

# SEX WORK AND LAWS IN SOUTH ASIA: A MONOGRAPH



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## Sex Work and Laws In South Asia:

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# TABLE OF CONTENTS

<b>1</b>	<b>INTRODUCTION</b>	<b>2</b>
<b>2</b>	<b>BANGLADESH</b>	<b>3</b>
<b>3</b>	<b>INDIA</b>	<b>9</b>
<b>4</b>	<b>NEPAL</b>	<b>21</b>
<b>5</b>	<b>PAKISTAN</b>	<b>27</b>
<b>6</b>	<b>SRI LANKA</b>	<b>33</b>
<b>7</b>	<b>END NOTE</b>	<b>44</b>

## **ANNEXURES**

I	"Nepal I - Muluki Ain regarding Trafficking".	46
II	"Nepal II- The Traffic in Human Beings (Control) Act, 1986".	47
III	"Nepal III- The Human Trafficking and Transportation (Control) Act, 2008.	49
IV	"Nepal IV - The Some Public (Offences and Penalties) Act, 1970".	55
V	"Pakistan I - The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979.	57
VI	"Pakistan II - The Punjab Suppression of Prostitution Ordinance 1961.	63
VII	"Sri Lanka I - The Vagrants Ordinance".	68
VIII	"Sri Lanka II - Brothels Ordinance".	78

## INTRODUCTION

The law with regard to sex work remains among the most ambiguous pieces of legislation in South Asia. Activists working for the empowerment of sex workers or in HIV/AIDS prevention programs in the region remain unclear about even the basics of prevalent laws with regard to prostitution and trafficking. India, Pakistan, Bangladesh and Myanmar share a common colonial past and retain penal codes framed by the British in 1860. Thus we find common or similar statutes with regard to issues like public decency, obscenity, morality, public health (often used against sex workers) and selling or buying for purposes of prostitution. We also find sections like 377 of the Indian Penal Code and Pakistan Penal Code categorizing homosexual acts as an offence.

Many laws limit the definition of trafficking to only those acts involving prostitution. This focus dates back to the United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others in 1949. The SAARC Convention on Preventing and Combating Trafficking in Women and Children signed in 2002 continues the sole focus of prostitution as the end point of trafficking. The definition of trafficking clearly confines it to the moving, buying or selling of women and children for prostitution. Similarly the category of “persons subjected to trafficking” is restricted to women and children victimized or forced into prostitution through deception, threats, coercion, kidnapping or other unlawful means. This exclusive focus does not address the issue of persons trafficked for other purposes like forced or bonded labour. On the other hand by conflating trafficking and sex work/prostitution it derails all discussion about trafficking through fraud, deceit and coercion into a debate over prostitution – de-criminalization, regulation and abolition.

This monograph attempts to demystify and explain the content of the prevalent laws in the region which are relevant to activists and practitioners working in the field. The available legislations and case law have been analyzed from the point of view of the issues of conflation of trafficking and sex work, right of sex workers to live in liberty and dignity, the right to move freely,

the right to reside in a place of choice, the right to migrate, forced and voluntary sex work, entry of minors, rescue and rehabilitation. The material available is uneven in respect to the countries in the region and this in turn is reflected in the document. Thus most material was available with regard to India and Sri Lanka, then Bangladesh, Nepal and Pakistan and the least for Myanmar, which has not been included due to our limitation in obtaining English translations of documents in Burmese. While the monograph does give unequal space to the various countries of the region, however, this is not indicative of bias but of the constraint of the availability of material.

Biases and prejudices, particularly notions of morality and ‘good’ and ‘bad’ women are often starkly reflected in the working of the criminal-justice system beginning with the lodging of a report with regard to the commission of an offence to the investigation and collection of evidence by investigating agencies. This area is vital in many ways as it represents the interface of law with the daily life of sex workers. It is crucial, for example to see the impact, if any, of the declaration by courts in Bangladesh that sex workers have a right to life and livelihood, in the interface of sex workers, society and law, or the impact of the Hudood Ordinance with respect to sex work in Pakistan. Similarly the impact of Public Interest Litigation judgments in India or of for the first time making prostitution illegal in Nepal in 2008, are areas which need exploration. Indeed, the impact of legislation on the daily lives of sex-workers needs to be studied. These crucial areas need detailed study and are outside the scope of the present monograph. Field research involving interactions with sex workers as to the working of the laws and judgments in their daily lives along with interviews of police, lawyers and judges need to be undertaken to get a comprehensive picture of the ground realities. However, the author visited VAMP [Veshya Anyay Mukti Parishad] the collective of women in sex work in Western India to discuss the impact of The Immoral Traffic [prevention] Act. This resulted in a graphic booklet in Hindi and Marathi later translated into Kannada and Telugu that simplifies the workings of the law and its implementation.



## BANGLADESH

The Constitution of the Peoples' Republic of Bangladesh codifies the right to the protection of the law and the right to life and personal liberty under Articles 31<sup>1</sup> and 32<sup>2</sup> as fundamental rights. This right has been held by courts to be similar the right to life under Article 21 of the Indian Constitution and to include the right to livelihood. However, in the context of sex work as a livelihood, Article 18(2) of the Bangladesh Constitution under the head 'Public and Health and Morality' lays down as a fundamental principle of State Policy that: 'The State shall adopt effective measures to prevent prostitution and gambling'<sup>3</sup>. In line with the vice approach, the directive

to prevent prostitution is clubbed with measures to prevent consumption of alcohol and drugs.

The conjunction of prostitution and gambling as social evils is reflected in other legislations like the Local Government (Zila Parishad) Act, 1988 which empowers Zila Parishads to make regulations under Section 59(2)(bb) for 'prevention of beggary, juvenile delinquency, prostitution and other social evils'<sup>4</sup>. Similarly, the Rangamati Hill District Local Government Parishad Act, 1989 empowers the Parishad to make regulations for 'prevention of beggary, juvenile delinquency, prostitution and other social

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<sup>1</sup> Article 31 of the Constitution of the Peoples' Republic of Bangladesh

Right to protection of law: To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

<sup>2</sup> Article 32 of the Constitution of the Peoples' Republic of Bangladesh

Protection of right to life and personal liberty: No person shall be deprived of life or personal liberty save in accordance with law.

<sup>3</sup> Article 18 of the Constitution of the Peoples' Republic of Bangladesh

Public health and morality: (1) The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and drugs which are injurious to health.

(2) The State shall adopt effective measures to prevent prostitution and gambling.

<sup>4</sup> Section 58 of the Local Government (Zila Parishad) Act, 1988

ACT NO.29 OF 1988

Section 58. Power to make regulations.- (1) A Zila Parishad may, with the prior approval of the Government, make regulations, not inconsistent with this Act and the rules, for carrying out the purposes of this Act.

(2) In particular, and without prejudice of the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-  
(bb) prevention of beggary, juvenile delinquency, prostitution and other social evils;

evils' under Section 69(2)(aa) of the Act<sup>5</sup>. In the same vein the Vagrancy Act, 1943, is used against sex workers to classify and harass them as 'vagrants' and send them for detention in Vagrant's Homes.

The Dhaka Metropolitan Police Act (DMPA) prohibits soliciting another person in public for prostitution. The police arrest a sex worker under Section 54 of the Code of Criminal Procedure which provides for arrest without warrant and charge her under DMPA. The Magistrate on finding the person guilty can impose a fine of 500 Taka and/or fifteen days imprisonment. Often however, the arrested sex worker is not charged or tried but detained till a bribe is paid for release. Similar provisions exist in the Metropolitan Police Acts of five other towns – Sylhet, Rajshahi, Chittagong, Khulna and Barisal.

### A. Legal Status of Prostitution/Sex Work

In the case reported as *Bangladesh Society for the Enforcement of Human Rights and Ors versus Government of Bangladesh and Ors* [2000] ICHRL 11 (14 March 2000); 53 DLR (2001) 1; (2000) 3 CHRLD 217, the issues that come up are: the legal position of prostitution, the scope of the right to life, vagrancy and prostitution in the context of eviction and detention of sex workers.

#### Facts

##### *Eviction and Detention*

The facts of the case relate to the incidents of 23 and 24 July 1999, when the police raided and barged into the rooms of the residents of Nimtoli and Tanbazar brothels in Narayanganj in Bangladesh. The residents were asleep at the time, and, without giving them any time to organise their belongings, the police dragged them onto the streets. They abused and beat them and

pushed them and their children into waiting buses. They were detained in different vagrant homes and government shelters. According to the government authorities, this wholesale eviction was carried out with a view to 'rehabilitate the sex workers'. In the vagrant homes, the inmates were denied the right to meet their family members and were allegedly tortured both physically and mentally.

The Bangladesh Society for Enforcement of Human Rights challenged the forcible eviction of women sex workers and their children as unlawful and violative of the workers' right to be protected from unlawful arrest. It was submitted that the sex workers were wrongfully arrested under the Vagrancy Act, 1950. That 155 sex workers had been forcibly detained in a vagrant home, subjected to mental and physical torture and denied visits from their families. It was argued that the detention of the sex workers violated the right to legal protection against harmful and unlawful action and was in contravention of the right to life and liberty including livelihood enshrined in Articles 31 and 32 of the Constitution of Bangladesh. The evictions were sought to be declared illegal and it was prayed that the sex workers should be released from custody. The Government of Bangladesh contended that prostitution was not permitted under Article 18(2) of the Constitution and justified the eviction and detention of the sex workers.

#### Law declared

##### *No express law prohibiting prostitution*

The High Court Division of the Supreme Court of Bangladesh observed that legislation existed to prevent keeping a brothel or allowing premises to be used as a brothel and related offences. However, the Court held that there was no law expressly prohibiting prostitution and the legislation does not outlaw prostitution itself and that though sex workers are not

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<sup>5</sup> Section 69 of the Rangamati Hill District Local Government Parishad Act, 1989 Act No.19 of 1989

Section 69. Power to make regulations.- (1) The Parishad may, with the prior approval of the Government, make regulations, not inconsistent with the provisions of this Act or the rules, for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-  
(a) prevention of beggary, juvenile delinquency, prostitution and other social evils,

socially recognised as professionals, they are enrolled with the local administration. It held that in spite of the legislation with regard to the keeping of brothels, the sex workers are entitled to operate in brothels. The judgement held that the Penal Code prohibits non-consensual sexual intercourse and that this does not apply to the consensual activities of sex-workers. The Court observed that even though prostitution is not illegal, it is not encouraged and the State is constitutionally mandated under Art 18(2) to adopt preventive measures.

#### *Sex workers enjoy constitutional right to life including livelihood*

The judgment held that sex workers enjoy the same constitutional protection to fundamental human rights and freedom, respect and dignity and the right to life and liberty guaranteed under Articles 11<sup>6</sup>, 31 and 32 of the Constitution of Bangladesh. It held that the right to life under Article 31 of the Bangladesh Constitution was similar in scope to Article 21 of the Indian Constitution and the right to life includes the right to livelihood. The Court upheld the fundamental right of the protection of privacy of the sex workers, saying that it should be remembered that nobody could violate the privacy of the inmates of any house or trespass, except in accordance with law.

Interestingly, the Court then referred to the interpretation of the right to life in the Indian case of *Olga Tellis vs. Bombay Municipal Corporation*<sup>7</sup> and stated that the inmates of Nimtoli and Tanbazar have a guaranteed right to life and livelihood. It then stated that an important facet of the right to life is the right to livelihood and

the easiest way of depriving a person of the right to life would be to deprive him/her of the means of livelihood.

The judgment held that the wholesale eviction of sex workers from Tanbazar and Nimtoli had deprived them of their livelihood, which amounts to deprivation of their right to life, thus making the act unconstitutional and illegal.

#### *Right against search and seizure*

The judgment held that every citizen including sex workers have the constitutional right under Art 43 of the Constitution to be protected against forcible search or seizure of one's home<sup>8</sup>. The provision allows reasonable restrictions to be placed on the right to secure one's home against search and secure on the grounds of public order, public health and morality. Interpretations of law when applied to sex workers often get coloured by notions of 'morality' and 'immorality' leading to denial of their rights. The Court clearly and unequivocally held that the forcible and violent evictions of the sex worker residents violated these rights against forcible search and seizure of the home.

The judgment held the failure of the police to take any action against the illegal evictions to be contrary to S.2 of the Police Act 1961, which provides that no police force can work successfully unless it wins the respect of the people. The action of the police at night was held to be an infringement of the principle that searches without warrant should not occur between dusk and

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<sup>6</sup> Article 11 of the Constitution of the Peoples' Republic of Bangladesh

*Democracy and human rights: The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed . . . , and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.*

<sup>7</sup> *Olga Tellis versus Bombay Municipal Commissioner, All India Reporter (AIR) 1986 SC 180.*

<sup>8</sup> Article 43 of the Constitution of Bangladesh:

*Protection of home and correspondence: Every citizen shall have the right, subject to any reasonable restriction imposed by law in the interests of the security of the State, public order, public morality or public health –*

(a) to be secured in his home against entry, search and seizure; and  
(b) to the privacy of his correspondence and other means of communication.  
(c)



dawn. The Court observed that decency demands that personal searches of women should be carried out by women police officers, and the police action violated this principle.

#### *Sex Work and Vagrancy*

The submission on behalf of the State that the sex workers fell within the scope of Section 2(9) of the Vagrancy Act as they were roaming around the area and causing mischief and could be categorized as 'vagrants' was rejected. The Court ruled that mere roaming around in any area would not bring the sex workers within the purview of the Vagrancy Act unless they were also found for example, to be asking for alms in a public place. It held that the detention of the sex workers in the Vagrants' Home in Kashimbazar by the police and treating some of the evicted inmates of Tanbazar and Nimtoli brothel as vagrants, was done without any lawful authority.

The judgment observed that the declaration of sex workers as 'vagrants' and their detention in Vagrant Homes failed to meet the procedural requirements under the Vagrancy Act. The police treatment and confinement of sex workers as 'vagrants' was held to be unlawful, despite the assertion by the State that the detention was with the aim of rehabilitation.

#### *Violation of Right and Release*

The judgment declared that the eviction and the detention of sex workers was a violation of their right to life and livelihood and contrary to their personal dignity. The court ordered the immediate release of the sex workers confined in the Vagrancy Home.

### **Recommendations and Observations**

In addition to the declaration of the eviction and detention as unlawful and the direction to release the sex workers the judgment gave some recommendations and observations.

- *Rehabilitation*

The Court took the view that, 'Even if prostitution is not illegal in Bangladesh, it is never encouraged and State machineries are all out to prevent it by adopting various measures including rehabilitation schemes in consonance with our Constitutional

mandate in its directive state policy that the State shall adopt effective measures to prevent prostitution.

It held that any rehabilitation scheme, including the one designed here by the government and the UNDP, must not just uplift the beneficiaries' personal morals and family life, but also be compatible with their own human dignity and worth. It must seek to provide better education, family connections and economic opportunities in order to minimise the conditions giving rise to prostitution. The respondents must co-ordinate their efforts with the UNDP or other appropriate organisations to formulate a pilot scheme for the rehabilitation of sex-workers.

- *Legislation*

The judgment observes that the measures for rehabilitation should be followed by legislation prohibiting prostitution or soliciting prostitution.

- *Role of Administration*

The role of the police and administration in aiding/abetting the property owners in the massive eviction of residents including sex workers was held to be reprehensible. In order to minimize the impact of the role of money and influence on the behaviour of the police, the judgment recommends framing a Code of Conduct modelled on the Code of Conduct for Law Enforcement Agencies adopted by the General Assembly of the United Nations.

### **B. The Vagrancy Act, 1943**

The Vagrancy Act, 1943 was enacted as the Bengal Act No. VII of 1943 and after the creation of Bangladesh in 1971, the word "Bangladesh" was substituted for "East Pakistan" and the word Bengal omitted through the Bangladesh Laws (Revision and Declaration) Act in 1973. The Vagrancy Act, which deals with vagrancy in Bangladesh defines "vagrant" to mean a person found asking for alms in any public place or wandering about or remaining in any public place in a condition or manner which makes it likely that the person exists by asking for alms. It



excludes persons asking for money or collecting food and gifts for a prescribed purpose<sup>9</sup>.

The legislation provides for the Government to set up institutions called Vagrant's Home for the permanent detention of vagrants. A police officer can require any person who is apparently a vagrant to accompany him/her to appear before a Special Magistrate<sup>10</sup>. The Special Magistrate is authorized to make a summary enquiry into the circumstances and character of the person. After giving an opportunity of hearing to the person, the Magistrate can record a declaration to the effect that the person is a vagrant. The provisions of the Act then come into play and the person can be detained and sent to the Vagrant's Home<sup>11</sup>. The application of the Vagrancy's Act in the context of sex workers has been illustrated above.

### C. The Oppression of Women And Children (Special Enactment) Act, 1995

The Oppression of Women and Children (Special Enactment) Act, 1995, was enacted 'to make special provisions for certain

abominable offences connected with the oppression of women and children' in 1995 and contains provisions with regard to prostitution and trafficking.

The import, export, buying, selling, hiring or disposing of a woman in any other manner with the intention of employment for prostitution or illicit intercourse or unlawful and immoral activities has been made punishable with life imprisonment and fine<sup>12</sup>. The provision also creates a presumption with regard to intention for use in prostitution in case of selling, hiring or otherwise disposing a woman to a prostitute or a person managing a brothel on the part of the person disposing as well as the person obtaining possession of the woman<sup>13</sup>.

Likewise, the keeping in possession, custody or under guardianship of any woman in order to import or export her, hire her out or otherwise dispose of her with intent that she shall be employed for the purpose of prostitution or illegal intercourse or unlawful and immoral activities is made punishable with a term of rigorous imprisonment which may extend to 14 years and fine<sup>14</sup>.

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<sup>9</sup>Section 2(9) of the Vagrancy Act, 1943

<sup>10</sup>Section 6 of the Vagrancy Act, 1943

<sup>11</sup>Section 7 of the Vagrancy Act, 1943

<sup>12</sup>The Oppression of Women and Children (Special Enactment) Act, 1995

**8. Penalty for trafficking etc. in women.** (1) *Whoever imports, exports, buys or sells or lets to hire or otherwise disposes of any woman with intent that such woman shall be employed for the purpose of prostitution or illicit intercourse or unlawful and immoral activities, shall be punishable with lifelong imprisonment, and shall also be liable to fine.*

<sup>13</sup>The Oppression of Women and Children (Special Enactment) Act, 1995  
Section 8

**Explanation 1** - *When a woman is sold, let for hire, or otherwise disposed of to a prostitute or any person keeping or managing a brothel, the person so disposing of such woman shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.*

**Explanation 2** - *Any prostitute or person keeping or managing a brothel, who buys, hires or otherwise obtains possession of any woman shall, until the contrary is proved, be presumed to have bought or hired or brought into his possession or custody such woman with intent that she shall be used as a prostitute.*

<sup>14</sup>The Oppression of Women and Children (Special Enactment) Act, 1995  
Section 8. *Penalty for trafficking etc. in women-*

(2) *Whoever keeps in his possession, custody or under his guardianship any woman in order to import or export her, hire her out or otherwise dispose of her with intent that she shall be employed for the purpose of prostitution or illegal intercourse or unlawful and immoral activities shall be punishable with a term of rigorous imprisonment which may extend to 14 years, and shall also be liable to fine.*

The abduction of a woman with intention of employment for prostitution or any other unlawful or immoral activity, or to force her to marry against her intentions, or to force or seduce or allure to sexual intercourse has been made punishable with minimum 7 years and extendable to ten years imprisonment and fine<sup>15</sup>.

The trafficking in children – defined as the import, export or the selling children has been made punishable with death or life imprisonment for the person committing the act as well as the person who is possession of the child<sup>16</sup>.

Aiding and abetting the offences of importing, exporting, selling for prostitution and trafficking of children has been made punishable with the same punishment as provided for the offence<sup>17</sup>.

### Comments

- The following points are worth noting with regard the legislations mentioned above: Even though there is no expressly prohibiting prostitution/sex work, other laws like the Vagrancy Act are used by the police to arrest, detain, evict and harass sex workers.
- The declaration that sex workers could not be categorized

as 'vagrants' is a landmark feature of the Supreme Court judgment in the Bangladesh Society for Human Rights case. Sex workers are often targeted and harassed by legislations inapplicable to them. The judgement clearly upholds the declared position of sex workers that they work and earn their livelihood and are not to be looked upon as beggars or vagrants.

- Legislations with regard to prostitution at times explicitly criminalize instances of adults who may be in brothels or prostitution with consent. The present legislation - The Oppression of Women and Children (Special Enactment) Act, 1995 – makes the import, export, selling of a woman for prostitution an offence. However, the ingredients constituting the offences make it clear that it is third parties who import, export, sell or hire a woman for prostitution who are punishable. The definition of the offences does not include a woman who of her own volition hires herself for sex work.
- The Court recognized sex work as a livelihood and part of the fundamental right to life and directed the release from detention of sex workers, yet reflecting the stigma attached in society, advocated and recommended rehabilitation followed by legislation prohibiting sex work/prostitution.

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<sup>15</sup>The Oppression of Women and Children (Special Enactment) Act, 1995

Section 9. Penalty for abducting any woman for using her in unlawful or immoral etc. activities.- Whoever abducts any woman with intent that-

(a) she shall be employed or used for the purpose of prostitution or any other unlawful or immoral activity,

(b) she shall be forced to marry against her intentions,

(c) she shall be forced or seduced or allured to sexual intercourse,

shall be punishable with lifelong imprisonment or a term of rigorous imprisonment which may extend to 10 years and shall not be less than 7 years, and shall also be liable to fine.

<sup>16</sup>The Oppression of Women and Children (Special Enactment) Act, 1995

**Section 12. Penalty for trafficking in children-** If any person unlawfully imports, exports or sells children, or brings into his possession any child for the purpose of importing, exporting or selling such child, or if a child (destined) for such purpose is found with any person, such person shall be punishable with death or lifelong imprisonment.

<sup>17</sup>The Oppression of Women and Children (Special Enactment) Act, 1995

**Section 14. Penalty for abetment of offences-** Whoever abets any offence punishable under this Act shall, if such offence is committed in consequence of the abetment, be punishable with the punishment provided for the offence.



## INDIA

In India the principal legislation dealing with sex work/prostitution is the Immoral Traffic Prevention Act, (ITPA) the erstwhile Suppression of Immoral Traffic Act, 1956 (SITA)<sup>18</sup>. The origins as well as the title of the legislation itself reflect the stigmatization and the conception of sex work as being synonymous with trafficking. The legislation was enacted in pursuance of the ratification by the Government of India of the International Convention for the Suppression of Traffic in Persons and of the exploitation of the prostitution of others.

Trafficking would be generally understood to mean transporting a person by the means of the use of threats, force, coercion, abduction, fraud or deception. However, the legislation did not even have a definition of trafficking from the inception and for most of its existence, leave aside provisions to check it. Yet so deep is the association of prostitution with trafficking, that the law with regard to sex work is called prevention of “immoral traffic”. In a departure from criminal jurisprudence, indicative of stigmatization of sex workers, The ITPA has paradoxical offences like detaining a person “with or without his consent” in premises where sex work is carried on or taking a person, “with or without his consent” for the purpose of prostitution.

The Constitution of India guarantees the fundamental right to

carry on any trade, business or profession<sup>19</sup>. The ITPA has been held to be constitutionally valid and the limitations imposed by the statute on the right of sex workers to carry on their trade, business or profession have been held to be permissible reasonable restrictions. The Constitution also prohibits traffic in human beings and *begar* (bonded labour) and other forms of forced labour<sup>20</sup>. The Indian Penal Code, 1860 also contains some provisions dealing with buying and selling for prostitution. There are a number of judgments interpreting the ingredients of the offences created by the law, as well as in public interest litigations filed in courts with regard to sex work/prostitution.

### A.The Immoral Traffic (Prevention) Act, 1956

The Immoral Traffic (Prevention) Act, 1956 (ITPA) is the principal legislation in the area of sex work/prostitution (it was formerly called the Suppression of Immoral Traffic Act, 1956, and was amended to be called the ITPA in 1986). It does not specifically make sex work/prostitution illegal but criminalizes a number of activities in the nature of running a brothel, living on earnings of prostitution, procuring a person for prostitution and prostitution in the vicinity of a public place. Till the recent amendment in 2009, soliciting for purpose of prostitution was an offence and the major provision invoked against sex workers.

<sup>18</sup>It is proposed to change the name of the Act to “Immoral Traffic (Prevention) Act...”, Proposed amendment (a) in Act 44 of 1986 –Gazette of India, August 20, 1986, Pt II, S2, Ext, p 9 (No 38).

<sup>19</sup>Article 19(1)(g) of the Constitution of India, 1950

<sup>20</sup>Article 23 of the Constitution of India, 1950

## Definitions

**Brothel** has been defined as any house, room, conveyance or place, or any portion, 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<sup>21</sup>.

**Prostitution** has been defined as the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind. The provision states that the expression "prostitute" is to be construed in the context of the definition of prostitution<sup>22</sup>.

**Public place** has been defined to as any place intended for use by, or accessible to, the public and includes any public conveyance<sup>23</sup>.

**Keeping a brothel**, or any person who keeps or manages, or acts or assists is punishable with rigorous imprisonment for a minimum of two years and maximum of three years and fine of INR 10,000. A second or subsequent conviction is punishable with rigorous imprisonment of a minimum of three years and maximum of seven years and fine up to INR 200,000.

