Prajwala vs Union Of India on 29 May, 2026

2026 INSC 609 REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL CIVIL JURISDICTION

MISCELLANEOUS APPLICATION NO. 530 OF 2022
IN
WRIT PETITION (CIVIL) NO. 56 OF 2004

PRAJWALA …PETITIONER(S)

VERSUS

UNION OF INDIA & ORS. …RESPONDENT(S)

JUDGMENT

J.B. PARDIWALA, J.:

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1. Human trafficking, an inherently complex crime, has long been the subject of some definitional disagreement internationally. In the late 1990s, some consensus was reached and the first ever agreed definition came to be incorporated in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons especially Women and Children, 20001 (hereinafter, the "Palermo Protocol"), which supplemented the United Nations Convention against Transnational Organised Crime.2 Article 3 of the Trafficking Protocol reads thus:

> "For the purposes of this Protocol:
>
> (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
>
> (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

1 Protocol to Prevent, Suppress, and Punish Trafficking in Persons especially Women and Children (adopted 15th November 2000, entered into force 25th December 2003) 2237 U.N.T.S. 319. 2 United Nations Convention against Transnational Organised Crime (adopted 15th November 2000, entered into force 29th September 2003) 2225 U.N.T.S. 209.

> (d) "Child" shall mean any person under eighteen years of age." (Emphasis supplied)

2. This definition makes it clear that all the perpetrators figuring in the organised crime network, including those taking part in the recruitment, transportation, transfer, harbouring or receipt of persons, qualify as persons involved in the crime of human trafficking. The 'means' through which they secure the victim could range from the use of threat, force, other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability or the giving or receiving of

payments or benefits to achieve the consent of a person having control over the victim. It is also emphasized that the aforesaid must be done "for the purpose of exploitation" of the victim(s), which shall include the exploitation of the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. If any of the 'means' as enumerated herein is used to cause/effect any of the modes of exploitation as detailed above, the consent of the trafficked victim becomes immaterial.

3. Therefore, three key elements must be present according to the definition – (i) the action (recruitment, transportation etc.), (ii) the means (threat, force etc.) and, (iii) the purpose (exploitation). Cumulatively, they constitute the crime of human trafficking. However, an exception to the three-element requirement is carved out when the victim is a child i.e., a person below the age of 18 years. The 'means' element is not a pre-requisite when the crime involves children. It is sufficient to show that the 'action' as described above was done for the 'purpose' as also described above. In other words, in case of persons who are aged 18 years and above, all three elements must be proved for a case of trafficking to be made out. However, for persons below the age of 18, proving the existence of only two elements would be enough.

4. This definition has been emulated either verbatim or with slight modifications in the national legislations of several countries, including India. The definition highlights that all persons, irrespective of age or gender, can become victims of trafficking. The range of potentially exploitative practices is also intentionally left open-ended, indicating that new or additional exploitative practices may be identified in the future. Yet another important point to note is that movement from one place to another is not always necessary for human trafficking. Movement i.e., through transfer or transportation is merely one possible way through which the 'action' element identified in the definition can be satisfied. The inclusion of terms like "receipt" and "harbouring" shows that human trafficking not only refers to the process whereby someone is forcefully or deceitfully moved into situations of exploitation but also extends to the maintenance of that person in such a situation.

5. Although human trafficking can involve various modes or forms of exploitation and it is not strictly gendered, yet the present petition deals only with the trafficking of a targeted group of vulnerable persons for a certain single purpose - the trafficking of women and children, in particular, for Commercial Sexual Exploitation ("CSE"). Considering that this is the scope within which the present matter operates, while we recognize the multi-various and nuanced forms in which human trafficking could manifest in the present day, we have been conscious to exclude any specific discussions on human trafficking for labour, servitude, removal of organs, etc., since it would transgress beyond the issues raised herein.

II. CONTEXT SETTING

6. India acts as a source, transit and destination country for the trafficking of women and children for CSE. According to the petitioner, the CSE of women and children is largely carried out both in and out of brothels, houses and resorts, amongst other places. However, of late, there has been a trend of decentralization of sex trafficking activities away from the traditional brothels and therefore, "red light areas" are not the only centres for CSE. Moreover, the creation of sexual

exploitative material and its widespread dissemination through the internet does not require either the victim or the perpetrator to be at a single physical location. Therefore, it was urged that coordinated efforts from different stakeholders and authorities is required to completely uproot any and all traces of CSE in the country.

7. The processes through which the victims are trafficked are inherently varied. Owing to trafficking being a money-making endeavour for the traffickers, all exchanges are made in an effort to maximise financial gain and minimize financial loss or operational costs. Therefore, the characteristics of every individual trafficking operation are situation and victim dependent. For example, the nuances would vary depending on the personality of the trafficker, the culture group in which they operate, the age and gender of the victim, the behavioural tendencies of the victim etc.

8. According to the petitioner, the very start of this nefarious crime is the identification and subsequent manipulation of the vulnerabilities of potential victims by the traffickers. Such vulnerabilities could relate to age, gender and/or economic situation. The traffickers primarily target women and girls who are severely affected by poverty, lack of access to education, chronic unemployment, gender and caste discrimination and dearth of economic opportunities in their States of origin with the promise of financial allurement, better living conditions or marriage. Vulnerabilities also tend to intensify during conflict or in post-conflict situations. For example, the petitioner has alleged that trafficking rates have soared during the Covid-19 pandemic and in the post-pandemic era. The lure often also involves assurances of glamour or rescue from troubled family or marital situations. These opportunities are deliberately made available at far-away locations to achieve a dual goal – one, to cut them off from their roots completely and two, to reduce the probability of the victims obtaining effective support, either from known persons or law enforcement, upon any realization that they have been trafficked.

9. Some common ways of securing initial contact with potential victims are via posting fraudulent advertisements for job vacancies, cultivating fake romantic relationships or companionships, abduction or kidnapping etc. These traffickers who pull the wool over the victim's eyes could also be known and familiar faces, and sometimes even close relatives or friends. Some traffickers build a façade of being rich, prosperous, and well-connected and are therefore seen as symbols of success in the local community. Such persons pay some nominal amount to initially take the victims away from the custody of the family and also to reinforce that their promise of an economic opportunity for the victim is real, genuine and well-intended.

10. The journey of each victim is unique and cannot be fit into a specific box.

There are also instances where they may be initially inducted in the employment or given the opportunity that they were originally promised in order to ensure that the family does not immediately report anything. However, subsequently, they might be re-routed into the trafficking ring and sold for CSE.

11. It is often seen that during transportation, especially where the trafficked women and children are calculatedly deceived for the purposes of consent, the victims are well taken care of to avoid both

resistance and suspicion, thereby rendering any interception during transit almost impossible. It is only after reaching the destination that the trafficked women and children are ambushed into entering the prostitution market. For victims who have been forcefully taken, their transport is carried out as covertly as possible to escape any prying eyes. When initiation is resisted, collective torture, physical abuse, blackmail, threats etc., ensues. Traffickers are known to subject the victims to extreme violent behavior to compel them into submission.

12. This does not mark the end of their trauma; it is only the beginning of it. The victims are forced to live within exploitative structures where all the traffickers including the brothel owners or managers, pimps, local goons etc., are living on her earnings. The price paid to procure her becomes the principal debt that lies heavy on her shoulders. This debt only reduces when 50-100 times the principal is repaid, until which she remains trapped in debt bondage. This is one very common method by which the traffickers legitimize their confiscation of the victim's earnings.

13. The reality of the victim's life becomes grim with the passing of each day, rampant with sexual exploitation and abuse, and with zero autonomy or free choice over what is being done to them. After a few days of resistance and attempts to escape, she succumbs to her inevitable confinement. Stories of the fate of women and girls who unsuccessfully attempted to break free are constantly fed to them in order to erase the thought of escaping. Such stories often highlight the alleged complicity of police officers to emphasise that their present reality is inescapable.

14. Apart from the abundance of psychological trauma, the victims also endure violations to their bodily integrity day in and day out. Their health does not assume any priority in the exploitative model that is centered around their existence. Untrained doctors attend to them only to conduct abortion procedures or treat sexually transmitted infections. Their medical care is often ad-hoc and unhygienic and this destroys their physical well-being, often permanently. Medical attention is seldom prioritized since it is expensive, and the victims are seen as replaceable or disposable. The crime, as we mentioned above, is, after all, hyper-focused on greed and avarice.

15. To cope with all the trauma inflicted, victims also start relying on alcohol and drugs, which quickly morph into an addiction for various forms of substance abuse. There are accounts of victims also being forced by the traffickers to consume drugs or alcohol as yet another means of exerting control over them.

16. In due course, the victims are gradually given small portions of their earnings, released from 'absolute' debt-bondage and motivated to serve as procurers of more girls from their own villages or other places for more income. They then become entrenched in the trafficking ring themselves, plunging deeper into the wrath of the crime that they were once forced into. These victims then slowly rise in ranks and are progressively incentivized to victimise countless others.

17. Over the years, it has also been seen that there is a rapid decrease in the age of the trafficked. Children, especially between the ages of 12 and 18 years, are severely exploited in such settings. They are seen as more submissive and less likely to negotiate their position with any trafficker or client. The increase in demand for children in CSE is also fueled by the perception that they are not

carriers of any sexually transmitted disease. This has led to traffickers resorting to specifically targeting young children, grooming them and forcing them to undergo different hormonal therapies to advance their growth for the purpose of CSE.

18. Even when rescued, in a lot of cases, the victims fail to give a true account of their trafficking or forced prostitution to law enforcement authorities and the Civil Society Organisations ("CSOs"). Throughout the duration of their exploitation, they are tutored and taught to behave in a specific manner during raids. They are trained to give a false name, age and domicile to send any rescue attempt or investigation adrift. This is not entirely because they are unwilling to be rescued but because of the long-term complex psychological conditioning that has clawed its way into every response of theirs.

19. Most victims also resist rescue because they consider law enforcers as forming a significant part of the group of perpetrators and therefore, find it difficult to internalise that genuine help can be offered by them.

Many victims fear that if they escape their servitude and initiate investigations against their trafficker, the trafficker and their associates will harm them or their family members. The organised nature of the trafficker's operation enables them to realistically follow through on such threats. The victims are also warned that if arrested, their life in the government homes would be worse, devoid of any earnings whatsoever and be pervaded by ostracism. All these narratives compound and demotivate the victim from offering any cooperation.

20. More often than not, immediately after the victims are rescued, the traffickers ensure that they are released from police custody into the care of those who claim to be their parents, spouse or some other relative. It has been found that even if such persons may be the real parents/families of the victim, the traffickers have several methods hidden in their reserve to exert complete control over such guardians. Therefore, re-victimisation becomes a very real possibility for any rescued victim. Insofar as cross-border trafficking is concerned, the routine and immediate repatriation of the victims without a fair assessment of whether there are reasonable grounds for believing that they would be re-victimised, also proves to perpetuate the cycle of the crime, whose elements remain well-entrenched in the source country.

21. Extreme psychological manifestations of their trauma can range from displaying symptoms of Post-Traumatic Stress Disorder ("PTSD"), phobias, panic attacks and anxiety which is triggered by any cue of the past traumatic stimuli. Depressive and dissociative disorders that manifest as persistent sadness, disturbance in sleep and appetite, loss of consciousness or amnesia, "flat affect" etc. Psychotic disorders which may present as delusions, hallucinations or behavioral difficulties. A lot of them also experience "trauma bonding" or "Stockholm's syndrome" with their traffickers.

22. Rescued victims may also exhibit signs of physical abuse ranging from bruises, broken bones, Traumatic Brain Injuries ("TBI"), burns, scarring etc. They may also diagnosed with infectious diseases, such as tuberculosis and hepatitis, which are spread in overcrowded, unsanitary environments with limited ventilation; chronic illnesses, such as diabetes or cardiovascular disease;

or Reproductive health problems, including Reproductive Tract Infections ("RTIs"), cervical damage, sexually transmitted diseases, urinary tract infections, pelvic pain and injuries from sexual assault, or forced abortions.

23. The aforesaid context which has been laid out by the petitioner through the original writ petition is an extreme way in which the crime of human trafficking for CSE could potentially manifest. While we are cognizant that this is the manner in which the crime may take shape for several victims, we must acknowledge that it may be difficult to fit all cases into this exact category or stratagem. There are varied, both subtle and non- subtle forms in which traffickers victimise persons and we have been careful to keep this aspect in mind while approaching the issues raised before us.

24. The petitioner has also brought to our notice that, in an era marked by the democratisation of the internet, a lot of criminals have leveraged the cyberspace for committing their crimes, and that trafficking, is no different. Therefore, it was urged that we must acknowledge Cyber- Enabled Human Trafficking (hereinafter, "CEHT") as a serious concern. Cyber technology has expanded the range of vulnerabilities that traffickers can exploit, transcending traditional economic reasons. It was contended that a lot of the recruitment is also conducted through social media platforms, matrimonial sites, job sites, gaming applications etc. Victims are also successfully groomed online over an extended period of time despite the anonymous nature of online relationships. The proliferation of the internet has also led to an unprecedented surge in the making and dissemination of Sexual Exploitative and Abuse Material involving both children (i.e., "CSEAM") and adult women.

