

A REVISIT OF ANCIENT TO POST-  
MODERN LEGAL PERSPECTIVE  
OF PROSTITUTION IN INDIA:  
CONTEMPORARY LAWS AND ISSUES

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***A**bstract—Prostitution and sex work are not new practices; its origins may be traced back via mythology as well as the historical record. Prostitution is seen as a social ill by certain members of our society, while its existence is welcomed by others. This means there are two possible interpretations. But it's certain that some sex workers in the prostitution industry are subjected to sexual abuse or become survivors of violence at the hands of their procurers or clients. In this paper, I will make an effort to document the history of prostitution in India and its contemporary significance. The writers have made an effort to examine the loopholes in the current legal framework, the issues and problems, and the potential next steps for deciding whether or not to legalize prostitution in India.*

**Keywords:** Prostitution, Poverty, Viciousness, Slavery, Human Trafficking

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## I. INTRODUCTION

Some claim that prostitution is one of the world's oldest occupations, although in India it is even older. Menaka, Rambha, Urvashi, and Thilothamma, all figures from Indian mythology, were portrayed as epitomising feminine beauty and charm. Prostitutes were also present throughout the time of the Pandavas and the Kauravas. Kautilya, in his classic *Arthashastra*, details the proper behaviour and lifestyle for a prostitute (Aishwarya Sandeep, 2021). Indications of favor-code seekers of behaviour have even been found. In his magnum opus, '*Arthashastra*,' composed between the fourth and third centuries B.C.E., Chanakya states, "Providing sexual entertainment to the public using prostitutes (Ganika) was an activity not only strictly controlled by the State but also one which was, for the most part, carried out in establishments owned by the State." In smaller communities that could not sustain a full-fledged governmental system, however, women who made a living off of their attractiveness (*rupajivas*) would have been permitted to work independently as practitioners. Sometimes referred to as "concubines," *pumsachali* are a third kind of pleasure ladies (IILS, 2022)<sup>1</sup>.

*Nagarvadhus*, often known as "brides of the town," were common in ancient India (grooms). *Vasantasena*, the protagonist of the ancient Sanskrit tale *Mricchakatika* published in the second century B.C. by Sudraka, and *Amrapali*, the state courtesan and Buddhist pupil depicted in *Vaishali Ki Nagarvadhu* by Acharya Chaturseen.

Later, sacred prostitution became widely accepted across India, with the *Mahakala* of Ujjain temple serving as its epicentre. *Devadasi* in Southern India and *Mukhies* in Northern India were the names given to the women<sup>2</sup>. The *Devadasi* system eventually became a recognised institution with the name *Devadasi*. Later, sacred prostitution grew widespread across India, with the *Mahakala* of Ujjain temple serving as its epicentre. In Southern India, young women were referred to as *Devadasi*, whereas in Northern India, they were known as *Mukhies*. The *Devadasi* system eventually became a recognised institution with the name *Devadasi*.

*Devadasi* is a system that is still there, and the interesting thing about it is that it is said to be thriving. "Female slaves of the gods" is what *devadasi* refers to (Shingal, 2015)<sup>3</sup>. A girl who was married to a god or goddess of her

<sup>1</sup> *Devadasi System in India*, IILS Blog, <https://www.iilsindia.com/blogs/devadasi-system-india> (last visited Aug. 22, 2023).

<sup>2</sup> Amritya Sen, *Illusions of Empire: Amartya Sen on What British Ple Really Did for India* THE GUARDIAN, <https://www.theguardian.com/world/2021/jun/29/british-empire-india-amartya-sen> (last visited on Aug 8, 2023).

<sup>3</sup> Ankur Shingal, *The Devdasi System: Temple Prostitution in India*, 22 UCLA WOMENS. LAW J. (2015).

community showed her devotion to the divine. As part of their devotion to the church, they also received training in classical dance and music, which helped them rise to positions of prominence and prominence in society.

In the past, these female-only courses would dance and sing during prayer services. Later, they began to wed benefactors, often aristocratic rulers. The monarchs would provide for them, and the women would give them sexual favours in return. As the British era progressed, the monarchs gradually lost their authority, leaving these individuals in charge. Since they had no other means of subsistence, they began engaging in the same activities as the monarchs in order to help support their families<sup>4</sup>. Prostitution became an institution among certain families and communities, with subsequent generations of females being groomed by devadasi and referred to as prostitutes. Girls who engage in these acts are sometimes referred to collectively as prostitutes. In contrast, the many forms they take are designated by several other labels<sup>5</sup>. The following are examples of some of them:

- a. Prostitutes who sing and dance with grace and refinement are known as “Tawaifs.”
- b. Nochi means “young female student of a Tawaif.”
- c. Literally translated, “Kanjari” means “low-class, uncultured tawaif.”
- d. A Kasbi is a woman from a family with a long history of engaging in the sex trade.
- e. The Nautch girl was a colonial-era dancer who performed for people of various socioeconomic backgrounds in India.

In the 1980s, the practise of Devadasi was outlawed. Red light districts are known as sites where prostitution is legalised and openly practised. Thousands upon thousands of women continue to labour in these regions and neighborhoods throughout numerous Indian states<sup>6</sup>.