Similarly a tenant, lessee, occupier, person in charge of any premises, or owner, lessor or landlord who uses, or knowingly allows the premises as a brothel is punishable with imprisonment of two years and fine up to INR 2000. A second or subsequent conviction is punishable with imprisonment of five years and fine<sup>24</sup>.

**Living on the earnings of prostitution:** any person over the age of 18 years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person is punishable

with imprisonment of two years and fine up to one thousand rupees. If the earnings relate to the prostitution of a child, the person shall be punishable with imprisonment for a minimum of term seven years and maximum of ten years<sup>25</sup>.

Any person over the age of 18 years living with, or habitually in the company of, a prostitute or exercising control, direction or influence over the movements of a prostitute to show aiding, abetting or compelling her prostitution or acting as a tout or pimp is presumed to be knowingly living on the earnings of prostitution of another person<sup>26</sup>.

*Note: The provision is used to harass family members of sex workers and is highly discriminatory.*

**Procuring, inducing or taking for prostitution:** The following acts have been made punishable with a minimum of three years and a maximum of seven years and fine:

- (a) procuring or attempting to procure a person whether with or without his/her consent, for the purpose of prostitution; or
- (b) inducing a person to go from any place, with the intent that he/she may for the purpose of prostitution become the inmate of, or frequent, a brothel; or
- (c) taking, attempting to take a person or causing a person to be taken, from one place to another with a view to his/her carrying on, or being brought up to carry on prostitution ; or
- (d) causing or inducing a person to carry on prostitution.

If the offence is committed against the will of any person, the perpetrator is punishable with imprisonment of seven years extendable to fourteen years.

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<sup>21</sup>Section 2(a) of the Immoral Traffic (Prevention) Act, 1956

<sup>22</sup>Section 2(f) of the Immoral Traffic (Prevention) Act, 1956

<sup>23</sup>Section 2(h) of the Immoral Traffic (Prevention) Act, 1956

<sup>24</sup>Section 3 of the Immoral Traffic (Prevention) Act, 1956

<sup>25</sup>Section 4(1) of the Immoral Traffic (Prevention) Act, 1956

<sup>26</sup>Section 4(2) of the Immoral Traffic (Prevention) Act, 1956

If the person in respect of whom an offence committed is a child, the perpetrator is punishable with a minimum of seven years imprisonment extendable to life imprisonment<sup>27</sup>.

*Note: The Section does not make a distinction between minors and adults. An adult person going with consent is also included in the ambit of the provision.*

**Trafficking**<sup>28</sup> has been defined as recruiting, transporting, transferring, harbouring, or receiving a person for the purpose of prostitution by means of—

- (a) threat or use of force or coercion, abduction, fraud, deception; or
- (b) abuse of power or a position of vulnerability; or
- (c) giving or receiving of payments or benefits to achieve the consent of such person having control over another person<sup>29</sup>.

Trafficking in persons is punishable with a minimum of seven years imprisonment. A second or subsequent conviction is punishable with life imprisonment. Abetting or attempting to commit trafficking is liable for the same punishment<sup>30</sup>.

**Visiting a brothel**<sup>31</sup> for the purpose of sexual exploitation of any victim of trafficking in persons is punishable with imprisonment of three months and fine up to INR 20,000. A second or subsequent conviction is punishable with imprisonment of six months fine up to INR 50,000<sup>32</sup>.

*Note: The provision seeks to punish clients and has been criticized*

*by sex workers as an attack on their right to livelihood. Also as likely to drive the profession underground contributing to more hazardous working conditions as well as hampering aids prevention and health work. The Section is looked upon as tool in the hands of police to extort money from clients.*

**Detention in premises of prostitution** whether with or without consent, in any brothel, or in any premises with intent that such person may have sexual intercourse with a person who is not the spouse is punishable with a minimum of seven years imprisonment extendable to ten years or life imprisonment and fine up to INR 100,000<sup>33</sup>.

Any person found with a child in a brothel, is presumed to have committed the offence of detaining a person<sup>34</sup>. Where a child found in a brothel, is, on medical examination, detected to have been sexually abused, it is to be presumed that the child has been detained for purposes of prostitution<sup>35</sup>.

A person is presumed to have detained a person in a brothel or in any premises for the purpose of sexual intercourse with a man other than her lawful husband, if such person —withholds from her any jewellery, wearing apparel, money or property belonging to her, or threatens her with legal proceedings if she takes away with her any jewellery, wearing apparel, money or property lent or supplied to her by the person<sup>36</sup>.

*Note: The Section does not make a distinction and brings within its*

<sup>27</sup>Section 5 of the Immoral Traffic (Prevention) Act, 1956

<sup>28</sup>This section defining and creating the offence of trafficking is sought to be added by the Immoral Traffic (Prevention) Amendment Bill, 2006

<sup>29</sup>Proposed Section 5A of the Immoral Traffic (Prevention) Act, 1956

<sup>30</sup>Proposed Section 5B of the Immoral Traffic (Prevention) Act, 1956

<sup>31</sup>This section providing for punishment of clients is sought to be added by the Immoral Traffic (Prevention) Amendment Bill, 2006

<sup>32</sup>Proposed Section 5C of the Immoral Traffic (Prevention) Act, 1956

<sup>33</sup>Section 6(1) of the Immoral Traffic (Prevention) Act, 1956

<sup>34</sup>Section 6(2) of the Immoral Traffic (Prevention) Act, 1956

<sup>35</sup>Section 6(2A) of the Immoral Traffic (Prevention) Act, 1956

<sup>36</sup>Section 6(3) of the Immoral Traffic (Prevention) Act, 1956

*ambit an adult person who with consent may be in a brothel.*

**Prostitution in or in the vicinity of public place** which are within a distance of 200 m of any place of public religious worship, educational institution, hotel, hospital, nursing home or other public place notified is punishable with three months imprisonment<sup>37</sup>.

If the offence is in respect of a child, it is punishable with a minimum of seven years imprisonment extendable to ten years or life imprisonment and fine. Subsequent offences are punishable with six months imprisonment<sup>38</sup>.

A tenant, lessee, occupier, owner, lessor, landlord or keeper of a public place who knowingly lets the premises be used for prostitution is punishable with three months imprisonment and fine. Subsequent offences are punishable with six months imprisonment<sup>39</sup>.

**Soliciting for prostitution**<sup>40</sup> in a public place or within sight of a public place by words, gestures, exposure of person, whether by sitting by a window or on the balcony to attract or endeavour to attract the attention of any person is punishable with six months imprisonment and INR 500 fine. Subsequent convictions are punishable with one year imprisonment and fine<sup>41</sup>. A man committing the offence is punishable with a minimum of seven days imprisonment extendable to three months<sup>42</sup>.

**Seduction of a person in custody:** an individual having the custody, charge or care of or in a position of authority over any person who causes, aids or abets the seduction for prostitution of that person is punishable with a minimum of seven years imprisonment extendable to ten years or life imprisonment<sup>43</sup>.

**Detention in a corrective institution:** a female offender found guilty of prostitution in the vicinity of a public place can be detained in a corrective institution for a minimum of two years and maximum of seven years. The Court can make the order of detention after giving an opportunity to be heard to the person and taking into account the character, health, mental condition of offender and reaching a conclusion that the offender will benefit from instruction and discipline in the corrective detention<sup>44</sup>.

*Note: The maximum sentence for the offence of prostitution in the vicinity of a public place is three months imprisonment as punishment. However, it is ironical and anomalous that the Court for the purpose of "reform" can send the person to a minimum of two years and maximum of seven years detention in a corrective detention.*

**Removal and/or Rescue of person** by Special or Trafficking Police Officers who are authorized to enter and search the premises where an offence under the Act has been or is being committed and remove all the persons found there<sup>45</sup>. A Magistrate on receiving information that any person is living or carrying on or is being made to carry on prostitution in a brothel can direct

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<sup>37</sup>Section 7(1) of the Immoral Traffic (Prevention) Act, 1956

<sup>38</sup>Section 7(1A) of the Immoral Traffic (Prevention) Act, 1956

<sup>39</sup>Section 7(2) of the Immoral Traffic (Prevention) Act, 1956

<sup>40</sup>The offence of soliciting for purpose of prostitution is sought to be omitted by the Immoral Traffic (Prevention) Amendment Bill, 2006

<sup>41</sup>Section 8 of the Immoral Traffic (Prevention) Act, 1956

<sup>42</sup>Section 8 Proviso of the Immoral Traffic (Prevention) Act, 1956

<sup>43</sup>Section 9 of the Immoral Traffic (Prevention) Act, 1956

<sup>44</sup>Section 10A of the Immoral Traffic (Prevention) Act, 1956

<sup>45</sup>Section 15 of the Immoral Traffic (Prevention) Act, 1956

a police officer to enter the brothel and remove the person<sup>46</sup>.

The Magistrate can direct that the persons removed and/or rescued be sent to a minimum of one year and a maximum of three years detention in a protective home<sup>47</sup>.

*Note: The Section does not take into account the right of an adult person to be in a place of his/her own will and volition. Regardless of the will of an adult person the provisions authorize removal and rescue. The persons removed/rescued are not accused of any crime, yet can be sent for one to three years detention.*

A person carrying on or being made to carry on prostitution can also make an application to a Magistrate seeking care and protection, the Magistrate can direct that the applicant be kept in a protective home or corrective institution for the period specified in the order<sup>48</sup>.

*Note: In sharp contrast to the earlier two provisions this Section authorizes a Magistrate to direct detention in a corrective institution only if the individual exercises a choice and asks for care and protection.*

**Closure of brothel and eviction of offenders** can be directed if a Magistrate is satisfied that a premises within two hundred meters of a public place is being used as a brothel or by prostitutes for carrying on their trade<sup>49</sup>. A Court convicting a person for keeping a brothel under Section 3 or for prostitution in the vicinity of public place under Section 7 of the ITPA can

also order eviction of the occupiers<sup>50</sup>.

**Removal of prostitute**<sup>51</sup> residing in a Magistrate's geographical area of jurisdiction can be ordered in the interests of the general public. The Magistrate can also prohibit the person from re-entering without written permission<sup>52</sup>.

*Note: The provision is clearly discriminatory and violative of equality and the fundamental rights to move freely and reside in a place of choice. However, the provision has been upheld as constitutionally valid by the Supreme Court of India<sup>53</sup>.*

## **B. The Indian Penal Code, 1860**

The Indian Penal Code, 1860 (IPC) contains some provisions dealing with the procuring of minors from within the country or importing them into India from some other country for the purpose of illicit sexual intercourse. It also contains provisions penalising the selling, buying or hiring of minors for prostitution or illicit sexual intercourse.

A person who induces any minor girl under the age of 18 years to accompany him or her from a place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person is punishable with up to ten years imprisonment and fine<sup>54</sup>.

A person who imports into India from any country outside India

<sup>46</sup>Section 16 of the Immoral Traffic (Prevention) Act, 1956

<sup>47</sup>Section 17(4) of the Immoral Traffic (Prevention) Act, 1956

<sup>48</sup>Section 19 of the Immoral Traffic (Prevention) Act, 1956

<sup>49</sup>Section 18(1) of the Immoral Traffic (Prevention) Act, 1956

<sup>50</sup>Section 18(2) of the Immoral Traffic (Prevention) Act, 1956

<sup>51</sup>The provision giving power to order removal of a prostitute is sought to be omitted by the Immoral Traffic (Prevention) Amendment Bill, 2006

<sup>52</sup>Section 20 of the Immoral Traffic (Prevention) Act, 1956

<sup>53</sup>State of Uttar Pradesh versus Kaushalya and others, AIR 1964 SC 416

<sup>54</sup>Section 366A of the Indian Penal Code, 1860



or from the State of Jammu and Kashmir any girl under the age of 21 years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse, is punishable with up to ten years imprisonment and fine<sup>55</sup>.

A person who kidnaps or abducts any person in order that such person may be subjected, or be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person is punishable with up to ten years imprisonment and fine<sup>56</sup>.

A person who sells, lets to hire, or otherwise disposes of any person under the age of 18 years with intent that such person shall or is likely to be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose is punishable with up to ten years imprisonment and fine<sup>57</sup>.

Where a female under the age of 18 years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, there is a presumption that it was done for the purpose of prostitution<sup>58</sup>.

A person who buys, hires or otherwise obtains possession of any person under the age of 18 years with intent that such person shall or is likely to be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose is punishable with up to ten years imprisonment and fine<sup>59</sup>.

Where a prostitute or any person keeping or managing a brothel, buys, hires or otherwise obtains possession of a female under

the age of 18 years there is a presumption that it was done for the purpose of prostitution<sup>60</sup>.

## C. Judicial Interventions

### I. Public Interest Litigation

#### (a) Vishal Jeet versus Union of India

*Vishal Jeet versus Union of India*<sup>61</sup> is a writ petition under Article 32 of the Constitution of India by way of a Public Interest Litigation seeking issuance of certain directions, directing the Central Bureau of Investigation (i) to institute an enquiry against those police officers under whose jurisdiction 'Red Light' areas as well as Devadasi and Jogin traditions are flourishing and to take necessary action against such erring police officers and law breakers; (ii) to bring all the inmates of the red light areas and also those who are engaged in 'flesh trade' to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a more dignified way of life and (iii) to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into the 'flesh trade' to protective homes and then to rehabilitate them.

#### *Law declared*

The Supreme Court looked upon prostitution as an evil, but it took the view that it was neither practical nor desirable to make a roving enquiry through the CBI throughout the length and breadth of the country and no useful purpose would be served by issuing any such direction. It observed that the problem could not be eradicated by banishing, branding, scourging or inflicting

<sup>55</sup>Section 366B of the Indian Penal Code, 1860

<sup>56</sup>Section 367 of the Indian Penal Code, 1860

<sup>57</sup>Section 372 of the Indian Penal Code, 1860

<sup>58</sup>Section 372 Explanation I of the Indian Penal Code, 1860

<sup>59</sup>Section 373 of the Indian Penal Code, 1860

<sup>60</sup>Section 372 Explanation I of the Indian Penal Code, 1860

<sup>61</sup>*Vishal Jeet versus Union of India*, 1990 AIR 1412 1990 SCR (2) 861 1990 SCC (3) 318 JT 1990 (2) 354 1990 SCALE (1)874

severe punishment on these hapless persons, most of whom are unwilling participants and involuntary victims of compelled circumstances. The Court gave the following directions as measures towards eradicating child prostitution, *Devadasi* system and *Jogin* tradition (dedication of girls to the temple, sanctioned by religion) and to protect and safeguard the interests of the children by preventing sexual abuse and exploitation:

- 1 All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.
- 2 The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women's organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well as the members of various voluntary social organisations and associations etc., The main objects of the Advisory Committee being to make suggestions regarding:
  - a. the measures to be taken in eradicating child prostitution, and
  - b. the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.
- 3 All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.
- 4 The Union Government should set up a committee of its own in the line, we have suggested under direction No.(2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection,

rehabilitation etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

- 5 The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.
- 6 The Advisory Committee can also go deep into devadasi system and *Jogin* tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.

(b) *Gaurav Jain versus Union of India*

In this case<sup>62</sup> a writ petition under Article 32 of the Constitution was filed as a Public Interest Litigation after reading a report which appeared in the magazine *India Today*. The petition sought directions to provide separate schools with vocational training, hostels, with medical check-up facilities in each state and union territory for children of prostitutes, up to the age of 16 years to rescue them from "falling into immoral and depraved way of life".

*Law declared*

The Court took the view that segregating prostitutes' children by locating separate schools and providing separate hostels would not be in the interest of such children. It appointed a Committee to consider the problems faced by the children of prostitutes. The Committee submitted its report and made various recommendations for the rehabilitation of these children and setting up of juvenile homes. The two judges agreed with the directions for rehabilitation of the children of prostitutes, but one of the judges gave general directions for eradication of prostitution. This issue has now been referred to a larger bench for consideration.

*Note: The Public Interest Litigations were filed by individuals based on their subjective notions of morality with little or no knowledge*

<sup>62</sup>*Gaurav Jain versus Union of India, (1990) Supp 3 SCC 709*

of the best interests of and no consultation with sex worker/prostitute community. The Court proceeded with the matter without ascertaining the wishes of the community whose interests were vitally involved and impacted by judgments in such litigations.

## 2. Removal of prostitute

In the case *State of Uttar Pradesh versus Kaushalya*<sup>63</sup>, the constitutional validity of Section 20 of the ITPA was challenged on the ground of violation of guaranteed fundamental rights.

The ITPA under Section 20 gives power to a Magistrate to direct a prostitute residing in his geographical area of jurisdiction to remove himself/herself from the area and also to prohibit the person from re-entering without written permission from the Magistrate. The validity of the provision was challenged as discriminatory and violative of the right to equality<sup>64</sup> as well as an infringement of the rights to move freely<sup>65</sup> and to reside in any part of India<sup>66</sup>.

### *Law declared*

The Supreme Court observed that reasonable classification was permissible under Article 14 which guarantees the right to equality if it is in keeping with the objective to be achieved by the particular legislation. It held that there was a pronounced and real difference between a woman who is prostitute and a woman who is not. The judgment took the view that the classification had a relation with the objective sought to be achieved by the Act and did not violate the fundamental right to equality.

In respect to the violation of the fundamental rights to move around freely and reside in any part of India, the Court held that the reasonableness of a restriction depends upon the urgency of the evil sought to be controlled. It observed that one of the objects of the Act is to control the growing evil of prostitution

and the restrictions imposed by Section 20 were in public interest. The judgment held that once a conclusion is reached that the activities of a prostitute in a particular area are so subversive of public morals and destructive of public health that it is necessary in public interest to deport her from that place, then the restrictions imposed are reasonable and permissible.

The power to remove a prostitute under Section 20 of the Act was held to be not violative of the right to equality, a reasonable restriction on the right to move freely and reside in a place of choice and constitutionally valid.

*Note: The Section is clearly discriminatory and violative of fundamental rights. The judgment clearly illustrates the role of prejudice and stigma with regard to the prostitute/sex worker in declaring the provision as valid.*

## 3. Eviction from premises

In the case of *Chitan J Vaswani versus State of West Bengal*<sup>67</sup>, the appellants were keepers of a public place namely, a bar. They were convicted under Section 3(1) of the Suppression of Immoral Trafficking in Women and Girls Act, 1956, for keeping and managing a brothel in the bar, and under Section 7(2)(a) for knowingly permitting prostitutes for the purpose of their trade to resort to or remain in the bar. There was also a direction under Section 18(1) read with Section 18(2) of the Act evicting the appellants from the bar. The submission before the Supreme Court of India was that the order of eviction was bad, because the bar was not within 200 m of any public institution of the type referred to in Section 18(1).

### *Law declared*

The Supreme Court observed that Section 18(1) of the Act

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<sup>63</sup>*State of Uttar Pradesh versus Kaushalya and others, AIR 1964 SC 416*

<sup>64</sup>*Article 14 of the Constitution of India, 1950*

<sup>65</sup>*Article 19(1)(d) of the Constitution of India, 1950*

<sup>66</sup>*Article 19(1)(e) of the Constitution of India, 1950*

<sup>67</sup>*Chitan J Vaswani versus State of West Bengal, AIR 1975 SC 2473; 1976 SCR (2) 300; 1975 SCC (2) 829*

gave power to the Magistrate to order eviction after notice, if the premises are being run as a brothel within 200 m of a public place. However, Section 18(2) gave powers to a Court convicting a person under Section 3 or Section 7 of the Act to order eviction from the premises. Section 7(1) punishes prostitution in premises within 200 meters of specified public places. Section 7(2)(a) of the Act punishes the keeper of a public place who knowingly permits prostitutes to resort to such place for their trade. The Court pointed out that the question of distance from a public place was not an ingredient of the offence. It observed that Section 18(2) gives power to order eviction from premises in the event of conviction under Section 7(1) or Section 7(2) of the Act.

The Supreme Court dismissed the appeals and upheld the order of eviction from the premises after handing out a conviction for being the keeper of a public place who knowingly permits prostitutes to resort to the premises for purposes of their trade.

#### **4. Decoy Customers**

There are two significant judgements with regard to the common practice of the police using 'decoy' customers to entrap sex workers.

##### *(a) Krishnamurthy versus Public Prosecutor*

In the case of *Krishnamurthy versus Public Prosecutor*<sup>68</sup> the police sent a decoy customer with three marked ten rupee currency notes to a house they suspected was being used as a brothel. The decoy was shown three girls by the accused, selected one and paid Rs. 30/- in the marked currency notes. The decoy and the girl went inside a room. The police raided the premises and found the decoy and girl in a dishevelled state and recovered the marked currency notes from the accused. The accused was convicted for keeping a brothel under Section 3(1) of the Act and appealed to the Supreme Court.

The main submission before the Supreme Court was that a solitary instance of the house of the appellant being used for the purpose of prostitution is not sufficient for establishing that the house was being 'kept as a brothel'. The Court observed that it may be true that a place used once for the purpose of prostitution may not be a brothel. However a finding can be reached only after looking at the facts and circumstances. The judgment held that it is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was keeping the brothel.

##### *Law declared*

The Court noted that information was received about the place being used as a brothel. Thereafter a person goes to the place and freely asks for girls, where he is shown girls to select from and where he engages a girl for prostitution. In the circumstances, the Court held that the premises were used as a brothel and upheld the conviction for keeping a brothel.

##### *(b) Kamalabai Jethamal versus State of Maharashtra*

In the case of *Kamalabai Jethamal versus State of Maharashtra*<sup>69</sup>, the police sent two young men with marked currency notes to a place suspected of being used as a brothel. They went to the house of the accused, rang the bell and were admitted by a woman. They asked for two girls for enjoyment and were shown two girls. The INR 100 note was given to the accused which she put under the blouse. One of the young men and a girl went into the kitchen. The police raided the place and found the young man and girl naked and in a compromising position. They then were asked to dress and come out. A woman who had accompanied the police party searched the accused and recovered the INR 100 currency note from under the blouse. The accused charged with the offences of keeping a brothel and living on the earnings

<sup>68</sup>*Krishnamurthy @ Tailor Krishnan versus Public Prosecutor, Madras, AIR 1967 SC 567: 1967 SCR (1) 586*

<sup>69</sup>*Kamalabai Jethamal versus State of Maharashtra, AIR 1962 SC 1189: 1962 SCR Supl. (2) 632*

of prostitution was acquitted by the Magistrate, convicted by the High Court and appealed to the Supreme Court.

The main submissions before the Supreme Court that the woman, who was brought by the police to search the appellant and is alleged to have recovered the INR 100 note from her person, had not been produced. Secondly that considering that it was a woman who had to be searched it must be presumed that in accordance with the requirements of law and of decency no man could have been present when the search of the appellant took place. Thirdly that the High Court could not have ordered the eviction of the accused person from the premises.

#### *Law declared*

The Supreme Court observed that it was reprehensible and a matter of greater concern to use students in this manner and should not be allowed by any governmental authority. It held that it was no justification to say that, in order to suppress immoral traffic in women and to stop prostitution somebody has to be used and the only class of people that can be employed are confessedly a police agent and a young man willing to be employed by the police.

However, after expressing disapproval, the Supreme Court held that there was evidence in the shape of the testimony of the young man with regard to the payment of INR 100 and that amount was used for the purpose of procuring a girl for prostitution. The Court held that it was not necessary to examine the woman who searched the accused and recovered the marked INR 100 currency note and the payment was held to have been proved. The judgment upheld the conviction of the accused under Section 3 for keeping or allowing premises to be used as a brothel and under Section 4 of the Act for living on earnings of prostitution. The order of eviction from premises by the High Court was also upheld as a valid exercise under Section 18(2) after conviction for keeping a brothel.

*Note: The disapproval of the Supreme Court of sending young men*

*to “aid in an act of prostitution” is a pointer to critically examining the ethics of sending a “decoy” customer employed by the police in a large number of cases against sex workers. The only other category where this method is deployed is narcotics and drug-related cases. The area of sex work and drugs both evoke strong moral disapproval and stigmatization. In other offences like theft and robbery the method of sending a “decoy” person soliciting/instigating theft or robbery is not considered an acceptable method of investigation, prosecution and conviction for the offence.*

### **5. Procuring a minor**

In the case of *Ramesh versus State of Maharashtra*<sup>70</sup> the accused was convicted of the offence of procuring a minor girl under Section 366A of the Indian Penal Code. The case against him was that a girl who was a minor below the age of 18 years was brought up by Patilba and had before the date of the offence been habituated to the life of a prostitute. On the day in question the accused went to the residence of Patilba and asked him to bring the girl to a theatre. Patilba accompanied the girl to the theatre where the latter sought some customers. They were taken by another person to a place called Bohori Kathada to which the girl was invited for the purpose of prostitution. The accused were convicted for the offence of procuring a minor girl under Section 366A IPC and the case reached the Supreme Court in appeal.

#### *Law declared*

The Court delineated the three principal ingredients of the offence of procuring a minor: (a) that a minor girl below the age of 18 years is induced by the accused, (b) that she is induced to go from any place or to do any act, and (c) that she is so induced with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person.