25. It is difficult to obtain accurate data on trafficking owing to multiple reasons which have been pointed out by us in the later parts of our discussion. Therefore, without going into the numbers which have been given by indicative studies conducted across the world, all we would like to say is that even as far back as the year 2004, the admitted position of the Union of India (hereinafter, the "respondent no. 1") was that there are at least 30 lakh victims across the country.

III. HISTORY OF THIS LITIGATION

26. This litigation, which began in the year 2004, has had a long and chequered history before this Court. It has been characterised by efforts that were both commendable and proactive, but the practical implementation of which unfortunately failed to see the light of day and fell short of many a promise.

27. The petitioner is an anti-trafficking organisation operating in Hyderabad, Telangana. It is stated that, over the years, they have set up three State-recognised shelter homes, currently housing over 250 women and children who have been rescued from prostitution. The petitioner has worked with the Central government and various State governments inter-alia in providing training to a large number of government functionaries, conducting several campaigns, spearheading assessment studies, establishing Industrial Training Institutes ("ITIs") for victims/survivors, financially supporting reintegration and repatriation costs for victims/survivors and spreading awareness about the crime of trafficking. They have also worked extensively on drafting Anti-Trafficking Policies and Minimum Standards of Care Policies for Homes for several States. They have helped in

bringing about the practice of Video Conferencing during trial for victims/survivors as a State policy, helping in the declaration of all child victims/survivors as orphans and granting them reservations, etc.

28. All this shows that the petitioner has been at the forefront of bringing about meaningful progress in the field.

A. The original writ petition and the circumstances under which it came to be disposed

29. The petitioner had filed the Writ Petition (Civil) No. 56 of 2004 ("original writ petition"), which brought to the fore several issues and challenges that exist in the anti-trafficking efforts undertaken in India.

30. It was submitted that the law relating to the raids of brothels, rescue of sex workers/trafficked victims therefrom, and their rehabilitation in the aftermath, is grossly inadequate. A point of specific mention was that, throughout all the phases, the rescued come to be treated as 'criminals' instead of 'victims/survivors' of a heinous crime. It was added that there is significant insensitivity and indignity involved in the rescue process, which extends to the post-rescue phase. Moreover, it was alleged that the victims/survivors are not afforded adequate protection from the traffickers after their rescue, despite being aware that the threat to their safety becomes intensified once they are removed from the clutches of the perpetrators. In the absence of adequate attention being paid to the post-rescue stage of rehabilitation, the victims/survivors also end up going back to the same brothels and are re-exploited, instead of getting reintegrated back into society. This is, especially, after a great number of resources and manpower are spent on the rescue by the State. All this, the petition alleges, serves to continue the cycle of traumatisation and subjects the victims/survivors to irrecoverable injury.

31. The petitioner identified the core reason underlying all the issues aforementioned – the absence of a robust "Victim Protection Plan". According to it, its non-existence carries a realistic risk of rendering any rescue effort an abortive exercise from the get-go. It allows the process to be riddled with varying forms of violations, harassment and trauma, both by the protectors as well as the perpetrators of the crime. In other words, the original writ petition was of the firm view that if victim- protection measures are not incorporated in the pre-rescue, rescue and post-rescue stages, it would be counterproductive to carry out the rescue itself.

32. This Court, while in seisin of the original writ petition, acknowledged that the present matter related to the protection of women who were victims of offences committed under the Immoral Traffic (Prevention) Act, 1956 ("ITPA") and that some sort of monitoring of the activities of the protective homes under the ITPA may be necessary. With this object in mind, it was thought fit to implead the National Legal Services Authority ("NALSA") as a party.

33. From the very beginning, all the parties, including the respondent no. 1, were unanimous in their view that a comprehensive protocol was required to be put in place. The matter did not take an adversarial turn. This is reflected from the observation made by this Court vide order dated

28.03.2005 recording the submission of the then learned Solicitor General that "the Ministry of Human Resource & Development intends to formulate a scheme relating to the rescue and rehabilitation of trafficking victims as also control and supervision of protective homes". It was never disputed that strengthening the protective and rehabilitative measures for victims of trafficking was necessary.

34. In accordance with the aforesaid submission, on 29.07.2005, the respondent no. 1 had placed on record a "Draft Protocol for the pre- rescue, rescue and post-rescue operations of child victims of trafficking for commercial sexual exploitation" and averred that the same could be comparably applied to adult victims as well. However, the counsel appearing for the petitioner had pointed out some deficiencies in the said draft protocol as regards certain aspects like the quantity and quality of food supplied to the residents, supply of medicines including anti-viral drugs for the treatment of HIV etc. Therefore, a consultative process for incorporating all the aforesaid suggestions had commenced.

35. Aware of the need for a thorough and exhaustive examination, on 21.11.2005, the respondent no.1 submitted that the Government of India was agreeable to take a holistic view of the matter and also consider the schemes prepared by the National Commission for Women ("NCW") and NALSA, respectively, on the subject. Subsequently, on 04.04.2006, after a review of the aforementioned schemes, the respondent no.1 had stated that they are in agreement with all the suggestions given by the petitioner, except those suggestions that carry huge financial implications to the public exchequer.

36. Since several stakeholders, i.e. the petitioner, NCW, NALSA and the various ministries of the Government of India, were involved, on 17.08.2006, this Court proposed that it would be better if everyone coordinated their efforts and placed a common scheme before this Court. In pursuance of the same, on 19.09.2006, a Joint-Proposal of the NALSA and the petitioner to implement a Victim Protection Plan in the country was filed. Over the period of time, the relevant ministries of the Government of India and all the States were directed to file their responses to the Joint-Proposal.

37. Vide order dated 30.10.2014, this Court had noted that certain directions had already been given by this Court in Vishal Jeet v. Union of India reported in (1990) 3 SCC 318, wherein a similar issue pertaining to the protection and rehabilitation of those who had fallen victim to prostitution, was canvassed. An affidavit was sought from the respondent no. 1 to indicate what steps had been taken, by both the Union and the States, in furtherance of the directions given in paragraph 16 of the said judgment, which included, amongst other things, the formation of Central and State Advisory Committees for the purpose of looking into (a) measures which can be taken to eradicate child prostitution and (b) the social welfare programmes necessary for the care, protection, treatment, development and rehabilitation of rescued child victims. For ready reference, the said directions from Vishal Jeet (supra) are reproduced hereinbelow:

> "16. We, after bestowing our deep and anxious consideration on this matter feel that it would be appropriate if certain directions are given in this regard. Accordingly, we make the following directions:

(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 the members of various voluntary social organisations and associations etc., the main objects of the Advisory Committee being to make suggestions of:

(a) the measures to be taken in eradicating the 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. 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. [...]" (Emphasis supplied)

38. On the next date of hearing, i.e., on 25.08.2015, it was submitted that a meeting of the Central Advisory Committee ("CAC") as mentioned in Vishal Jeet (supra) was scheduled to be convened and all the representatives of the concerned States/UTs were invited to attend the same. Simultaneously, NALSA had also formed a dedicated Committee to look into some of the issues raised in the petition which had

culminated into a separate Report. The agenda for the first meeting of the CAC was to discuss the Report prepared by NALSA as also the judgment delivered by this Court in Vishal Jeet (supra) and place on record what further action the government wishes to take in this regard.

39. Thereafter, on 13.10.2015, this Court directed that in accordance with the request made in paragraph 10(iv) of the affidavit dated 09.10.2015 filed by the respondent no. 1 (hereinafter, the "first affidavit"), an Inter-

Ministerial Committee comprising of the relevant ministries/departments of the Government of India, the States/UTs and CSOs for preparing a comprehensive legislation to tackle all aspects of trafficking, be constituted before the next date of hearing. The details and the mode of working of the said Inter-Ministerial Committee was also directed to be placed on record.

40. Shortly thereafter, on 16.11.2015, the respondent no. 1 filed another affidavit (hereinafter, the "second affidavit") stating that approval has been obtained from the Cabinet Secretariat to form an Inter-Ministerial Committee under the chairmanship of the Secretary, Ministry of Women & Child Development, Government of India ("MWCD") for the preparation of a comprehensive legislation. In addition to this, it was stated that the issue of setting up the Organised Crime Investigation Agency ("OCIA") was already underway with the Ministry of Home Affairs, Government of India ("MHA"), wherein a proposal costing less than Rs.100 Crores has already been prepared and circulated for inter-

ministerial consultation.

41. Taking into account the second affidavit of the respondent no.1, vide order dated 09.12.2015, this Court disposed of the original writ petition by observing thus:

"1. Heard the learned counsel.

2. We have gone through the affidavit dated 16th November, 2015 filed on behalf the Ministry of Women & Child Development, Government of India.

3. It has been submitted in the said affidavit that the Ministry of Home Affairs shall set up the "Organized Crime Investigative Agency" (OCIA). We hope that before 30th September, 2016, OCIA shall be set up and also hope that it is made functional before 1st December, 2016 looking to the importance of the issue before us.

4. We also record the fact, as mentioned in the Office Memorandum dated 16th November, 2015, that the Ministry of Women & Child Development has taken a policy decision to constitute a Committee under chairmanship of the Secretary, Ministry of Women & Child Development, Government of India, for preparing a

comprehensive legislation dealing with the subject of trafficking.

5. The afore-stated Committee is to work on the following terms and reference :

• To study the various Acts/Legislations under the purview of different Ministries/ Departments relating to various aspects of trafficking.

• To consider the gaps in the existing legislation, from the point of view of prevention, pre-rescue, rescue, post-rescue and rehabilitation aspects.

• To strengthen victim protection protocol so as to ensure that victims are treated as victims not as offenders.

• To draft a comprehensive legislative framework covering all aspects of trafficking, as may be considered necessary. • To provide for adequate shelter homes for the rescued victims. • To prepare a comprehensive policy for law enforcing agencies, including for lady police officers for handling the victims of trafficking.

6. We are sure that the Committee shall do the needful at an early date so that appropriate law can be enacted on the subject. We hope that the Committee shall prepare and submit its report preferably in six months.

7. In view of the above development in the matter, this petition does not survive. The writ petition is, accordingly disposed of.

8. We record our appreciation for Prajwala and Dr. Sunitha Krishnan for bringing such an important and humanitarian issue to our notice and for able assistance rendered by learned Senior Counsel Mr. Dushyant Dave and Ms. Indu Malhotra, learned Additional Solicitor General Mr. N.K. Kaul and learned Advocate Ms. Aparna Bhat, National Legal Services Authority and other learned advocates in the process of disposing of this case relating to social problems." (Emphasis supplied)

42. It is evident from the aforesaid order of this Court that, the original writ petition was disposed of by taking on record the undertaking of the respondent no. 1 on two aspects: (a) the creation of the OCIA under the MHA and (b) the constitution of an Inter-Ministerial Committee under the chairmanship of the Secretary, MWCD, for the purpose of preparing a comprehensive legislation on the subject of trafficking. The said Inter- Ministerial Committee was tasked with inter-alia studying the relevant legislations; identifying the existing legislative gaps from the perspective of prevention, pre-rescue, rescue, post-rescue and rehabilitation; strengthening the Victim Protection Plan to ensure that the victims are not treated as offenders; drafting a comprehensive legislative framework; providing for adequate shelter homes for the rescued victims/survivors and; preparing a policy for law enforcement officers guiding them to appropriately handle the victims of trafficking.

43. In the aforesaid order, this Court had also recorded hope to see the OCIA be set up by 30.09.2016 and be made functional before 01.12.2016. Furthermore, it was hoped that the Inter-Ministerial Committee formed under the chairmanship of the Secretary, MWCD would look into all the necessary aspects with utmost expediency and prepare a report, preferably within a period of six months, so that an appropriate law can be enacted on the subject.

B. Developments post the disposal of the original writ petition

44. Several meetings of the above-mentioned Inter-Ministerial Committee were held, and their efforts have culminated into the Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016. The same was uploaded online inviting suggestions from the public. Upon the receipt of widespread feedback, the draft Bill was reworked upon. The subsequently revised Draft Bill was put up for consultation with domain experts and CSOs in various regions of the country. Thereafter, the revised Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2017 was formulated. However, for reasons best known to the respondent no. 1, the Bill never came to be introduced before the Parliament.

45. Owing to an absence of progress on both the constitution of the OCIA and the enactment of a comprehensive legislation respectively, the petitioner had filed a Miscellaneous Application being M.A. No. 451 of 2017 (hereinafter referred to as “First M.A.”) seeking compliance of the undertaking furnished by the respondent no. 1 due to which the original writ petition came to be disposed of.