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<sup>4</sup> UNODC, *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, UNITED NATIONS OFF. DRUGS CRIME 1 (2008), [https://www.unodc.org/documents/human-trafficking/An\\_Introduction\\_to\\_Human\\_Trafficking\\_-\\_Background\\_Paper.pdf](https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf) (last visited on March 22, 2023).

<sup>5</sup> Reuben Balfour & Jessica Allen, *A Review of the Literature on Sex Workers and Social Exclusion By the UCL Institute of Health Equity*, UCL INST. HEAL. EQUITY, 1, (2014), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/303927/A\\_Review\\_of\\_the\\_Literature\\_on\\_sex\\_workers\\_and\\_social\\_exclusion.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/303927/A_Review_of_the_Literature_on_sex_workers_and_social_exclusion.pdf) (last visited on March 22, 2023).

<sup>6</sup> BALDEV RAJ NAYAR, *VIOLENCE AND CRIME IN INDIA, A QUANTITATIVE STUDY*, Delhi, 2 (Macmillan Co. of India Ltd. 1975) (last visited on March 22, 2023).

## II. CAUSES FOR PROSTITUTION

One of the many things that might push a person over the edge into commercial sex is financial hardship. Unscrupulous middlemen prey on women from outlying regions by promising them good jobs but ultimately selling them as prostitutes. Poverty is the primary factor that forces desperate women into prostitution. In the case of men, too, unemployment is a crucial issue that pushes them into prostitution as a career choice. Prostitution is blamed on a number of factors, but it is generally agreed that financial hardship is a major one. In the past, only women were considered prostitutes and men were their customers; but, in the modern day, all sexes and those who do not adhere to either gender's traditional binary are actively engaged in this industry<sup>7</sup>. The number of men working as prostitutes in India is reportedly on the rise. When there are no female customers, they turn to selling sex to male customers, it says. Gigolo is the slang term for a male prostitute.

The rising poverty rate has pushed many people, particularly young people, into metropolitan areas, where prostitution is seen by some as a quick way to meet their needs and the needs of their families. By taking a high-level look at the concept of prostitution, we can see that it was not quite as pervasive in the past as it is now. As a result of the urbanisation process, there has been a fundamental shift in the make-up of our world. The emergence of free business, a byproduct of urbanisation, has contributed to a widening economic gap between the haves and have-nots, hence increasing the prevalence of poverty, unemployment, criminality, and social isolation (India, 1949). As a result, there has been an increase in the prevalence of prostitution as a means by which some individuals, especially women, have adapted to the bleak economic realities. Also, unemployment might force some women to choose jobs in the sex industry. Due to a dearth of legal employment options, many women have turned to shady dealings to make ends meet.

After experiencing rape, almost 6% of women in the sample became prostitutes. And oftentimes, survivors of sexual assault suffer further victimization at the hands of a culture that wrongly holds these women responsible for their own attack. In certain situations, not only has society rejected them, but so have their own relatives. Casualties are often forced to deal with comparable problems, whether justice is delayed or denied. And after a given period of time, when they have no safe place to call home in our society and no hope for their future, they find their ways into the shadows of prostitution<sup>8</sup>. After experiencing incest, around 8% of the young women involved turned to prostitution. Incest between an uncle and a niece is second only to that between a

<sup>7</sup> Sanjoy Roy & Chandan Chaman, *Human Rights and Trafficking in Women and Children in India*, 1 J. HIST. ARCHAEOLOG. ANTHROPOL. SCI. 162 (2017).

<sup>8</sup> Sarmah Mridula & Mahanta Subhashish, *Crime against Women in India with Reference to the Indian Penal Code*, 96, (6 CLAR. INT. MULTIDISCIPL. J2017).

parent and his daughter as a source of public scandal. Young victims of incest who are sexually abused at home sometimes end up as prostitutes because they feel unsafe leaving their homes. A woman or man may become a prostitute for a variety of reasons, not only those listed above.

### III. LAWS RELATING TO PROSTITUTION IN INDIA

Human trafficking is a major moral and ethical problem that affects people all over the world. According to the United Nations Human Rights Council, this is a “grave violation of Human Rights.” The exploitation of women and children by unlawful force, coercion, abduction, fraud, deceit, abuse of authority or vulnerability, or the provision of rewards or advantages to the person in charge of such victims is now known as human trafficking, as slavery has been banned across the globe<sup>9</sup>. As a result of sexual abuse, compulsion to do labour or services, slavery or organ harvesting, in its Trafficking in Persons Protocol, the United Nations outlawed human trafficking worldwide.

Human trafficking is defined as a crime of economic and social significance under many articles and clauses of India’s Constitution. No citizen of India shall be deprived of his life, personal liberty, or property without due process of law, as guaranteed by Article 21<sup>10</sup> of the Indian Constitution. The Constitution outlaws the use of forced labour and the sale of human beings under Article 23<sup>11</sup>.

### IV. CHILD PROSTITUTION

**Analysis of Sections 372 and 373 of Indian Penal Code:** Whoever sells, lets to hire, or otherwise disposes of a minor with the intent that the minor shall, at any age, be employed or used for the purpose of prostitution, illicit intercourse with any person, or for any lawful and immoral purpose, shall be punished with imprisonment of either description for a term of three years<sup>12</sup>.