The Court observed that the evidence clearly establishes that the girl was below 18 years of age. However, there is no evidence on the record that Patilba induced the girl to go

<sup>70</sup>*Ramesh versus State of Maharashtra, AIR 1962 SC 1908: 1963 SCR (3) 396*

to the theatre or from the theatre to Bohori Kathada. There was no evidence that the girl was not willing to go to Gulzar Theatre on the night in question nor is there any evidence that she was unwilling to go to Bohori Kathada to which she and her companion were invited for the purpose of prostitution. It could be assumed that when Patilba accompanied the girl to the theatre and from the theatre to the Bohori Kathada at the suggestion of the accused, he knew that the girl was going for plying her profession as a prostitute.

However, the judgment held that a person who merely accompanies a woman going out to ply her profession as a prostitute, even if she has not attained the age of 18 years, does not thereby commit an offence under Section 366A of the Indian Penal Code. It cannot be said that the accompanying person induces the girl to go from any place acts with the intent or knowledge that she will be forced or seduced to illicit intercourse.

The Court observed that seduction implies surrender of her body by a woman, who is otherwise reluctant or unwilling to submit herself to intercourse, and does so in consequence of persuasion, flattery, blandishment or importunity. Where a woman offers herself for intercourse for money in the course of her profession as a prostitute there are no scruples nor reluctance to be overcome, and surrender by her is not seduction within the meaning of the offence.

The judgment held that where a person instigates another to assist a woman following the profession of a prostitute it cannot be said to be an act done with the intention or knowledge she will be seduced to illicit intercourse. Applying the law declared, the Supreme Court allowed the appeal and acquitted the accused of the offence of procuring a minor.

### Comments

- The Public Interest Litigations pertaining to prostitution were filed by individuals based on their subjective notions and individual morality with little or no knowledge of the best interests of and no consultation with sex worker/prostitute

community. The PILs had prayers asking the Court to segregate children from their mothers and set up separate schools for children of prostitutes – demands which are unlikely to find any support in the community for whose betterment the petitions claimed to have been filed. The Court proceeded with the matter without ascertaining the wishes of the community whose interests are vitally involved and impacted by judgments in such litigations.

- The offences created under the ITPA like procuring a person for prostitution or detaining a person in premises where prostitution is carried on do not make a distinction between minors and adults. An adult person going with consent or staying in a brothel of his/her own volition is also included in the ambit of the provision.
- The provisions in ITPA providing for rescue from brothels makes no distinction between minors and adults and does not take into account the rights of an adult person to be in a place of his/her own will and volition. Regardless of the will of an adult person the provisions authorize removal and rescue. The persons removed/rescued are not accused of any crime, yet can be sent for one to three years detention.
- The maximum sentence for the offence of prostitution in the vicinity of a public place is three months imprisonment as punishment. However, it is unjust, ironical and anomalous that the Court for the purpose of “reform” can send the person to a minimum of two years and maximum of seven years detention in a corrective detention.
- The provision giving power to a Magistrate to order removal of a prostitute from a geographical area and locality is clearly discriminatory and violative of equality and the fundamental right to move freely and reside in a place of choice. The judgment of the Supreme Court in State of Uttar Pradesh versus Kaushalya declaring the provision as valid and constitutional is illustrative of the role of prejudice and stigma with regard to prostitute/sex worker prevalent in society.

- The observation of the Supreme Court disapproving of sending young men to “aid in an act of prostitution” is a pointer to critically examining the ethics of sending a “decoy” customer employed by the police in a large number of cases against sex workers. The only other category where this method is deployed is for “vices” rather than crime. The area of sex work and drugs both evoke strong moral disapproval and stigmatization. In other offences like theft and robbery the method of sending a “decoy” person soliciting/instigating theft or robbery is not considered an acceptable method of investigation, prosecution and conviction for the offence.
- The Section in ITPA creating a presumption and an offence of any person above 18 years living on the earnings of prostitution is highly discriminatory and used to harass family members of sex workers.
- The proposed Section 5C to be introduced as per the Immoral Traffic (Prevention) Amendment Bill, 2006 seeking to punish clients has been criticized by sex workers as an attack on their right to livelihood. The provision is likely to drive the profession underground contributing to more hazardous working conditions as well as hampering aids prevention and health work. The Section could also serve as a tool in the hands of police to extort money from clients.





## NEPAL

There is no specific law in Nepal criminalizing sex work/prostitution. There is a widely held view about the phenomenon of trafficking taking place on a large scale, however there appears to be no reliable data with regard to the magnitude of trafficking from Nepal. Migration from Nepal for work, trafficking for purposes other than sex work or going voluntarily and then landing up in near bonded conditions of employment are some other issues which need to be kept in mind as they are often conflated with trafficking for sex work.

The Muluki Ain or Country Code 1963 is the law of the land and makes provisions for various aspects of society. The Code is in Nepali and there is no official English translation. The part dealing with trafficking reads “Muluki Ain Regarding Human Trafficking, Chapter 11” (unofficial translation). Thereafter the Traffic in Human Beings (Control) Act, 2043 was enacted in 1986 with the objective of controlling trafficking. Recently a more comprehensive legislation, the Human Trafficking and Transportation (Control) Act, 2064, Act Number 5 of the Year 2064 (2008) has been brought onto the statute books repealing the earlier 1986 legislation. Chapter 14 of the Country Code titled “Muluki Ain Regarding Rape, Chapter 14” that defines and provides for punishment for rape is relevant in the context of sex work as it provides for differential punishment in case the

survivor/victim of rape is a prostitute. Despite the absence of a law criminalizing prostitution, sex workers are arrested, detained and harassed by the police under laws dealing with disturbing public tranquillity and peace or obscenity like the “Some Public (Offences and Penalties) Act, 1970.

### A. Muluki Ain Regarding Human Trafficking

Chapter 11 prohibits taking a person outside Nepal and selling him or her and includes the crime of enticing a person. The individual selling another person is punishable with ten years imprisonment if arrested before the sale and to twenty years if arrested after the sale of the person. The individual buying a person is punishable with the same length of imprisonment as the seller.

Separating or enticing a minor under 16 years or a mentally retarded person of any age without the permission of the legal guardian is punishable with three years imprisonment and fine. Making a person a servant, slave or bonded labourer is punishable with ten years imprisonment and compensation.

A person who intentionally abets or assists in the commission of the offence is punishable with half the punishment awarded

to the main perpetrator. It provides that in the case of the sale of an individual, the money would not be returned to the buyer and the seller would be fined in addition to the punishment laid down.

### **B. Traffic in Human Beings (Control) Act, 1986**

The Traffic in Human Beings (Control) Act was enacted in 1986 to control traffic in human beings by King Birendra Bir Bikram Shah Dev with the approval of the National Panchayat.

The legislation provides for prosecution and punishment for offences committed outside the country on the same footing as if they had been committed within Nepal.

#### *Trafficking*

Traffic in human beings was defined as selling a human being with any motive, taking a person abroad with intent to sell and compelling a woman to take to prostitution through allurement or enticement, deceit, threats, intimidation, pressures or otherwise. Aiding, abetting, hatching a conspiracy or attempting any of these acts also amounted to trafficking under the provision.

#### *Punishments*

Trafficking in human beings was made punishable by ten to 20 years imprisonment.

Taking a person outside Nepal with intent to sell was punishable with imprisonment from five to ten years.

Compelling a woman to take to prostitution through allurement or enticement, deceit, threats, intimidation, pressures or otherwise was punishable by ten to fifteen years imprisonment.

Aiding, abetting, hatching a conspiracy or attempting any of these acts was punishable with up to five years imprisonment.

In case a person was sold, the amount paid by the purchaser was forfeited, and he was to be fined for the amount in addition to imprisonment for trafficking in human beings.

#### *Onus of proof*

In case a woman was being taken outside Nepal by someone other than her guardian or close relative and a complaint was made that it was with the intention of selling or compelling her to engage in prostitution, the onus of proving the lack of such intention was on the accused.

### **C. Human Trafficking And Transportation (Control) Act, 2064 (2008)**

The Human Trafficking and Transportation (Control) Act, 2008 was enacted as a more comprehensive law replacing the 1986 legislation creating a separate offence of Human Transportation and with provisions for rehabilitation of the victim/survivors.

The legislation provides for prosecution and punishment for offences committed outside the country on the same footing as if they had been committed within Nepal. It defines "victim" as a person sold, transported or put into prostitution. "Exploitation" has been defined as keeping a human being as a slave and as bonded and to include the removal of human organs, except where done in accordance with law.

#### *Human Trafficking and Transportation*

Human Trafficking<sup>71</sup> has been defined as selling or purchasing

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<sup>71</sup>Human Trafficking and Transportation (Control) Act, 2064 (2008)

Section 4. Acts considered as Human Trafficking and Transportation: (1) If anyone commits any of the following acts, that shall be deemed to have committed human trafficking:

- (a) To sell or purchase a person for any purpose,
- (b) To force someone into prostitution, with or without any benefit,
- (c) To extract human organ except otherwise determined by law,
- (d) To go in for prostitution.

a person for any purpose, forcing someone into prostitution with or without benefit, extracting human organs except in accordance with law and to go in for prostitution.

Human Transportation<sup>72</sup> has been defined as taking a person out of the country for the purpose of buying and selling. Taking a person from his/her home or from any person by means of enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and keeping him/her in custody or taking to a place within Nepal or abroad to hand over to somebody else for prostitution or exploitation also falls within the category of human transportation. Taking away a person by inducement, fear, threat to or coercion of his/her guardian or custodian is also included in the definition of the offence.

#### *Punishments*

The legislation provides for stringent punishments for human trafficking and human transportation. Persons involved in human trafficking and human transportation are liable to be punished separately for both offences. Enhanced punishment is provided in case of the offence being committed by a public servant or a guardian or a close relative of the victim/survivor and for repeated offenders.

#### *Punishment for Human Trafficking*

- Twenty years imprisonment and a fine of NPR 200,000 for selling or buying a human being.
- Ten years to five years imprisonment and a fine of NPR 50,000-100,000 for forcing into prostitution, with or without financial benefit.

- Ten years imprisonment and a fine of NPR 200,000-500,000 for extracting human organs except in accordance with law.

*Note: Sex work/prostitution was not an offence in Nepal till this enactment. In a retrograde development indicating the conflation of trafficking and sex work, the new law specifically includes 'to go in for prostitution' in the definition of trafficking.*

#### *Punishment for Human Transportation*

- Ten years to fifteen years imprisonment and a fine of NPR 50,000-100,000 for taking a person out of the country.
- Fifteen years to twenty years imprisonment and a fine of NPR 100,000-200,000 for taking a child out of the country.
- Ten years of prison and a fine of NPR 50,000-100,000 for taking a person from one place to another place within the country.
- Ten years to twelve years imprisonment and a fine of NPR 100,000 for taking a child from one place to another place within the country.
- One year to two years of imprisonment for taking a person from one place to another place within the country, and two years to five years of prison for taking out of the country for the purpose of exploitation.
- Abetment, attempt and conspiracy to commit the offences is punishable with half the term of imprisonment and fine awardable for the offence.

#### *Compensation to victim/survivor*

The Act provides for the award of compensation to the victim/survivor which is not to be less than half of the fine levied as

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<sup>72</sup>Human Trafficking and Transportation (Control) Act, 2064 (2008)

Section 4. Acts considered as Human Trafficking and Transportation: (2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:

(a) To take a person out of the country for the purpose of buying and selling,

(b) To take anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

punishment to the offender<sup>73</sup>.

#### *Burden of proof*

The legislation shifts the burden of proof and a person accused of an offence has to provide evidence to prove that he/she did not commit the offence.

#### *Rescue and Rehabilitation*

The Act places the responsibility on the Nepal Government to rescue Nepali citizens sold in other countries. It also provides for the setting up of rehabilitation centres for physical and mental treatment, social rehabilitation and family reconciliation of the victim.

### **D. Some Public (Offences And Penalties) Act, 1970**

The *Some Public (Offences and Penalties) Act, 1970* was enacted

for the maintenance of peace and order and for ensuring welfare, righteous conduct and morality of the people.

The legislation is a general one and does not have any specific link with sex work/prostitution. However, due to the stigmatization and persecution of sex workers, provisions pertaining to public nuisance, public tranquillity, obscenity and harassment are used to detain, arrest and harass them<sup>74</sup>. These offences are punishable with fine and in some cases imprisonment.

### **E. Rape And Prostitution**

Chapter 14 of the Muluki Ain or Country Code deals with the ingredients of the offence of rape and prescribes the punishment. It provides for punishment for six to ten years if the woman is below 14 years of age and three to five years if the woman is

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<sup>73</sup>Human Trafficking and Transportation (Control) Act, 2064 (2008)

Section 17. Compensation:

- (1) A court shall issue order to provide compensation to the victim which shall not be less than half of the fine levied as punishment to the offender
- (2) If the victim dies before receiving the compensation under Sub-Section (1) and if he/she does have children below the age of 18, the children shall receive the compensation. If the victim does not have any children, the dependant parents shall receive the compensation.
- (3) If there are no dependant parents and minor children to receive compensation under Sub-Section (2), the amount should be accrued in the Rehabilitation Fund.

<sup>74</sup>Some Public (Offences and Penalties) Act, 1970

Section 2. Some public offences are prohibited: No person shall commit any of the following acts:

- a) Causing obstruction to any public servant in the discharge of his official duties by committing battery or hooliganism or other activities;
- b) Disturbing public tranquility by committing battery and hooliganism;
- c) Using obscene words, speeches or signs and disturbing the peace thereby, or engaging in obscene acts at a public place;
  - c.a) Printing or publishing any obscene materials using obscene language, through words or pictures having obscene meaning, or exhibiting or selling or distributing such obscene publications, except for the purpose of public health or medical science;
- d) Improperly obstructing in the regular operation of essential social services such as the post, communications, transportation and electricity supply;
- e) Trespassing on governmental or non-governmental offices or anyone's residence and land by committing hooliganism or staying therein without permission;
- f) Damaging public or private property by committing hooliganism, or pelting stones or by other ways;  
Sexually molesting females and thereby insulting them at public places;
- h) Behaving irresponsibly at public places;
- i) Interrupting anyone, who is staying anywhere or walking on a street or traveling by a vehicle, by any means or obstructing the way, by committing hooliganism, sexual molestation, assault, misconduct, or rioting or taking or damaging the property in the possession of such person or damaging the means of transportation, with the intent to cause trouble or harassment;
- j) Intimidating or abusing or teasing any person, or committing any improper acts through telephone, letters or any other means or medium, with the intent to terrorize or intimidate, disrespect or insult or harass;
- k) Spreading terror or intimidation or showing weapons in such a manner to disturb the peace by entering or not entering a mass meeting or procession.

above 14 years of age.<sup>75</sup> However, if the woman is a prostitute the punishment prescribed is a fine of Rs. 500 or imprisonment of one year<sup>76</sup>.

The constitutional validity of this provision providing for different and much lesser punishment in case the victim was a prostitute was challenged in the Supreme Court of Nepal. The Supreme Court struck the provision down as unconstitutional holding that providing lesser punishment for rape of a prostitute was discriminatory<sup>77</sup>. It observed that a provision providing for different punishment on the basis of the victim's character or personal, professional, social or legal status does not comply with the spirit of the Constitution. The judgement observed that "*prostitution is a profession or occupation irrespective of whether or not it is legal*" and given the Constitutional right to choose one's own profession and the Constitutional guarantee of equality, sex workers should not be discriminated against in the criminal law with respect to rape.

## F. Comments

- The Muluki Ain or Country Code regarding rape providing for a much lesser punishment if the victim/survivor was a prostitute is a striking reflection and illustration of the tremendous social stigma attached to sex work/prostitution, even when it is not criminalized by law.
- The Muluki Ain or Country Code Chapter regarding trafficking does not limit the offence of trafficking to the purpose of prostitution and is exceptional in this regard.
- The Ministry of Law and Justice of the Government of

Nepal in an effort to modernise Nepal's justice system has prepared a comprehensive body of criminal and civil laws to replace the entire Muluki Ain which has 51 chapters and 728 sections governing various areas including property, marriage, personal, civil and criminal law.

- The Traffic in Human Beings (Control) Act, 1986 in force for two years until its repeal by the new legislation in 2008, makes trafficking of human beings for any motive an offence thus covering purposes other than prostitution. The Act clearly spells out and makes the "compelling a woman to take to prostitution through allurement or enticement, deceit, threats, intimidation, pressures or otherwise" an offence which is a closer depiction of trafficking rather than a conflation with prostitution.
- Similarly, the Human Trafficking and Transportation (Control) Act, 2008 makes trafficking for any purpose an offence. It specifically includes the purpose of removal of human organs in the definition.
- In addition, the specific offence of human transportation created by the Act does not limit the definition to the purpose of prostitution but clearly mentions taking away a person through coercion, deceit and threats for "exploitation".
- Prior to the recent Human Trafficking and Transportation (Control) Act, 2008, sex work or prostitution was not illegal in Nepal, however, law dealing with public tranquillity, peace, obscenity the Some Public (Offences and Penalties) Act, 1970, was used to detain, arrest and harass sex workers.

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<sup>75</sup>Muluki Ain Regarding Rape, Chapter 14

One who commits rape should be imprisoned for six upto ten years if the woman raped is under fourteen years of age, and for three upto five years if the woman is fourteen or above fourteen years of age.

<sup>76</sup>Muluki Ain Regarding Rape, Chapter 14

If someone has a sexual intercourse with a prostitution without her consent, the one who commits it will either be fined an amount of Rs. five hundred or imprisoned upto one year.

<sup>77</sup>Sapana P. Malla for FWLD v. HMG/Nepal, Publication of Judgments relating to Human Rights: Special Issue (Kathmandu: Supreme Court, 2002) at 144-151.

- In contrast to the earlier position where the laws defined trafficking but did not criminalize prostitution, the Human Trafficking and Transportation (Control) Act, 2008 has for the first time made prostitution an offence and included it in the definition of human trafficking. There is no available data or legal cases as to the working of the new provision with regard to sex work/prostitution.

### **G. ANNEXURES**

For easy reference unofficial translations of four legislations from Nepal are being attached as annexures:

1. The Muluki Ain regarding Trafficking (Nepal I - Muluki Ain regarding Trafficking).
2. The Traffic in Human Beings (Control) Act, 1986 (Nepal II - The Traffic in Human Beings (Control) Act, 1986")
3. The Human Trafficking and Transportation (Control) Act, 2008 (Nepal III - The Human Trafficking and Transportation (Control) Act, 2008).
4. The Some Public (Offences and Penalties) Act, 1970 (Nepal IV - The Some Public (Offences and Penalties) Act, 1970")



## PAKISTAN

The Constitution of Pakistan gives every citizen the right to enter any lawful profession or business under Article 18 of the Fundamental Rights chapter<sup>78</sup>. However in the context of sex work/prostitution, Article 37 which forms part of the State Policies to be followed, prostitution is put together with gambling, taking of injurious drugs, printing, publication, circulation of obscene literature and the State is enjoined to prevent these activities as part of the agenda of

promotion of social justice and eradication of social evils<sup>79</sup>. Article 11 of the Constitution prohibits forced labour, traffic in human beings and employment of children below fourteen years of age in hazardous employment<sup>80</sup>. Legislations giving powers to local governments, the Village Council and Neighbourhood Council, club prostitution with beggary, gambling, taking of injurious drugs and consumption of alcoholic liquor, juvenile delinquency and other social evils and enjoin the taking of measures for their

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<sup>78</sup>Constitution of the Islamic Republic of Pakistan, 1973

Article 18. Freedom of trade, business or profession.

Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent:-

- (a) the regulation of any trade or profession by a licensing system; or
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

<sup>79</sup>Constitution of the Islamic Republic of Pakistan, 1973

Article 37. Promotion of social justice and eradication of social evils.

The State shall:

- (g) prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements;

<sup>80</sup>Constitution of the Islamic Republic of Pakistan, 1973

Article 11. Slavery, forced labour, etc. prohibited.

(1) Slavery is non-existent and forbidden and no law shall permit or facilitate its introduction into Pakistan in any form.

(2) All forms of forced labour and traffic in human beings are prohibited.

(3) No child below the age of fourteen years shall be engaged in any factory or mine or any other hazardous employment.

(4) Nothing in this Article shall be deemed to affect compulsory service:-

(a) by any person undergoing punishment for an offence against any law; or

(b) required by any law for public purpose provided that no compulsory service shall be of a cruel nature or incompatible with human dignity.



prevention<sup>81</sup>. Children in brothels or associating with prostitutes are categorized as "neglected and destitute child" by the Punjab Destitute and Neglected Children Act, 2004 and gives powers to the State to send the child to a child protection institution or to a suitable person<sup>82</sup>.

There is no-country wide national legislation dealing with sex work/prostitution and/or trafficking presently in force. The Punjab Suppression of Prostitution Ordinance, 1961 is applicable to the province of Punjab except the Tribal Areas. The Punjab Suppression of Immoral Traffic Act, 1935, the North-West Frontier Province Anti-Prostitution and Suppression of Brothels Act, 1937, the Sind Prevention of Prostitution Act, 1951 and The Bombay Prevention of Prostitution Act, 1923, as applicable to Karachi District which were earlier applicable stand repealed by the 1961 Punjab Ordinance. However, The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979 creating the offence of "Zina" – a man and a woman willfully having sexual intercourse without being married to each other – would apply to sex work/prostitution in the entire country.

### **A.The Punjab Suppression Of Prostitution Ordinance, 1961**

The Punjab Suppression of Prostitution Ordinance 1961 was brought in with the object of amending and consolidating the law on suppression of prostitution in the province of Punjab in Pakistan.

#### *Definitions*

**Prostitution** has been defined as promiscuous sexual intercourse for hire with payment in money or kind<sup>83</sup>. The term "prostitute" means any female available or known to be available for purposes of prostitution<sup>84</sup>.

**Brothel** has been defined as a house or place where a prostitute stays or carries on prostitution. Any place or institution where facilities are available for prostitution also falls within the category of brothel<sup>85</sup>.

**Running a brothel** has been defined as the keeping, managing

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<sup>81</sup>The Punjab Local Government Ordinance, 2001

195. *General powers of local governments, etc.– Notwithstanding any specific provision of this Ordinance, every local government, Village Council and Neighbourhood Council shall perform their functions conferred by or under this Ordinance and in performance of their respective functions shall exercise such powers and follow such procedures as are enumerated in the Sixth Schedule.]*  
Sixth Schedule

Entry 83. Social welfare.– (1) *The concerned local government may–*

(c) *adopt such measures as may be specified by Government for the prevention of beggary, prostitution, gambling, taking of injurious drugs and consumption of alcoholic liquor, juvenile delinquency and other social evils;*

<sup>82</sup>Punjab Destitute and Neglected Children Act, 2004

Section 28. *Entrustment of the custody of destitute and neglected child (1) If the Court is satisfied that the child brought before it, is a destitute and neglected child and that it is expedient to deal with him, the Court may order that he be admitted to a child protection institution or his custody be entrusted to a suitable person, who is able and willing to look after the child, until such child attains the age of eighteen years, or in exceptional cases for a shorter period.*

<sup>83</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 2(d) *"prostitution" means promiscuous sexual intercourse for hire, whether in money or kind;*

<sup>84</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 2(e) *"prostitute" means any female available or known to be available for purposes of prostitution;*

<sup>85</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 2(a) *"brothel" means any house, part of a house, room or place in which a prostitute resides or carries on prostitution or any place or institution where facilities are known to be available for prostitution;*

or financing of a brothel or knowingly permitting premises to be used as a brothel and has been made punishable with two years imprisonment and a fine of one thousand rupees<sup>86</sup>.

#### *Penalties*

Soliciting in a street or public place by words, gestures, indecent exposure or otherwise attracting attention for prostitution is punishable with six months imprisonment or fine of two hundred rupees<sup>87</sup>.

**Permitting** prostitution in places of public amusement is punishable with a fine of five hundred rupees<sup>88</sup>.

**Living on earnings:** A person above 18 years of age living on the earnings of prostitution is punishable with two years imprisonment and fine. In case the person is a male an additional punishment of whipping can be imposed<sup>89</sup>. There is a presumption of living on the earnings of prostitution in case of a person living with or habitually in the company of or aiding

a prostitute or keeping or managing a brothel<sup>90</sup>.

**Causing Procuring or Importing:** A person having the custody or care of a girl under the age of sixteen years who causes or encourages or abets her seduction or prostitution is punishable with three years imprisonment and fine. An additional punishment of whipping can be imposed if the convicted person is a male<sup>91</sup>. Procuring or enticing or leading away or persuading any woman or girl to leave her residence, with or without her consent, for the purposes of prostitution or to become an inmate of or frequent a brothel is punishable with three years imprisonment, fine and whipping in case of a male<sup>92</sup>. Similarly, bringing or attempting to bring any woman or girl for prostitution is punishable with three years imprisonment, fine and additionally whipping in case of a male<sup>93</sup>.

**Keeping:** A person keeping any woman or girl in a brothel or detaining in any place with the intention that she may have

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<sup>86</sup>Section 3 of the Punjab Suppression of Prostitution Ordinance 1961.

<sup>87</sup>Section 4 of the Punjab Suppression of Prostitution Ordinance 1961.

<sup>88</sup>Section 5 of the Punjab Suppression of Prostitution Ordinance 1961.