46. Shortly thereafter, the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 was brought out in the public domain and was also passed in the Lok Sabha. The same was likely to be taken in the Rajya Sabha in the next session of the Parliament. Taking into account this progress, the petitioner did not press the First M.A. and the same came to be disposed of vide order dated 03.12.2018. The said order reads thus:

> “Learned counsel for the petitioner says that a Bill has been passed in the Lok Sabha and is likely to be taken in the Rajya Sabha in the next session of Parliament. She says that the proposed Bill satisfies the requirements of the petitioner and, therefore, she does not press this application. Accordingly, application stands disposed of.”

47. Despite the 2018 Bill being passed in the Lok Sabha on 26.07.2018, it could not be considered in the Rajya Sabha due to the prorogation of the 16th Lok Sabha. In consequence thereof, the 2018 Bill had also lapsed upon the dissolution the 16th Lok Sabha.

48. During this time, the respondent no.1 seems to have revisited the original idea of setting up the OCIA. It had, on second thought, considered it appropriate to empower the National Investigation Agency (“NIA”) to investigate offences related to human trafficking. Therefore, Sections 370 and 370A of the Indian Penal Code, 1860 (“IPC”) were added to the Schedule of the National Investigation Agency Act, 2008 (“NIA Act”) by way of an amendment made in the year 2019.

49. It is the case of the respondent no. 1 that their endeavors with respect to the enactment of a human trafficking legislation, did not cease. After incorporating additional suggestions received from all quarters, a re- drafted Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 was drawn up. The same was pending cabinet approval for its introduction before the Parliament. However, yet again, for reasons best known to the respondent no. 1, no further progress was achieved on the matter.

50. Therefore, for the second time, the petitioner filed another Miscellaneous Application being M.A. No. 530 of 2022 (hereinafter referred to as the "Second M.A.") seeking compliance of this Court's order dated 09.12.2015 disposing of the original writ petition. It is the case of the petitioner that although much time had lapsed, yet no progress worth the name had been made by the respondent no.1 on both fronts. This is especially when the menace of human trafficking has become more acute during the post-pandemic period.

51. The initial stance of the respondent no. 1 when the Second M.A. came to be admitted by this Court was marked by one significant change – although they had affirmed their commitment to introducing a dedicated legislation on the subject of human trafficking, yet they submitted that there remained no need for establishing a new investigative agency in the form of the OCIA when the NIA had already been empowered in that regard.

52. As some more time unfolded in the course of hearing the second M.A., another fundamental shift in the stance of the respondent no.1 occured – they have submitted that the legislative developments, more particularly, the enactment of the Bharatiya Nyaya Sanhita Act, 2023 ("BNS"), the Bharatiya Nagarik Suraksha Sanhita Act, 2021 ("BNSS") and the Bharatiya Sakshya Act, 2023 ("BSA") respectively, along with the ITPA and schemes already present, entirely obviate the need to introduce a separate legislative framework as well.

53. Therefore, cumulatively seen, they have sought to canvass that both of the initial commitments made by them before this Court did not require implementation because they were either not necessary or because they had become redundant.

54. To capture the arguments put forth by both sides more precisely, we have recorded their submissions in an elaborate manner in the following section.

IV. SUBMISSIONS OF THE PARTIES

C. Submissions on behalf of the petitioner

55. Ms. Aparna Bhat, the learned Senior Counsel appearing on behalf of the petitioner submitted that the original writ petition was filed praying for a "Victim Protection Plan" to be created for the victims/survivors of CSE and that it thoroughly highlighted the inadequacy of, both the law and the institutional support system, relating to the pre-rescue, rescue and post-rescue stages of rehabilitation of victims/survivors of trafficking.

56. She also emphasised that, during the course of hearing of the original writ petition, all the State Governments, NALSA and other stakeholders were heard on the issue. Much progress was achieved through several consultations and reports. At every step, this Court closely monitored every development. Consensus was achieved amongst all on the barebones of the legal and institutional reforms which had to be brought into place. It was in this background that the judgment of this Court dated 09.12.2015 was passed disposing of the original writ petition by taking on record certain commitments by the Union of India. These commitments were as follows:

> (i) The creation of the OCIA, and;
>
> (ii) The enactment of a dedicated and comprehensive legislation dealing with all aspects of human trafficking, which would include a robust Victim Protection Plan.

57. It has been submitted by the learned counsel that, during the time when the aforesaid commitments were made, the following were the legislative and institutional frameworks that already existed:

> (i) The ITPA, which is a special legislation dealing with trafficking for CSE keeping in line with India's international law obligations under the United Nations Convention for the Suppression of Women in Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949 ("1949 Convention");
>
> (ii) Sections 370 and 370A which were added to the IPC, 1860 by way of an amendment in the year 2013;
>
> (iii) The Protection of Children from Sexual Offences Act, 2012 ("POCSO Act").
>
> (iv) The Information Technology Act, 2000 ("ITA").
>
> (v) The Juvenile Justice (Care and Protection of Children) Act, 2000 ("erstwhile JJA").
>
> (vi) An Anti-Trafficking Cell, set up by the MHA in 2006 to act as an interface with all Central Government agencies, departments, and ministries.
>
> (vii) Anti-Human Trafficking Units ("AHTUs") which were set up across the country at the district-level for tackling all aspects of the crime of human trafficking viz. prevention, rescue, rehabilitation and reintegration;
>
> (viii) Ujjawala Scheme – a scheme for the rehabilitation of victims/survivors of CSE introduced by MWCD.
>
> (ix) The NALSA Victims of trafficking and Commercial Sexual Exploitation Scheme, 2015 (for short, the "NALSA Scheme") which details the provision of legal services to

victims of trafficking at various stages; and

(x) An Office Memorandum dated 30.04.2012 issued by the MHA categorizing human trafficking as an Organised Crime.

58. The counsel would submit that the current stand taken by the respondent no.1 in the present M.A. i.e., that there exists no need to enact a separate comprehensive legislation and set-up the OCIA, is untenable. The legislative and institutional responses that existed during the time when the commitment was made, continue to exist as on date, without any substantive change having been brought in. Moreover, it has been submitted that this change in stance has been made almost 10 years after the judgment in the original writ petition was passed and is therefore, extremely and opportunistically belated. The counsel would submit that the respondent no. 1 has essentially forced a fait accompli situation in the present matter at the expense of thousands of victims of trafficking.

59. The learned counsel would submit that apart from introducing a separate provision for organised crime under Section 111 of the BNS, the new criminal laws have essentially reproduced the provisions pertaining to trafficking as they existed in the erstwhile criminal laws. Another pertinent aspect to be noted, according to the learned counsel was that, vide Office Memorandum No. F.NO.15011/27/2011-ATC dated 30.04.2012 titled "Advisory on Human Trafficking as Organised Crime" issued by the MHA, trafficking had already been recognized as an organised crime as far back as 2012. In this context, the incorporation of Section 111 BNS is unlikely to bring about a sea change in the prosecution of trafficking cases.

60. It was submitted that the ITPA was enacted in the year 1956 and certain amendments were carried out in the year 1987. However, there have been radical changes in the way the crime of trafficking is committed for CSE and therefore, the ITPA has become insufficient to deal with the evolving ways in which victims are trafficked.

61. She would submit that the suggestion of the MHA to set up the OCIA was in acknowledgment of the fact that human trafficking is an organised crime and a dedicated body for the purpose of investigating such organised crime is required. Such a body would be well-equipped to address the link between money laundering and human trafficking which can efface the said crime altogether. Different stages of trafficking are funded by various illicit financial activities, which include transportation, logistics, proceeds from the selling and buying of victims, movement of funds, etc. Therefore, uncovering the financial network behind the trafficking operation is very crucial. According to the counsel, the current capacity building measures of law enforcement do not lay due emphasis on this important aspect.

62. It was also submitted that the effect of the 2019 amendment to the NIA Act, which amended its schedule to include Sections 370 and 370A of the IPC, 1860 respectively, has also not brought any real ground-level change since the NIA has only taken up a few cases of human trafficking for investigation, with a majority of them being cross-border ones.

63. Therefore, according to the learned counsel, it might not be entirely true to say that the empowerment of the NIA to investigate the crimes pertaining to human trafficking, in conjunction with the new criminal laws, the ITPA and the existing schemes, meet the needs originally envisioned for the OCIA and the proposed trafficking legislation.

64. Insofar as the AHTUs are concerned, it was submitted that despite trafficking being mostly carried out as inter-State or cross border operations, there is a lack of coordination between the AHTUs operating in the different States. In addition to this, it was pointed out that the AHTUs in most States are not designated police stations. Therefore, they are constrained to play a very limited role in intelligence gathering and rescue, after which the victims are mandatorily handed over to the local police station.

65. As regards the "protective homes" provided for under Section 21 of the ITPA the counsel submitted that the Ujjawala Homes (protective homes under the ITPA) and the Swadhar Scheme (homes for women in distress) have been merged and resultantly, all homes now fall within the Shakti Sadan Scheme. This merging of different categories of homes for vulnerable populations under one umbrella has led to a situation where persons requiring different degrees of care (persons with mental health issues, victims of domestic violence etc.) are being housed with victims of trafficking who may exhibit violent behaviour in the initial days of rescue and will need treatment for substance abuse, specialized medical treatment etc. Even in its merged form, the counsel would submit that there are several persistent issues which are faced by these homes which include inter-alia inadequate standards of care, poor budgeting and inadequate monitoring. The counsel also submitted that recent data on the number of functional Shakti Sadans reveal that there is a stark disparity between all the States/UTs. Owing to this, the idea of rehabilitation has acquired different meanings and interpretations across several parts of this country. In effect, she argues that there are no real and tangible rehabilitation options provided for rescued adult victims. Neither economic benefits nor spaces to enhance skills or engage in education or technical development are effectively provided within the present institutional framework.

66. Another aspect which the learned counsel pointed out was that, in almost all cases, prosecution is initiated only against those persons/perpetrators found at the place of the raid. Consequently, large sections of the trafficking network including the procurers, transporters etc. go scot-free despite forming an integral part of the criminal network. According to the counsel, the reason behind several key perpetrators slipping away is because the singular path to rescue, investigation and prosecution begins with "mass raids" by law enforcement at known areas of sex trafficking. The learned counsel is of the view that "mass raids" must not be initiated unmindfully or in a routine fashion, and adequate planning must precede it so that the entire crime network can be uncovered.

67. Additionally, she would submit that requisite investigation and prosecution under the Prevention of Money Laundering Act, 2002 ("PMLA, 2002") are also given a go-by. The capacity building and training efforts for law enforcement also do not give due emphasis to this crucial aspect. The counsel argued that not addressing the link between money laundering and human trafficking would be detrimental in combating CSE effectively since the different stages of trafficking are funded by various illicit financial activities. Traffickers use several novel methods including

setting up frontal businesses to carry out illegal activities under the radar or forcing the victims to open bank accounts in their names which are then utilized for moving funds and escaping detection.

68. It was submitted that the issue of forced prostitution and the rehabilitation of such victims was also the central focus in Vishal Jeet (supra). Therein, it was noted that despite the existence of several laws, the desired ground results were far from having been achieved. Due to this, several directions were passed by this Court in Vishal Jeet (supra). Pursuant to the same, a CAC on Trafficking was formed by the MWCD in the year 1994. The CAC comprised of state officials, civil society partners, police and other experts. The petitioner organization was also a part of the CAC. However, it was stated that, to the petitioner's knowledge, the CAC has not been functioning for the past 12 years. The State Advisory Boards/Committees which were created, after extensive advocacy, have also stopped functioning.

69. It was also submitted that during the adjudication of the original writ petition, CSE was primarily associated with prostitution, sex trafficking, production and dissemination of sexual abuse material and sex tourism. However, in the last few years, traditional CSE has integrated cyber-elements, and the traffickers use the cyber space to recruit, coerce and manage the victims. In other words, it was submitted that the pre- existing intricate web of trafficking has gotten a lot denser and more convoluted with the camouflage provided by technology.

70. In the last, the counsel would submit that, having supported a large number of rescued victims over a period of time, the petitioner has realised that the existing law and policy are not equipped, both in letter and spirit, to holistically provide the requisite support to the trafficked victims/survivors or to prevent trafficking and re-trafficking. The modes and methods of committing the crime have also evolved significantly. Law enforcement and rehabilitation programs work in parallel tracks with no synergy or coordination. Rehabilitation efforts are confined to tracing families and handing the rescued back to them even if the families have been instrumental in the process of trafficking. The counsel would submit that a continuum of protection, prosecution and rehabilitation, keeping the victim's interests at the forefront, is completely lacking. Adequate resources in terms of manpower, technical support, infrastructure etc. which is needed for a workable system has not been created even to comply with existing statutory requirements. Therefore, she would urge that there is a dire need for a robust "Victim Protection Plan", the contours of which be clearly demarcated with legislative clarity. She would also urge that the original commitments made by the respondent no.1, be implemented.