It is considered until proven otherwise, that anybody who gives a minor girl to a prostitute or the owner or operator of a brothel knows that the girl would be used for sexual purposes. Consensual sexual contact between two people who are not married to each other or who are not joined in any union that would not technically be marriage but is nonetheless recognised under the

<sup>9</sup> Artsjabs, *A Legal Framework about Child Prostitution*, <https://www.legalserviceindia.com/legal/article-44-a-legal-framework-about-child-prostitution.html> (last visited on Aug. 8, 2023).

<sup>10</sup> INDIA CONST. art. 21.

<sup>11</sup> INDIA CONST. art. 23.

<sup>12</sup> Pen. Code, §372, No. 45 of 1860, [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_5\\_23\\_00037\\_186045\\_1523266765688&sectionId=46148&sectionno=372&orderno=421](https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&sectionId=46148&sectionno=372&orderno=421) (last visited on Aug. 8, 2023)

personal law or custom of either the individuals' own community or, in the case of couples from different communities, both communities.

Adults who purchase minors for the purposes of prostitution or unlawful intercourse are subject to a fine of up to one million rupees and a maximum prison sentence of 10 years. It is a crime punishable by imprisonment of either description for a term which may not be less than one year for any person who purchases, hires, or otherwise obtains possession of a minor with the intent that the minor, at any age, shall be employed or used for the purpose of prostitution or illicit intercourse with any person, or who knows that it is likely that the minor, at any age, shall be employed or used for the purpose of prostitution or illicit intercourse with any person, or for any unlawful purpose<sup>13</sup>.

Any prostitute or brothel owner/manager who acquires custody of a minor female by purchase, hiring, or other means is believed to have done so with the intent to exploit her for prostitution until proved otherwise. Criminal penalties are provided in this provision for violators of Section 372. When a guy approaches a woman and makes a romantic advance, he is exempt from this rule.

## V. PROCURATION OF A MINOR GIRL

**Analysis of Section 366-A Indian Penal Code:** The clause makes it illegal to knowingly or intentionally procure an underage female. Whoever, by any means whatsoever, induces any girl under the age of eighteen to leave any place or to do any act with the intention that such girl may be forced or seduced to illicit intercourse with another person or with the knowledge that it is likely that she will be forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment extending up to ten years and shall also be liable to fine.

When a female under the age of eighteen is coerced into leaving her residence or doing an unlawful conduct, this clause applies (Baldev Nayar Raj, 1975)<sup>14</sup>. The criminal must either intend to compel or persuade such a girl to engage in sexual activity with another person, or know that such a girl is likely to engage in illegal sexual activity with another person.

Any method of enticement is fair game. The International Convention for the Suppression of the Traffic in Women and Children, signed in Paris in 1910, inspired the addition of Sections 366-A and 366-B to the Indian Penal Code by the Indian Penal Code (Amendment) Act, 1923.

<sup>13</sup> Anubhav Chaudhry, *Pornography in the India Legal Scenario* 5 INT'L JL MGMT. & HUMAN. 604, (2022).

<sup>14</sup> Baldev R. Nayar, *Violence and Crime in India*, (Macmillan Publishers Limited 1975).

Since the offence under this section is one of enticement with a specific aim, the offender does not commit a new offence each time he or she offers the girl for sale to a new person after the inducement. The lack of information on the severity of the imprisonment in this part is problematic (Ghosh, & Nag, 2021)<sup>15</sup>.

A man was arrested for allegedly using section 366 to force a juvenile girl into prostitution in the case of *Fateh Chand v. State of Haryana*. IPC sections 372 and 373 make it illegal to sell or otherwise dispose of a child girl with the intent that she be forced into prostitution, and to purchase or hire a minor girl with the intent that she be forced into prostitution.

Until the necessary purpose or knowledge is proven on the side of the accused, he cannot be found guilty under this section if a woman who may not have reached the age of eighteen makes a livelihood through prostitution by presenting herself to others promiscuously for money.

It has been determined that if the father of a married girl under the age of eighteen removes her from her husband's home and gives her in marriage to another man, the father is guilty of the offence of inducement under this section, but the man to whom the girl was later married cannot be convicted because the object of the inducement to leave must be seduction by another person and not simply the desire to get away from the unhappy marriage (Azhar, et al., 2020)<sup>16</sup>.

It was held that the accused was guilty under sections 366-A and 376 of the Code even if consent on the part of the victim was proved in a case where a minor married girl was forcibly taken away by the accused from the custody of her mother and raped, and where it was proven that she was fifteen years of age at the time of the incident.

## VI. IMPORTATION OF GIRL FROM FOREIGN COUNTRY

**Analysis of Section 366-B of Indian Penal Code:** If you bring in a female who is under 21 years old from outside of India or the Indian state of Jammu and Kashmir with the purpose or knowledge that she is underage, you will face penalties under this provision. A girl under the age of twenty-one who is brought into India from a country other than India or the State of Jammu and Kashmir with the intent that she may be forced or seduced to illicit intercourse with another person, or with the knowledge that it is likely that she will be

<sup>15</sup> Rajdeep Ghosh & Swasti Nag, *Prostitution in India: A Comparison of Ancient and Present Legal Outlook* 4 INT'L JL MGMT. & HUMAN 1579, (2021)

<sup>16</sup> Sameena Azhar et al., *Diversity in Sex Work in India: Challenging Stereotypes Regarding Sex Workers*, 24 SEX. CULT. 1774 (2020).

either forced or seduced to illicit intercourse with another person, is subject to a fine and a prison sentence of up to ten years (Uma, & Sreenath, 2020)<sup>17</sup>.