<sup>89</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 6. Punishment for living on earnings of prostitution— (1) Whoever being above the age of eighteen years,—

(a) knowingly lives, wholly or in part, on the earnings of another's prostitution, or

(b) exploits the prostitution of another person, whether with or without that person's consent,

shall be punished with imprisonment of either description for a term which may extend to two years [and] with fine which may extend to one thousand rupees, [\* \* \*] and if the person convicted is a male he may be punished with whipping in lieu of or in addition to any other punishment provided in this sub-section.

<sup>90</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 6. Punishment for living on earnings of prostitution-

Presumption.— (2) Where any person is proved to be living with, or to be habitually in the company of, a prostitute or is proved to have directed or exercised control or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, compelling or exploiting her prostitution with any other person or generally, or to be keeping or managing or assisting in the management of a brothel, it shall be presumed, until the contrary is proved, that he is knowingly living on the earnings of prostitution.

<sup>91</sup>Section 7 of the Punjab Suppression of Prostitution Ordinance 1961.

<sup>92</sup>Section 8 of the Punjab Suppression of Prostitution Ordinance 1961.

<sup>93</sup>Section 9 of the Punjab Suppression of Prostitution Ordinance 1961

sexual intercourse with any man other than her lawful husband is punishable with three years imprisonment, fine and whipping in case of a male<sup>94</sup>.

**Withholding** of the jewellery, clothing or other property belonging to a woman or girl creates a presumption of detention for the purposes of the Section. Similarly threatening a woman or girl with legal proceedings if she takes away jewellery or clothing lent or supplied by the person also creates the presumption of detention<sup>95</sup>. Civil or Criminal legal proceedings are prohibited any woman or girl for taking away or being found in possession of any such clothing as was necessary to enable her to leave such premises or brothel<sup>96</sup>.

## **B. The Offence Of Zina (Enforcement Of Hudood) Ordinance, 1979**

The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979 was brought to modify the existing law and bring it in conformity with the injunctions of Islam with regard to Zina set out in the Holy Quran and Sunnah. The Ordinance came into force on 10 February 1979 and was made applicable to the whole of Pakistan.

The Ordinance defined the offence of Zina as a man and a woman willfully having sexual intercourse with each other without being married to each other. The explanation to the provision laid down that penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina<sup>97</sup>.

An adult has been defined as a male who has attained 18 years of age or a female who has attained the age of 16 years, or has attained puberty<sup>98</sup>. *Hadd* has been defined as the punishment

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<sup>94</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 10. Punishment for keeping any woman or girl for prostitution.— (1) Whoever—

(a) keeps any woman or girl in a brothel, or

(b) detains any woman or girl, against her will, in any place with intent that she may have sexual intercourse with any man other than her lawful husband, shall be punished with rigorous imprisonment for a term which may extend to three years, [and] with fine which may extend to one thousand rupees, [\* \* \*] and if the person convicted is a male, shall also be liable to whipping.

<sup>95</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 10. Punishment for keeping any woman or girl for prostitution—

(2) Presumption.— A person shall be presumed to detain a woman or girl in any place for the purpose referred to in clause (b) of sub-section (1), if such person, with intent to compel or induce her to remain there,—

(a) withholds from her any jewellery, clothing or other property belonging to her, or

(b) threatens her with legal proceedings if she takes away with her any jewellery or clothing lent or supplied to her by or under the direction of such person.

<sup>96</sup>The Punjab Suppression of Prostitution Ordinance 1961

Section 10. Punishment for keeping any woman or girl for prostitution—

(3) Bar of certain legal proceedings— No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such clothing as was necessary to enable her to leave such premises or brothel.

<sup>97</sup>The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979

### Section 4 **Zina**

A man and a woman are said to commit 'Zina' if they willfully have sexual intercourse without being married to each other.

**Explanation:** Penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina.

<sup>98</sup>The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979

### Section 2. **Definitions**

In this Ordinance, unless there is anything repugnant in the subject of context:

(a) "adult" means a person who has attained, being male, the age of eighteen years, or, being female, the age of sixteen years, or has attained puberty;

ordained by the Holy Quran<sup>99</sup>. An adult man who is not insane and who has sexual intercourse with a woman to whom he is not married or suspect himself to be married is liable to *hadd*, the punishment prescribed by the Holy Quran. Similarly, an adult woman who is not insane and who has sexual intercourse with a man to whom she is not married and does not suspect herself to be married is liable to *hadd*. The Ordinance prescribes stoning to death in a public place as the punishment in case of the man or woman is a *muhsan*<sup>100</sup>. If the man or woman is not a *muhsan* then the punishment prescribed is whipping numbering one hundred stripes in a public place<sup>101</sup>.

The selling, hiring or otherwise disposing of any person for the purpose of prostitution or illicit intercourse or for any

unlawful and immoral purpose is made punishable with life imprisonment and whipping not exceeding thirty stripes. The intent of use for the purpose of prostitution is to be presumed when a female is sold, hired or otherwise disposed of to a prostitute or a person managing a brothel. "Illicit intercourse has been defined as sexual intercourse between persons not united by marriage<sup>102</sup>.

The buying, hiring or otherwise obtaining possession of any person for the purpose of prostitution or illicit intercourse or for any unlawful and immoral purpose is made punishable with life imprisonment and whipping not exceeding thirty stripes. The intent of use for the purpose of prostitution is to be presumed when a female is bought, hired or otherwise obtained possession

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<sup>99</sup>The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979  
Section 2 (b) "hadd" means punishment ordained by the Holy Quran or Sunnah;

<sup>100</sup>The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979  
Section 2 (d) "Muhsan" means

- (i) a Muslim adult man who is not insane and has had sexual intercourse with a Muslim adult woman, who, at the time he had sexual intercourse with her, was married to him and was not insane; or
- (ii) a Muslim adult woman who is not insane and has had sexual intercourse with a Muslim adult man, who, at the time she had sexual intercourse with him, was married to her and was not insane.
- (iii)

<sup>101</sup>The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979  
Section 5. Zina is zina liable to hadd if-

- (a) , it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or
- (b) , it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be, married. Whoever is guilty of Zina liable to hadd shall, subject to the provisions of this Ordinance, -
- (a) , if he or she is a *muhsan*, be stoned to death at a public place; or
- (b) if he or she is not *muhsan*, be punished, at a public place; with whipping numbering one hundred stripes.

<sup>102</sup>The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979  
Section 13. **Selling person for purposes of prostitution, etc.**

Whoever sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine.

Explanations:

- (a) When a female is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.
- (b) For the purposes of this section and section 14 "illicit intercourse" means sexual inter-course between persons not united by marriage.

of by a prostitute or a person managing a brothel<sup>103</sup>.

Enticing or taking away a woman with the intention that she may have illicit sexual intercourse is punishable with seven years imprisonment, fine and whipping not exceeding thirty stripes<sup>104</sup>. The Ordinance also omitted certain from the Pakistan Penal Code like Section 372 regarding selling minors for purposes of prostitution and Section 373 regarding buying minors for purposes of prostitution<sup>105</sup>.

The provisions punishing buying, selling and enticing for prostitution or illicit intercourse or any unlawful and immoral activity and the omission of the Sections dealing with buying and selling of minors for prostitution in the Pakistan Penal Code under the Ordinance remained in force from the promulgation of the Hudood Ordinance in 1979 to 2006. In 2006, these provisions were omitted by the Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006).

### C. Comments

- Sex Work/Prostitution would be punishable as the offence of Zina under the Hudood Ordinance – sexual intercourse between a man and a woman without being married to each other. The Hudood Ordinance is applicable to the whole of Pakistan and imposes severe punishment as per the Holy Quran and Sunnah.
- Sex work/prostitution is prevalent and there are well known

red light areas like Hira Mandi in Lahore. Certain forms of temporary marriage in Islamic Law are brought in the context of sex work/prostitution thus taking out of the ambit of the offence of Zina under the Hudood Ordinance. However, this area needs more exploration.

- The Punjab Suppression of Prostitution Ordinance 1961 defining brothel, prostitution, prostitute, soliciting, procuring, enticing, living off the earnings of prostitution remains in force in the province of Punjab.
- Under the Hudood Ordinance buying, selling and enticing for purpose of prostitution, illicit intercourse or unlawful and immoral purpose remained punishable from 1979 till 2006, when they were omitted by the Protection of Women (Criminal Laws Amendment) Act.

### D. Annexures

For easy reference two legislations from Pakistan are being attached as annexures.

1. The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979 (Pakistan I - The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979).
2. The Punjab Suppression of Prostitution Ordinance 1961 (Pakistan II - The Punjab Suppression of Prostitution Ordinance 1961).

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<sup>103</sup>The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979

Section 14. Buying a person for purposes of prostitution, etc.

Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine.

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

<sup>104</sup>Section 16 of the Offence of Zina (Enforcement Of Hudood) Ordinance, 1979

<sup>105</sup>Section 19 of the Offence of Zina (Enforcement Of Hudood) Ordinance, 1979

# SRI LANKA

In Sri Lanka there are three legislations dealing with sex work/prostitution and trafficking along with some provisions and amendments in the penal code. In many countries laws with regard to vagrancy are used to harass sex workers, in Sri Lanka the principal legislation dealing with prostitution is the Vagrancy Ordinance. In addition there is a legislation to deal with running of brothels called the Brothels Ordinance. The third law dealing with the area is the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act. Some provisions of the Children and Young Persons Ordinance deal with the subject of sex work/prostitution. In addition there are a number of cases decided by courts dealing with the legislations and interpreting words and phrases like brothel, prostitution as well as the offences laid down like living on the earnings of prostitution.

## A. VAGRANTS ORDINANCE

The Vagrants Ordinance clubs sex workers/prostitutes with people asking for alms, vagrants, people not having visible means of sustenance and not giving a good account of themselves and creates punishable offences in the nature of “idle and disorderly” person, “rogue and vagabond” and “incurable rogue”.

### *Idle and Disorderly*

The Vagrants Ordinance deems certain categories of persons as “idle and disorderly” and proceeds to punish them with fourteen days imprisonment and/or fine<sup>106</sup>. The Ordinance places “every common prostitute wandering in the public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner” in the category of “Idle and Disorderly person” and liable to punishment<sup>107</sup>. Police officers have been given powers to arrest an idle and disorderly person without a warrant<sup>108</sup>.

### *Rogue and Vagabond*

The Ordinance goes on to create the category of “rogue and vagabond” punishable with one month imprisonment and fine<sup>109</sup>. An individual convicted a second time of the offence of “idle and disorderly” person is deemed to be a rogue and vagabond<sup>110</sup>. A person willfully exposing his person in an indecent manner in any street, road, highway or public place to the disgust and annoyance of others is also deemed to be a rogue and vagabond and liable to the punishment<sup>111</sup>.

Any person knowingly aiding, abetting, assisting, harbouring or concealing a rogue or vagabond is punishable with four months imprisonment and fine<sup>112</sup>.

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<sup>106</sup>Section 3(1) of the Vagrants Ordinance

<sup>107</sup>Section 3(1)(b) of the Vagrants Ordinance

<sup>108</sup>Section 3(2) of the Vagrants Ordinance

<sup>109</sup>Section 4 of the Vagrants Ordinance

<sup>110</sup>Section 4(a) of the Vagrants Ordinance

<sup>111</sup>Section 4(c) of the Vagrants Ordinance

<sup>112</sup>Section 21 of the Vagrants Ordinance

### *Incorrigible Rogue*

The third category created is of “incorrigible rogue” punishable with four months imprisonment, fine and corporal punishment not exceeding 24 lashes. In addition the person can be asked to give security for good behaviour for one year and in default can be punished with a further four months imprisonment. An individual convicted for a third time of the offence of idle and disorderly person or for a second time as a rogue and vagabond is deemed to be an incorrigible rogue and liable to the punishment<sup>113</sup>.

Any person knowingly aiding, abetting, assisting, harbouring or concealing an incorrigible rogue is punishable with six months imprisonment and fine.

### *Soliciting and Acts of Indecency in Public Place*

A person soliciting in or near a public place for the commission of illicit sexual intercourse or indecency whether with the person soliciting or any other person is punishable with six months imprisonment and fine. Similarly a person committing an act of gross indecency or behaving with gross indecency in or about a public place or found in any public enclosure in circumstances indicating immoral purposes is liable to the punishment. In case of a second offence of soliciting by a male the punishment of whipping can be imposed in addition to imprisonment and fine<sup>114</sup>. In case the offender is a female, the Court can send the person to a detention home instead of a regular prison<sup>115</sup>.

### *Living on Earnings of Prostitution*

A person who knowingly lives wholly or partly on the earnings

of prostitution is regarded as a certain category of incorrigible rogue. An individual who systematically procures persons for illicit or unnatural intercourse also falls within this category. This category of incorrigible rogue is punishable with six months imprisonment and fine after a summary conviction. In case of conviction after a full fledged trial rather than a summary trial, the punishment of two years imprisonment and whipping in the case of a male can be imposed by the court<sup>116</sup>.

The provision creates a presumption of knowingly living on earnings of prostitution if a male who lives with or is habitually in the company of a prostitute. There is a similar presumption about living on earnings of prostitution, in case of any person, male or female, who exercises control, direction or influence over the movements of a prostitute which show that he/she is aiding, abetting or compelling the prostitution<sup>117</sup>.

### *Causing Encouraging Prostitution of a girl*

A person having the care, custody or charge of a girl who causes or encourages the seduction or prostitution or unlawful carnal knowledge of the girl is punishable with six months imprisonment and fine. A person who knowingly allows the girl to associate with or be in the employment of a prostitute or immoral person is deemed to have caused or encouraged the seduction or prostitution or unlawful carnal knowledge of the girl. A parent or guardian who has given consent to a girl living with a man as his wife is exempted from being punished under the provision<sup>118</sup>.

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<sup>113</sup>Section 5 of the Vagrants Ordinance

<sup>114</sup>Section 7 of the Vagrants Ordinance

<sup>115</sup>Section 8 of the Vagrants Ordinance

<sup>116</sup>Section 9(1) of the Vagrants Ordinance

<sup>117</sup>Section 9(2) of the Vagrants Ordinance

<sup>118</sup>Section 11 of the Vagrants Ordinance



### *Detention of Girl*

A magistrate can order the execution of a bond to exercise due care and supervision by the parent or guardian, in case it is shown that a girl with the knowledge of the parents or guardian was exposed to the “risk of seduction or prostitution or of being unlawfully carnally known” or living a life of prostitution<sup>119</sup>. The magistrate can also direct the care and detention of the girl in a place of safety<sup>120</sup>. In case the parent or guardian is convicted of causing or encouraging the seduction or prostitution or unlawful carnal knowledge of the girl, the Magistrate can order the custody of the girl to a relative or other fit person or society till the attainment of sixteen years of age or for any shorter period.

A person who knowingly assists or induces a girl to escape from the custody or who harbours, conceals or prevents the return to the person given the custody by the Magistrate is liable to the punishment of three months imprisonment and fine<sup>121</sup>.

In case there is reasonable cause to suspect that an offence has been or is being committed against any girl, the Magistrate can issue warrant to search any house, building or any other place specified and for the removal of the girl from the place<sup>122</sup>.

## **B. Brothels Ordinance**

The Brothels Ordinance is a short piece of legislation dealing with the running of brothels and providing for punishments for managing or acting or assisting in the management of a brothel. The Ordinance was first brought in as Ordinance No. 5 in 1889, then as Ordinance No. 21 of 1919 and then as Ordinance No. 42 of 1943.

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<sup>119</sup>Section 12 of the Vagrants Ordinance

<sup>120</sup>Section 13 of the Vagrants Ordinance

<sup>121</sup>Section 15(2) of the Vagrants Ordinance

<sup>122</sup>Section 17 of the Vagrants Ordinance

<sup>123</sup>Section 2 of the Brothels Ordinance

<sup>124</sup>Section 3 of the Brothels Ordinance

### *Punishments*

Any person who manages, acts or assists in the management of a brothel is punishable with a fine of LKR 500 or six months imprisonment or both fine and imprisonment.

A tenant, lessee, occupier or owner who knowingly permits the use of the premises or a part of it as a brothel or for habitual prostitution is punishable with a fine of LKR 500 or six months imprisonment or both fine and imprisonment.

Similarly, a lessor or landlord or their agent who lets the premises or a part to be used as a brothel or for habitual prostitution is punishable with a fine of LKR 500 or six months imprisonment or both fine and imprisonment.

A second or subsequent conviction for the offence is punishable with six months imprisonment or fine of one thousand rupees or both fine and imprisonment.

In addition the court may require the person convicted to enter into a recognizance for good behaviour for a period of twelve months. In default of entering such a recognizance three months imprisonment can be imposed by the court<sup>123</sup>.

### *Deemed Manager*

Any person who appears, acts or behaves as Master or Mistress or as the person having care, government or management of a brothel is deemed to be the manager or keeper of the brothel and liable to punishment, even if in fact he or she is not the real keeper or manager<sup>124</sup>.

### *Termination of Tenancy*

In case of the conviction of the tenant, lessee or occupier of the premises, the court has the power to terminate the tenancy on its own or on an application by the landlord or the owner or by the prosecuting agency.

If the landlord or lessor does not move such an application and the tenant, lessee or occupier is subsequently convicted of an offence under the Ordinance, then the landlord or lessor is deemed to have knowingly abetted the offence and liable to punishment<sup>125</sup>.

### **C. Convention On Preventing And Combating Trafficking In Women And Children For Prostitution Act, 2005**

The Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, 2005 was enacted by the Sri Lanka Parliament to give effect to the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution adopted in Kathmandu in 2002. The legislation defines phrases like trafficking, prostitution, traffickers as well as creates the offences of trafficking in women and children for prostitution and prescribes the punishment to be imposed on the perpetrator. It gives jurisdiction to the Sri Lanka courts to try offences committed outside the country, if the perpetrator is present in Sri Lanka or is committed by a citizen of Sri Lanka or by a stateless person residing in the country. The courts also get jurisdiction if the person against whom the offence is committed is a Sri Lankan citizen.

### **Definitions**

**Trafficking** has been defined as the moving, selling or buying of women and children for prostitution within and outside the country for monetary or other considerations with or without the consent of the person being subjected to trafficking.

**Persons subjected to trafficking** has been defined to mean women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage or any other unlawful means.

**Prostitution** has been defined as the sexual exploitation or abuse of persons for commercial purposes.

**Trafficker** has been defined to mean any person, agency or institution engaged in any form of trafficking.

**Repatriation** has been defined to mean return to the country of origin of the persons subjected to trafficking across international frontiers.

### *Offences and Punishments*

Any person who keeps, maintains or manages, knowingly finances or takes part in the financing of, or knowingly lets or rents, a building or other place or any part thereof for the purpose of trafficking of women and children for prostitution or any connected matter is held to be guilty of an offence under the Act.

A person who attempts to commit, aids or abets in the commission of, or conspires to commit an offence is also to be held guilty of an offence under the Act.

A person guilty of an offence under the Act is punishable with imprisonment for a minimum period of three years and maximum of fifteen years and fine.

The Court can recover compensation to be paid to the victim by way of a fine imposed on the offender. A further term of imprisonment up to five years can be imposed in case of failure to pay compensation. In case of a second or subsequent offence, twice the punishment and fine can be imposed on the offender.

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<sup>125</sup>Section 4 of the Brothels Ordinance

## A. Penal Code Provisions

The Penal Code of Sri Lanka through amendments in 1995 and 2006 specifically created offences with regard to sex work/prostitution and trafficking.

### *Offences and Punishments*

#### *Procuring*

The 1995 amendment to the Penal Code<sup>126</sup> replaced Section 360 A and laid down six clauses defining the offence with regard to procuring for prostitution or illicit sexual intercourse:

- (1) Procuring or attempting to procure of a person, male or female, of any age, with or without consent from Sri Lanka or outside for prostitution;
- (2) Procuring or attempting to procure, removing or attempting to remove a person under sixteen years of age from Sri Lanka for illicit sexual intercourse with a person outside Sri Lanka;
- (3) Procuring or attempting to procure, removing or attempting to remove of any person, of any age, with or without consent to leave Sri Lanka to become an inmate of a brothel elsewhere;
- (4) Bringing into Sri Lanka of a person under sixteen years of age with the intention of illicit sexual intercourse;
- (5) The procuring or attempting to procure of a person with or without consent to leave the usual place of residence of such person for prostitution in a brothel in or outside Sri Lanka; and
- (6) Detaining a person without consent in a brothel for prostitution or sexual abuse.

All acts falling within the above clauses are punishable with a minimum of two years and a maximum of ten years imprisonment and fine.

<sup>126</sup>Penal Code (Amendment) Act No. 22 of 1995

<sup>127</sup>Penal Code (Amendment) Act No. 16 of 2006

#### *Trafficking*

The 2006 amendment to the Penal Code<sup>127</sup> replaced Section 360 C and laid down three clauses defining the offence of trafficking:

- (1) Buying, selling or bartering a person for money or other consideration. Instigating, promoting, facilitating or inducing the buying, selling or bartering of a person for money or other considerations is also included in the offence;
- (2) Recruiting, transporting, transferring, harbouring or receiving a person for the purpose of securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation or other offences. The use of threat, force, fraud, deception or inducement or exploiting the vulnerability of a person for the above purposes is also an offence;
- (3) Recruiting, transporting, transferring, harbouring or receiving a child, with or without consent, for the purpose of securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation.

All the above acts fall within the definition of trafficking and are punishable with a minimum of two years and a maximum of twenty years imprisonment and fine. If the offence is with respect to a child the minimum punishment is three years imprisonment.

## B. Children And Young Persons Ordinance

The Children and Young Persons Ordinance was brought to establish Juvenile Courts, for supervision of Juvenile Offenders and for the protection of Children and Young Persons. The Chapter on "Prevention of Cruelty and Exposure to Moral and Physical Danger" contains two provisions in the context of sex work/prostitution.

### *Causing Encouraging Prostitution*

A person having the custody, charge or care of a girl under 16 years of age causing or encouraging the seduction or prostitution of the girl is liable to two years imprisonment.

A person who knowingly lets a girl under 16 years of age consort with or enter or continue in employment of a prostitute or a person of immoral character is deemed to have caused or encouraged the commission of the offence.

### *Child or Young Person in Brothels*

A person having the custody, charge or care of a child who has attained the age of four years or of a person below 16 years allows the child or young person to reside in or frequent a brothel is punishable with six months imprisonment or fine of two hundred and fifty rupees or both fine and imprisonment.

## **C. Judicial Interventions**

### **I. Keeping – Managing a Brothel**

#### **(a) *Pieris versus Magrida***

The High Court of Sri Lanka dealing with Brothels Ordinance in the case of *Pieris versus Magrida Fernando et al*<sup>128</sup> interpreted the word brothel in the context of the offence of keeping a brothel and knowingly letting premises be used as a brothel.

The evidence established that a number of women occupied the place alleged to be a brothel. That men of all sorts visited it both during the day and by night, spirits were drunk on the premises and that there were fights among the people. The first accused in the case was convicted of keeping a brothel under Section 2(a) of the Brothels Ordinance. The second accused was convicted of as a lessee knowingly letting the premises be used as a brothel under Section 2(b) of the Ordinance. The two accused persons appealed against their conviction.

### *Law declared*

The High Court of Sri Lanka observed that the fact that a number of women occupy the premises, men of all sorts visit it both by day and by night, spirits being drunk and fights taking place may make the neighbours want to shut the place down. The place may be a nuisance to decent people, however the evidence did not in any way relate to the offence of keeping a brothel. The Court held that the word brothel has a well-known legal acceptance. It applies to a place to which persons of both sexes have recourse for the purpose of prostitution. The judgment notes that not a single act of indecency or fornication is spoken to by any of the witnesses as having occurred in this house, which is said to be used as a brothel. The Court concluded that there is no evidence that the place was a brothel and acquitted the accused persons.

*Note: The social stigma attached to sex work often colours the interpretations given by courts to phrases when dealing with offences around prostitution. The judgment clearly distinguishes moral disapproval and nuisance for decent people from conviction for an offence of keeping a brothel.*

#### **(b) *Silva v. Suppu***

The High Court in the case of *Silva versus Suppu*<sup>129</sup> dealt with the interpretation of managing and keeping a brothel as an offence under Section 1(1) of the Brothels Ordinance.

The accused was the lessee of the premises consisting of twelve small rooms partitioned by walls or planks. In consequence of information received, a police constable was set to watch the premises. He saw every night, from 6 to 11 p.m., men going into the house and coming out after an interval. The accused was seen standing at the entrance speaking to those who entered and from whom he received money. According to the constable he knew four of the women who were found in the house as common prostitutes.

<sup>128</sup>*Pieris v. Magrida Fernando Et Al - NLR - 212 of 1 [1895] LKHC 32; [1895] 11; (1895) 1 NLR 212 (5 November 1895)*

<sup>129</sup>*Silva v. Suppu - NLR - 119 of 21 [1919] LKHC 4; [1919] 3; (1919) 21 NLR 119 (21 May 1919)*

An Inspector of Police with some policemen raided the house one day at about 10 p.m. They found some men and eight women. Two of these men who were found in two of the rooms in company with two of the women admitted that they had come there for purposes of prostitution, and that the accused had received money from them. At the trial they gave evidence to this effect. The other women were in other parts of the house talking to other men. At the trial some men gave evidence to the effect that they kept some of the women found in the house as their mistresses. However, these men were mere “pimps” as per the conclusion of the Magistrate. In only a few of the rooms were there any signs of occupation, such as pots and pans for cooking and the rest of the rooms were bare.