71. In view of the serious vacuum existing in both the law and policy arenas combined with the changed stance of the respondent no.1 vis-à-vis the enactment of a comprehensive legislation and the creation of the OCIA, the counsel for the petitioner would pray that a thorough set of guidelines and directions be issued by this Court in order to protect the fundamental rights of the victims of trafficking for CSE.

D. Submissions on behalf of the respondent

72. Ms. Aishwarya Bhati, the learned ASG appearing on behalf of the respondent would submit that they have complied with and remain committed in implementing the directions given in the judgment of this Court dated 09.12.2015 by which the original writ petition came to be disposed of. It is the respondent no.1's position that they have undertaken extensive legislative, administrative and institutional measures to address the multifaceted issue of human trafficking and victim protection.

73. As regards a comprehensive legislation, especially one that addresses prevention, pre-rescue, rescue, post-rescue and rehabilitation of trafficked victims, it was submitted that, although a comprehensive Bill was drafted in the year 2021, yet in view of the new developments that ensued in the intervening period, it was decided that a separate law on trafficking was not necessary since the existing legislations provide a robust and comprehensive legal framework to combat trafficking. More particularly, Sections 111, 143 and 144 of the BNS respectively address various aspects of trafficking, including organised crime and Section 396 BNSS mandates State Governments to establish victim compensation schemes.

74. For the purpose of effectively handling human trafficking cases which have inter-state, national and international ramifications, it was submitted that the NIA Act was amended in the year 2019 empowering it to investigate the offence of human trafficking. The NIA's jurisdiction ensures that there exists effective national-level coordination, thereby leading to more effective investigations and prosecutions.

75. With respect to shelter homes, it was submitted that a scheme called "Mission Shakti" is being implemented across the country with components like "Shakti Sadan – Integrated Relief and Rehabilitation Home". These homes cater to the needs of women who are destitute, distressed, marginalized, or victims of trafficking. They provide shelter, healthcare, psychological counselling and skill development, all aiming to reintegrate the victims back into society.

76. The ASG would submit that the Government of India has also provided financial assistance of Rs. 10 Lakhs from the Nirbhaya Fund for the setting up/strengthening of each AHTU to the States/UTs and the border security forces, respectively. As on January 2025, she would submit that 827 AHTUs are functional, including those established by the border security forces. These units play a vital role in enforcement, victim identification and support, working closely with NGOs and State agencies to ensure the protection and rehabilitation of trafficked persons. Additionally, over 14,000 Women Help Desks ("WHDs") have also been established in police stations through financial assistance given under the Nirbhaya Fund. These desks aim to make the police stations more accessible and responsive to women's needs in addition to creating a safe and supportive environment for women to report crimes.

77. Insofar as CEHT is concerned, it was submitted that the MHA has put in place the Crime Multi-Agency Centre ("Cri-MAC") which is a national level communication platform for the online sharing of information on crimes and criminals, including human trafficking for CSE. This platform is said to operate on a 24x7 basis, facilitating the seamless flow of information between various law enforcement agencies. It was submitted that the Cri-MAC is instrumental in addressing the growing

concern of cyber-enabled CSE.

78. It was also submitted that training programs are being conducted in order to sensitise law enforcement personnel, including lady police officers about the crime of human trafficking and simultaneously equipping them to gather the necessary skills required to handle victims appropriately. In connection to this, it was further submitted that since "Police" and "Public Order" fall under the State List as provided in the Seventh Schedule to the Constitution, it is the primary responsibility of the State governments to take necessary measures for the prevention, investigation and prosecution of human trafficking cases. Therefore, it was prayed that appropriate directions be issued to the State governments to strengthen their actions in this regard.

79. In light of all the aforesaid, the ASG would submit that the NIA in conjunction with the new criminal laws and the ITPA meets the needs originally envisioned for the OCIA and a separate dedicated legislation.

In fact, it would be her submission that they constitute a "more robust framework" for the handling of trafficking offences. Therefore, it was prayed that the extensive measures undertaken by the respondent be acknowledged and the present MA be disposed of.

V. ISSUES FOR CONSIDERATION

80. Having heard the learned counsel appearing for the parties and having gone through the materials placed on record, the following seminal questions fall for our consideration:-

> (i) Whether, on a combined reading of Articles 21 and 23 of the Constitution respectively, the victims of trafficking for CSE could be said to be entitled to the right to rehabilitation?
>
> (ii) Whether it could be said that there is a gap or lacuna in the present legislative and institutional framework insofar as the rescue, protection, rehabilitation and repatriation of the victims of trafficking for CSE is concerned?
>
> (iii) Whether it is necessary for this Court to direct the creation of the OCIA for the investigation of offences pertaining to human trafficking?

VI. ANALYSIS A. Understanding Human Trafficking

81. Before turning to the legal framework governing trafficking, it is useful to first understand what human trafficking means in ordinary terms, and to examine the broader web of conditions and concepts that are inseparably connected to it. This section accordingly examines: (i) the lack of reliable data on the extent of trafficking; (ii) the structural vulnerabilities that make certain populations acutely susceptible to being trafficked, and (iii) why human trafficking must be approached as a complex social phenomenon rather than a problem reducible to any single cause or cure. Such grounding will illuminate the legal discussion of various intricate issues that fall before us

in this present matter.

82. Trafficking, in its colloquial sense, refers to trading in something that should not be traded in for various social, economic or political reasons. Hence, we have terms like drug trafficking, arms trafficking and human trafficking. The concept of human trafficking refers to the criminal practice of exploiting human beings by treating them like commodities for profit.3 Thus, at the core of human trafficking are notions of exploitation, commercialisation and commodification. Some scholars have gone further, arguing that this trade in human beings reflects the incremental commodification of the body itself, i.e., a cultural decomposition of the human person, stripped progressively of spirit, personhood, and vitality, until only the body remains, offered for profit.4

83. It is undeniable that human trafficking is a problem of epic proportions that needs urgent attention. However, accurate data that clearly delineates the extent of the problem is hard to come by at both the national and international levels.5 Challenges to developing transparent and reliable estimates are numerous. The most fundamental reason is 3 Sankar Sen & P.M. Nair, A Report on Trafficking in Women and Children in India 2002-2003, 2 (Inst. of Soc. Scis., Nat'l Hum. Rts. Comm'n & UNIFEM 2004).

4 Id at 11.

5 Prabha Kotiswaran, From Sex Panic to Extreme Exploitation: Revisiting the Law and Governance of Human Trafficking, in Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery 1, 3 -4 (Prabha Kotiswaran ed., Cambridge Univ. Press 2017).

the nature of the crime itself: trafficking is largely hidden, and only a small fraction of cases ever come to the attention of officials. Criminal justice statistics, therefore, do not tell the whole story.6 Exacerbating this issue of statistical inaccuracy are factors such as: (i) lack of international standardisation of definitions along the lines of the Palermo Protocol and (ii) nuances found in the interpretation of the definition of trafficking.7 These factors have invariably led to challenges in developing systems capable of accurately identifying and tracking the menace of human trafficking.

84. Such apprehensions surrounding the lack of accurate data on trafficking are particularly acute when dealing with the issue in India. This is especially so given the very fragmented nature of the law dealing with human trafficking in India (an aspect which we will explore in detail elsewhere), the vast geography of the country and its cultural and social diversity. All these factors only make it harder to identify and track instances of human trafficking. The lack of reliable data is an important limitation to keep in mind, as it serves as a caution against placing too much reliance on any given statistic when evaluating issues relating to human trafficking.

85. While much of the discussion in the later parts of this judgment would revolve around looking at trafficking from a legal standpoint, it is important not to lose sight of the fact that the root cause of trafficking lies in multifarious social, political and structural vulnerabilities that 6 Cindy J. Smith & Kristiina Kangaspunta, Defining Human Trafficking and Its Nuances in a Cultural Context, in Human Trafficking: Exploring the International Nature, Concerns, and Complexities 19, 2 & 24

(John Winterdyk, Benjamin Perrin & Philip L. Reichel eds., CRC Press 2012). 7 Id.

plague broad sections of this country's population. These vulnerabilities, among other things, include poverty, oppression, lack of human rights, lack of social or economic opportunities, dangers from conflict or instability and other similar conditions. These vulnerabilities, often referred to as "push factors", play a decisive role in people falling into the trap of perpetrators of trafficking. On the other hand, there are also factors that "pull" potential victims towards situations that ultimately lead to their exploitation, such as the lure of better employment, higher earnings, or simply a more secure life. In other words, trafficking is a phenomenon that emerges when aspirations collide with exploitation.

86. A critical connecting factor between structural vulnerability and trafficking is migration. It is well established that there is a close linkage between migration and trafficking. Thus, while not all migration is trafficking, trafficking rarely occurs in the absence of migration. For a large majority of this country's population, migration is a survival and livelihood strategy; the structural vulnerabilities that drive such movement also create conditions conducive to coercion and deception. Viewed from this vantage point, trafficking cannot be separated from broader migration flows. Rather, it emerges from within them, reflecting how systemic inequalities transform a survival strategy into a pathway of exploitation.8

87. Now, one might wonder why there is a need, especially for this Court, to understand the interlinkages among human trafficking, migration, 8 For a brilliant exposition on this aspect, See generally K.C. Mujeebu Rahman, Precarity, Mobility, and the Law: Reframing Human Trafficking in India, J. Hum. Trafficking (advance online publication 2025), https://doi.org/10.1080/23322705.2025.2602121.

and other factors of vulnerability. The reasons which necessitate such an understanding are two-fold: (i) it helps us not lose sight of the fact that the cause of trafficking lies not just in a single moment of coercion but also within a host of complex social, economic, political and structural factors.9 Consequently, any efforts to prevent, combat and curtail human trafficking would necessarily have to address such factors as well; and (ii) it provides a more nuanced understanding of human trafficking by positioning it as a complex social phenomenon.10

88. Human trafficking, as a concept, has been examined, dissected, and debated by practitioners and scholars across diverse fields. This is only natural, given the complexity of the phenomenon and the diversity of actors involved. Each one agrees to the fact that human trafficking is one of the worst forms of human exploitation. However, the convergence ends there. Much of the debates and discussions surrounding human trafficking have been compartmentalised, giving rise to multiple distinct approaches to understand and combat trafficking, each emphasising a different aspect of the problem and prescribing a different set of solutions.11

89. The criminal justice approach treats trafficking primarily as organised transnational crime. Its tools are prosecution, tougher sentencing, and stricter border controls. The human rights approach, by contrast, places the trafficked person at the centre, insisting that the primary task is victim

protection, access to legal remedies, and the restoration of 9 Id.

10 Julie Kaye & John Winterdyk, Explaining Human Trafficking, in Human Trafficking: Exploring the International Nature, Concerns, and Complexities 57, 72-74 (John Winterdyk, Benjamin Perrin & Philip L. Reichel eds., CRC Press 2012).

11 Id at 58 -72; Also see - Veerendra Mishra, Combating Human Trafficking: Gaps in Policy and Law 32, 37-44(SAGE Publications 2015) (Chapter 2: Diverse Perspectives to Combat Human Trafficking).

dignity. Feminist approaches have occupied contested ground. On one hand, we have proponents who view prostitution as inherently exploitative and tend to treat all sex trafficking as inseparable from prostitution itself. On the other hand, there are those who insist on distinguishing between coerced and voluntary sex work and argue that conflating the two causes more harm than good. The labour and migration approach understands trafficking as a product of unequal global labour markets and thus its prescriptions lean toward structural reform, workers' rights, and better regulation of migration pathways. Each of these frameworks captures something real. Each also carries its own limitations.12

90. Such a bifurcated approach to human trafficking has not only given rise to varying and contradictory strategies but has also acted as a stumbling block in developing holistic approaches to effectively combat trafficking. It is our firm view that human trafficking cannot be understood, and still less effectively addressed, through any single lens. To illustrate, a purely criminal justice response, however necessary it may be, leaves untouched the structural vulnerabilities that continuously supply the crime with victims. A purely structural response, however well-intentioned, offers little immediate relief to those already trapped in exploitation and in need of rescue and legal redress. No single framework is sufficient to address the complexity of the phenomenon, and effective anti-trafficking work requires, at its core, a multidisciplinary approach. This is the frame within which this Court wishes to approach and address the issues before it.

12 Id; See generally Maggy Lee, Introduction: Understanding Human Trafficking, in Human Trafficking 1 (Maggy Lee ed., Willan Publishing 2007).

91. The discussion in the foregoing paragraphs has established a number of foundational points and thereby helped chart for this Court the limitations and challenges it will face and must address when discussing and deciding the issues before it in this matter. With this understanding in place, we now turn to examine the legal landscape that governs human trafficking. In the section that follows, this Court will examine, in some detail, both the international and national legal frameworks operative in India, dealing with human trafficking for CSE.