Any female brought into India must come from outside the nation or the state of Jammu & Kashmir. That young lady can't be older than twenty-one. The criminal must have had the purpose to coerce or seduce the girl into having sexual relations with another person, or the offender must have known that the girl would be coerced or seduced into having sexual relations with another person.

Both this and Section 366-A were inserted by the Indian Penal Code (Amendment) Act, 1923 to implement provisions of the International Convention for the Suppression of the Traffic in Women and Children, which was signed in Paris in 1910. It is unclear from this provision, as well as from section 366-A, whether the imprisonment is minimal or severe. The crime defined in this subsection may be tried in a court of session and is cognizable, without the possibility of bail or compounding (Bhardwaj, 2021).

**Suppression of Immoral Traffic in Women and Girls Act, 1956:** For the purpose of prosecuting human trafficking, parliament approved the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) in 1956. The legislation's stated goal is the elimination of a pervasive social problem. In recent years, calls for legislation to crack down on immoral behavior have grown. While the Act may seem all-encompassing at first glance, it really relies on other laws for matters such as definition, penalty, and the framing of a charge. Trafficking is defined under IPC sections 370 and 371. IPC sections 359–374 define and penalise the kidnapping, abduction, sale, and forced labour of young females. Wrongful confinement is defined under section 340 of the International Penal Code (Chatterjee, & Parpart, 2019)<sup>18</sup>. Sexual offences including sexual harassment, assault or criminal force with purpose to disrobe a woman, voyeurism, and stalking are defined and their punishments are outlined in Sections 354 A, 4354 B, 354 C, and 354 D. Many of the parts of the Act relied on the Indian Evidence Act for their wording.

**Immoral Traffic (Prevention) Act, 1956:** To combat the issue of women being trafficked, the Prevention of Immoral Traffic Act and the Immoral Traffic (Prevention) Act, 1956 were passed and put into effect in 1956. The court has declared prostitution to be immoral, but in the Indian context, this cannot be construed as making it criminal. The Immoral Traffic (Prevention) Act, 1956 (ITPA) makes it explicitly illegal to engage in any conduct that

<sup>17</sup> Saumya Uma & Samudyata Sreenath, *Legal Imagination and Social Reform: Navtej Johar Revisited*, 13 NUJS L. REV. 2, (2020).

<sup>18</sup> Sudeshna Chatterjee & Jane L. Parpart, *Silence as Strategy in the Sexual Commerce Industry: A Case Study from India*, RETHINK. SILENC. VOICE AGENCY CONTESTED GENDERED TERRAINS BEYOND BIN. 142 (2019).



facilitates prostitution, including the trafficking of children and women for the purpose of prostitution, the operation of a brothel, the support of one's family through funds obtained through prostitution, the solicitation or enticement of another to engage in prostitution, and so on<sup>19</sup>. Thus, in order for them to develop into respectable members of society, it may not be illegal for them to engage in private prostitution or to receive payment for sex performed with mutual agreement and no prior solicitation. Goals of the Act include making it a crime to engage in the aforementioned prostitution-related activities and authorising police to shut down brothels and relocate their clients to rehabilitation facilities. Legal proceedings for violations of this Act may be brought before a special court established by the Central Government.

It is illegal to exploit a child or anybody else sexually for financial advantage. An outside party is given the task of sexually exploiting the victim. The International Traffic in Persons Act (ITPA) legalizes sexual conduct for financial gain outside of brothels as well. That goes for private residences, vehicles, and wherever else. This Act gives law enforcement the jurisdiction to take action or begin an investigation in places like massage parlors, bars, tourist circuits, escort services, friends clubs, etc., where commercial sexual exploitation or activity is happening or likely to occur.

The Immoral Trafficking (Prevention) Act of 1956 was enacted to give legal effect to the International Convention for the Suppression of Acts of Trafficking in Persons, which was signed on May 9, 1950, in New York. In this case, Shri Gopala Menon signed the bill. The bill was passed into law by India's President on December 30th, 1956. On December 31, 1956, the Act's first provision went into force. The remaining clauses came into force on May 1, 1958. The act was renamed in 2003 from its original title, the "Suppression of Immoral Traffic in Women and Girls Act, 1956." (SITA) The major goal was to decrease the amount of girls and women who prostitute themselves. The Act's name was changed from the Prostitution Act to the Immoral Trafficking (Prevention) Act, 1956 when it became apparent that male prostitution would also need to be controlled and prohibited. The Act applies across the whole of India, including all Union Territories.

Several words are defined in the Act's section 2, subsections 2(a)-(c) (j)<sup>20</sup>. A brothel is defined in Section 2(a) as "any home, room, conveyance, or place, or any portion thereof, whereby any person is exposed to sexual exploitation or abuse for the purpose of generating financial gain for himself or for the benefit of another person." Section 2(f) provides a comprehensive definition of

<sup>19</sup> Sibnath Deb et al., *Child Trafficking for Prostitution: The Exploitation of Poverty-stricken Situation, Disadvantaged Children in India*, 49 (2022).