The accused was charged and convicted under Section 1 (1) of the 1889 Brothels Ordinance which makes it an offence for any person to “keep or manage or act or assist in the management of a brothel.” The accused appealed to the High Court of Sri Lanka.

#### *Law declared*

The Court observed that in Sri Lanka the practice of immoral women walking the streets picking up men and resorting to some house for the purpose of prostitution was not so common or prevalent and therefore the term “brothel” as accepted in English law does not have relevance in the context of local conditions. It held that the commonly understood meaning of “brothel” locally as a house run by a man usually called a “brothel keeper” to which men resorted for purposes of prostitution with women who were to be found in the house, is the interpretation to be given to the word “brothel” used in local Ordinances.

The judgment held that the evidence proves that the house in question was run by the accused, so that women who were prostitutes had access to it for the purpose of prostitution. That men visited it, paying the accused a consideration, and were allowed access to the women for purposes of prostitution. The

submission that the women were tenants of the rooms was rejected by the Court. It observed that even if the women were to be assumed to be tenants – it had been established that the accused was residing in the premises, had control over those seeking admission so as “to be able to levy a charge for such admission. The appeal was dismissed and the conviction for managing or keeping a brothel under the Brothels Ordinance was affirmed by the High Court.

#### **(c) *Dorothy Silva v. Inspector of Police***

The High Court of Sri Lanka in the case of Dorothy Silva versus Inspector of Police<sup>130</sup> interpreted the offence of managing or keeping a brothel under the Brothels Ordinance.

#### *Facts*

The accused Dorothy de Silva, was charged with having on 24 January 1975 at premises called “Sal Mal”, No. 2, Savoy Building, Galle Road, Wellawatte, kept or managed a brothel and thereby committed an offence under Section 2 (a) and punishable under Section 2 (1) of the Brothels Ordinance. She was found guilty and sentenced to pay a fine of LKR 300.

The case for the prosecution was that Gerard Perera who acted as the decoy in this case on the day in question selected a girl called Mala Jayawardene out of four or five girls offered to him at the premises by the accused for prostitution for which he paid the accused Rs. 75. No sexual act or any form of intimacy took place at the premises, but the girl was sent to a hotel called Europa House, a short distance away, where by previous arrangement the decoy met her and took her into a room of the hotel where preparations were made for the sexual act when the police raided the premises.

The Magistrate held that the offence of managing a brothel had been established and convicted the accused under the Brothels Ordinance. The accused appealed on the ground that no act of indecency or sexual intercourse had been committed on the premises.

<sup>130</sup>*Dorothy Silva v. Inspector of Police* - NLR - 553 of 78 [1977] LKHC 1; [1977] 5; (1977) 78 NLR 553 (1 January 1977)

#### *Law declared*

The central issue in the appeal was whether it is imperative that acts of indecency or sexual intercourse should be committed or opportunities for such acts should be available in the premises itself to which persons of both sexes resort to for the purpose of prostitution, in order to make such premises a “brothel” within the meaning of the Brothels Ordinance.

The Court held that it makes no difference if instead of the acts of indecency or sexual intercourse taking place in the very premises itself in which the women are offered for prostitution, arrangements are made to supply women and be made available to men at some other place for the purpose of committing acts of indecency or sexual intercourse. If any premises are used to promote such activities, such premises fulfilled all the attributes of a brothel for the purpose of the Brothels Ordinance.

The judgment observed that a “brothel” for the purpose of the Brothels Ordinance is certainly what the word is understood in common parlance, namely a place where persons of both sexes resort to for the purpose of prostitution in the place itself. However, brothel was also held to mean a place where arrangements are made whereby women living at the premises or elsewhere are supplied for the purpose of prostitution, that is to commit acts of indecency or sexual intercourse either at the premises itself or elsewhere.

The judgment dismissed the appeal and held the accused Dorothy Silva guilty of the offence of “managing a brothel” under the Brothels Ordinance.

**(d)** *Danny v. Sirinimal Silva, Inspector of Police, Police Station, Chilaw*  
The Supreme Court of Sri Lanka in the case of Danny versus Sirinimal<sup>131</sup> Silvar dealt with the question whether illicit sexual intercourse in a guest house could be prosecuted under the Brothels Ordinance.

#### *Facts*

The petitioner had a relationship of sexual intimacy with one Leela Perera. They met on 22. 07. 1998 and decided to spend the night at the Sirisevana Guest House. At about 10.30 p.m., police officers arrived and got them to open their bed room and arrested them. They were taken to the Chilaw Police Station along with five women and four men, also taken into custody at the said Guest House. They were kept in custody until the 23rd and were produced before the Magistrate's Court, Marawila along with the other “suspects” on charges under the Brothels Ordinance. An application for bail was refused and the petitioner was remanded until 29. 07. 1998 when he was discharged. The petitioner challenged the arrest and detention as violative of fundamental rights.

#### *Law declared*

The Supreme Court declared that in terms of the Brothels Ordinance, having sexual intercourse is not an offence. Section 2 of the Ordinance provides that any person who keeps or manages or acts or assists in the management of a brothel shall be guilty of an offence.

The judgment held that there was no complaint against the petitioner and there was no reason at all to suspect that the petitioner had committed any offence. The arrest of the petitioner was wrongful and violative of his rights under Article 13(1) of the Constitution: “No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason of his arrest.”

The Supreme Court held that the petitioner is entitled to a sum of LKR 25,000/- as compensation and costs payable by the State. In addition, the six police officers involved were directed to pay LKR 5000/- each as compensation. The judgment ordered that the total amount of LKR 55,000/- was to be paid within three months.

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<sup>131</sup>*Danny v. Sirinimal Silva, Inspector of Police, Police Station, Chilaw and Others - SLR - 29, Vol 1 of 2001 [2000] LKSC 10; (2001) 1 Sri LR 29 (12 December 2000)*

*Note: The Supreme Court judgment clearly enunciated the law without bringing moral disapproval and declared that sexual intercourse in a guest house could not in any way be construed as an offence under the Brothels Ordinance. In fact, the Court ordered compensation for violation of fundamental rights of the petitioner.*

## II Soliciting in Public Place

The High Court of Sri Lanka dealing with the Vagrants Ordinance in the case of *Thideman versus Gunasekera*<sup>132</sup> interpreted the phrases soliciting a person in a public place and living on the earnings of prostitution.

### *Facts*

An Inspector of Police and a constable drove up to a place reputed to be a brothel, halted their car by the side of the road and switched off the lights. The accused then approached the car and asked the constable, who was in civil dress, whether he wanted "the goods". An agreement as to its price was reached, the accused went in and brought a woman, whereupon he was arrested. The accused was convicted, under Section 7 (1) (a) of the Vagrants Ordinance, of the offence of soliciting in a public place a person for the purpose of the commission of an act of illicit intercourse. The accused Thideman then appealed against the conviction.

### *Law declared*

The High Court observed that in the facts of the case it looked that it was not the accused but the police who did the soliciting. If a person had innocently halted his car there, on the accused putting this question he would probably have been driven away. Here the conduct of the Police was that 'of would-be patrons'. Even apart from the behaviour of the police, the Court held that soliciting connotes importunity, asking with earnestness, pressing of a matter and not mere inquiry. It may mean inviting, 'as when a trader' solicits patronage" but that again is not mere inquiry. The judgment held that publicity is one of the elements of the

offence and a private conversation on a public road does not come within the purview of the Section .

The judgment took the view that the offence of living wholly or in part on the earnings of prostitution under Section 9(1)(a) of the Vagrants Ordinance would be applicable. The Court took note of the fact as to how quickly the accused appeared, the nature of his very first words, the subsequent haggling over terms and then going in and promptly producing the woman. It held that the inference to be reached is the accused knowingly lives wholly or in part on the earnings of prostitution. The Court referred to the presumption under the provision of knowingly living on the earnings of prostitution in case of a male person exercising control, direction or influence on the movements of a prostitute indicating aiding or abetting or compelling the prostitution.

The judgment set aside the conviction for soliciting a person in a public place, convicted the accused under Section 9 (1) of the Vagrants Ordinance for living on earnings of prostitution and imposed the punishment of three months rigorous imprisonment.

*Note: The observation by the High Court that it looks as if the police was soliciting rather than the accused is vital to developing a criminal jurisprudence with regard to the ethics of sending a "decoy" customer employed by the police in a large number of cases against sex workers. The only other category where this method is deployed is narcotics and drug related cases. The area of sex work and drugs both evoke strong moral disapproval and stigmatization. In other offences like theft and robbery the method of sending a "decoy" person soliciting/ instigating theft or robbery is not considered an acceptable method of investigation, prosecution and conviction for the offence.*

## III Living on Earnings of Prostitution

(a). *Appuhamy versus Emanis*

The High Court in *Appuhamy versus Emanis et al*<sup>133</sup> interpreted

<sup>132</sup>*Thideman v. Gunasekera* - NLR - 143 of 43 [1941] LKHC 22; [1941] 49; (1941) 43 NLR 143 (10 July 1941)

<sup>133</sup>*Appuhamy v. Emanis Et Al* - NLR - 160 of 23 [1921] LKHC 22; [1921] 40; (1921) 23 NLR 160 (8 July 1921)



the phrase living in earnings of prostitution in the context of the offence under Section 9(1)(a) of the Vagrants Ordinance.

#### *Facts*

A Police Constable saw the accused standing by a “passenger” who was in a rickshaw which had stopped by the gate of the Hunupitiya park. Thereafter the accused went away, and within a few minutes returned to the park with a woman. The “passenger” had sexual intercourse with the woman while the accused stood on the side. The Magistrate convicted the accused of knowingly living on the earnings of prostitution under Section 9 (1) (a) of the Vagrants Ordinance. The Magistrate took the view that in view of the provisions of Section 9 (2) of that Ordinance, the accused must be deemed to be knowingly living on the earnings of prostitution.

#### *Law declared*

The High Court of Sri Lanka held that there was no evidence which would justify the raising of the presumption created by Section 9(2). It observed that there is no evidence in this case that the woman was a prostitute nor is there any evidence to show that the accused lived wholly or in part on the earnings of prostitution. The judgment declared that a single isolated fact, such as the one spoken of by the Police Constable, is not sufficient to sustain a conviction under the provisions of the Ordinance.

The Court set aside the conviction and acquitted the accused of the charge of living on the earnings of prostitution.

*Note: In an area where morality impacts interpretation in a major way, the view taken by the Court that there was no evidence to show that the woman was a prostitute and a single isolated act cannot be equated with living on earnings of prostitution is remarkably free from prevalent moral values.*

#### **(b) Saibo versus Chellam et al**

The High Court in the Saibo versus Chellam case<sup>134</sup> interpreted

living on the earnings of prostitution in the context of sex workers/prostitutes being charged and convicted for the offence under Section 9(1)(a) of the Vagrants Ordinance.

#### *Facts*

In this case two women who were said to be prostitutes had been convicted under Section 9(1) (a) of the Vagrants Ordinance of having knowingly lived on the earnings of prostitution and sentenced to pay a fine of Rs. 50 each by the Magistrate. They appealed on the ground that the Section under which they have been convicted does not apply to them, as it does not penalize prostitutes living on their own earnings.

#### *Law declared*

The High Court observed that prostitution is not an offence per se under the law, and the interpretation given by the Magistrate would have the effect of making a very important alteration in the law, and prostitution would stand penalized. The judgment notes the definition of the offence – “Any person who knowingly lives wholly or in part on the earnings of prostitution”. Referring to the use of the word “knowingly” it points out that if a prostitute earns money and lives on such earnings, there can be no mistake as to what her earnings are, and there can be no question of her doing so “knowingly”. There could be no possibility of her doing so “unknowingly” under a misapprehension, or mistake. The use of the word “knowingly” throws on the prosecution the burden of proving that the accused had the requisite knowledge, and the accused may prove that such knowledge was absent. This would apply in a case when another person is charged with the living on the earnings of a prostitute, but in the case of the prostitute herself it would be meaningless.

The judgement held that both according to the intention of the Ordinance and the words used Section 9(1)(a) has no application to prostitutes who live on their own earnings or prostitution. The convictions for living on the earnings of prostitution were set aside and the two women were acquitted.

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<sup>134</sup>Saibo v. Chellam Et Al. - NLR - 251 of 25 [1923] LKHC 15; [1923] 27; (1923) 25 NLR 251 (27 July 1923)

*Note: It is an important judgment which clearly enunciates that sex work/prostitution is not an offence under the law and that a woman earning a living from sex work/prostitution cannot be convicted for any offence.*

### **G. Comments**

- Sex work has nothing in common with begging or vagrancy. The Vagrants Ordinance makes explicit the unjustifiable equation of sex work with begging and vagrancy. Sex workers are automatically included in the categories of “vagrant” and “rogue” and liable to punishment.
- The Convention on Prevention of Trafficking in Women and Children for Prostitution Act limits the offence of trafficking only for the purpose of prostitution, leaving out trafficking for other purposes from its scope.
- Persons subjected to trafficking have been defined to mean women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage or any other unlawful means and does not make consent of an adult irrelevant to the offence.
- However, the 2006 amendment to the Penal Code defines trafficking to include other purposes like forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation or other offences.
- The social stigma attached to sex work often colours the interpretations given by courts to phrases when dealing with

offences around prostitution. A number of judgments of the courts clearly distinguishes moral disapproval from conviction for an offence under criminal law.

- The Supreme Court clearly enunciated the law that sexual intercourse in a guest house could not in any way be construed as an offence under the Brothels Ordinance.
- The observation by the High Court in the context of the practice of sending “decoy” customers that it looks as if the police was soliciting rather than the accused is vital to developing a criminal jurisprudence with regard to the ethics of sending a “decoy” customer employed by the police in a large number of cases against sex workers. In other offences like theft and robbery the method of sending a “decoy” person soliciting/instigating theft or robbery is not considered an acceptable method of investigation, prosecution and conviction for the offence.
- The judgments clearly lay down that sex work/prostitution is not an offence under the law-that a woman earning a living from sex work/prostitution cannot be convicted for any offence.

### **A. Annexures**

For easy reference two legislations from Sri Lanka are attached as annexures:

1. The Vagrants Ordinance (Sri Lanka I - The Vagrants Ordinance)
2. The Brothels Ordinance (Sri Lanka II- Brothels Ordinance)

## END NOTE

The specific legislations with regard to sex work/prostitution and trafficking have been explained for each of the countries in South Asia – Bangladesh, India, Nepal, Pakistan and Sri Lanka. The focus has been on the ingredients of provisions criminalizing certain acts as offences and providing for punishment. Similarly cases decided by courts have been scrutinized and the relevant judgments along with necessary factual matrix have been summarized. Comments looking critically at the specific provision of a legislation or a particular judgment from the rights of sex workers to live with liberty and dignity perspective of the monograph have been put down as 'Notes' after explaining the provision or judgment. In addition, at the end of the chapter dealing with a country the broad critical comments flowing from the text with regard to the legislations as well as the cases have been provided as Comments.

However, certain broad threads also emerge from the content and analysis of the material:

- Predominantly in South Asia sex work/prostitution specifically is not declared illegal or criminal by the laws enacted by the various constituent countries. However a number of activities linked with and around sex work in the nature of soliciting, running a brothel, living off the earnings of prostitution and punishment for clients are criminalized. The laws seem ostensibly to be sympathetic and view the sex worker as a victim and want to target traffickers and individuals forcing persons into prostitution. Yet even in the absence of a specific legislation criminalizing prostitution in the legal lexicon of a country, sex workers seem to bear the brunt of a high degree of police harassment in the shape of arrests, beatings, detention and worse.
- There may not be laws making sex work illegal, however, in practice sex workers/prostitutes are targeted and equated with beggars and vagrants and arrested, detained, harassed and punished under anti-vagrancy legislations. Sex work may have nothing in common with begging and vagrancy yet sex workers get automatically included in the categories of beggar or vagrant in the working of the penalizing provisions as well as rehabilitative measures.
- In the working of the legislations with regard to prostitution a large number of prosecutions for various offences like soliciting or running a brothel are based on the method of sending "decoy" customers. The only other category where this method is deployed is narcotics and drug related cases. The area of sex work and drugs both evoke strong moral disapproval and stigmatization. In other offences like theft and robbery the method of sending a "decoy" person soliciting/instigating theft or robbery is not considered an acceptable method of investigation, prosecution and conviction for the offence.
- The laws enacted with regard to trafficking focus on sex work and confine the definition of trafficking limiting it to the purpose of prostitution. Some of them conflate trafficking and sex work. This is partly due to the enactment of legislations as a follow up and implementation of the United Nations 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and the SAARC Convention on Preventing and Combating Trafficking in Women and Children, 2002. However, this leaves out the rights violations involved in trafficking for purposes other than prostitution, such as the recruitment, transportation and confinement in exploitative labour conditions.
- The ingredients making up a number of offenses under the legislations do not make a distinction between adults and children. This results in total negation of the individual will and volition of an adult person in provisions penalizing acts like detaining in a brothel or procuring for prostitution. The definition of the offence explicitly makes the consent or lack

of consent of an adult individual irrelevant. Laws creating offenses need to make a clear distinction between children and adult persons.

- Similarly, the provisions under the legislations with regard to rescue of individuals from brothels make no distinction between adult persons and children. In a total denial of the right of an adult person to take decisions this results in “rescue” of adults who are present with consent in the raids conducted by the police. The provisions dealing with “rescue” without ascertaining the wishes of an adult woman/person is in total violation of the fundamental rights of sex workers/prostitutes to life, liberty, move freely and reside in place of choice. Laws with provisions for rescue need to make a clear distinction between children and adult persons.
- The legislations provide for detention of “rescued” persons in protective homes or corrective institutions for long periods of time. The rescued persons are not accused of any crime, however, the provisions authorize for the purpose of “reform” detention for longer periods than the punishment prescribed for an offence.
- Provisions in laws giving power to order removal of a prostitute from a geographical area or location or residence in public interest are in total violation of the fundamental rights of life, liberty, move freely and reside in place of choice.
- The laws with regard to trafficking club women and children together. The provisions clearly infantilise women and treat them as children in need of paternalistic protection. The right of an adult woman to move and migrate needs to find place and recognition in the legislations in respect of trafficking. Ascertaining the wishes of an adult is crucial to the framing and working of any law. An adult woman may choose to remain in sex work/prostitution after being initially trafficked and the legislations must take these situations on board.

While this monograph summarizes the legislations and available case laws with regard to sex work, it indicates the need for more

study on the actual implementation of these legislations on the ground. The role of the police as well as judiciary at all levels must of necessity be a part of such a research endeavour.

## ANNEXURES

A compilation of some of the less accessible laws in South Asia would be useful for the those working in the fields of empowerment of sex workers, HIV/AIDS prevention, anti-trafficking and prevention of child prostitution. For easy reference the following legislations are annexed:

1. The Muluki Ain regarding Trafficking of Nepal is attached as Annexure titled “Nepal I - Muluki Ain regarding Trafficking”.
2. The Traffic in Human Beings (Control) Act, 1986 of Nepal is attached as Annexure titled “Nepal II- The Traffic in Human Beings (Control) Act, 1986”.
3. The Human Trafficking and Transportation (Control) Act, 2008 of Nepal is attached as Annexure titled “Nepal III- The Human Trafficking and Transportation (Control) Act, 2008”.
4. The Some Public (Offences and Penalties) Act, 1970 of Nepal is attached as Annexure titled “Nepal IV - The Some Public (Offences and Penalties) Act, 1970”.
5. The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979 of Pakistan is attached as Annexure titled “Pakistan I - The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979”.
6. The Punjab Suppression of Prostitution Ordinance 1961 of Pakistan is attached as Annexure titled “Pakistan II - The Punjab Suppression of Prostitution Ordinance 1961”.
7. The Vagrants Ordinance is attached as Annexure titled “Sri Lanka I - The Vagrants Ordinance”.
8. The Brothels Ordinance is being annexed as Annexures titled “Sri Lanka II - Brothels Ordinance”.

## MULUKI AIN REGARDING HUMAN TRAFFICKING, CHAPTER 11

- Nobody is allowed to take anybody else outside the borders of Nepal or sell him/her there, enticing him/her with the purpose of selling a human. If he/she is taken to a foreign land to sell and if the one who does so is arrested before he has sold him/her, he/she will be imprisoned for ten years, and if arrested after having sold, he/she will be imprisoned for twenty years. If the person who buys is found inside the borders of Nepal, he/she will also be punished as equal to the one who sells.
- Nobody is allowed to separate or entice to separate a minor under sixteen years of age or a mentally disturbed one of any age from his/her guardianship without permission of the legal guardian. If he/she is separated or enticed, the one who does so will be fined an amount upto five hundred rupees or imprisoned upto three years or be given both punishments.
- Nobody is allowed to make anybody else his/her servant, slave or bonded labour. The one who makes anybody else a servant, slave or bonded labor will be imprisoned for to ten years, and the court will also be able to have the one convicted pay appropriate compensation to the one concerned.
- Anybody who intentionally helps to commit a crime as mentioned in No. 1J2J3 of this chapter will receive half of the punishment that the major culprit receives.
- If a human is sold or bought in accord with No. 213 of this chapter, the amount of the buyer will not be returned and the one who sells will be fined based the amount in addition to the punishment mentioned in these numbers.

# NEPAL RECORDER

Year 10, No. 45  
Kathmandu : November 28, 1986

## Ministry of Law and Justice

Nepal Rajapatra, Vol. 36, No. 31. (Extraordinary), Kartik 24, 2043  
November 10, 1986)

### Traffic in Human Beings (Control) Act, 1986

**Preamble:** Whereas it is expedient to control traffic in human beings in order to protect the interests of the public and maintain good conduct, now therefore, His Majesty King Birendra Bir Bikram Shah Dev has enacted this law on the advice and with the approval of the National Panchayat.

#### 1. Short Title and Commencement

- (1) This law may be called the Traffic in Human Beings (Control) Act, 1986.
- (2) It shall come into force at once.

#### 2. Extra-Territorial Application of the Act

Even if any person has committed any offense punishable under this Act outside the Kingdom of Nepal, he shall be prosecuted and punished under this Act as if he had done so within the Kingdom of Nepal.

#### 3. Prohibition to Engage in Traffic In Human Beings

No person shall engage in traffic in human beings.

#### 4. Acts to be Deemed Tantamount To Traffic In Human Beings

In case any person engages in any of the following acts, he shall be deemed to have conducted traffic in human beings:

- (a) To sell human beings with any motive.
- (b) To take away any person abroad with intent of sale.
- (c) To compel any woman to take to prostitution through allurement or enticement, deceit, threats, intimidation, pressures or otherwise.
- (d) To hatch a conspiracy for committing any of the acts mentioned in the foregoing clauses, or to assist in or abet such acts, or attempts to engage therein.

#### 5. Complaint

- (1) Any person who receives information that any one has engaged in an act of trafficking in human beings, or is planning to do so, may file a complaint with any police office. The complainant shall submit available evidence along with such complaint.
- (2) The complaint filed under Sub-Section (1) must be forwarded by the police to the nearest District Court. In case the court is satisfied that there is proper reason to take appropriate action on such complaint and issues an order accordingly, the police shall conduct necessary inquiries and investigations in respect thereto.

#### 6. Authentication of Statements

- (1) In case the person who has filed a complaint under Section 5 is the person who is being taken away for sale or for prostitution, or who has been sold, or compelled to engage in prostitution, and in case such person presents himself or herself personally, his or her statements shall be forthwith recorded in the presence of a government lawyer,

and he or she shall be taken to the nearest District Court within 24 hours for the purpose of having such statement authenticated.

(2) In case the complaint is brought before the District Court for the authentication of his or her statements under Sub-Section (1), the appropriate judge shall, irrespective of anything contained in current law, peruse, and read out such statements. In case the recorded statement corresponds to the oral deposition, the judge shall record the matter accordingly, and in case he finds any discrepancy between the recorded and oral statements, he shall note down the extent of such discrepancy, and then authenticate the statement.

#### **7. Onus of Proof**

(1) In case any woman is being taken outside the Kingdom of Nepal by any person other than her guardian or close relative, and in case any person files a complaint under Section 5 to the effect that she is being taken away with the intent of selling her or compelling her to engage in prostitution, the onus of proving that she was not being taken away with any such intention shall lie on the accused.

(2) The onus of proving that the contents of the statements authenticated by the court under Sub-Section (2) of Section 6 are false shall lie on the accused.

#### **8. Fines and Penalties**

(1) Any person who is convicted of trafficking in human beings shall be sentenced to imprisonment for a term ranging from ten to twenty years.

(2) Any person who is convicted of taking people outside of the Kingdom of Nepal with the intent of sale shall be imprisoned for a term ranging from five to ten years.

(3) Any person who is convicted of compelling any woman to take to prostitution through allurement or enticement, deceit, threat, intimidation or pressure or otherwise shall be imprisoned for a term ranging from ten to fifteen years.

(4) Any person who is convicted of hatching a conspiracy for conducting traffic in human beings, or assisting in such

arts, or abetting any person to engage in such acts, or attempting to do so, shall be imprisoned for a term not exceeding five years.

(5) In case any person has been sold and purchased, the amount paid by the purchaser shall be forfeited and the purchaser shall be punished with a fine equal to such amount, in addition to the term of imprisonment prescribed in Sub-Section (1).