B. The legal landscape surrounding human trafficking for the purposes of CSE

92. Before dealing with the myriad of issues before us in this matter, it becomes essential to clearly understand the legal landscape surrounding human trafficking for CSE, both at the international

and the national level. Only when we are clear as to what the law says, i.e., what it prohibits, what it allows, what it considers to be trafficking, will we be able to answer the issues before us with clarity and conviction. Thus, in this section, we will first briefly discuss the international legal landscape of human trafficking, focusing specifically on the various aspects of the Palermo Protocol. Thereafter, we will lay out and discuss the plethora of legal instruments which are simultaneously at play in India when dealing with the phenomenon of human trafficking for CSE.

i. International Legal Framework on Human Trafficking – The Palermo Protocol

93. At the international level, the United Nations Convention against Transnational Organised Crime is the primary legal instrument for combating transnational organised crime. The Convention is supplemented by three Protocols, each of which focuses on specific types of organized crime and are as follows: the Palermo Protocol i.e., the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. For the subject matter of this petition, we are solely concerned with the Palermo Protocol. There is no doubt that to understand the full scope of the protocol, it needs to be read in conjunction with a host of other interrelated international instruments. However, in this section, we have restricted ourselves to discussing only the Palermo Protocol, as it is the international instrument most helpful for contextualising and furthering our understanding of trafficking and the laws related to it in the Indian context.

94. The Palermo Protocol comprises 20 articles and is divided into four parts: I. General provisions (articles 1 to 5); II. Protection of victims of trafficking in persons (articles 6 to 8); III. Prevention, cooperation and other measures (articles 9 to 13); and, IV. Final provisions (articles 14 to

20).

95. It will be instructive to examine the preamble to the Palermo Protocol first. The adoption of the protocol was primarily rooted in the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there was no universal instrument that addresses all aspects of trafficking in persons.13 As per the preamble, the primary goal of the 13 Preamble, Protocol to Prevent, Suppress, and Punish Trafficking in Persons especially Women and Children (adopted 15th November 2000, entered into force 25th December 2003) 2237 U.N.T.S. 319.

protocol is to lay down measures: (i) to prevent trafficking, (ii) to punish traffickers, and (iii) to protect the victims of such trafficking, including by protecting their internationally recognised human rights. These three goals of prevention, punishment, and protection have commonly been referred to as the 3P's of the Palermo Protocol.14 a. Definition of the term "Trafficking in Persons"

96. Before we delve into how the protocol addresses each of the 3P's, it is important to briefly discuss the definition and its various elements in some depth. Since the definition of trafficking incorporated into Indian law largely follows that of the Palermo Protocol, any discussion on the

Protocol's definition will also be helpful, at least on a very broad level, for understanding the definition in the Indian context.

97. Until December 2000, the term "trafficking in persons" lacked an international definition despite its inclusion in several legal instruments. This long-standing failure stemmed from significant differences of opinion regarding the ultimate outcome of trafficking, its defining acts, and their relative importance.15 This changed after the adoption of the Palermo Protocol, which, under Article 3, defined the term. To quickly recapitulate our discussion on the definition: (i) the three elements (actions, means, and purpose) cumulatively constitute the crime of trafficking; (ii) consent of a victim of trafficking in persons 14 Yoon Jin Shin, A Transnational Human Rights Approach to Human Trafficking: Empowering the Powerless 222, 230-232 (Brill Nijhoff 2017) (Chapter 6: International Human Rights Law in the Context of Human Trafficking).

15 U.N. Office on Drugs and Crime, The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised 1-2 (2019), https://www.unodc.org/documents/human-

trafficking/2018/Issue_Paper_International_Definition_TIP.pdf shall be irrelevant where any of the means have been used; and (iii) the 'means' element is not a prerequisite when the crime involves children.

• 'Action' Element

98. The first component of the definition, the 'action' element, is one part (and in the case of trafficking in children, the only part) of the definition that will constitute the actus reus of trafficking. This element can be fulfilled by a variety of activities, including, but not limited to, the undefined practices of recruitment, transportation, transfer, harbouring, or receipt of persons.16 The language employed in the 'action' element is such that it sufficiently covers any acquisition of a person.17 Further, the actions mentioned are disjunctive or alternatives to one another; the presence of any one suffices. Further, it is not an essential requirement of trafficking in persons that the victim be physically moved. 18

99. The 'action' element of trafficking carries implications of what is to come, i.e., the underhandedness and trickery employed by the trafficker which comprises the second element of the process: the 'means', which in turn qualifies the action and makes it part of human trafficking.

16 U.N. Office on Drugs and Crime, Abuse of a Position of Vulnerability and Other "Means" Within the Definition of Trafficking in Persons 16 (2013), https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf. 17 Jessica Elliott, The Role of Consent in Human Trafficking 47, 53-58 (Routledge 2014) (Chapter 3:

Defining Trafficking: The Evolution of an International Legal Definition).

18 U.N. Office on Drugs and Crime, Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime 29 (2020), https://www.unodc.org/documents/treaties/Review_Mechanism/Review_Mechanism_2020/Website/Legislative_Guide_on_TiP/TiP_LegislativGuide_Final.pdf • 'Means' Element

100. The second part of the actus reus of trafficking, the 'means' element, is relevant only to trafficking in adults. This aspect of the definition confirms the position already reflected in earlier treaties on the subject:

> individuals can end up in a situation of exploitation through indirect methods such as deception and fraud, as well as through physical force. The 'means' follows on from the 'action', and refers to the manner in which the action is executed. It is important to note that none of the stipulated 'means' are defined, and there appears to be significant overlap between them.

101. As per an Issue paper published by the UNODC the various 'means' listed out in the definition (threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability) are of such a nature that they sufficiently cover not only "direct means" (such as threats, force, coercion, abduction) but also "less direct means"(such as fraud, deception and abuse of power or position of vulnerability).19 • 'Exploitation' Element

102. The final element of the definition, 'for the purpose of exploitation', introduces a mens rea requirement into the definition. Trafficking will occur if the implicated individual or entity intended that the action (which, in the case of trafficking in adults, must have occurred or been 19 Supra note 16 at 17.

made possible through one of the stipulated means) would lead to exploitation.20

103. Instead of explicitly defining the term 'exploitation', the Trafficking Protocol specifies a minimum list, saying, "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." By introducing the phrase "at a minimum" into an international treaty, it is implied that a national legislation can incorporate a more extensive list of forms of exploitation, allowing for definitions of human trafficking to differ from country to country.21 Exploitation as a concept is generally associated with particularly harsh and abusive conditions of work, or "conditions of work inconsistent with human dignity"22

104. The requirement to show "means" affirms that exploitative conditions alone are insufficient to establish trafficking of adults. Thus, not all exploitation is trafficking. The forms of exploitation stipulated in the Protocol's definition of trafficking are not 'trafficking' under the instrument unless the other required element(s) (act/means) are also established. The only exception to this relates to trafficking in children, the definition of which does not contain a means element. To illustrate, agreement to work in a situation that may be considered exploitative will not constitute trafficking if

that agreement was secured and 20 U.N. Office on Drugs and Crime, The Concept of 'Exploitation' in the Trafficking in Persons Protocol 24 (2015), https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf 21 Michael Dottridge, Trafficked and Exploited: The Urgent Need for Coherence in International Law, in Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery 59, 60 (Prabha Kotiswaran ed., Cambridge Univ. Press 2017).

22 Supra note 20 at 26.

continues to operate without deployment of any of the means stated in the definition. While exploitation alone may involve criminal offences and human rights violations, "means" must be used to constitute trafficking of adults within the confines of the Palermo Protocol.

105. Since the focus of the present petition is on human trafficking for the purposes of sexual exploitation, it would also be helpful to try to gauge the meaning of the terms "exploitation of the prostitution of others or other forms of sexual exploitation" i.e., forms specific to the sexual exploitation. Both the terms, while clearly broader than the term 'prostitution', have been left undefined under International Law, including in the Palermo Protocol. This was presumably because there was significant disagreement among states over the meaning of the terms, and the decision to leave them undefined was the only viable path to progress. The main reasons behind the disagreement were the differing policies and laws to be found within many countries regarding adult sex work.23 Thus, leaving such terms undefined allowed each state to give the terms the meaning that would allow them to be enforced in consonance with pre-existing laws on prostitution and/or sex work.24

106. 'Exploitation of the prostitution of others' is generally understood as referring to profiting from the prostitution of another person. In that sense, it operates to establish the locus of (usually criminal) conduct in a person other than the prostitute. The term first appeared in international law in the 1949 Convention, however, it also does not provide a definition. The little international guidance available on the possible scope of 'sexual exploitation' includes a proposal in the 23 Supra note 20 at 27-29.

24 Id.

UNODC Model Law that the term be defined in national law to mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials.25

• Irrelevance of Consent

107. The baseline established by the Palermo Protocol is that the consent of an adult victim to the intended exploitation is irrelevant if any of the listed 'means' are used. The consent of a child victim of trafficking is irrelevant, regardless of whether or not 'means' have been used. The protocol does not say that the use of means must operate to invalidate or damage consent.26 Lack of consent is

not an element of the crime of trafficking in persons. Thus, the focus should be firmly on the actions and intentions of the perpetrators, and once the elements of the crime of trafficking, including the use of one of the identified means (coercion, deception, etc.), are proven, any defence or allegation that the victim 'consented' should be deemed to be irrelevant.27 It also means, for example, that a person's awareness of being employed in the sex industry or in prostitution does not exclude such a person from becoming a victim of trafficking. While being aware of the nature of the work, the person may have been misled as to the conditions of work, which turned out to be exploitative.28 25 Id.

26U.N. Office on Drugs and Crime, The Role of 'Consent' in the Trafficking in Persons Protocol (2014) 25, https://www.unodc.org/documents/human-

trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf. 27 Id at 27-28.

28 Id.

b. Definitional uncertainties

108. Based on the discussion in the preceding section, the foundational elements of what constitutes trafficking are intelligible and lucid. However, the exact scope that some of the elements of the definition entail is hazy and not well-established. This lack of coherence is only to be expected, given that the definition has either left many terms undefined or provided no clarity about the exact scope they would cover.

109. A discussion on each of the undefined elements of the 'acts', 'means' and 'purposes' components is beyond the scope of this judgment.29 Further, the debates surrounding the definitional ambiguities in the Palermo Protocol are wide, convoluted, and ongoing. We do not wish to explore either the undefined terms or the debates surrounding the definitional ambiguity in depth here. Rather, our aim here is modest: to draw the reader's attention to certain problems that are inherent in the definition which, rather than being merely academic, also tend to have practical and real consequences.

110. The lack of coherence with respect to the definition is most stark when dealing with the 'means' and 'purpose' elements. Both the 'means' and 'purpose' elements do not describe single fixed conditions but rather span a broad continuum of possibilities. Consider the 'means' element first. At one end of the spectrum sit what might be called strong means:

> the use of physical force, abduction, or outright fraud. Understanding what these terms entail and the kinds of activities they encompass is fairly easy to gauge and non-controversial. On the other end of the 29 For an instructive guide on this See generally– Supra note 18.

spectrum, we have what we might call weak means: deception, abuse of power or vulnerability. These are, of course, ambiguous terms that could possibly encompass a very wide variety of acts.

111. The same continuum applies to the 'purposes' element as well. At one end of the spectrum lie certain exploitative practices which are considered to be egregious and completely unacceptable, such as those relating to slavery or forced labour and would thus fulfil the 'purposes' element. Whilst at the other end of the spectrum are those practices, which, despite being morally reprehensible, would not be considered to fulfil the 'purpose' element. All forms and manifestations of exploitation that do not belong at either end lie somewhere along this continuum. Whether or not such forms of exploitation can be considered to be fulfilling the 'purposes' element is the pertinent question that arises in a plethora of cases. The UNODC's legislative guide also acknowledges this aspect:

> "Certain forms of exploitation raise particular practical and evidentiary challenges. Some forms of exploitation are often hidden within legitimate industries and therefore difficult to identify. Furthermore, it may be difficult in practice to delineate exploitative conduct, in the criminal sense, from conduct that may be more akin to bad working conditions and thus best addressed through other non-criminal measures."30 (Emphasis Supplied)

112. This ambiguity, rooted in the continuum, is exacerbated by the fact that the definition provides no guidance on the required threshold of severity. The definition does not tell us how serious the 'means' must be or how extreme the exploitation must be for the situation to qualify 30 Supra note 18 at 33.

as trafficking. Consequently, despite understanding trafficking as an offence that falls along a continuum, there is a lack of normative clarity as to where along the continuum trafficking actually begins.

