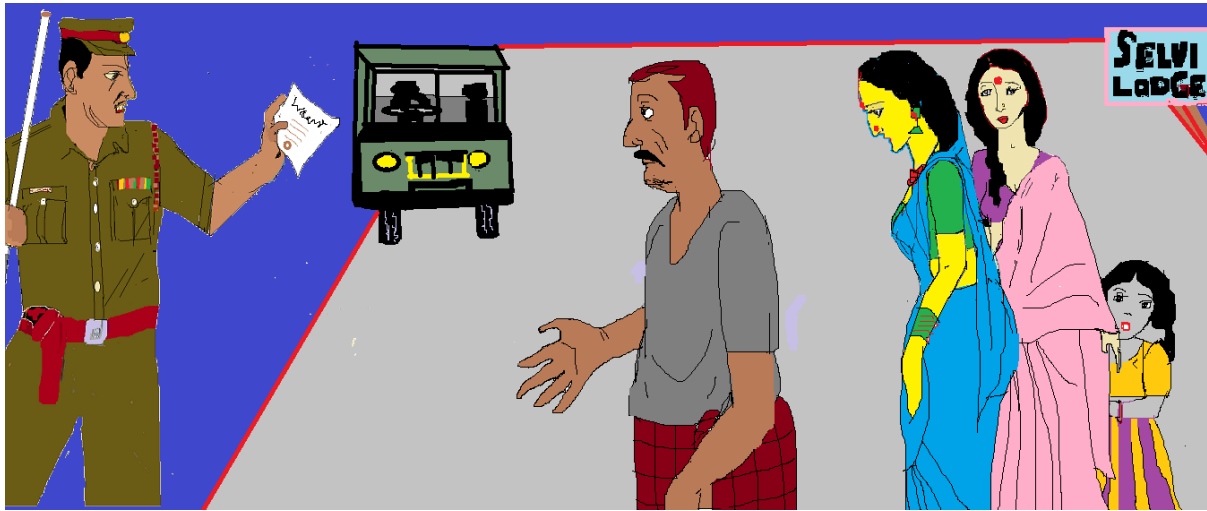
ITPA Sec 5: Criminalizes procuring, inducing, or taking a person for the sake of prostitution.

Sec 370: Criminalizes all forms of procurement, transportation, and lodging for purposes of sexual exploitation, including inducement through payment or benefits. Consent of the sex worker is immaterial.

SC Panel recommendation: Applicable only where the procuring, inducing or taking is done without the consent of the woman.

Case study: I am Sheela, from Madurai. I support my family and my aged parents entirely through sex work, and. I travel from Madurai and do sex work in Dindugul. Sometimes a friend informs me about a client, and asks me to contact him. Sometimes the client picks me up in his vehicle from the Madurai bus stop and drops me back.

Discussion Question: In your view should Sheela's friends and/or client be punished? Why? How can you apply the SC panel and Verma Commission recommendations in this situation?



ITPA Sec 6: Criminalizes detaining a woman and/or children in premises where prostitution is carried on. The consent of the woman is immaterial.

Sec 370: Criminalizes all forms of procurement, transportation, and lodging for purposes of sexual exploitation, including inducement through payment or benefits. Consent of the person is immaterial.

SC Panel recommendation: Applicable only if the woman is detained without her consent. Not applicable to children who are with their mothers without proof of abuse.

Case study: Radha Lodge in Chennai is a place where women from nearby villages stay and do sex work on contract for a few months at a time. Often, women bring their young children who stay with them in the lodge. The police raided the lodge and arrested the owner for trafficking women and children on the premises.

Discussion question: Do you think the lodge owner was guilty of trafficking women and children? How will you decide if a woman was trafficked or is doing sex work voluntarily?



ITPA Sec 7: Criminalizes prostitution within 200 meters of a public place temple, school, hostel, hospital, clinic etc.

SC Panel recommendation: The issue is to avoid causing public nuisance. Remove blanket restriction on prostitution within a distance of 200 metres place of religious worship, nursing home or hospital. Prohibit prostitution in these places only when it is visible in public, or if it cause nuisance to the public.