#### **9. His Majesty's Government To Be Plaintiff**

His Majesty's Government shall be the plaintiff in all cases filed under this Act, and such cases shall be deemed to have been included in Schedule I of the 1961 State Cases Act.

#### **10. Power to Remand**

(1) Notwithstanding anything contained in current Nepal law, if there exist adequate and proper grounds for remanding the accused to custody in any case relating to offenses punishable under this Act, and if the government lawyer has any arguments in respect thereto, the accused may be remanded to custody after preparing a memorandum mentioning such arguments.

(2) In case the accused is not satisfied with the order to remand him to custody under Sub-Section (1), he may file a complaint with the appellate court through the authority who has heard the case. Such authority must forward the complaint, as well as the memorandum, to the appellate court within three days, and act as directed by such court,

#### **11. Applicability of this Act**

Irrespective of anything contained in the Law on Traffic in Human Beings in the Legal Code, in all matters provided for in this Act, action shall be taken accordingly.

#### **12. Power To Frame RULES**

His Majesty's Government may frame necessary rules to implement the objectives of this Act.

Royal Seal Affixed on Kartik 24, 2043 (November 10, 1986).



# AN ACT MADE TO CONTROL TRAFFICKING IN PERSON AND TRANSPORTATION

Un-officially Translated by FWLD  
July 27, 2007

Preamble : Whereas it is expedient to provide for legal instrument for control of the act of trafficking in person and transportation and for protection and rehabilitation of the victim of such act,

Now, therefore, the Legislature-Parliament has enacted this Act.

## Chapter-one

Preliminary

### 1. Short Title and Commencement :

- (1) This Act may be cited as he "Trafficking in person and Transportation (Control) Act, 2064" (2007 A.D.)
- (2) This Act shall come into force at once.
- (3) This Act shall commence throughout Nepal and also be applicable to any person who, residing outside Nepal, commits the offense under this Act against a Nepali citizen.

### 2. Definition :

Unless the subject or context otherwise requires in this Act,-

1. 'offense' means the act under Section 3.
2. 'center' means the rehabilitation center established pursuant to Section 13.
3. 'victim' means a person sold, transported or caused to be engaged in prostitution.
4. 'children' means a person who has not completed the age of eighteen years.
5. 'exploitation' means the act of making (a person) slave, servitude and the word includes the act of removing, save as per prevailing law, human organ.

6. 'prescribed or as prescribed' means prescribed or as prescribed in the rules made under this Act.

## Chapter-Two

Provision Relating to Offense and Investigation

### 3. Trafficking in Person and Transportation not to be Done :

- (1) No one shall traffic in person and transport and cause to be trafficked and transported.
- (2) A person who commits the act under sub-section (1) shall be deemed to have committed an offense under this Act.

### 4. Trafficking in Person and Transportation to be Deemed to have been Committed :

- (1) Any person who commits the following act shall be deemed to have committed trafficking in person :-
  1. selling or buying a person with any purpose,
  2. causing to be engaged in prostitution by receiving or not receiving benefit of any kind,
  3. removing, save as per prevailing law, human organs,
  4. having sexual intercourse with a prostitute.
- (2) Any person who commits the following act shall be deemed

to have committed transportation of person:-

- (a) taking a person to a foreign country with the purpose of selling or buying,
- (b) taking by separating from the house, place or person of abode or having control over or keeping with him/her or harboring or taking from one place to another place within Nepal or to a foreign country or handing over to somebody a person by enticement, allurements, misrepresentation, fraud, deception, force, coercion, abduction, taking hostage, taking benefit of vulnerability, making unconscious, abusing post or power or alluring, causing fear, giving threat or coercing the parent or guardian, with the propose of causing to be engaged in prostitution or exploitation.

#### **5. Filing of Complaint:**

- (1) Any person having the knowledge that an offense under Section 3 has been committed or being committed or is about to be committed may file a complaint in a nearby police office.
- (2) If the person filing a complaint pursuant to sub-section (1) requests in writing to keep his/her name confidential, the police office registering the complaint shall have to keep his/her name confidential.

#### **6. Statement to be Authenticated:**

- (1) If the victim himself/herself files the complaint under Section 5, the police office shall immediately take his/her statement and present him/her immediately before the nearby district court for authentication of such statement.
- (2) If the police office brings pursuant to sub-section (1) the statement for authentication, notwithstanding anything contained in prevailing law and notwithstanding that the suit of the offense relating to the statement does not fall under the jurisdiction of such district court, the judge of such district court shall readout such statement to him/her and authenticate the statement, if the statement is written as stated by him/her and if the statement is not written as stated by him/her, by stating to what extent the statement is different.

- (3) Where a statement is authenticated pursuant to sub-section (2), the court may admit the statement so authenticated as evidence even if the victim does not appear before it in connection with the proceedings of the suit.

#### **7. Arrest or Search may be Made :**

- (1) If an information is received that an act to be deemed an offense under this Act has been committed, being committed or about to be committed in a house, land, place or vehicle and there exists a possibility that the offender may flee, escape or any evidence may disappear or be destroyed if an action is not taken immediately, notwithstanding anything contained in prevailing law, a police personnel at least of the level of police sub-inspector may carry out at any time the following work after raising a Parcha (a deed of justification) :-
  1. to enter into, search or take custody of such house, land, place or vehicle,
  2. if somebody causes an obstruction in carrying out such work, to take necessary action by opening or breaking window, door according to necessity,
  3. to arrest the person committing such act without arrest warrant or to search him/her,
  4. to seize or take custody of all physical evidence discovered in such house, land, place or vehicle.
- (2) The police personnel carrying out the work under sub-section (1) shall carryout the work in the presence of, if possible, also of the representative of the local body and, if not possible, of the persons present at that time and shall prepare a public deed thereof and provide one copy thereof to the concerned house, land or vehicle owner.

#### **8. Proceedings to be Carried by Detaining Accused:**

Notwithstanding anything contained in prevailing law, the proceedings of the suit relating to the offense under section 4, except the ones relating to the offense referred to in clause (d) of sub-section (1) of the said Section ,shall be carried out by detaining the accused.

### **9. Burden of Proof :**

Notwithstanding anything contained in the prevailing law, where a person is accused of having committed an offense under this Act, the burden of proving that s/he has not committed the offense shall lie with him/herself.

### **10. Separate Legal Practitioner may be Appointed :**

If the victim desires to have his/her representation through separate legal practitioner in the hearing to be made in a court of law of a suit relating to the offense under this Act, s/he may appoint such legal practitioner.

### **11. Interpreter or translator may be Appointed :**

If the victim does not understand the language used in the work or proceedings of the suit relating to the offense under this Act, s/he may appoint an interpreter or translator by permission of the concerned court or office.

## **Chapter-3**

Provision Relating to Rescue, Rehabilitation and Reunion

### **12. Work Concerning Rescue :**

Government of Nepal shall make arrangements for rescue of a Nepali citizen sold in a foreign country.

### **13. Rehabilitation Center :**

- (1) In order to provide physical or mental treatment to and socially rehabilitate the victim and to reunite him/her with family, Government of Nepal shall establish rehabilitate centers according to necessity.
- (2) An association may , by obtaining approval as prescribed, establish and operate rehabilitation center for the purpose of sub-section (1) and Government of Nepal shall carryout a regular and effective monitoring of such association and the rehabilitation center established by it.
- (3) The Government of Nepal may provide as prescribed financial and other assistance to the center operated pursuant to sub-section (2).
- (4) The center shall have to make arrangements for social

rehabilitation and family reunion of the person living in the center.

- (5) The center shall have to make arrangements for medical treatment and advisory service and facility to the victim according to necessity.
- (6) No one shall employ a victim living in the center into a work against his/her will.
- (7) Provisions relating to the management, operational standard, monitoring of the center, skillful training and employment to, rehabilitation, family reunion of the victim shall be as prescribed.

### **14. Rehabilitation Fund:**

- (1) The Government of Nepal shall establish a rehabilitation fund for operation of the rehabilitation center established pursuant to sub-section (1).
- (2) The following money shall be credited to the fund established pursuant to subsection (1) :-
  1. money received from Nepal Government,
  2. money received from a local or foreign organization, association or person,
  3. one half amount of the money to be received from the fine imposed pursuant to Section 15.
- (3) The management and operation of the rehabilitation fund shall be as prescribed.

## **Chapter-4.**

Provision Relating to Punishment and Compensation

### **15. Punishment:**

A person who commits an offense under section 3 shall be punished with as hereunder:

1. a person who sells or buys a person, with imprisonment of twenty years and fine of two hundred thousand rupees,
2. a person who causes (somebody ) to be engaged in prostitution with or without receiving benefit of any kind , with imprisonment from ten years to fifteen years and fine

- from fifty thousand to one hundred thousand, according to the degree of offense,
3. a person who removes, save as per the prevailing law, a human organ, with imprisonment of ten years and fine from two hundred thousand to five hundred thousand rupees.
  4. a person who commits sexual intercourse with a prostitute, with imprisonment from one month to three months and fine from two thousand to five thousand rupees,
  5. a person who, with the purpose of selling, or buying or causing to be engaged in prostitution,
    - (1) takes a person to a foreign country, with imprisonment from ten years to fifteen years and fine from fifty thousand to one hundred thousand and if children is taken, with imprisonment from fifteen years to twenty years and fine from one hundred thousand to two hundred thousand,
    - (2) takes a person from one place to another place of Nepal, with imprisonment of ten years and fine from fifty thousand to one hundred thousand rupees and if children has been taken, with imprisonment from ten years to twelve years and fine of one hundred thousand rupees,
    - (f) a person who, with the purpose of exploitation, takes a person from one place to another place of Nepal pursuant to clause (b) of sub-section (2) of Section 4, with imprisonment from one year to two years and if taken to a foreign country, with imprisonment from two years to five years.
    - (g) save as provided for in clause (e) and (f), a person who commits an offense under clause (b) of sub-section (2) of Section 4, with imprisonment from seven years to ten years.
    - (h) a person who abets, conspires or attempts or who is an accomplice of the offense of trafficking in person or transportation, with one half punishment of the punishment provided for the said offense.
    - (2) Notwithstanding anything contained in sub-section(1), the following provision shall apply to the following matter :
      - (a) if the person who sells or buys and who causes to be engaged a person in prostitution with or without receiving benefit of any kind is one and same person, s/he shall be punished separately for sale or procreation and for causing to be engaged in prostitution with or without receiving benefit of any kind,
      - (b) if the person who buys or sells or causes to be engaged a person in prostitution with or without receiving benefit of any kind and who commits the offense under clause (b) of sub-section (2) of Section 4 is one and same person h/se shall be punished separately for sale or procreation and for commission of such offense,
      - (c) notwithstanding anything contained in clause (b), if the person who takes a person by separating him/her pursuant to clause (b) of sub-section (2) of section 4 and who , with the purpose of buying and selling or causing to be engaged in prostitution with or without receiving benefit of any kind, takes a person to a foreign country or from one place to another place of Nepal is one and some person, s/he shall be punished separately for taking a person by so separating and for taking to a foreign country or one place from one place of Nepal.
      - (3) If the offense under Section 3 is committed by a person holding a public post s/he shall be punished with, in addition to the punishment provided for commission of such offense, twenty five percent additional punishment of such punishment.
      - (4) A person who commits an offense under Section 3 against a person who is under his/her protection or guardianship or the person in the relationship punishable as per the chapter on Incest of the Muluki Ain (Code of the Realm) shall be punished with, in addition to the punishment provided for the offense, ten percent additional punishment of such punishment.
      - (5) A person who repeats the offense under Section 3 shall be punished, for the offense committed every time, in addition to the punishment provided for such offense, with one fourth additional punishment of such punishment
      - (6) If the person who has filed a complaint pursuant to Section 5 gives, in the course of the trial of the suit, a statement in contravention of the statement he has once given or does not appear in the time called for by the court or does not assist the court, s/he shall be punished with imprisonment from three months to one year.

#### **16. Not to be Punished :**

If a person having failed to receive any assistance called for

escaping or fleeing from a place after knowing or having reasonable ground to believe that s/he is about to be bought, sold or engaged in prostitution or has been taken for that purpose or is sold or bought or caused to be engaged in prostitution, and having been obstructed, prevented or captured or forced by somebody in an attempt made by him/her to flee or escape, commits an act believing that s/he cannot flee, escape from such obstruction, force or capture without use of force and the person who so obstructs captures or forces, dies or receives injury due to such act, s/he shall not be punished, notwithstanding anything contained in prevailing law.

#### **17. Compensation :**

- (1) The court shall have to make available, from the offender, to the victim a reasonable compensation not less than an amount equal to fifty percent of the fine imposed on him/her.
- (2) If the victim dies before receiving the compensation amount under sub-section (1), such amount shall be given as prescribed to his/her minor son and daughter and in absence of such son and daughter to his/her father and mother dependent on him/her.
- (3) If the victim does not have minor son and daughter and dependent father and mother entitled to the compensation amount under sub-section (1), such amount shall be required to be collected into the rehabilitation fund under Section 14.

### **Chapter-5**

#### Miscellaneous

#### **18. Property to be Confiscated :**

- (1) All movable and immovable property acquired by a person by commission of an offense under this Act shall be confiscated.
- (2) If it is proved that a person has knowingly used or allowed to be used his/her house, land or vehicle for committing and causing to be committed an act deemed to be an offense under this Act, such house, land or vehicle shall be confiscated.

#### **19. Reward:**

- (1) If, on the basis of an information given by a person of the

matter that an act to be deemed an offense under this Act has been committed or going to be committed, a person is rescued or a person involved in such act is arrested, such informant shall be given as reward an amount equal to ten percent of the fine imposed pursuant to Section 15 from the rehabilitation fund under section 14.

- (2) If there are more than one informants under sub-section (1), such amount shall be given to them on pro-rata basis.

#### **20. Details of Informant to be Kept Secret :**

The, name, address of the informants under subsection (1) of Section 19 and the details of the information received from him/her shall be kept confidential.

#### **21. Waiver to the Claim of Punishment:**

Where an accused charged of having committed an offense under this Act has, after admitting the offense s/he has committed, rendered assistance to the police, government attorney or court to collect evidence in respect of that offense, to arrest other accused or gang or accomplices thereof and if s/he has committed the offense for the first time, the court may, in awarding punishment in such offense, waive the punishment not exceeding twenty five percent of the punishment to be awarded to him.

- (1) Provided that if the assistance rendered by him/her is not proved from other evidence or if s/he gives a statement in the court contrary to the assistance rendered to the police or government attorneys, a suit may be re-instituted against him notwithstanding anything contained in this Act or prevailing law.
- (2) Notwithstanding anything contained in sub-section (1), waiver to the claim of the punishment can not be made in the following conditions :-
  - (a) to waive the claim of the punishment for main accused,
  - (b) where children has been trafficked or transported,
  - (c) one who has once obtained the facility of the waiver of the punishment.

#### **22. Claim may be Made :**

While instituting a suit relating to the offense under this Act,

the concerned government attorney may make a claim that the accused has committed an offense of moral turpitude.

**23. Committee may be Formed :**

- (1) The Government of Nepal may form as prescribed one national committee and district committees according to necessity in order also to coordinate government agencies and non-government organizations in the act of controlling the offense under this Act and rehabilitating the victim .
- (2) The functions, duties and powers of the committee under sub-section (1) shall be as prescribed.

**24. Punishment for Causing Obstruction :**

A person who causes an obstruction in the work and proceedings relating to the investigation of the offense under this Act shall be punished with fine up to rupees ten thousands.

**25. Not to be Publicized :**

- (1) Without obtaining approval of the victim, no one shall print in a newspaper or publicizes in other mass media his/her real name, picture or any statement adverse to his/her characteristics.
- (2) A person who prints or publicize name, picture or statement pursuant to subsection (1) shall be fined from ten thousand to twenty five thousand rupees.

**26. Security Arrangement :**

If a person who has filed complained pursuant to Section 5 requests the nearby police for security stating reasonable cause of likely to be retaliated for reason of having filed complaint before the police or having given statement or statement of

interrogation in an office or court, such police office shall make any or all of the following arrangements to him/her:

- (a) providing security to and from the office or court in connection with the proceedings of the suit,
- (b) to keep or cause to be kept under police protection for a certain period,
- (c) placing him/her in the center.

**27. Proceedings to be carried out in Camera Court :**

- (1) The proceedings and hearing of the suit relating to the offense under this Act shall be carried out in a camera court.
- (2) Only the prosecutor, defendant, legal practitioners on their behalf and the persons allowed by the court can enter such bench when the proceedings is carried out and hearing is made pursuant to sub-section (1).

**28. Government to be Plaintiff:**

In the suit under this Act, Government shall be plaintiff and the suit shall be deemed to have been included into Schedule-I of the State Cases Act, 2049 (1993).

**29. Power to Make Rule :**

Government of Nepal may make rule required to implement the objective of this Act.

**30. Repeal and Saving:**

- (1) The trafficking-in-person (Control) Act, 2063 is hereby repealed.
- (2) All the act and action carried out under the Act under Sub-section (1) shall be deemed to have been carried out under this Act.

## Some Public (Offences and Penalties) Act, 1970

Date of Royal Seal and Publication:

04/10/1970

### Amendment Acts

- 1) Some Public (Offences and Penalties) (First Amendment) Act, 1974 :06/10/1974
- 2) Some Nepal Act (Amendment) Act, 1982 :21/11/1982
- 3) Judicial Administration Act, 1991 :30/05/1991
- 4) Some Public (Offences and Penalties) (Second Amendment) Act, 1992 :02/11/1992

### Act no. 12 of the year 1970

"Act designed to provide for the control of some public offences and penalties thereof"

**Preamble:** Whereas it is desirable to control some public offences and enact penalties thereof for the maintenance of peace and order in different areas of the Kingdom of Nepal and for ensuring the welfare, righteous conduct and morality of the people in general,

Be it enacted by His Majesty the King, Mahendra Bir Bikram Shah Dev upon advice and consent of the Rastriya Panchayat.

### 1. Short title, extent and commencement:

- 1) This Act shall be called "Some Public (Offences and Penalties) Act, 1970".
- 2) This Act shall be applicable throughout the Kingdom of Nepal.
- 3) This Act shall enter into force immediately.

**2. Some public offences are prohibited:** No person shall commit any of the following acts:

- a) Causing obstruction to any public servant in the discharge of his official duties by committing battery or hooliganism or other activities;
- b) Disturbing public tranquility by committing battery and hooliganism;
- c) Using obscene words, speeches or signs and disturbing the

peace thereby, or engaging in obscene acts at a public place;

- c.a) Printing or publishing any obscene materials using obscene language, through words or pictures having obscene meaning, or exhibiting or selling or distributing such obscene publications, except for the purpose of public health or medical science;

- d) Improperly obstructing in the regular operation of essential social services such as the post, communications, transportation and electricity supply;
- e) Trespassing on governmental or non-governmental offices or anyone's residence and land by committing hooliganism or staying therein without permission;
- f) Damaging public or private property by committing hooliganism, or pelting stones or by other ways;
- g) Sexually molesting females and thereby insulting them at public places;
- h) Behaving irresponsibly at public places;
- i) Interrupting anyone, who is staying anywhere or walking on a street or traveling by a vehicle, by any means or obstructing the way, by committing hooliganism, sexual molestation, assault, misconduct, or rioting or taking or damaging the property in the possession of such person or damaging the means of transportation, with the intent to cause trouble or harassment;
- j) Intimidating or abusing or teasing any person, or committing any improper acts through telephone, letters or any other means or medium, with the intent to terrorize or intimidate, disrespect or insult or harass;
- k) Spreading terror or intimidation or showing weapons in such a manner to disturb the peace by entering or not entering a mass meeting or procession.

### 3. Power to arrest:

- 1) If a police personnel finds any person on the spot committing any offences defined under Section 2, he may arrest such



- person without a warrant<sup>1</sup>.
- 2) The local police officer or the police personnel of a Police Post not below the rank of Sub-Inspector, may issue a warrant<sup>2</sup> for arrest, if he believes that a person has committed an offence, as a result of the investigation carried out on the basis of a complaint or reliable information or upon his own reasonable suspicion that a person committed an offence defined under Section 2.

Provided that the arrested person shall be produced before a case hearing authority within twenty four hours of such arrest excluding the period of journey and such person shall not be held in detention beyond such period without an order from such case hearing authority.

#### **4. Statute of limitations for filing a case:**

- 1) Cases under this Act shall be filed within seven days from the date of the commission of the offence.
- 2) Notwithstanding anything provided by Sub-section (1), if an aggrieved person wants to file a case under this Act, he shall lodge a complaint to the police office within seven days of the commission of the offence excluding the period of journey. In such cases, the statute of limitations prescribed in Sub-section (1) shall be effective from the date when the complaint is lodged.

Provided that if the case hearing authority finds reasonable cause for failure to file a case within seven days of the commission of the offence, he may extend the statute of limitations up to thirty five days after the commission of the offence.

#### **5. Case hearing authority and procedures:**

- 1) The Chief District Officer shall have original jurisdiction to try and hear cases prescribed by this Act.
- 2) The Chief District Officer shall apply the procedures provided by the Nepal Special Court Act, 1974 in order to proceed with cases in accordance with this Act.

- 3) The Appellate Court shall have jurisdiction to hear an appeal against a judgment made by the Chief District Officer in accordance with Sub-section (1).

#### **6. Penalties:**

- 1) In a case proceeded with in accordance with this Act, the Chief District Officer may, depending on the gravity of case, impose a fine of up to ten thousand rupees and order the offender to provide compensation to the victim equal to the amount he lost and if the Chief District Officer finds, in the course of the investigation, reasonable to hold the offender in detention, the offender may be held in detention for a period not exceeding thirty five days issuing a decision with the reasons thereof. Such cases shall be decided within three months<sup>3</sup>.

Provided that if it is deemed that the imposition of only a fine is not sufficient and imprisonment is also necessary, the recommendation shall be submitted before the Appellate Court in order to render imprisonment not exceeding two years. The decision of the Appellate Court shall be prevailing in such cases.

- 2) In case an offence was committed by the offender for the first time, the judicial authority may, depending on the gravity of case, not impose punishment contained in Sub-section (1) and may release him by making him sign a document that he will not commit such offence again from that date onwards.

**7. His Majesty's Government as claimant:** Cases under this Act shall be filed by the Government as claimant.

**8. Case may be initiated under other prevailing Nepal Laws:** Any cases involving offences that are punishable under this Act may be filed in accordance with other prevailing Nepal laws.

Provided that no one shall be tried and punished in accordance with other prevailing laws for an offence if he has already been tried for the same offence and punished under this Act.

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<sup>1</sup> Translator's note: The term 'warrant' used in this Section means 'arrest order'.

<sup>2</sup> Translator's note: The term 'warrant' used in this Section means 'arrest order'.

<sup>3</sup> Translator's note: The period of three months starts from the date a case is filed with the office of the Chief District Officer.

# The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979.

Ordinance No. VII of 1979  
February 9th, 1979

## **An Ordinance to bring in conformity with the injunctions of Islam the law relating to the Offence of Zina.**

WHEREAS it is necessary to modify the existing law relating to zina so as to bring it in conformity with the Injunctions of Islam as set out in the Holy Quran and Sunnah;

AND WHEREAS the President is satisfied that circumstances exist which render it necessary to take immediate action;

Now, THEREFORE, in pursuance of the Proclamation of the fifth day of July 1977, read with the Laws (Continuance in Force), Order, 1977 (C.M.L.A. Order No. I of 1977), and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance:-

### **1. Short title, extent and commencement**

- (1) This Ordinance may be called the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.
- (2) It extends to the whole of Pakistan.
- (3) It shall come into force on the twelfth day of Rabi-ul-Awwal, 1399 Hijri, that is, the tenth day of February, 1979.

### **2. Definitions**

In this Ordinance, unless there is anything repugnant in the subject of context:

- (a) "adult" means a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty;

(aa) "confession" means, notwithstanding any judgement of any court to the contrary, an oral statement, explicitly admitting the commission of the offence of zina, voluntarily made by the accused before a court of sessions having jurisdiction in the matter or on receipt of a summons under section 203A of the Code of Criminal Procedure, 1898 (Act V of 1898)."]

(b) "hadd" means punishment ordained by the Holy Quran or Sunnah;

(d) "Muhsan" means

(i) a Muslim adult man who is not insane and has had sexual intercourse with a Muslim adult woman who, at the time he had sexual intercourse with her, was married to him and was not insane; or

(ii) a Muslim adult woman who is not insane and has had sexual intercourse with a Muslim adult man who, at the time she had sexual intercourse with him, was married to her and was not insane;

and

### **4. Zina**

A man and a woman are said to commit 'Zina' if they wilfully have sexual intercourse without being married to each other.

**Explanation:** Penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina.

### **5. Zina liable to hadd.**

(1) Zina is zina liable to hadd if-

- (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or

(b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be, married.

- (2) Whoever is guilty of Zina liable to hadd shall, subject to the provisions of this Ordinance, -
- (a) if he or she is a muhsan, be stoned to death at a public place; or
  - (b) if he or she is not muhsan, be punished, at a public place; with whipping numbering one hundred stripes.
- (3) No punishment under sub-section (2) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies; and if the punishment be of whipping; until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.

#### **5A. No case to be converted, lodged or registered under certain provisions:-**

No complaint of zina under section 5 read with section 203A of the Code of Criminal Procedure, 1898 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496A of the Pakistan Penal Code (Act XLV of 1860) and no complaint of lewdness shall at any stage be converted into a complaint of zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No. VII of 1979) or an offence of similar nature under any other law for the time being in force.