113. Scholars have contended that this persistent doubt regarding the exact scope of the offence of trafficking has led to anti-trafficking offences proving ineffective in comparison to other serious offences, such as homicide or rape, for which conviction rates are higher.31 While it can be argued that the main culprit for the low conviction rates is the lack of effective enforcement, it cannot be ignored that the lack of normative clarity regarding the legal norms surrounding trafficking only compounds the problem, i.e., lack of clarity around legal norms leads to hesitancy in pursuing legal measures against trafficking offences. Further, such confusion or lack of coherence is almost certainly in the interests of individuals who exploit others, rather than in the interests of those who are exploited and are supposed to be protected by law.32

114. There is no doubt that defining human trafficking clearly is crucial. It is intended to identify a crime that can be detected and prosecuted. In other words, the point along the continuum where trafficking begins is significant because it marks the actions that will be dealt with under the criminal law regime. As one leading scholar on Human trafficking notes:

> "The stakes for definitional clarity (and indeed definitional ambiguity) are high because to characterize certain conduct as trafficking has substantial and wide-ranging consequences for States, for the perpetrators of that conduct and for the victims. Of relevance to States, for example, is the fact that the identification of 31

Supra note 5 at 6.

32 Supra note 21 at 77.

a particular practice as trafficking brings that practice within the various monitoring and compliance mechanisms that have evolved at the international, regional and national levels. Criminals involved in a practice that is determined to be trafficking are likely to be subject to a different and typically harsher legal regime than would be applicable if they were charged with an alternative offence. Persons who are identified as victims of trafficking are entitled to special measures of assistance, support and protection, measures that may be withheld from those who, for one reason or another, are not assessed as having been trafficked".33

115. However, achieving definitional clarity and delineating the scope and contours of the offence of trafficking are easier said than done. This is because the decision not to provide definitions or set forth the scope of the terms was not an oversight but rather a conscious decision taken by the framers of the protocol. The struggle for an international legal definition of trafficking pre-dates the Palermo Protocol by many decades. The key disagreements between States that prevented the emergence of a consensus were not resolved during the negotiations of this instrument.34 The definition of trafficking agreed in 2000 reflects the many compromises that ultimately permitted its formulation and adoption. Thus, the ambiguity was not accidental, but rather, part of a broader effort to create a definition of trafficking that all States could agree to.35 Further, the malleability of the definition, as frustrating as it can be, allows states to tailor the offence to their needs and political, ethical, and normative desires. This becomes all the more important when we consider the fact that cultural and other social factors inherent to a particular place play a significant role in shaping perceptions of 33 Anne T. Gallagher, The International Legal Definition of "Trafficking in Persons": Scope and Application, in Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery 83, 86(Prabha Kotiswaran ed., Cambridge Univ. Press 2017).

34 Supra note 15.

35 Id.

what constitutes exploitative conduct for the purposes of establishing trafficking.

116. Further, the flexibility inherent in the definition need not always be viewed as a detriment or an impediment to the development of anti- trafficking endeavours. In fact, given the nature of the trafficking offence, it may very well be a necessity. The sociological indeterminacy of the coercion-exploitation continuum does not easily lend itself to neat standards. Similarly, patterns of exploitation change over time, often leaving behind legal definitions rooted in a particular socio-economic context. Further, the complexity of the trafficking cases makes it difficult to apply standard definitions to specific instances. In the context of slavery, Bales said that people are inventive and flexible, and the permutations of human violence and exploitation are infinite.36 This is equally applicable to the concept of trafficking. Under such circumstances, ambiguities around the definition cannot, and indeed should not, be definitively resolved.

117. Viewed in this context, the Protocol's definition of trafficking embodies both compromise and a desire for flexibility. However, whilst ensuring flexibility, the final text of the definition also provides a sufficiently clear indication that it is not intended to be overly broad or open-ended.37 Drawing a clear line that would establish which cases would or would not be considered as 'trafficking' is neither possible nor desirable. However, care needs to be taken to ensure that the definition is not interpreted in an extreme manner, i.e., a very rigid and inflexible 36 Supra note 3 at 23.

37 Supra note 33 at 87.

interpretation that makes it underinclusive or an overly broad and open-ended interpretation that makes it overinclusive. To the extent possible, a balancing exercise needs to be undertaken, as only that would be in line with the intention that the framers of the protocol had in mind. Further, when deciding whether or not an act should be classified as trafficking, consideration should be given to the totality of the circumstances and the fact that trafficking is a criminal offence intended to cover instances in which individuals are moved into and/or maintained in a situation of serious exploitation through means that were themselves highly abusive.38

118. It would be incomplete to close this discussion of the Palermo Protocol's definition by cataloguing only its ambiguities and limitations. The definition has achieved something that had eluded the international community for decades: a workable, widely adopted framework for understanding and criminalising trafficking. Trafficking has now been criminalised in the vast majority of countries worldwide, with most domestic definitions reproducing or closely reflecting the three elements forming part of the Protocol's definition. However, the definition's biggest achievements lie in the fact that: (i) it pushed trafficking discourse away from its preoccupation with the sexual exploitation of women, ensuring it encompasses all genders and a wide spectrum of exploitative practices and; (ii) it brought into the ambit of trafficking not only those who directly exploit victims but also those who recruit, transport, and facilitate people for the purposes of such exploitation, i.e., the full chain of the trafficking operation.

38 Id.

c. Prosecution, Protection and Prevention

119. In order to ensure that the definition provided in Article 3 was given effect in domestic criminal laws, the protocol under Article 5 obligates state parties to adopt legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3. Article 5 reads thus:

> "1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
>
> 2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article." (Emphasis Supplied)

120. Criminalization is central to suppressing and punishing trafficking in persons and to give effect to the purposes of the protocol. The protocol also makes it clear that the criminalization obligations are not limited to completed offences or the principal actors in the commission of the trafficking offence. It puts an obligation on states to extend the ambit of criminal law to (i) situations in which perpetrators attempt to traffic; (ii) persons who knowingly participate as aiders or facilitators, and (iii) to organisers and directors who oversee trafficking ventures and instruct others to commit offences without necessarily becoming directly involved in trafficking themselves.

121. Trafficking in persons is a serious crime and involves victims whose rights need to be protected and who are in need of assistance and support. Many victims are severely traumatised by their experiences and may have special vulnerabilities and protection needs. For these reasons, one of the stated purposes of the Palermo Protocol under article 2 subparagraph (b) is the protection and assistance of victims of trafficking, with full respect for their human rights. Article 6 of the Palermo Protocol deals with the assistance to and protection of victims of trafficking in persons and reads thus:

"1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;"

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

(Emphasis Supplied)

122. The measures provided under Article 6 seek to protect victims from further harm and retaliation, support their recovery, minimise stigmatisation, protect their privacy and physical safety, assist in their rehabilitation and reintegration, facilitate their participation in legal proceedings, and enable them to remain informed about proceedings and obtain compensation for the damages suffered. Further, Article 6 provides that, when providing assistance under the article, the age, gender, and special needs of the victim should be taken into account, thus bringing individualised care within the ambit of the protocol.

123. The protection measures in the Protocol are not exhaustive and should be read in light of other relevant binding and non-binding human rights instruments and guidelines. Victims of trafficking have rights available to all human beings, independent of their status as victims of trafficking, and are entitled to general protection measures available to all victims of crime.39

124. Article 7 of the Protocol calls on States Parties to consider adopting legislative or other appropriate measures that permit foreign trafficked persons to remain in the territory of the receiving State, temporarily or permanently, in appropriate cases. Article 7 reflects the view of the drafters of the Protocol that victims of trafficking who are not nationals or permanent residents of the receiving State and who have no other legal right to stay in that country deserve special consideration within the immigration system.

125. Article 8 of the Palermo Protocol concerns measures regarding the repatriation of victims of trafficking. In some cases, return of victims to their home State can have serious consequences. It may be used by traffickers as a threat, for reprisals, and may involve risks of stigmatisation and re-trafficking. Recognising this, the Palermo Protocol requires that the return be carried out with due regard for the safety of victims. Article 8 of the Palermo Protocol reads thus:

> "1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.
>
> 2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal 39 Supra note 18 at 55.

proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons." (Emphasis Supplied)

126. Effectively addressing trafficking in persons must involve not only measures criminalising and combating trafficking in persons but also measures aimed at preventing it from occurring in the first place. Article 9 of the Trafficking in Persons Protocol sets out several prevention measures that States Parties shall take or shall endeavour to take. These measures include general prevention measures, research and information campaigns, cooperation with non-governmental organisations and other parts of civil society, measures addressing the factors that make persons vulnerable to trafficking and discouraging the demand that fosters exploitation of persons. Article 9 of the Palermo Protocol reads thus:

> "1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking." (Emphasis Supplied)

127. Article 11 of the Trafficking in Persons Protocol deals with border measures for preventing trafficking in persons through detecting traffickers and victims of trafficking and sets out several measures that state parties must take with respect to the same.

ii. Domestic Legal Framework on Human Trafficking for the purposes of CSE

128. The legal infrastructure addressing human trafficking for the purposes of CSE in India is broad but fragmented, comprising of multiple statutory instruments. In this sub-section, our aim is to discuss the legal instruments and the applicable provisions therein, particularly those that have bearing on trafficking for the purposes of CSE. In our examination, we will also delineate who is considered a victim of trafficking under the Indian regime. This question is of particular relevance under the ITPA, owing to the unique nature of what it seeks to regulate.

129. We will – first, discuss Article 23, the anti-exploitation right provided in Part III of the Indian Constitution. Secondly, we will discuss relevant provisions from (i) ITPA (ii) BNS and (iii) the Juvenile Justice (Care and Protection of Children) Act, 2015 ("JJA") & POCSO, i.e., statutory instruments which are most relevant when dealing with instances of trafficking for CSE. Lastly, to provide a holistic picture, we will also briefly discuss the policies already in place to address the needs of trafficking victims. While there are a host of other legislative instruments relevant to trafficking for non-CSE purposes, they don't warrant discussion given the scope of issues before us in this matter.

a. Article 23 of the Constitution – Prohibition of traffic in human beings and forced labour

130. Article 23 is placed under the caption "Rights against exploitation" in Part III of the Indian Constitution and reads thus:

> (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

(Emphasis Supplied)

131. Article 23 (1) embodies two declarations: (i) the prohibition of traffic in human beings, begar and other similar forms of forced labour; and (ii) any contravention of such prohibition being an offence punishable in accordance with law.

132. The constitutional concept enshrined in Article 23 is to provide citizens with a fundamental right of guarantee against exploitation. To understand the scope of Article 23 and the intention behind its inclusion in Part III of the Constitution, it would be instructive to look at the observations made by this Court in People's Union for Democratic Rights v. Union of India, reported in (1982) 3 SCC 235. In this case, this Court was dealing with a writ petition alleging violations of various labour law regulations affecting workers engaged in construction activities for the Asian Games to be held in India. On the scope of Article 23 and the intention behind its inclusion in Part III, the Court observed as follows:

> "12 […] Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24. […] It is Article 23 with which we are concerned and that article is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human being and begar and other similar forms of forced labour" practised by anyone else. The sweep of Article 23 is wide and unlimited and it strikes at "traffic in human beings and begar and other similar forms of forced labour" wherever they are found. The reason for enacting this provision in the Chapter on Fundamental Rights is to be found in the socio-economic condition of the people at the time when the Constitution came to be enacted.

The Constitution-makers, when they set out to frame the Constitution, found that they had the enormous task before them of changing the socio-economic structure of the country and bringing about socio-economic regeneration with a view to reaching social and economic justice to the common man. Large masses of people, bled white by wellnigh two centuries of foreign rule, were

living in abject poverty and destitution, with ignorance and illiteracy accentuating their helplessness and despair. The society had degenerated into a status-oriented hierarchical society with little respect for the dignity of the individual who was in the lower rungs of the social ladder or in an economically impoverished condition. The political revolution was completed and it had succeeded in bringing freedom to the country but freedom was not an end in itself, it was only a means to an end, the end being the raising of the people to higher levels of achievement and bringing about their total advancement and welfare. Political freedom had no meaning unless it was accompanied by social and economic freedom and it was therefore necessary to carry forward the social and economic revolution with a view to creating socio-economic conditions in which every one would be able to enjoy basic human rights and participate in the fruits of freedom and liberty in an egalitarian social and economic framework. It was with this end in view that the Constitution-makers enacted the directive principles of state policy in Part IV of the Constitution setting out the constitutional goal of a new socio-economic order. Now there was one feature of our national life which was ugly and shameful and which cried for urgent attention and that was the existence of bonded or forced labour in large parts of the country. This evil was the relic of a feudal exploitative society and it was totally incompatible with the new egalitarian socio-economic order which "we the people of India" were determined to build and constituted a gross and most revolting denial of basic human dignity. It was therefore necessary to eradicate this pernicious practice and wipe it out altogether from the national scene and this had to be done immediately because with the advent of freedom, such practice could not be allowed to continue to blight the national life any longer. Obviously, it would not have been enough merely to include abolition of forced labour in the directive principles of state policy, because then the outlawing of this practice would not have been legally enforceable and it would have continued to plague our national life in violation of the basic constitutional norms and values until some appropriate legislation could be brought by the legislature forbidding such practice. The Constitution-makers therefore decided to give teeth to their resolve to obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the Chapter on Fundamental Rights, so that the abolition of such practice may become enforceable and effective as soon as the Constitution came into force. This is the reason why the provision enacted in Article 23 was included in the Chapter on Fundamental Rights. The prohibition against "traffic in human beings and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice.