<sup>20</sup> The Immoral Traffic (Prevention) Act, 1956, Act No. 104 of 1956, India Code (1993) [https://www.indiacode.nic.in/bitstream/123456789/15378/1/the\\_immoral\\_traffic\\_%28prevention%29\\_act%2C\\_1956.pdf](https://www.indiacode.nic.in/bitstream/123456789/15378/1/the_immoral_traffic_%28prevention%29_act%2C_1956.pdf) (last visited on Aug. 8, 2023).

prostitution as commercial sexual exploitation or abuse. According to Section 2 of the Act, a “minor” is someone who has turned 16 but is under the age of 18.

In Section 3, the penalties for preventing a place from being used as a brothel are outlined. The opening of a brothel is strongly discouraged. It imposes jail terms of between two and five years as penalty for the crime. Prostitution as a primary source of support is criminalized under the act’s Section 4.

Procuring or taking a person for the purpose of prostitution is illegal under the act, and those found guilty face a fine and jail term of at least three years and no more than seven years (section 5). (d). Specifically, the Act’s Section 6 addresses the confinement of a person in a place where prostitution takes place. Criminal seduction of a prisoner is addressed in Section 9. Victims are discussed in Sections 3, 4, 5, 6, and 9. The violations addressed by this law are listed in Sections 3 through 9.

Prostitution to or within a specific distance of a public place is illegal under Section 7. Any prostitute who engages in prostitution within 200 yards of a place of public assembly, such as a church, school, or hospital, is subject to the penalties outlined in Section 7 (1). Prostitution solicitation by words, gestures, or the intentional exposing of one’s body is addressed in Section 8. You may find the provisions for investigations in Sections 13, 14, 15, 16, and 17, and for trials in Section 18.

Every violation of the Act is a cognizable offence, as stated in Section 14 of the Act. The Metropolitan Magistrate or the first-class judicial magistrate u/s 22 has jurisdiction over cases involving violations of sections 3, 4, 5, 6, 7, and 8 of the Act.

Case filing jurisdiction, the advisory body, and the Special Police Officer (u/s 15) are all specified in the Act. Prostitution is the primary target of the statute, rather than human trafficking. The Act’s Sections 16, 18, 19, 20, and 21 specifically outline the Magistrate’s authority.

## **VII. SPECIAL POLICE OFFICERS AND ADVISORY BODY**

The State Governments are authorised by this Act to select specialised law enforcement personnel to investigate and prosecute violations of this Act. The State Government may also select female police officers and advisory groups as necessary.

**Cognizable offence:** As they are considered “cognizable offences,” the individual responsible for doing the conduct may be arrested without a warrant by the special police officer or at his or her command.

**To close brothels or premises of prostitution:** When the police or another person informs the Magistrate that a house, place, etc. within 200 metres of a public place has been used for prostitution, the Magistrate will send a notice to the owner, tenant, agent, or caretaker of that location, asking them to explain why the location should not be declared a place of illicit working within seven days. If the magistrate finds, after hearing both sides, that the location was used for prostitution, he may compel the occupants to remove the premises within seven days and prohibit the property from being rented out without a licence.

### A. The Protection of Children from Sexual offences, 2012

**Child Prostitution:** Whenever a minor (someone under the age of 18) engages in or is coerced into sexual activity, this is known as child prostitution. India has among of the highest rates of all countries for the occurrence of child prostitution. The primary reason is that youngsters are more susceptible to being ensnared by pimps and intermediaries because they are less resistant to being persuaded by flattery and have less defence mechanisms. In addition, being so young means, they are eager to explore the world, which sometimes causes them to take risks that set them up for situations from which they will have a difficult time escaping. Laws against enslaving or trafficking minors are quite stringent. The Indian Penal Code stipulates that the purchase or sale of a juvenile may result in up to 10 years in jail and a fine of up to one million rupees. In addition, anyone responsible for the sexual exploitation of a child who has been trafficked face harsh penalties under Section 370A<sup>21</sup>. However, evidence suggests otherwise. Thirty percent of the sex workers in India are under the age of twenty, and of those, approximately 15 percent started working in the sex trade before they were 15 and 25 percent started between the ages of 15 and 18. There are also roughly 3.3 million young people between the ages of 15 and 18, and 2 million children between the ages of 5 and 14 who engage in commercial sex. They account for forty percent of India’s estimated one million commercial sex workers. Eighty percent of them live in the five major cities, seventy-one percent of them cannot read, and half a million youngsters are coerced into this industry every year<sup>11</sup>. The Juvenile Justice (Care and Protection) Act, 2015 has measures for rehabilitating and restoring children in need of care and protection, although by the time such a kid is rescued, the harm has usually been done.

<sup>21</sup> Pen. Code, §370A, No. 45 of 1860, [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_5\\_23\\_00037\\_186045\\_1523266765688&sectionId=46146&sectionno=370A&orderno=419](https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&sectionId=46146&sectionno=370A&orderno=419) (last visited on Aug. 8 2023).