Case study: I am Seema. I normally do not stand near public places like temples but during important festivals there are crowds visiting religious places. I get picked up by many clients from there.

Discussion question: Should Seema be prosecuted for picking up clients near the temple? How would you interpret the law based on the SC panel recommendations?



ITPA Sec 8: Criminalizes seducing or soliciting for purpose of prostitution

SC Panel recommendation: Delete this section. Trying to attract a client, whether or not from a public place, should not be punishable.

Case study: I am Sankari. I need to be able to indicate to clients that I am available. I use my eyes, or the way I dress, or stand, to do that. I have to market my body, since this is my asset.

Discussion question: What do you think about Sankari's statement? What would you tell the police to do in this situation?

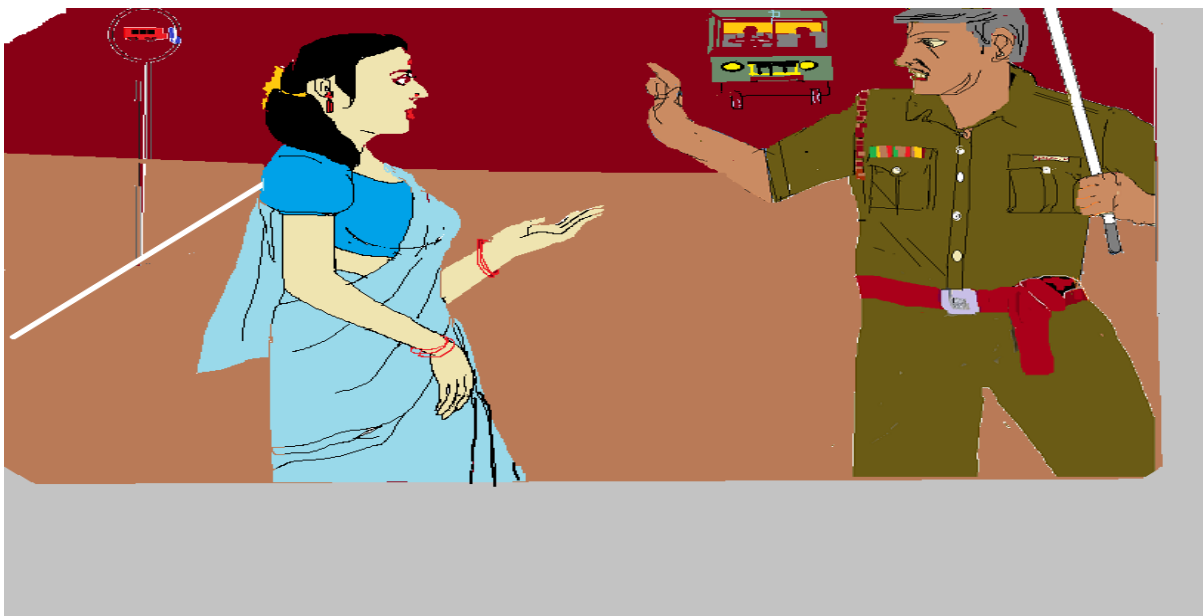


ITPA Sec 10 A: Allows sex worker held under Sec 7, 8, to be sent to correction home for two to seven years

SC Panel recommendations: The premise that sex work is morally wrong needs to be reconsidered, and this section should be suitably amended.

Case study: My name is Ameena. I just came out of remand after two years. I was arrested when I was going on a bus with a customer. I couldn't even inform my family because the police took me straight to the lock up, then to the court, and from there to the home. After two weeks I somehow managed to send a message through another sex worker. Now my children don't talk to me.

Discussion Question: What would you tell the police to do in this situation?



ITPA Sec 14: Allows police to arrest women without a warrant under Secs 7, 8.

SC Panel recommendation: Arrests should be require a warrant, and should not be made by a person below the rank of Inspector. Arrests by persons of lower rank must be scrutinized by a magistrate.