(Emphasis Supplied)

133. It is evident from the above that the reasons behind the inclusion of Article 23 in Part III of the Constitution were not incidental. At the time of independence, the social and economic conditions of the majority of the country's population were very abject. There was little respect for the dignity of those who formed the lower echelons of the social or economic ladder. The constitution makers realised that political freedom would not be fruitful without social and economic conditions that would enable people to enjoy basic human rights and participate effectively in society. Directive principles were thus effectuated, setting out the social and economic goals.

134. However, the exploitative structures and practices in place were so severe and abject that the constitution-makers thought it unwise to include a prohibition against such structures and practices in Part IV.

Inclusion in Part IV would have subjected their abolition to further legislative action. The constitution makers, therefore, decided to give teeth to their resolve by enacting a constitutional prohibition against such practices and structures in Part III, thereby making it enforceable and effective as soon as the Constitution came into force. The significance of this choice cannot be overstated. By placing this prohibition in Part III, the constitution makers ensured that it would attain the status of a fundamental right and, consequently, be afforded the highest possible protection and enforcement.

135. Further, two other crucial points regarding the scope and ambit of Article 23 become evident: (i) first, the sweep of Article 23 is wide and unlimited, and it strikes against traffic in human beings in whatever form it is found, i.e., the term used in the Article is 'traffic in human beings', which is evidently a very wide expression40; and (ii) second, Article 23 is not limited in its applications against the State, but it prohibits "trafficking in human beings and begar and other forms of forced labour" practised by anyone. It is clearly intended to be a general prohibition, total in its effect and all pervasive in its range, and it is enforceable not only against the state but also against any other person indulging in any such practice.

136. There is another aspect of this Court's decision in People's Union for Democratic Rights (supra) that is worth mentioning. On the complaint of non-payment of minimum wages to the workers, the State contended that any such violation was statutory in nature and not a fundamental rights violation. Consequently, it argued that the writ petition was not 40 ¶ 7, Vishal Jeet v. Union of India, (1990) 3 SCC 318.

maintainable. After delineating the scope of Article 23 and the intent behind its inclusion in Part III (as discussed above), the Court established a violation of Article 23 on account of non-payment of minimum wages in the following manner:

> "13. [...] We do not think it would be right to place on the language of Article 23 an interpretation which would emasculate its beneficent provisions and defeat the very purpose of enacting them. We are clearly of the view that Article 23 is intended to abolish every form of forced labour. The words "other similar forms of forced labour" are used in Article 23 not with a view to importing the particular characteristic of "begar" that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that article all other forms of forced labour and since "begar" is one form of forced labour, the Constitution-makers used the words "other similar forms of forced labour". If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they would straightaway come within the meaning of the word "begar" and in that event there would be no need to have the additional words "other similar forms of forced labour". These words would be

> rendered futile and meaningless and it is a well-recognised rule of interpretation that the court should avoid a construction which has the effect of rendering any words used by the legislature superfluous or redundant. The object of adding these words was clearly to expand the reach and content of Article 23 by including, in addition to "begar", other forms of forced labour within the prohibition of that article. Every form of forced labour, "begar" or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this article if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. [...] The reason is that it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be in breach of the contract entered into by him. [...]
>
> 14. Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is "forced labour" that is labour or service which a person is forced to provide and "force" which would make such labour or service "forced labour" may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as "force" and if labour or service is compelled as a result of such "force", it would be "forced labour". Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him.

And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly "forced labour". There is no reason why the word "forced" should be read in a narrow and

restricted manner so as to be confined only to physical or legal “force” particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and everyone shall have the right to work, to education and to adequate means of livelihood. The Constitution-makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is not unoften that in a capitalist society economic circumstances exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word “force” must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is “forced labour” because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words “forced labour” under Article 23. Such a person would be entitled to come to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be “forced labour” and the breach of Article 23 is remedied. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23.” (Emphasis Supplied)

137. If we unpack the above observations, it is clear that this Court has warned against interpreting Article 23 in a manner which would deprive it of its beneficial character and thereby defeat the constitutional aim behind its inclusion in Part III. Thus, the words of the Article should not be pedantically read and should be given a liberal interpretation, so as to cast the net of its benefits as widely as possible.

138. The approach taken by the Court in People's Union for Democratic Rights (supra) is itself a perfect illustration of this. The Court first recognised that the term ‘forced labour’ should not be restricted to cases where no remuneration was paid, and should be read widely to cover all cases where labour was provided against a person’s will. Further, the Court held that the word ‘forced’ should be construed expansively to potentially include those scenarios in which a person provides labour due to the force and presence of structural factors such as poverty. Applying this reasoning to the facts, this Court held that in cases where minimum wage is not paid, it would be presumed that the labour is provided against the person’s will.

139. Such a liberal approach has been adopted by this Court not only when interpreting Article 23, but also in interpreting other legislative enactments aimed at abolishing exploitative structures and practices prohibited under Article 23. An illustration of this can be seen in the approach taken by this court in Bandhua Mukti Morcha v. Union of India, reported in (1984) 3 SCC 161, wherein the court was dealing with issues relating to exploitative working conditions faced by stone quarry workers. The Court was faced with the contention that, since the workers did not strictly fall within the definition of 'bonded labour' provided under the Bonded Labour System (Abolition) Act, 1976, no obligations under it would arise when dealing with them. The Court, rejecting such an interpretation, made the following observation:

> "24. [...] The thrust of the Act is against the continuance of any form of forced labour. It is of course true that, strictly speaking, a bonded labourer means a labourer who incurs or has or is presumed to have incurred a bonded debt and a bonded debt means an advance obtained or presumed to have been obtained by a bonded labourer under or in pursuance of the bonded labour system and it would therefore appear that before a labourer can be regarded as a bonded labourer, he must not only be forced to provide labour to the employer but he must have also received an advance or other economic consideration from the employer unless he is made to provide forced labour in pursuance of any custom or social obligation or by reason of his birth in any particular caste or community. It was on the basis of this definitional requirement that the learned Additional Solicitor-General on behalf of the State of Haryana put forward the argument that even if the workmen employed in the stone quarries and stone crushers were being, compelled to provide forced labour, they were not bonded labourers, since it was not shown by them or by the petitioner that they were doing so in consideration of an advance or other economic consideration received from the mine lessees and owners of stone crushers. Now if this contention of the learned Additional Solicitor- General were well founded, it would become almost impossible to enforce the provisions of the Bonded Labour System (Abolition) Act, 1976 because in every case where bonded labourers are sought to be identified for the purpose of release and rehabilitation under the provisions of the Act, the State Authorities as also the employer would be entitled to insist that the bonded labourers must first prove that they are providing forced labour in consideration of an advance or other economic consideration received by them and then only they would be eligible for the benefits provided under the Act and this would make it extremely difficult, if not impossible, for the labourers to establish that they are bonded labourers because they would have no evidence at all to prove that any advance or economic consideration was provided to them by the employer and since employment of bonded labourers is a penal offence under the Act the employer would immediately, without any hesitation, disown having given any advance or economic consideration to the bonded labourers. [...] Therefore, whenever it is shown that a labourer is made to provide forced labour, the Court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is therefore a bonded labourer. This presumption may be rebutted by the employer and also by the State Government if it

> so chooses but unless and until satisfactory material is produced for rebutting this presumption, the Court must proceed on the basis that the labourer is a bonded labourer entitled to the benefit of provisions of the Act. The State Government cannot be permitted to repudiate its obligation to identify, release and rehabilitate the bonded labourers on the plea that though the concerned labourers may be providing forced labour, the State Government does not owe any obligation to them unless and until they show in an appropriate legal proceeding conducted according to the Rules of adversary system of justice, that they are bonded labourers." (Emphasis Supplied)

140. What flows from the above extract is clear. When dealing with Article 23 or a legislation enacted with the aim of abolishing exploitative structures or practices, this Court would not be tethered to the rigours of strict legal interpretation and would, where necessary and feasible, presume that the exploited persons are entitled to the benefits flowing from such a legislation or policy. Further, when dealing with such legislation, this Court has also shown a willingness to extend its reach to those who are not explicitly covered, where their conditions of exploitation are found to be similar to those who are.41 b. ITPA, 1956 • Necessary prelude to the ITPA – the conflation between sex trafficking and prostitution

141. Very often, sex trafficking or trafficking for the purposes of sexual exploitation is conflated with prostitution itself (we had briefly touched upon this understanding while discussing the feminist approach to trafficking), and this conflation is subtly reflected or reinforced in the legal framework of many countries. Such an assertion is true for the 41 ¶ 84, 89 & 92-96, Balram Singh v. Union of India, (2024) 11 SCC 601.

ITPA as well as the 1949 Convention.42 Notably, the ITPA is based upon the 1949 Convention.

142. The 1949 Convention under its Preamble states that "whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community". This excerpt gives some indication about the international consensus on prostitution which existed during that time – it was adjudged as inherently exploitative, antagonistic to a person's dignity and detrimental to public interest. Coupled with this outlook was also the strong belief that no person could ever fully and freely consent, on their own terms, to undertake prostitution owing to the inherent nature and conditions of work involved. Both of these views augmented each other and gave rise to one ideological outcome: that all persons involved in the prostitution of others are traffickers.

143. The aforesaid is precisely the fundamental approach adopted in the ITPA too. Articles 1 and 2 of the 1949 Convention respectively, which gave much needed impetus to the ITPA, also evidently only deal with persons who are involved (in any manner whatsoever) in the prostitution of others. The aforesaid two articles read thus:

> "1. The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person.

42 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2nd December 1949, entered into force 25th July 1951) 96 U.N.T.S. 271.

2. The Parties to the present Convention further agree to punish any person who:

(1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;

(2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others."

144. The precursor to the 1949 Convention i.e., the 1933 International Convention for the Suppression of the Traffic in Women of Full Age43 also took root in the same ideological stance and commingled prostitution with sex trafficking. Therefore, the 1949 Convention and thereafter, the ITPA seem to have simply followed suit.

145. At the outset, we must note that we have undertaken an exhaustive and microscopic analysis of the provisions of the ITPA since several existing provisions provide the foundational skeletal framework of the "Victim Protection Plan" that the petitioners seek in the present application including inter alia the manner of raid/rescue/initial intervention for both children and adults, the determination involved in assessing whether someone would require care and protection from the State, the homes in which adult victims would be housed, the facilities to be made available in such an environment etc. We have also looked into the offences created under the ITPA to examine how holistically it criminalises all the perpetrators involved.

43 International Convention for the Suppression of the Traffic in Women of Full Age (adopted on 11th October 1933, entered into force 24th August 1934) 150 L.N.T.S. 431, art. 1. "Whoever, in order to gratify the passions of another person, has procured, enticed or led away, even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished. notwithstanding that the various acts constituting the offence may have been committed in different countries. Attempted offences, and, within the legal limits, acts preparatory to the offences in question, shall also be punishable. For the purposes of the present Article, the term "country", includes the colonies and protectorates of the High Contracting Party concerned, as well as territories under his suzerainty and territories for which a mandate has been entrusted to him.".

146. The ITPA, initially referred to as the Suppression of Immoral Traffic in Women and Girls Act (for short, "SITA") was enacted in the year 1956, at a time when only a handful of States enacted dedicated legislations on the subject of 'immoral trafficking'. The term "immoral traffic" in legal parlance referred to trafficking for the purposes of prostitution as distinct from trafficking for forced labour or removal of organs etc. It was commonplace during the 1900s to view this specific crime from the strict viewpoint of social morality and therefore, the term "immoral" came to be attached to it. Not that trafficking as a whole could ever be said to be "moral" from any perspective; however, a heightened sense of immorality had been associated with such trafficking.

147. The necessity and desirability of a Central law on the subject was felt to not only ensure uniformity across the country but also create a deterrent for the widespread commercialisation of prostitution. Meanwhile, the Government of India had also ratified the 1949 Convention. With a view to implement the provisions of the aforesaid Convention, the Suppression of Immoral Traffic in Women and Girls Act, 1956, found its existence in the Indian statute books. The Act underwent amendments in the years 1978 and 1986, respectively. In the latter of the two amendments, its nomenclature was modified. However, since then, no change has been made to the legislative scheme of the ITPA.