## VIII. LAW BEFORE POSCO ACT, 2012

Prior to the POSCO Act, offences involving sexual abuse of children in India were handled under the Indian Penal Code. The following provisions of the Indian Penal Code were used in prosecutions involving sexual abuse of children:

**I.P.C. 375 (Rape) (1860):** To wit: Section 354<sup>22</sup> of the Indian Penal Code (1860) shockingly violating women’s sense of modesty. Section 377<sup>23</sup>, Crimes Against the Person and the Person’s Family, Indian Penal Code (1860). To safeguard children and make crimes like child trafficking, pornography, and the sale of minors illegal, the International Criminal Court (I.P.C.) was insufficient. The IPC’s many flaws meant it was unable to provide adequate protection for kids in situations like these:

- a) Anyone, including male victims, may be subjected to sexual acts of penetration other than “conventional” peno-vaginal intercourse without any recourse under IPC 375<sup>24</sup>.
- b) There is no legislative definition of “modesty” in IPC 354<sup>25</sup>. It’s a minor crime with a potential for escalation. The “modesty” of a young boy is not safeguarded either.
- c) The phrase “unnatural offences” is not defined in IPC 377. It’s not meant to punish adults who sexually abuse minors; it only applies to those who’ve been penetrated during an assault.

**Reasons for Enactment of POSCO Act, 2012:** To protect children from sexual assault, sexual harassment, and pornography and to facilitate adequate legal machinery by establishing special courts for trial of such offences, the Indian government enacted the POSCO ACT in response to the inadequacy of the Indian Penal Code and the lack of any other stringent legislation addressing and effectively tackling such heinous crimes as sexual exploitation and abuse of children. This was done in accordance with Article 15 of the Indian Constitution, which requires the government to look out for its citizens’ children, and in place of the United Nations Conventions on the Rights of the

<sup>22</sup> Pen. Code, §354, No. 45 of 1860, [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_5\\_23\\_00037\\_186045\\_1523266765688&sectionId=46121&sectionno=354&orderno=394](https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&sectionId=46121&sectionno=354&orderno=394) (last visited on Aug. 8 2023).

<sup>23</sup> Pen. Code, §377, No. 45 of 1860, [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_5\\_23\\_00037\\_186045\\_1523266765688&sectionId=46160&sectionno=377&orderno=434](https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&sectionId=46160&sectionno=377&orderno=434) (last visited on Aug. 8 2023).

<sup>24</sup> Pen. Code, §375, No. 45 of 1860, [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_5\\_23\\_00037\\_186045\\_1523266765688&sectionId=46151&sectionno=375&orderno=424](https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&sectionId=46151&sectionno=375&orderno=424) (last visited on Aug. 8 2023).

<sup>25</sup> Pen. Code, §354, No. 45 of 1860, [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_5\\_23\\_00037\\_186045\\_1523266765688&sectionId=46121&sectionno=354&orderno=394](https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&sectionId=46121&sectionno=354&orderno=394) (last visited on Aug. 8 2023).

Child, which spell out the guidelines that member nations must follow to safeguard children.

**Commencement of POCSO ACT, 2012:** On June 19, 2012, President Obama signed into law the Protection of Children from Sexual Offences Act, 2012, and on June 20, 2012, it was published in the Indian Official Gazette. The POCSO Act's preamble states that laws protecting children are essential to a child's healthy growth and development because it ensures the child's right to privacy and secrecy is upheld at all times and in all proceedings regarding the child's legal status. For the healthy growth of a child's body, mind, and spirit, as well as their relationships with others, it is crucial that they be protected, as required by the POCSO Act. State parties to the Convention on the Rights of the Child are obligated under the POCSO Act to adopt all relevant national, bilateral, and multilateral steps to avoid violations of the Convention on the Rights of the Child. –

- a) A youngster being pressured or induced to participate in sexually inappropriate behaviour is a crime.
- b) Use of minors for sexual exploitation, including prostitution and other illegal activities.
- c) The pornographic industry's blatant and systematic exploitation of young people.

**Importance of POSCO Act:** According to the POCSO Act, a “child” is anybody less than 18 years old. It includes just the child's physical age and says nothing about the child's developmental maturity. Acts of immodesty against minors are also criminalised, and the law recognises all types of penetration other than penile-vaginal penetration. Under Section 15<sup>26</sup> of the Act, anybody caught viewing or possessing child pornographic material is subject to a fine or jail time of up to three years, or both. Abetment of child sexual abuse is a crime under Section 17<sup>27</sup> and is punishable by imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or one-half of the longest term of imprisonment provided for that offence, or by fine, or by both, under Section 18 of this Act. Children in India will have a much easier time during trials because to the Act's provisions in Sections 19-22 of Chapter V. Reports of sexual abuse of children may now be filed with the Special Juvenile Police in a timely and uncomplicated way, thanks to the established protocols for doing so. Any member of the media or any employee of a hotel, lodge, hospital, club, studio, or

<sup>26</sup> The Protection of Children from Sexual Offences §15, Act No. 32 of 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12864&sectionno=15&orderno=15](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12864&sectionno=15&orderno=15) (last visited on Aug. 8, 2023).

<sup>27</sup> The Protection of Children from Sexual Offences §17, Act No. 32 of 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12866&sectionno=17&orderno=17](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12866&sectionno=17&orderno=17) (last visited on Aug. 8, 2023).

photographic facility (by whatever name they go by) is required by Section 20 of Chapter V of the Act to immediately report the discovery of any material or object that is sexually exploitative of a child (such as pornographic, sexually related, or making obscene representation of a child or children) by the use of any means of communication. Critics of the Act have pointed out that its provisions appear to criminalise consensual sexual intercourse between two people under the age of 18 and take the personal liberty of adolescents to indulge in consensual sex, with the added risk that young people who engage in sexual activities will be subject to further harassment from family, police, and society. The new law has stoked the fire of discussion over the wisdom of age-of-consent regulations and the perils of adolescence.