Case study: My name is Leela. Last year, I was picked up for soliciting near a bus stop. The police saw me standing in the road side and asked me to get into the van and produced me before the magistrate. I had to pay a fine and was released.

Discussion question: What is your view of the Bombay High's Court's observation regarding the right of adult women to choose sex work as a means of livelihood? As a policy maker what would you recommend to the police?

My name is Stella. I used to work for daily wages on a construction site. The supervisor started asking me for sex and threatened to stop my work if I did not agree. After some months, I decided to leave and become a sex worker. Why should I put up with his harassment? I now earn my own money on my own terms.

ITPA Sec 15, 16: Allows search without warrant, arrests of people in the premises, and their before a magistrate

SC Panel recommendation: This section should apply only to people who say they are being held against their will (without consent)

Case study: I am Shanthi. I have a five year old child. I stay in a brothel and earn through sex work. Once there was a raid. I was arrested, and taken to the police station with my child. Next day the magistrate sent me to a government remand home. I was there for three months not knowing when they will send me out. After three months, my sister took me out by showing evidence that she is my blood relation. But she told my family I was a sex worker. They started talking badly about me to my child, so I left the place after a fight. Now I live alone with my child and still do sex work. But I feel very bad about my rift with my family.

Discussion question: Do you think the disruption caused in Shanti's life is justified? How did her arrest help reduce trafficking?

ITPA Sec 17: Allows sex workers to be detained in rehabilitation home for up to three years to ensure they do not return to prostitution. Consent is not required.

SC Panel recommendation: Not applicable to voluntary sex workers unless they consent. To be sure that the person is not a trafficked person, magistrate must ask the woman, and if convinced, should let her free. If magistrate is unsure, the woman can be detained for up to one week, and a panel comprising sex worker and anti-trafficking NGO representatives should meet the woman and decide. The decision to send sex workers back to their families must be taken with their consent.

Case Study: I am Prema. There was a raid and I was put in a home for two years. I came out last year and have got back to sex work. They (the staff at the shelter), said if they catch me again, they will lock me up for five or seven years...are they going to pay my son's college fees that they can tell me what to do?

Discussion question: How can you be sure that Prema is not trafficked? In your view how has locking up Prema addressed the issue of trafficking?



ITPA Sec 17A, 18: Allows investigation of parents, guardians, or husbands before handing over rescued sex worker to their care

SC Panel recommendation: Not applicable to voluntary sex workers. In other cases, the matter should be decided with the ‘rescued’ person’s consent.

Case Study: My name is Lalitha. My parents died when I was a child. I was brought up by my grandmother, who was quite old. My neighbor seduced me and tricked me into sex work. I was rescued by the police and produced before a magistrate who asked me if I wanted to go back to my grandmother. I refused. So I was sent to a shelter home run by an NGO. I stayed there for some years, and they also arranged my marriage. I am very happy today, and grateful to everybody who saved me from prostitution.

Discussion question: What is the best way to decide whether a sex worker should be rescued, or who a rescued sex worker should be placed with?

Section 18: Allows closure of brothel, eviction of people, and sealing of premises without right of appeal

SC Panel recommendation: Owners of the premises have the right to appeal. This section does not apply if the place is used for mutual gain for two or more sex workers.

Case study: I am Meera. I live in my own house. It has two rooms. Sometimes, I allow friends to bring a client to my house. They use one room for sex work and pay me some money when they go. Though it is my own place, the police are harassing me for running a brothel.

Discussion question: What is your response to this situation?

Section 20: Allows magistrate can order removal of person from the area under her/his jurisdiction on suspicion of her doing sex work and forbid her re-entry

SC Panel recommendation: This section must be deleted as it contravenes the fundamental rights of a person to liberty, freedom of movement, dignity and autonomy.

Case Study: Mahesh was picked up on the basis of a complaint filed by a neighbor that Mahesh was a sex worker. The neighbor had earlier quarreled with Mahesh over her filling water from a public tap outside her house. The magistrate ordered her to be removed from the locality and sent to a government shelter home. She was taken away by the police in front to the entire neighbourhood.

Discussion question: How would you respond to this situation?