#### **8. Proof of zina liable to hadd.**

Proof of zina liable to hadd shall be in one of the following forms, namely:-

- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or
- (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (kabair), give evidence as eye-witnesses of the act of penetration necessary to the offence:

**Provided** that, if the accused is a non-Muslim, the eye-witnesses

may be non-Muslims.

#### **9. Case in which hadd shall not be enforced**

- (1) In a case in which the offence of zina is proved only by the confession of the convict, hadd, or such part of it as is yet to be enforced, shall not be enforced if the convict retracts his confession before the hadd or such part is enforced.
- (2) In a case in which the offence of zina is proved only by testimony, hadd or such part of it as is yet to be enforced, shall not be enforced if any witness resiles from his testimony before hadd or such part is enforced, so as to reduce the number of eye-witnesses to less than four.

#### **17. Mode of execution of punishment of stoning to death**

The punishment of stoning to death awarded under section 5 shall be executed in the following manner, namely :-

Such of the witnesses who deposed against the convict as may be available shall start stoning him and, while stoning is being carried on, he may be shot dead, whereupon stoning and shooting shall be stopped.

#### **20. Application of Code of Criminal Procedure 1898 and amendment**

- (1) The provisions of the Code of Criminal Procedure, 1898, hereafter in this section referred to as the Code, shall apply, mutatis mutandis in respect of cases under this Ordinance:

**Provided** that an offence punishable under this Ordinance shall be triable by a Court of Session and not by a Magistrate authorised under section 30 of the said Code and an appeal from an order the Court of Session shall lie to the Federal Shariat Court:

**Provided** further that a trial by a Court of Session under this Ordinance shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed.

- (2) The provision of the Code relating to the confirmation of the sentence of death shall apply, mutatis mutandis, to confirmation of sentences under this Ordinance.

- (4) The provision of sub-section (3) of section 391 or section 393 of the Code shall not apply in respect of the punishment of whipping awarded under this Ordinance.
- (6) In the Code, section 561 shall stand repealed.

### 21. Presiding Officer of Court to be Muslim.

The Presiding Officer of the Court by which a case is tried, or an appeal is heard, under this Ordinance shall be a Muslim:

**Provided** that, if the accused is a non-Muslim, the Presiding Officer may be a non-Muslim.

### 22. Saving

Nothing in this Ordinance shall be deemed to apply to the cases pending before any Court immediately before the commencement of this Ordinance, or to offences committed before such commencement.

*Source:: Manual of Hudood Laws in Pakistan, Kausar Brothers, Law Publishers, Lahore*

### Notes

1 Inserted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 10(i).

2 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 10(ii) : :  
(c) "marriage" means marriage which is not void according to the personal law or the parties, and "married" shall be construed accordingly;

3 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 10(ii) : :  
(e) "tazir" means any punishment other than "hadd", and all other terms and expressions not defined in this Ordinance shall have the same meaning as the Pakistan Penal Code, or the Code of Criminal Procedure, 1898.

4 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 11 : :

### 3. Ordinance to override other Laws.

The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.

5 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 12 : :  
"validly".

6 Inserted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 12A.

7 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 13 : :

### 6. Zina bil Jabr

- (1) A person is said to commit zina-bil-jabr if he or she has sexual inter-course with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:-  
(a) against the will of the victim;  
(b) without the consent of the victim;  
(c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or  
(d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

**Explanation:** Penetration is sufficient to constitute the sexual inter-course necessary to the offence of zina-bil-jabr.

- (2) Zina-bil-jabr is zina-bil-jabr liable to hadd if it is committed in the circumstances specified in sub-section (1) of section 5.
- (3) Whoever is guilty of zina-bil-jabr liable to hadd shall be subject to the provisions of this Ordinance, -  
(a) if he or she is a muhsan, be stoned to death at a public place; or  
(b) if he or she is not muhsan, be punished with whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as

the Court may deem fit having regard to the circumstances of the case.

- (4) No punishment under sub-section (3) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies; and if the punishment be of whipping until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.

### **7. Punishment for Zina or zina-bil-jabr where convict is not an adult.**

A person guilty of zina or zina-bil-jabr shall, if he is not an adult, be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both, and may also be awarded the punishment of whipping not exceeding thirty stripes:

**Provided** that, in the case of zina-bil-jabr, if the offender is not under the age of fifteen years, the punishment of whipping shall be awarded with or without any other punishment.

8 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 14(ii) :  
“or zina-bil-jabr”.

9 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 14(i) :  
“or zina-bil-jabr”.

10 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 15(i) :  
“or zina-bil-jabr”.

11 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 15(ii) :  
“or zina-bil-jabr”.

12 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 15(iii) :

- (3) In the case mentioned in sub-section (1), the Court may order retrial.

- (4) In the case mentioned in sub-section (2), the Court may award tazir on the basis of the evidence on record.

13 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 16 :

### **10. Zina or zina-bil-jabr liable to tazir.**

- (1) Subject to the provisions of section 7, whoever commits zina or zina-bil-jabr which is not liable to hadd, or for which proof in either of the forms mentioned in section 8 is not available and the punishment of qazf liable to hadd has not been awarded to the complainant, or for which hadd may not be enforced under this Ordinance, shall be liable to tazir.
- (2) Whoever commits zina liable to tazir shall be punished with rigorous imprisonment for a term which may extend to ten years and with whipping numbering thirty stripes, and shall also be liable to fine.
- (3) Whoever commits zina-bil-jabr liable to tazir shall be punished with imprisonment for a term which [shall not be less than four years nor more than] 14 [twenty-five years and shall also be awarded the punishment of whipping numbering thirty stripes.
- (4) When zina-bil-jabr liable to tazir is committed by two or more persons in furtherance of common intention of all each of such persons shall be punished with death.]

### **11. Kidnapping, abducting or inducing women to compel for marriage etc.**

Whoever kidnaps or abducts any woman 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 seduced to illicit inter-course, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in the Pakistan Penal Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she

may be, or knowing that it is likely that she will be, forced or seduced to illicit inter-course with another person shall also be punishable as aforesaid.

### **12. Kidnapping or abducting in order to subject person to unnatural lust.**

Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to the unnatural list of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with death or rigorous imprisonment for a term which may extend to twenty-five years, and shall also be liable to fine, and, if the punishment be one of imprisonment, shall also be awarded the punishment of whipping not exceeding thirty stripes.

### **13. Selling person for purposes of prostitution, etc.**

Whoever sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine.

Explanations:

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

(b) For the purposes of this section and section 14 "illicit intercourse" means sexual inter-course between persons not united by marriage.

### **14. Buying a person for purposes of prostitution, etc.**

Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit

intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine.

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

### **15. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage**

Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief, shall be punished with rigorous imprisonment for a term which may extend to twenty-five years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

### **16. Enticing or taking away or detaining with criminal intent a woman**

Whoever takes or entices away any woman with intent that she may have illicit inter-course with any person, or conceals or detains with intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

14 Substituted by Criminal Laws (Amendment) Ordinance, 1980 (Ordinance III of 1980), Section 14 for : "may extend to".

15 Inserted by Offence of Zina (Enforcement of Hudood) (Amdendment) Act, 1997.

16 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 17 : "or section 6".

17 The following was omitted by Protection of Women (Criminal

Laws Amendment) Act, 2006 (Act VI of 2006), Section 16 :

**18. Punishment for attempting to commit an offence**

Whoever attempts to commit an offence punishable under this Ordinance with imprisonment or whipping, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall be punished with imprisonment for a term which may extend to one-half of the longest term provided for that offence, or with whipping not exceeding thirty stripes, or with such fine as is provided for the offence, or with any two of, or all, the punishments.

**19. Application of certain provisions of Pakistan Penal Code, and amendment.**

(1) Unless otherwise expressly provided in this Ordinance, the provisions of sections 34 to 38 of Chapter II, sections 63 to 72 of Chapter III and Chapters V and VA or the Pakistan Penal Code shall apply, mutatis mutandis, in respect of offences under this Ordinance.

(2) Whoever is guilty of the abetment of an offence liable to hadd under this Ordinance shall be liable to the punishment provided for such offence as tazir.

(3) In the Pakistan Penal Code, -

(a) section 366, section 372, section 373, section 375 and section 376 of Chapter XVI and section 493, section 497 and section 498 of Chapter XX shall stand repealed; and

(b) in section 367, the words and comma “or to the unnatural lust of any person,” shall be omitted.

18 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 18(i) :

**Provided** that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and award punishment therefor, be convicted and punished for that offence 19[.] 19

19 Substituted by Offence of Zina (Enforcement of Hudood) (Amendment) Ordinance, 1980 (Ordinance XX of 1980), Section 2 for : “.”

20 Inserted by Offence of Zina (Enforcement of Hudood) (Amendment) Ordinance, 1980 (Ordinance XX of 1980).

21 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 18(i) : “further”.

22 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 18(ii) :

(3) The provisions of section 198, section 199, section 199A or section 199B of the Code shall not apply to the cognizance of an offence punishable under section 15 or section 16 of this Ordinance.

23 The following was omitted by Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), Section 18(iii) :

(5) The provisions of Chapter XXIX of the Code shall not apply in respect of punishments awarded under section 5 or section 6 of this Ordinance.



# THE PUNJAB SUPPRESSION OF PROSTITUTION ORDINANCE, 1961

(W.P. Ordinance II of 1961)

## CONTENTS

### Sections

1. Short title and extent.
2. Definitions.
3. Punishment for keeping a brothel or allowing any place to be used as a brothel.
4. Punishment for soliciting.
5. Punishment for permitting prostitution in places of public amusement.
6. Punishment for living on earnings of prostitution.  
Presumption.
7. Punishment for causing, encouraging or abetting prostitution of a girl under sixteen.
8. Punishment for procuration.
9. Punishment for importing any woman or girl for prostitution.
10. Punishment for keeping any woman or girl for prostitution.  
Presumption.  
Bar of certain legal proceedings.
11. Subsequent offence under section 3.
12. Determination of tenancy of premises on conviction for permitting use as a brothel or for purposes of habitual prostitution.
13. Power to arrest without warrant.
14. Power to enter without warrant and removal of minor girls.
15. Offences triable by certain magistrates only.
16. Power to make rules.
17. Repeal and savings.

## 'THE <sup>2</sup>[PUNJAB] SUPPRESSION OF PROSTITUTION ORDINANCE, 1961

(W.P. Ordinance II of 1961)

[7 January 1961]

*An Ordinance to amend and consolidate the law relating to the suppression of prostitution in the province of <sup>3</sup>[the Punjab]*

**Preamble.**— WHEREAS it is expedient to amend and consolidate the law relating to the suppression of prostitution in the province of <sup>4</sup>[the Punjab];

Now, THEREFORE, in pursuance of the Presidential Proclamation of the seventh day of October, 1958, and having received the previous instructions of the President, the Governor of West Pakistan is pleased, in exercise of all powers enabling him in that behalf, to make and promulgate the following Ordinance:-

### 1. Short title and extent.—

(1) This Ordinance may be called the <sup>5</sup>[Punjab] Suppression of Prostitution Ordinance, 1961.

<sup>6</sup>[(2) It extends to the whole of the province of <sup>7</sup>[the Punjab], except the Tribal Areas.]

**2. Definitions.**— In this Ordinance, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

<sup>8</sup>[(a) "brothel" means any house, part of a house, room or place in which a prostitute resides or carries on prostitution or any place or institution where facilities are known to be available for prostitution;]

(b) "place of public amusement" shall mean any place, enclosure, building, tent, booth or other erection, whether permanent or temporary, where music, singing, dancing, or any diversion or game or the means of carrying on the same, is provided, and to which the public are admitted either on payment of money or with the intention that money may be collected from those admitted, and shall include a race-course, circus, theatre, music hall, billiard-room, bagatelle-room, gymnasium or fencing school;

(c) "place of public entertainment" shall mean any place, whether enclosed or open, to which the public are admitted and where any kind of food or drink is supplied for consumption on the premises for the profit or gain of any person owning or having an interest in or managing such place, and shall include a refreshment-room, eating-house, coffee-house, liquor-house, boarding-house, lodging-house, hotel, serai or tavern, or wine, beer, spirit, arrack, toddy, bang or opium shop;

(d) "prostitution" means promiscuous sexual intercourse for hire, whether in money or kind;

(e) "prostitute" means any female available or known to be available for purposes of prostitution;

(f) "public place" includes site of any hut, bazar, mela, exhibition, any river bank, dock, jetty or warehouse to which the public have access, every public building, garden or monument and the precincts thereof, every place of public amusement or entertainment, and every place accessible to the public for drawing water, washing or bathing or for purposes of recreation.

### 3. **Punishment for keeping a brothel or allowing any place to be used as a brothel.—**

(1) Whoever—

(a) keeps or manages or acts or knowingly finances or takes part in the financing of, or assists in, the management of a brothel, or

(b) being a tenant, lessee, occupier or person in charge of

any premises, knowingly permits such premises or any part thereof to be used as a brothel, or

(c) being a lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that it is intended to be used as a brothel,

shall be punished with imprisonment of either description for a term which may extend to two years <sup>9</sup>[and] with fine, which may extend to one thousand rupees <sup>10</sup>[\* \* \*].

(2) Where, in any prosecution of a tenant, lessee, occupier or person in charge of any premises under this section, it is found that such premises or any part thereof have been used as a brothel, it shall be presumed, unless the contrary is proved, that he knowingly permitted such use.

4. **Punishment for soliciting.—** Whoever in any street or public place or place of public resort or within sight of and in such manner as to be seen or heard from any street or public place, whether from within any house or building or not,—

(a) by words, gestures, wilful and indecent exposure of her person or otherwise attracts or endeavours to attract attention for the purpose of prostitution, or

(b) solicits or molests any person or loiters for the purpose of prostitution, shall for a first offence be punished with imprisonment which may extend to six months, or with fine which may extend to two hundred rupees, or with both, and for a subsequent offence with imprisonment which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

5. **Punishment for permitting prostitution in places of public amusement.—** Whoever being the keeper of any place of public amusement or entertainment, knowingly permits prostitutes, for the purposes of their trade, to enter or remain in such place, shall be punished with fine which may extend to five hundred rupees.

**6. Punishment for living on earnings of prostitution.—**

(1) Whoever being above the age of eighteen years,—

(a) knowingly lives, wholly or in part, on the earnings of another's prostitution, or

(b) exploits the prostitution of another person, whether with or without that person's consent,

shall be punished with imprisonment of either description for a term which may extend to two years <sup>11</sup>[and] with fine which may extend to one thousand rupees, <sup>12</sup>[\* \* \*] and if the person convicted is a male he may be punished with whipping in lieu of or in addition to any other punishment provided in this sub-section.

(2) **Presumption.**—Where any person is proved to be living with, or to be habitually in the company of, a prostitute or is proved to have directed or exercised control or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, compelling or exploiting her prostitution with any other person or generally, or to be keeping or managing or assisting in the management of a brothel, it shall be presumed, until the contrary is proved, that he is knowingly living on the earnings of prostitution.

**7. Punishment for causing, encouraging or abetting prostitution of a girl under sixteen.—**

If any person having custody, charge or care of any girl under the age of sixteen years, causes or encourages or abets the seduction or prostitution of that girl, he shall be punished with rigorous imprisonment for a term which may extend to three years, <sup>13</sup>[and] with fine which may extend to one thousand rupees, <sup>14</sup>[\* \* \*] and if the person convicted is a male, shall also be liable to whipping.

**8. Punishment for procuration.**— Whoever procures or entices or leads away or attempts to procure, entice or lead away any woman or girl for the purposes of prostitution, whether with or without her consent, or who with intent that she may for the purposes of prostitution become the inmate of or frequent a brothel, persuades a woman or girl to leave her usual place of abode, shall be punished with imprisonment of either description for a term which

may extend to three years, <sup>15</sup>[and] with fine which may extend to one thousand rupees, <sup>16</sup>[\* \* \*] and if the person convicted is a male, he may be punished with whipping in lieu of or in addition to any other punishment provided in this section.

**9. Punishment for importing any woman or girl for prostitution.—**

Whoever brings or attempts to bring into the province any woman or girl with a view to her becoming a prostitute, shall be punished with imprisonment of either description for a term which may extend to three years, <sup>17</sup>[and] with fine which may extend to one thousand rupees, <sup>18</sup>[\* \* \*] and if the person convicted is a male, he may be punished with whipping in lieu of or in addition to any other punishment provided in this section.

**10. Punishment for keeping any woman or girl for prostitution.—**

(1) Whoever—

(a) keeps any woman or girl in a brothel, or

(b) detains any woman or girl, against her will, in any place with intent that she may have sexual intercourse with any man other than her lawful husband,

shall be punished with rigorous imprisonment for a term which may extend to three years, <sup>19</sup>[and] with fine which may extend to one thousand rupees, <sup>20</sup>[\* \* \*] and if the person convicted is a male, shall also be liable to whipping.

(2) **Presumption.**— A person shall be presumed to detain a woman or girl in any place for the purpose referred to in clause (b) of sub-section (1), if such person, with intent to compel or induce her to remain there,—

(a) withholds from her any jewellery, clothing or other property belonging to her, or

(b) threatens her with legal proceedings if she takes away with her any jewellery or clothing lent or supplied to her by or under the direction of such person.

(3) **Bar of certain legal proceedings.**— No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such clothing as was necessary to enable her to leave such premises or brothel.

### **11. Subsequent offence under section 3.—**

- (1) Whoever having been convicted of an offence punishable under section 3, is convicted of a subsequent offence punishable under the same section, may, in addition to the punishment provided under that section, be required by the Court to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Court may direct, and in default of executing such bond, may be imprisoned for a period not exceeding six months in addition to any punishment awarded in respect of his offence.
- (2) The provisions of Chapters VIII and XLII of the Code of Criminal Procedure, 1898<sup>21</sup>, shall apply to orders made for the execution of bonds under this section.

### **12. Determination of tenancy of premises on conviction for permitting use as a brothel or for purposes of habitual prostitution.—**

- (1) On conviction of any tenant, lessee or occupier of an offence under sub-section (1) of section 3, the Court shall give notice thereof in writing to the landlord or lessor of such person, who shall then be entitled to require the person so convicted to assign the lease or other contract, under which the said premises are held by him, to some person approved by the landlord or lessor which approval shall not be unreasonably withheld, and in the event of the person so convicted failing within three months to assign the lease or contract, as aforesaid, the landlord or lessor shall, notwithstanding any law, contract, decree or order of a Court to the contrary, be entitled to determine the lease or other contract, but without prejudice to the rights or remedies of any party to such lease or contract accruing before the date of such determination.
- (2) If the landlord or lessor determines a lease or contract of tenancy under the provisions of sub-section (1), the Court which has convicted the tenant, lessee or occupier may make an order for delivery of possession to the landlord or lessor within such time not being less than seven days as the Court may direct; and the order shall be served on the person against whom it is made in the manner provided in the Code of Criminal Procedure, 1898<sup>22</sup>, for the service of summons.

- (3) Whoever fails to comply with an order under the last preceding sub-section shall be punished with imprisonment of either description which may extend to one month, or with fine which may extend to two hundred rupees, or with both.
- (4) If the landlord or lessor, after he has received notice in writing of such conviction, fails to exercise his rights under sub-section (1), and subsequently during the subsistence of the lease or contract any such offence is again committed in respect of the premises, the landlord or lessor shall be deemed to have abetted that offence, unless he proves that he had taken all reasonable steps to prevent the recurrence of the offence.
- (5) Where a landlord or lessor determines a lease or other contract under this section, and subsequently grants another lease or enters into another contract of tenancy to, with, or for the benefit of the same person, without causing to be inserted in such lease or contract all reasonable provisions for the prevention of a recurrence of any such offence, he shall be deemed to have failed to exercise his rights under the provisions of this section, and any such offence committed during the subsistence of the subsequent lease or contract shall be deemed, for the purpose of this section, to have been committed during the subsistence of the previous lease or contract.

<sup>23</sup>**13. Power to arrest without warrant.**— If a complaint is made to any gazetted police officer about the commission of any offence punishable under section 3, 4, 5, 6, 7, 8, 9 or 10 or if any such offence is committed in the view of any police officer not below the rank of the Superintendent of Police, such officer may arrest, without warrant, any person accused of the commission of such offence.]

**14. Power to enter without warrant and removal of minor girls.**— The Superintendent of Police, or any gazetted police officer specially authorised in writing in this behalf by the District Magistrate, may enter any place and remove to the prescribed place any girl who appears to be under the age of eighteen years, if he has reason to believe—

- (a) that an offence punishable under section 3 has been or is being committed in respect of the place; or
- (b) that a woman or girl in respect of whom an offence under this Ordinance has been committed, is to be found therein.

**15. Offences triable by certain magistrates only.**— No offence under this Ordinance shall be tried summarily, or by a magistrate below the rank of a magistrate of the first class.

**16. Power to make rules.**— The Provincial Government may make rules for carrying into effect the provisions of this Ordinance.

**17. Repeal and savings.**—

- (1) The following enactments are hereby repealed:
  - (i) the Punjab Suppression of Immoral Traffic Act, 1935<sup>24</sup>;
  - (ii) the Punjab Suppression of Immoral Traffic Act, 1935<sup>25</sup>;

- (iii) the North-West Frontier Province Anti-Prostitution and Suppression of Brothels Act, 1937<sup>26</sup>; <sup>27</sup>[\*]
- (iv) the Sind Prevention of Prostitution Act, 1951<sup>28</sup>; <sup>29</sup>[:]
- <sup>30</sup>[and]
- <sup>31</sup>[(v) The Bombay Prevention of Prostitution Act, 1923, as applicable to Karachi District.]

- (2) Notwithstanding the repeal of the enactments mentioned in sub-section (1), everything done, action taken, obligation, liability, penalty or punishment incurred, inquiry or proceeding commenced, officer appointed or person authorised, jurisdiction or power conferred, rule made and order issued under any of the provisions of the said enactments shall, if not inconsistent with the provisions of this Ordinance, be continued and, so far as may be, be deemed to have been respectively done, taken, incurred, commenced, appointed, authorised, conferred, made or issued under this Ordinance.

<sup>1</sup>This Ordinance was promulgated by the Governor of West Pakistan on 29th Sep., 1960; published in the West Pakistan Gazette (Extraordinary), dated 7th Jan., 1961, pages 75-82; saved and given permanent effect by Article 225 of the Constitution of the Islamic Republic of Pakistan (1962).

<sup>2</sup>Substituted by the Punjab Laws (Adaptation) Order, 1974 (Pb. A.O. 1 of 1974), for "West Pakistan".

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid.

<sup>6</sup>Substituted by the West Pakistan Suppression of Prostitution (Amendment) Ordinance, 1963 (XXXVI of 1963).

<sup>7</sup>Substituted by the Punjab Laws (Adaptation) Order, 1974 (Pb. A.O. 1 of 1974), for "West Pakistan".

<sup>8</sup>Substituted by the West Pakistan Suppression of Prostitution (Amendment) Act, 1968 (II of 1968).

<sup>9</sup>Substituted by the West Pakistan Suppression of Prostitution (Amendment) Act, 1968 (II of 1968), for the word "or".

<sup>10</sup>The words "or with both", deleted *ibid*.

<sup>11</sup>Substituted by the West Pakistan Suppression of Prostitution (Amendment) Act, 1968 (II of 1968), for the word "or".

<sup>12</sup>The words "or with both", deleted *ibid*.

<sup>13</sup>Substituted *ibid*., for the word "or"

<sup>14</sup>The words "or with both", deleted *ibid*.

<sup>15</sup>Substituted *ibid*., for the word "or"

<sup>16</sup>The words "or with both", deleted *ibid*.

<sup>17</sup>Substituted by the West Pakistan Suppression of Prostitution (Amendment) Act, 1968 (II of 1968), for the word "or".

<sup>18</sup>The words "or with both", deleted *ibid*.

<sup>19</sup>Substituted *ibid*., for the word "or".

<sup>20</sup>The words "or with both," deleted *ibid*.

<sup>21</sup>V of 1898.

<sup>22</sup>*Ibid*.

<sup>23</sup>Substituted by the West Pakistan Suppression of Prostitution (Amendment) Act, 1968 (II of 1968).

<sup>24</sup>Pb. IV of 1935.

<sup>25</sup>*Ibid*.

<sup>26</sup>N.W.F.P. III of 1937.

<sup>27</sup>The word "and" deleted by the West Pakistan Suppression of Prostitution (Amendment) Ordinance, 1963 (XXXVI of 1963).

<sup>28</sup>Sind XX 1951.

<sup>29</sup>Substituted by the West Pakistan Suppression of Prostitution (Amendment) Ordinance, 1963 (XXXVI of 1963), for the full-stop.

<sup>30</sup>Added *ibid*.

<sup>31</sup>*Ibid*.

CHAPTER 32

## VAGRANTS

Ordinances AN ORDINANCE TO AMEND AND CONSOLIDATE THE LAW  
Nos. 4 of 1841, RELATING TO VAGRANTS.  
7 of 1873,  
7 of 1889,  
17 of 1889,  
19 of 1889,  
12 of 1891,  
3 of 1894,  
3 of 1904,  
21 of 1919,  
3 of 1930,  
51 of 1941,  
20 of 1947.

[1st January, 1842.]