**Case Laws:** In the case of *State v. Pankaj Chaudhary*<sup>28</sup>, the accused had placed his fingers into the vagina and anus of a five-year-old girl prior to the passage of the POSCO Act. He was charged with “outraging the modesty of a lady,” despite the fact that the act of penetrating a female with one’s fingers is not illegal in India. The case was decided in the defendant’s favour.

Why two men might face life in jail for sexually abusing a five-year-old child after the POSCO Act was passed, as shown in *State v. Manoj Shah and Pradeep Kumar*<sup>29</sup>. It all started in April of 2013.

#### **A. Roles of Special Court under POCSO Act during the Trial:**

1. Make the environment comfortable for the kid by letting them bring along someone they know and trust, such as a parent, guardian, close friend, or relative.
2. It allows for regular pauses for the kid.
3. The minor is not subjected to repeated court appearances in which he or she must testify.
4. It is not acceptable to question the youngster aggressively or to attack their character.
5. The child’s worth and pride are protected.
6. Child’s identity is concealed (vi) (Section 33).

Cases will be heard in private by the Special Court with the kid’s parents or another adult the youngster confides in present (Section 37). Anyone who suspects a violation of the POCSO Act may report it to the SJPU or the local police (Section 19). If a child or any other person suspects that a crime has

<sup>28</sup> State (Govt. of NCT of Delhi) v. Pankaj Chaudhary and Ors. [Criminal Appeal No. 2298 of 2009].

<sup>29</sup> <https://indianexpress.com/article/cities/delhi/5-year-olds-rape-delhi-court-sentences-convicts-for-20-years-citing-grotesque-crime-6242937/> (last visited on Aug. 8, 2023).

been or is about to be committed, that person, including the kid, may report it or file a complaint under POCSO. If a member of the media, hotel, lodge, hospital, or club staff discovers any material or device that may be considered sexually exploitative of a minor, they must immediately notify the SJPU or local police (Section 20). If a person discovers any material or device that might be used for sexual exploitation of a child, they have a legal obligation under the POCSO Act, 2012 to report it to the SJPU or the local police. Failure to comply carries a fine or jail time of up to six months, or both (Section.21). A person may be sentenced to up to six months in jail, a fine of up to \$1,000, or both if they file a false complaint or supply false information on another person (Section 22)<sup>30</sup>. A child's statement is never to be taken at a police station. Evidence of a child's mental or physical handicap may be recorded under a unique provision in the POCSO Act. The Magistrate may consult with a special educator or another adult who is acquainted with the child's preferred mode of communication (Section 26)<sup>31</sup>. A lawyer may be consulted by the minor at his or her request. The Legal Services Authority should provide a lawyer to represent the kid if the parents or guardian are financially unable to do so (Section 40)<sup>32</sup>. The victim's name, residence, family information, picture, school, area, etc. are all off-limits to the media according to the POCSO Act (Section 23)<sup>33</sup>. A fine of up to one thousand dollars or imprisonment for up to six months, both of which may be extended to one year, or both may be imposed if a child's identity is revealed (Section 23).

Media workers, hotel/lodge employees, medical staff, club employees, and studio/photography facility employees are all examples of people who may be obligated to report suspicious activity under the terms of this law. The penalty for not reporting is up to six months in jail, a fine, or both. Whenever police receive a report of child abuse, they must now file a First Information Report (FIR). A female police officer at or above the level of sub-inspector should preferred record a kid's statement; however this may be done wherever the youngster feels comfortable.

Under this law, a medical checkup for a kid is permitted even before filing a police report. The Investigation Officer has final say on this matter (IO). Within 24 hours of learning of the offence, the IO must arrange for a medical

<sup>30</sup> The Protection of Children from Sexual Offences §22, Act No. 32 of 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12871&sectionno=22&orderno=22](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12871&sectionno=22&orderno=22) (last visited on Aug. 8, 2023).

<sup>31</sup> The Protection of Children from Sexual Offences §26, Act No. 32 of 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12875&sectionno=26&orderno=26](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12875&sectionno=26&orderno=26) (last visited on Aug. 8, 2023).

<sup>32</sup> The Protection of Children from Sexual Offences §40, ACT NO. 32 OF 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12889&sectionno=40&orderno=40](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12889&sectionno=40&orderno=40) (last visited on Aug. 8, 2023).

<sup>33</sup> The Protection of Children from Sexual Offences §23, Act No. 32 of 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12872&sectionno=23&orderno=23](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12872&sectionno=23&orderno=23) (last visited on Aug. 8, 2023).

examination of the kid at a federal hospital or municipal hospital. This is done with the knowledge and approval of the kid's parent(s) or another responsible adult the youngster respects.

The POCSO Act mandates that all instances filed under the Act be submitted to the appropriate Child Welfare Committee (CWC) within 24 hours of filing the complaint. Within three days, the CWC must determine whether the kid should stay in institutional care or return home with his or her family, taking into account the youngster's perspective. The CWC shall select a support person to help the child throughout the investigation and trial of the matter, with the approval of the child's parent/guardian/other person the kid trusts.