Short title. **1.** This Ordinance may be cited as the Ordinance.

Punishment of persons behaving riotously or disorderly in the public streets. **2.** Every person behaving in a riotous or disorderly manner in any public street or highway shall be liable to a fine not exceeding five rupees :

Provided nevertheless that every person convicted four times of such conduct shall, for every subsequent offence, be punishable in the manner declared in the following section respecting idle and disorderly persons.

Persons who are deemed idle and disorderly persons.

- 3. (1)**
- (a) Every person being able to maintain himself by work or other means, but who shall wilfully refuse or neglect so to do, and shall wander abroad or place himself in any public place, street, highway, court, or passage to beg or gather alms, or cause, or procure, or encourage any of his family so to do, excepting priests and pilgrims in performance of their religious vows, not being mendicants of the description mentioned in the paragraph (d) of the next succeeding section ;
  - (b) every common prostitute wandering in the public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner;
  - (c) every person wandering abroad or lodging in any verandah, outhouse, shed, or unoccupied

building, or in any cart, vehicle, or other receptacle, without leave of the owner thereof, and not having any visible means of subsistence, and not giving a good account of himself ;

(d) every person, without leave of the owner, defacing the side of any house or building or wall by fixing any placard or notice, or by any indecent or insulting writing or drawing thereon ;

(e) every person who in or upon any wharf, jetty, street, road, walk, passage, verandah, or other place situated within any proclaimed area and used by or accessible to the public, persistently and without lawful excuse follows, accosts, or addresses by words or signs any person against his will and to his annoyance,

[§ 2, 51 of 1941.]

shall be deemed an idle and disorderly person within the true intent and meaning of this Ordinance, and shall be liable upon the first conviction to be imprisoned, with or without hard labour, for any term not exceeding fourteen days, or to a fine not exceeding ten rupees.

(2) A police officer may arrest without a warrant every person deemed to be an idle and disorderly person.

(3) In this section, " proclaimed area " means any area declared by the Minister by Order published in the Gazette, to be a proclaimed area for the purposes of this section.

[§ 2, 51 of 1941.]

4. (a) Every person convicted a second time of being idle and disorderly ;

(b) every idle and disorderly person resisting any constable or police officer apprehending him ;

(c) every person wilfully exposing his person in an indecent manner, or exhibiting any obscene print, picture, or other indecent exhibition, in any street, road, highway, or public place or elsewhere, to the annoyance and disgust of others ;

(d) every person wandering abroad, or placing himself in any public place, street, highway, court, or passage, and endeavouring by the exposure of any wounds, deformities, leprosy, or loathsome diseases to obtain or gather alms :

(e) every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions for himself or others, of any nature or kind, under any false or fraudulent pretences,

shall be deemed a rogue and vagabond within the true intent and meaning of this Ordinance, and shall be liable to be imprisoned with or without hard labour for any period not exceeding one month, or to a fine not exceeding twenty rupees.

Who are deemed to be rogues and vagabonds.

5. (a) Every person convicted a third time or more often of being idle and disorderly ; or

(b) a second time or more often of being a rogue and vagabond ; and

(c) every person escaping out of any place of legal confinement before the expiration of the term for which he shall have been committed under this Ordinance,

shall be deemed to be an incorrigible rogue within the true intent and meaning of this Ordinance, and shall be liable to imprisonment at hard labour for any period not exceeding four months, and to corporal punishment not exceeding twenty-four lashes.

Who are deemed to be incorrigible rogues.



Incorrigible rogue may be required to give security for future good behaviour.

**6.** Every person convicted as an incorrigible rogue may, in addition to any punishment imposed by the preceding section be required also to give security for his good behaviour for one year after his discharge, and in default of such security shall be liable to additional imprisonment at hard labour not exceeding four months.

Soliciting and acts of indecency in public places.

**7.** (1) The following persons, that is to say—

(a) any person in or about any public place soliciting any person for the purpose of the commission of any act of illicit sexual intercourse or indecency, whether with the person soliciting or with any other person, whether specified or not;

(b) any person found committing any act of gross indecency, or found behaving with gross indecency, in or about any public place ;

(c) any person found—

(i) in any public enclosure contrary to any local by-laws or regulations prescribing the use of such enclosures ; or

(ii) in any enclosure belonging to the State , without the permission of the person in charge thereof; or

(iii) within any private enclosure attached to any dwelling house, except upon the invitation of any inmate of the premises,

under such circumstances that it is reasonable to infer that he is there present for immoral purposes, unless he is able to explain his presence to the satisfaction of the court by which he is tried,

shall be guilty of an offence, and shall be liable on summary conviction to imprisonment of either description for a period not exceeding six months, or to a fine not exceeding one hundred rupees, or to both.

(2) In any case in which any person who has been convicted of an offence under paragraph (a) of the last preceding subsection shall subsequently be convicted of another such offence, he shall, if a male, in addition to any other punishment to which he may be sentenced by the court, be liable, at the discretion of the court to be whipped.

Female offender may be committed to house of detention.

**8.** In any case in which the offender against any of the provisions, whether of the last preceding section or any other preceding section of this Ordinance, is a female, the court may in its discretion direct, both in respect of any imprisonment to which she may be sentenced in the first instance and in respect of any imprisonment to which she may be sentenced in default of payment of a fine, that, instead of being imprisoned in one of the regular prisons of Sri Lanka, she shall be committed to any house of detention established under the Houses of Detention Ordinance, and there detained until the expiration of her sentence, and sections 5 and 6 of the said Ordinance shall apply to every such person so detained.

Punishment of certain classes of incorrigible rogues.

**9.** (1) Any person who—

(a) knowingly lives wholly or in part on the earnings of prostitution;

(b) systematically procures persons for the purpose of illicit or unnatural intercourse,

shall be deemed to be an incorrigible rogue within the true intent and meaning of this Ordinance, and shall be liable—

(I) on summary conviction to imprisonment of either description for a period not exceeding six months, or to a fine not exceeding one hundred rupees, or to both ; or

(ii) on conviction on indictment to imprisonment of either description for a period not exceeding two years, and if a male, in addition to any such imprisonment, if the court in its discretion directs, to be whipped.

(2) Every male person who is proved to live with, or to be habitually in the company of, a prostitute, and every person, whether male or female, who is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he or she is aiding, abetting, or compelling the prostitution of such person with any other person or generally, shall, unless the court is satisfied by evidence to the contrary, be deemed to be knowingly living on the earnings of prostitution.

**10.** (1) In the following cases, that is to say:—

(a) where any person being a male between the ages of twelve and twenty-one has been convicted by a Magistrate of any offence under sections 3 (1) (e), 7, or 9;

(b) where a Magistrate is satisfied that any person within the local limits of his jurisdiction, being a male between the ages aforesaid, is found habitually wandering about the streets and accosting persons therein, or in the company of disorderly or immoral persons or of reputed criminals, and that such person has no regular occupation, or no other occupation than that of professing to render casual services to persons requiring them,

it shall be lawful to the Magistrate, after due inquiry into the antecedents, connections, and habits of such person, if he is satisfied that the offender is addicted to unnatural vice, or is otherwise of corrupt or immoral habits, either—

(I) to require such person to execute a bond, with or without sureties, to the satisfaction of the Magistrate, to be of good behaviour for a period not exceeding twelve months, and subject to such conditions as the Magistrate may determine, and in default thereof, to commit such person to prison for a period not exceeding six months, there to be detained and employed at such productive labour as may be prescribed by prison rules ; or

(ii) if after due inquiry into all the circumstances of the case, the Magistrate is satisfied that the offender is a person who ought not to be allowed the option of giving security for good behaviour, or that he can be more appropriately and beneficially dealt with in manner hereinafter provided, to commit such person, if he is under sixteen years of age, to an approved school within the meaning of the Children and Young Persons Ordinance, or if he is over that age, to any institution established by law for the reclamation and industrial training of juvenile offenders, there to be detained for a period of not less than three years.

(2) If any such person is not already in custody, the Magistrate may enforce his attendance

Detention of youthful bad characters.

either by summons or warrant, as he may think fit.

(3) The Magistrate may direct the detention of any person so brought before him for the purpose of necessary inquiries, and may, if he shall so think fit direct a medical examination of such person.

(4) The Magistrate may at any time direct any person committed to prison under this section in default of finding satisfactory sureties to be released from prison on such sureties being forthcoming.

(5) The Minister may at any time direct that any person committed to an approved or certified school shall be transferred to any institution established by law for the reclamation and industrial training of juvenile offenders, or direct the release of any person detained either in such school or institution.

(6) When a Magistrate makes an order under subsection (1) (ii) of this section, the proceedings shall be submitted to the Court of Appeal, and the order shall not be executed unless it is confirmed by a Judge of the Court of Appeal.

(7) If, when such proceedings are submitted, the Court of Appeal thinks that a further inquiry should be made, or additional evidence taken upon any point, he may make such inquiry or take such evidence himself, or direct it to be taken by the Magistrate. Unless the Court of Appeal otherwise directs, the presence of the convicted persons may be dispensed with when such inquiry is made, or such evidence is taken.

(8) When the inquiry and the evidence, if any, are not made and taken by the Court of Appeal, the result of such inquiry and the evidence shall be certified to such Court of Appeal.

(9) In any case so submitted to the Court of Appeal, the Court-

(a) may confirm the sentence, or pass any other sentence justified by law; or

(b) may allow the conviction and convict the accused of any offence of which the Magistrate might have convicted him, or order a new trial on any other charge or on an amended charge; or

(c) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or if an appeal is presented within such period, until such appeal is disposed of.

(10) This section shall apply only within such defined areas as shall be specially appointed by the Minister by Order published in the Gazette.

Causing, &c, the seduction or prostitution or unlawful carnal knowledge of a girl.

|| (1) Every person, having the custody, charge, or care of a girl, who causes or encourages the seduction or prostitution or unlawful carnal knowledge of the said girl, shall be guilty of an offence and shall be liable on summary conviction thereof to a fine not exceeding one hundred rupees, or to imprisonment of either description for any term not exceeding six months or to both such fine and imprisonment.

(2) Without prejudice to the generality of subsection (1), a person shall, for the purposes of this section, be deemed to have caused or encouraged the seduction or prostitution or unlawful

carnal knowledge (as the case may be) of a girl who has been seduced or become a prostitute or been unlawfully carnally known, if he has knowingly allowed the girl to associate with, or to enter or continue in the employment of, any prostitute or person of known immoral character.  
(3) No person shall be liable to conviction under this section who as parent or guardian has given his consent to a girl living with any man as his wife.

- 12.** (1) Where it is shown to the satisfaction of a Magistrate on the complaint of any peace officer at the instance of any probation officer that any girl is with the knowledge of her parent or guardian exposed to the risk of seduction or prostitution, or of being unlawfully carnally known, or is living a life of prostitution, the Magistrate may require the parent or guardian of such girl to show cause why he should not be ordered to execute a bond with or without sureties for the exercise of due care and supervision in respect of the girl. Security by parent or guardian of girl.
- (2) For the purposes of this section, a Magistrate shall have all the powers which are conferred on a Magistrate by sections 84 to 92, both inclusive, 93, and 94 of the Code of Criminal Procedure Act, No. 15 of 1979, in relation to securities for keeping the peace and for good behaviour and those sections shall apply, mutatis mutandis, to bonds executed or ordered to be executed under this section.
- (3) Imprisonment for failure to execute a bond on the order of a Magistrate under this section shall be simple.
- (4) No person shall be liable to execute a bond under the provisions of this section who as parent or guardian has given his consent to a girl living with any man as his wife.
- (5) Where any girl, in respect of whom any person has been ordered to execute a bond under this section is removed for any period from the custody, care, or charge of such person under sections 13, 14, or 17, no action shall be taken to enforce the bond during the period of such removal, and if at any time thereafter the girl shall be restored to the custody, care, or charge of such person, the said bond shall remain of full force and effect.
- 13.** (1) Any peace officer may, on the complaint of a probation officer, remove to a place of safety to be selected by such probation officer any girl in respect of whom an offence under section 11 has been, or is reasonably believed by him to have been, committed. Detention of girl in place safety.
- (2) Any girl so removed to a place of safety may be there detained for a period not exceeding seven days, unless before the expiry of that time it has been decided that no charge will be made in respect of the said offence, in which case the girl shall be released on such decision being reached, but otherwise she shall be brought before a Magistrate before the expiry of the said seven days and may be detained in the said place of safety until the Magistrate has made an order in relation to the girl under the next subsection.
- (3) (a) Where it appears to a Magistrate that an offence has been committed under section 11 in respect of any girl who is brought before him and that it is expedient in the interests of the girl that an order should be made for her care and detention, he may, without prejudice to any other power, make such order as the circumstances may require for the

care and detention of the girl until a charge has been made against some person in respect of the offence ;

(b) If any such charge is made against any person, the order may be extended until the charge has been determined by the conviction or discharge of the person charged, and

(1).in the case of his conviction, it may be further extended for a period not exceeding twenty-one days as the convicting Magistrate may direct; and

(ii) in the case of his discharge, it shall be forthwith void except with regard to anything lawfully done thereunder.

(c) Any such order as is mentioned in subsections (2), (3) (a), or (3) (b) may be carried out notwithstanding that any person claims the custody of the girl.

Disposal of girl by order of court.

- 14.** (1) When any person having the custody, charge, or care of any girl has been—
- (a) convicted of an offence under section 11 in respect of the girl ; or
  - (b) ordered to execute a bond in respect of the girl under section 12, by a Magistrate, the Magistrate may, in his discretion, order that the girl be taken out of the custody, care, or charge of the person so convicted or bound over, and be delivered into the custody of a relative of the girl or some other fit person or society, approved and named by the Magistrate, until she attains the age of sixteen years or for any shorter period.
- (2) Before any such order is made, the consent and ability of such relative or other person or society to undertake such custody shall be proved to the satisfaction of the Magistrate.
  - (3) Any such order may be from time to time renewed, varied, or revoked by the Magistrate who made the same, or by any other Magistrate within whose jurisdiction the girl resides, either of his own motion or on the application of any person.
  - (4) If the girl has a parent or legal guardian, no order shall be made under this section unless the parent or legal guardian—
    - (a) has been convicted of the offence ; or
    - (b) is proved to the satisfaction of the Magistrate making the order to have been party or privy to the offence ; or
    - (c) has been ordered to execute a bond in respect of the girl under section 12; or
    - (d) cannot be found.
  - (5) Every order under this section shall be in writing, and may be made in the absence of the girl.
  - (6) The Minister may at any time discharge any girl from the custody of any person or society into whose custody she has been delivered under this section either absolutely or on such conditions as he may approve.
  - (7) It shall be lawful for the Minister to make rules in relation to girls delivered into the custody of any person or society under this section, and to the maintenance of such girls, and to the duties of such persons or societies with respect to such girls.
  - (8) All rules made under this Ordinance shall be laid, as soon as conveniently may be, on the table of Parliament at two successive meetings of Parliament and shall be brought before

Parliament at the next subsequent meeting held thereafter by a motion that the said rules shall not be disapproved, and if upon the introduction of any such motion, or upon any adjournment thereof, the said rules are disapproved by Parliament such rules shall be deemed to be rescinded as from the date of such disapproval, but without prejudice to anything already done thereunder ; and such rules, if not so disapproved, shall continue to be of full force and effect. Every such disapproval shall be published in the Gazette.

- 15.** (1) Any person or society into whose custody a girl is delivered by order under section 14 shall, whilst the order is in force, have the like control over the girl as if such person or society were the parent of the girl, and shall be responsible for the maintenance of the girl, who shall continue to be in custody of such person or society notwithstanding that she is claimed by her parent or any other person-
- (2) Every person who—
- (a) knowingly assists or induces, directly or indirectly, any girl to escape from the person or society into whose custody she has been so delivered ; or
  - (b) knowingly harbours, conceals, or prevents from returning to such person or society, any girl who has so escaped, or knowingly assists any such harbouring, concealment, or prevention,
- shall on summary conviction thereof be liable to a fine not exceeding one hundred rupees, or to imprisonment of either description for any term not exceeding three months.
- (3) On the complaint or application of the person or society into whose custody any girl has been delivered by order under section 14, the Magistrate making the order of delivery may make a further order on the parent or other person liable to maintain the girl to contribute any specified sum not exceeding fifteen rupees a month for that purpose, and to pay the same in such manner as the Magistrate may direct to the person or society into whose custody the girl is delivered,
- (4) Every such order of maintenance shall be in writing and shall be enforceable in like manner as if the girl had been ordered to be sent to an approved or certified school under the Children and Young Persons Ordinance, and also by a further order for the attachment and payment to the person named by the Magistrate of any pension or income due to the parent or other person liable to maintain the girl, including any pension or income due to him from the State Such further order shall be a full authority to the person by whom such pension or other income is payable to make the payment ordered, and the receipt of the person to whom the payment is ordered to be made shall be a good discharge to such first-mentioned person.

Control and maintenance of girl delivered into custody of any person or society by order of court.

- 16.** Offences under sections 11 and 15 of this Ordinance shall be deemed non-cognizable and bailable within the meaning of the Code of Criminal Procedure Act, No. 15 of 1979.

Offences to be non-cognizable and bailable.

- 17.** (1) If it appears to a Magistrate on information on oath laid by any probation officer that there is reasonable cause to suspect that an offence has been or is being committed in respect of

Search warrant.

any girl, he may issue a warrant authorizing all or any peace officers to search for such girl, and if it is found that an offence has been or is being committed in respect of her, to take her to and detain her for a period not exceeding seven days in a place of safety selected by the said probation officer and named in the warrant until she can be brought before a Magistrate.

(2) Any peace officer authorized by warrant under this section to search for any girl may enter (if need be by force) any house, building, or other place specified in the warrant and may remove the girl therefrom.

(3) It shall not be necessary in any information or warrant under this section to specify the name of the girl.

- Sanction of Attorney-General for prosecution, &c. **18.** No prosecution shall be instituted for an offence against section 11, and no complaint shall be made under section 12, without the sanction of the Attorney-General in writing.
- Protection of peace officers and probation officers. **19.** No proceedings civil or criminal shall be instituted against any peace officer or probation officer for any act bona fide done or omitted to be done in pursuance of any of the powers or duties conferred or imposed upon him by this Ordinance.
- Officers neglecting their duty. **20.** In case any principal or other grama niladhari, constable, or other peace officer aforesaid shall neglect his duty in anything required of him by this Ordinance, he shall be liable for every such offence to a fine not exceeding fifty rupees, or to imprisonment not exceeding two calendar months, with or without hard labour, at the discretion of the court.
- Persons obstructing officers. **21.** In case any person shall hinder, disturb, or molest any principal or other grama niladhari, constable, or other peace officer in the execution of this Ordinance, or shall be aiding, abetting, or assisting therein, or shall knowingly conceal or harbour, or knowingly attempt, aid, abet, or assist in harbouring or concealing any rogue and vagabond, and shall be thereof convicted, every such offender shall, for every such offence, be liable to a fine not exceeding thirty rupees, or to imprisonment with or without hard labour for any period not exceeding four months ; and every person who shall knowingly conceal or harbour, or knowingly attempt, aid, abet, or assist in harbouring or concealing any incorrigible rogue, shall be liable to a fine not exceeding fifty rupees or to imprisonment for any period not exceeding six months with or without hard labour.
- Fines to be levied by distress. **22.** All fines or penalties imposed by this Ordinance shall, on failure of immediate payment, be levied by summary warrant of distress and sale of the goods, property, and effects of the offender, and in default of payment every such offender shall be imprisoned at hard labour for the space of one month for every ten rupees of such fine which shall remain unsatisfied, and in like proportion for every lesser sum, provided that such imprisonment on any one conviction shall never exceed the term of twelve months ; and it shall also be lawful for any court before whom any such offender may be convicted to order, at its discretion, the whole or any part of such fine or penalty, when recovered, to be paid over or applied to the use and benefit of the persons who shall first have
- Informer's share.



given information against or been active in the apprehending of such offender, or shall appear otherwise deserving of reward in the matter.

**23.** No prosecution shall be instituted against any person for offences under sections 2, 3, 4, 5, 6, 20, and 21 of this Ordinance after the expiration of one calendar month next subsequent to the date of the offence.

No prosecution to be instituted after one month.

**24.** (1) A sworn statement made by a person about to leave Sri Lanka before—

- (a) a Justice of the Peace ; or
- (b) any pOlice officer not below the rank of a sub-inspector ; or
- (c) the customs officer for the time being in charge of the Colombo passenger jetty, not being below the rank of a charges officer, taken in the presence of the person accused under such circumstances that he has a full opportunity of asking questions of the person making the statement, and signed by such person, may, if the person making the statement has left Sri Lanka, be given in evidence against the person accused on any charge under section 3 (1) (e).

Sworn statement by person leaving Sri Lanka. [§ 3,51 of 1941.]

(2) It shall be the duty of the Justice of the Peace or other person before whom any such statement is made, before tendering it for the signature of the person making it, to read it over to such person in the presence of the accused, and to explain the statement to the accused, and upon it being signed by the person making it, to certify that the requirements of this section have been complied with.

(3) A statement produced in court and purporting to be certified under this section shall be prima facie evidence of the facts therein stated ; but the court may require the attendance of any person present when such statement was taken, for the purpose of examination with respect thereto.

**25.** In this Ordinance, unless the context otherwise requires—

- (a) “ girl” means a girl under the age of sixteen years;
- (b) “ guardian ”, in relation to a girl, includes any person who, in the opinion of the court having cognizance of any case or matter relating to the girl, has for the time being charge of or control over the girl ;
- (c) “legal guardian”, in relation to a girl, means a person appointed according to law to be her guardian by deed or will or by order of a court of competent jurisdiction;
- (d) “peace officer” includes police officers and grama niladharis appointed by a \*Divisional Secretary of the Divisional Secretary’s Division in writing to perform police duties;
- (e) “place of safety” means any hospital, institute, house, home, or other suitable place, the occupier of which is in the opinion of the probation officer after due inquiry a person of respectable character, and is willing to receive a girl temporarily;
- (f) “probation officer” means any person appointed to be a probation officer under the provisions of the Probation of Offenders Ordinance.

Interpretation.

[§ 2,20 of 1947.]

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\*See section 4 of the *Transfer of Powers (Divisional Secretaries) Act. No. 58 of 1992.*

**BROTHELS**

## AN ORDINANCE TO PROVIDE FOR THE SUPPRESSION OF BROTHELS.

Ordinances  
Nos. 5 of 1889,  
21 of 1919,  
42 of 1943.

[28th June, 1889.]

Short title. **1.** This Ordinance may be cited as the Brothels Ordinance.

Offences. **2.** Any person who—  
(a) keeps or manages or acts or assists in the management of a brothel; or  
(b) being the tenant, lessee, occupier or owner of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for the purpose of habitual prostitution ; or  
(c) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same, or any part thereof, with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel,

shall be guilty of an offence, and shall on conviction be liable—

Penalties. (i) to a penalty not exceeding five hundred rupees, or, in the discretion of the court, to simple or rigorous imprisonment for a term not exceeding six months, or to both such fine and imprisonment;  
(ii) on a second or subsequent conviction, to a penalty not exceeding one thousand rupees, or, in the discretion of the court, to simple or rigorous imprisonment for a term not exceeding one year, or to both such fine and imprisonment,  
and in the case of any conviction under this section, such person may, in addition to any such penalty or imprisonment as may be imposed by the court, be required by the court to enter into a recognizance, with or without sureties as to the court seems meet, to be of good behaviour for any period not exceeding twelve months ; and in default of entering into such a recognizance, with or without sureties (as the case may be), such person may be sentenced to simple or rigorous imprisonment for any period not exceeding three months, in addition to any such term of imprisonment as aforesaid.

**3.** Any person who shall appear, act, or behave as master or mistress, or as the person having the care, government, or management of any brothel, shall be deemed and taken to be the keeper or manager thereof, and shall be liable to be prosecuted and punished as such, notwithstanding that he or she shall not in fact be the real keeper or manager thereof.

Who shall be deemed keeper or manager of a brothel.

**4.** (1) Upon the conviction of the tenant, lessee, or occupier of any premises of any offence under this Ordinance, if shall be lawful for the court, on the application either of the prosecuting party, or of the owner, or lessor, or, if it so thinks fit, of its own motion, to declare that the tenancy or occupation of the said premises under the lease or agreement under which the same are held or occupied shall be terminated from such date and subject to such conditions as may be defined in the order of the court, and may by the same or a further order direct that the possession of the said premises shall be delivered to any person entitled to the possession thereof as from any date specified in the order.

Power of court terminate tenancy.

(2) In the event of any owner or lessor of any premises failing to exercise his right of application to the court under this section, and of the tenant, lessee, or occupier so convicted being subsequently convicted of an offence under this Ordinance in respect of the same premises, such owner or lessor shall be deemed to have knowingly abetted the said offence, and shall be liable to be prosecuted and punished accordingly, unless he proves that he had taken all reasonable steps to prevent the recurrence of the offence.

**5.** All offences under this Ordinance shall be “ non-cognizable ” and “ bailable within the meaning of those terms as defined in the Code of Criminal Procedure Act and shall be tried in the Magistrate’s Court, which is hereby empowered to award bailable all or any of the punishments hereinbefore provided, anything in section 14 of the said Act to the contrary notwithstanding.

Offences triable by Magistrate’s court and to be non-cognizable and bailable