The POCSO Act 2012 vests the State Commissions for the Protection of Child Rights (SCPCR) with the authority to investigate and report on operations carried out in accordance with the Act, as well as the obligation to oversee the Act's implementation. The commission has the authority to request information on any individual instance of child sexual abuse that falls within the purview of a CWC. The panel may also provide temporary solutions or make permanent recommendations to the state government.

Loss of educational and occupational possibilities, in addition to disability, illness, or pregnancy as a result of the abuse, are all grounds for compensation according to the provisions given forth in this act and heard by the special court. This remuneration would be granted both during the trial and after it was concluded.

**Special Court:** The POCSO Act established principles and procedures for the creation of Special Courts to expeditiously hear cases involving sexual offences against minors. For this reason, the Special Courts, sometimes known as "child-friendly courts," were established. A Special Court is a court that has been established in accordance with section 28<sup>34</sup> of the POCSO Act and is given the authority to hear and rule on matters solely under the POCSO Act. The State Government, in conjunction with the Chief Justice of the High Court, will appoint one Court of Session in each district to serve as a Special Court for the purpose of hearing cases involving violations of the POCSO Act. Additionally, if a session court is designated as a children's court under the Commission on the Protection of Children's Rights Act or a Special court appointed for similar reasons under any other legislation, then such court is considered to be a special court for the purposes of those laws. May, upon receiving a complaint of circumstances which constitute such an offence or upon a police report of such facts, take cognizance of any offence without the suspect being committed to it for trial. (Sec-33(1)) According to

<sup>34</sup> The Protection of Children from Sexual Offences §28, Act No. 32 of 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12877&sectionno=28&orderno=28](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12877&sectionno=28&orderno=28) (last visited on Aug. 8, 2023).



Section 32<sup>35</sup> of the POCSO Act, the State Government must appoint a Special Public Prosecutor for each Special Court that hears matters under the Act. This appointment is made public by a notice in the Official Gazette. He will be considered a public servant since he has been a lawyer for at least seven years and has been actively working in the field.

## IX. CONCLUSION & SUGGESTION

Several elements in the new law are designed to protect minors from sexual assault and harassment. The purpose of this legislation is to eliminate gender bias in the criminal justice system regarding crimes committed against children. For the purposes of penetrative sexual assault, the term “Sexual Assault” has been broadened to include the practise of dosing minors with hormones or other chemicals to bring about sexual maturity at a younger age. The importance of the Act cannot be overstated, since it provides a precise definition of child pornography and criminal penalties for its dissemination. In accordance with the Act, “child pornography” is any visual portrayal of sexually explicit action involving a kid, whether it be a picture, video, digital, or computer-generated image that cannot be distinguished from an actual child. Additionally, the changes suggest harmonising the law with the Information Technology Act and increasing the penalties for sending pornographic content to minors. The death penalty is included in the Act as a means of strengthening punishment for sexual offences committed against minors. Penalties under the new law include a maximum of 20 years in jail and maybe life in prison for individuals who conduct penetrative sexual assaults on children less than 16 years old. The statute raises the minimum sentence for penetrating sexual assault from 10 to 20 years in prison and the maximum sentence to the death penalty. The Act mandates that anybody caught using a kid in a pornographic context be sentenced to up to five years in jail and/or pay a fine of up to \$250,000 in order to deter such behaviour. A second or subsequent conviction, however, carries a maximum sentence of seven years in prison and a fine of up to \$7,000. More than a thousand special courts have been approved by the government to handle POCSO cases quickly.

The Ministry of Women and Child Development has proposed an amendment to the existing Protection of Children from Sexual Offences (POCSO) Act that will soon be tabled in the Lok Sabha in an effort to crack down severely on child pornography. The amendment would extend the scope of the Act to include sexually explicit digital content featuring children.

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<sup>35</sup> The Protection of Children from Sexual Offences §32, Act No. 32 of 2012, India Code (1993), [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_13\\_14\\_00005\\_201232\\_1517807323686&sectionId=12881&sectionno=32&orderno=32](https://www.indiacode.nic.in/show-data?actid=AC_CEN_13_14_00005_201232_1517807323686&sectionId=12881&sectionno=32&orderno=32) (last visited on Aug. 8, 2023).

There has been no legal definition of child pornography in India up to this point. It was a sizable loophole that might be used to circumvent regulation. Neither the Information Technology Act (Section 67)<sup>36</sup> nor the Indian Penal Code (Section 293)<sup>37</sup> provides a definition for child pornography. The term was coined from the definition of pornography, which states that pornographic content includes “any material which is lascivious or appeals to the prurient interests, or if its effect is such as to tend to deprave or corrupt the minds of those who are likely to see, read, and hear the same.” The term “child porn” has been modified to facilitate effective enforcement of the penalty. As a result of the amendment, pornographic material in which adults or young people pose as children will also be illegal.

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<sup>36</sup> The Information Technology Act, §67, Act No. 21 of 2000, India Code (1993), [https://www.indiacode.nic.in/bitstream/123456789/13116/1/it\\_act\\_2000\\_updated.pdf](https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf) (last visited on Aug. 8, 2023).

<sup>37</sup> Pen. Code, §293, No. 45 of 1860, [https://www.indiacode.nic.in/show-data?actid=AC\\_CEN\\_5\\_23\\_00037\\_186045\\_1523266765688&sectionId=46054&sectionno=293&orderno=327](https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&sectionId=46054&sectionno=293&orderno=327) (last visited on Aug. 8, 2023).