148. The Preamble of the ITPA originally read as "An Act to provide...for the Suppression of Immoral Traffic in Women and Girls". However, vide the 1986 Amendment, along with the nomenclature of the Act, the Preamble was amended to read as "An Act to provide...for the prevention of immoral traffic". This change was the result of two major updations – one, it was felt that the Indian approach must pivot from 'suppression' to 'prevention' signaling a stronger stance against the eradication of the commercial sexual exploitation of persons44 and two, it was acknowledged that this crime can victimize persons irrespective of gender45.

• Understanding the definition of "prostitution" and thereby, demarcating the "victim"

149. Before proceeding further with an overview of the legislative scheme underlying the ITPA, we find it absolutely necessary to draw some attention to the definition of "prostitution" under Section 2(f). The manner in which the term is defined would offer additional clarity on the way in which "prostitutes" are legally viewed under the ITPA framework. Prior to the 1986 amendment, prostitution was defined as "the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind" and subsequently, it was amended to read as "the sexual exploitation or abuse of persons for commercial purposes". The use of the disjunctive "or" between "exploitation" and "abuse" indicates that either sexual exploitation for commercial purposes or sexual abuse for commercial purposes, can both constitute prostitution. Although the phrase "for commercial purposes" has not been defined under the ITPA, yet from common parlance its meaning could be said to be analogous to the expression that it replaced i.e., "for hire, whether in money or in kind" which required the payment or receipt of money or 44 Rajya Sabha Debates, The Suppression of Immoral Traffic in Women and Girls (Amendment) Bill, 1986, 21st August 1986, 52. "[...] Suppression is done on something which is there. We accept the factum of the crime being present and we say we are going to suppress it. Prevention is, when we say, we are not going to allow it to take place in the first instance. There is no question of suppression because we will have prevention

[...]". 45 Id at 45. "[...] In view of the aforementioned position, it is proposed that the scope of the Suppression of Immoral Traffic in Women and Girls Act, 1956, as amended in 1978, be widened to cover all persons, whether male or female, who are exploited sexually for commercial purposes.[...]".

money's worth46. Therefore, some monetary or other consideration as an exchange for the sexual exploitation or abuse, must exist. It should partake the character of a business, or one carried on for profit.47

150. Perceptibly, the definition underwent a drastic shift – it changed from being gender-specific and focusing on the promiscuous offering of the body "by the woman" for hire to viewing the trade as inherently exploitative and abusive. The focus or spotlight was shifted from the prostitutes themselves and instead, placed on the persons benefiting from them. One could say that there was a significant pivot from scrutinizing the individual activity to targeting commercial exploitation. A principal reason for this rephrasing was to reiterate that the ITPA was largely brought forth to punish the perpetrators and not the prostitutes.48 We may point this out a bit more clearly by looking into the interpretation given to the pre-amendment definition. The Gujarat High Court in Bai Shanta v. State of Gujarat reported in 1966 SCC OnLine Gij 36 observed thus:

> "10. [...] what is aimed at under this Act, is not abolition of prostitutes and prostitution as such and make it per se a criminal, offence or punish a woman because she prostitutes herself, and that the purpose of the enactment was to inhibit or abolish commercialised vice namely the traffic in woman and girls for purpose of prostitution as an organised means of living. Various provisions of the Act tend to strengthen such a view. But there has been some exception and that is found in Sections 7 and 8 of the Act. [...] This provision (Section 7), therefore inhibits a woman herself from the practice of her profession in contravention of its terms and to that extent- renders prostitution a penal offence.[...]" 46 See K. Radhakrishnan v. State of Kerala, 2008 SCC OnLine Ker 101; Sushanta Kumar Patra v. State of Orissa, 2000 SCC OnLine Ori 244; Rajiv Puri v. State of Punjab, 2002 SCC OnLine P&H 703. 47 See Abbas K.K. v. State of Kerala, 2017 SCC OnLine Ker 3932. 48 Supra note 44 at 45. "The Act provides a framework for penal action against those responsible for the abuse and exploitation of women for the purposes of prostitution[...]".
>
> (Emphasis supplied)

151. From a reading of the aforesaid, we are sure that abolition of prostitution or making prostitution a criminal offence is not the principal object of the Act. Rather, what it aims for is the inhibition or abolition of the commercialisation of prostitution, i.e., prostitution as an organised means of living. Sections 7 and 8 respectively which seek to penalise individualized acts of prostitution under certain specific circumstances are merely exceptions to this general rule.

152. However, by defining prostitution strictly in exploitative terms, we seem to have embroiled ourselves in some ideological dissonance. The problem of defining all acts of prostitution as exploitative is this – one cannot then justify the non-criminalisation of the trade of prostitution as a

whole. How can it be said that something which is inherently exploitative must not be effaced altogether and instead, be allowed to be carried on in certain forms and/or manners? We say this with the necessary caution that our words must not be misconstrued; we are not trying to make a case for the absolute criminalization on the one hand, or the absolute unregulation on the other hand, of prostitution as a trade. All that we are trying to convey is that having made it clear that the legislative aim is not to condemn all acts of prostitution, the definition carries with it some normative ambiguity by painting it as solely being abusive or exploitative. Another nuance that materialises from this is the legislative acceptance or rather, concession that the prostitutes themselves are capable of self-exploitation or abuse.

• Punishing the perpetrators

153. Keeping true to its object of criminalising all acts enabling the commercialisation or the organization of the business of prostitution, Sections 3, 4, 5, 6 and 9 of the ITPA respectively specify the circumstances in which and the individuals upon whom criminal liability may be fastened.

154. Section 3 relates to the keeping of a brothel. The word "brothel" which is defined under Section 2(a) can be understood in three parts – one, as including any house, room, conveyance, or place, or any portion of the aforesaid; two, which is being used for the purposes of sexual exploitation or abuse (or simply, prostitution); and three, for the gain of another person or for the mutual gain of two or more prostitutes. The aforesaid definition being an inclusive one, enjoins a very wide scope so as to encompass a variety of possible locations. The third limb, which deals with the persons gaining from a brothel refers to both a profiting third party as well as two or more prostitutes who have organized amongst themselves to form a jointly profiting commercial enterprise. This is in line with the object of the ITPA seeking to do away with all kinds of commercialization of prostitution, be it one done collectively by the prostitutes themselves. However, it must be clarified that where a single woman practices prostitution for her own livelihood, without another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to a 'brothel'. [See, Ratnamala v. State reported in 1961 SCC OnLine Mad 9 and Ram Devi v. State reported in 1963 SCC OnLine All 45]

155. Now coming to the substantive part of Section 3 itself; sub-clause (1) states that any person who either keeps or manages, or acts or assists in such keeping or management of a brothel shall be punished. This essentially refers to all those persons having operational control over the activities undertaken in the brothel. Sub-clause (2) further deals with two other categories of persons who have ties to the premises itself; in simpler terms, those having proprietary control – (a) persons who are tenants, lessees, occupiers or those in charge of the premises who either themselves use, or knowingly allow others to use it as a brothel, and (b) the owners, lessors, landlords, or agents of the owners, lessors or landlords who have let the premises with the knowledge that it is intended to be used as a brothel, or is willfully a party to its use as a brothel. As can be seen, sub-clauses (1) and (2) respectively, on a combined reading, bring any and all persons associated with a brothel within the fold of Section 3.

156. Section 4 covers persons living on the earnings of prostitution and states that anyone who, over the age of 18 years, knowingly lives on the earnings of the prostitution of another person shall be exposed to punishment. Children can never be brought within the purview of this provision. A unique feature herein is that there exists a presumption clause for persons over 18 years of age who are (a) proved to be living with, or to be habitually in the company of a prostitute; or (b) proved to have exercised either control, direction or influence over the movements of a prostitute in such a manner such that it can be shown as aiding, abetting or compelling her prostitution; or (c) proved to be acting as a tout or pimp on behalf of a prostitute. While the presumptions under

(b) and (c) flow naturally from the principal object of the Act, the presumption under (a) moves one step further and may bring within its fold even the dependents or other persons who share a close personal relationship with the prostitute49.

157. Section 5 addresses the actions of the persons who appear at the very beginning of the crime - (a) those who procure or attempt to procure someone for prostitution, with or without their consent; or (b) induce someone to go from any place to a brothel with the intention that they may either become the inmate of a brothel or frequent a brothel; or (c) take or attempt to take, or cause a person to be taken, from one place to another so that they carry on the trade of prostitution; or (d) cause or induce someone to carry on prostitution, are all individuals covered under this provision. In other words, the section deals with multiple acts

- the procurement, the inducement to move to a brothel, the transportation and the causing or inducing a person to undertake prostitution.

158. One very noteworthy aspect of this provision is that it renders the consent of the person in respect of whom these acts are committed irrelevant even without requiring the existence of any coercion, fraud, force etc., and thereby, makes a crucial deviation from the three 'element' standard prescribed by the Palermo Protocol wherein the 'means' element makes a pivotal contribution (we have briefly already referred to this seemingly intentional deviation). This is plainly evident from the use of the words "with or without their consent" in Section 5(1)(a) and the conspicuous absence of force, coercion etc., in Sections 5(1)(b), 5(1)(c) and 5(1)(d) respectively. No doubt, the word "induces" finds 49 See Soni Bachu Lakhman v. The State of Gujarat, 1960 SCC OnLine Guj 12.

mention under sub-clauses 1(b) and 1(d) respectively, however, it does not pass the muster of the Palermo Protocol's 'means'. The presence or absence of consent only affects the quantum of punishment to which the perpetrators would be made liable. This relegation of consent to the background without requiring the existence of the traditional 'means' is also a feature of the 1949 Convention on which the ITPA is admittedly based.

159. Section 6 brings within its scope any person who 'detains' another, with or without their consent, (a) in any brothel or (b) in any premises with the intention that such person may have sexual intercourse with an individual who is not their spouse. A significant detail herein is that 'intention' to cause or induce the detained person to carry on prostitution, or the 'purpose' for which such person may be detained, is not a matter of concern or a necessary ingredient under (a). In

other words, with respect to detention in a brothel, the law assumes that the same must naturally be for the purposes of prostitution and therefore, the very act of detention in the brothel is considered self-sufficient. The location, therefore, occupies center stage.

160. The 1986 amendment brought in two additional situations in which a presumption that an offence under Section 6 has been committed could operate – (a) when a person is 'found' with a child in a brothel; and (b) when a child or minor 'found' in a brothel is detected to have been sexually abused upon medical examination. With respect to (a) as aforesaid, it can be seen that it is so widely worded that it may include any and all persons who may be found in a brothel with a child. Insofar as (b) is concerned, the provision feigns either deliberate or unintentional silence on whom such a presumption would apply and thereby, exposes a wide range of persons to criminal liability.

161. Section 9 deals with causing, aiding or abetting the 'seduction' for prostitution by a specific category of individuals i.e., those having the custody, charge or care of, or a position of authority over the individual concerned. On a closer look, it can be seen that the punishment prescribed herein is higher than that prescribed under 5 for causing or inducing a person to carry on prostitution. The reason behind the same hinges on the fact that such persons exploit or betray an existing relationship with the individual to achieve their insidious object. Recognising the specific vulnerability of individuals in such situations, the law has dealt with them separately. A marked difference that distinguishes this offence from the others that we have discussed thus far is that it is noticeably the lone provision which falls perfectly within the three element requirement stipulated for trafficking under the Palermo Protocol. We say so because "abuse of power or of a position of vulnerability" which is one of the 'means' under the Palermo Protocol is the foundation upon which this provision is also built.

162. What a deeper analysis of all the aforesaid offence creating provisions reveals is that, in punishing those persons involved in keeping or allowing a premises to be used as a brothel (section 3), or those living on the earnings of prostitution (section 4), or those procuring, inducing or taking persons for the sake of prostitution (section 5), or those detaining someone in a brothel (section 6), the existence of any threat, coercion, force, deception, abuse of power etc., is made immaterial (with the exception of Section 9). The mere third party involvement in the commercialisation of trade of prostitution is what is seen unfavourably.

• Penalising the prostitute – how, when and under what circumstances?

163. In all the preceding provisions, the target of the offence was predominantly anyone but the prostitute. A departure from the same is noted in Sections 7 and 8 respectively wherein 'open prostitution', even when not commercialized in the sense as understood within the Act, is brought within the criminal radar and the prostitute is also made the offender.

164. Section 7 states that any person who carries on prostitution and the person with whom such prostitution is carried on in any premises (a) which is located within the areas notified by the respective State governments; or (b) which is located within a 200 meter distance of public places such as places of religious worship, educational institutions etc., shall be punished mandatorily with

a sentence of imprisonment. Indisputably, the individual falling within the phrase "any person who carries on prostitution" is the prostitute. The expression "person with whom such prostitution is carried on" has been the subject of some debate, particularly as regards whether it includes a "customer" or not. Some High Courts have answered in the affirmative50, while some others in the negative51.

165. Section 8, in yet another manner, penalises certain actions of the prostitute i.e., the seduction or solicitation for the purpose of prostitution within or within the sight of any public place, and in such manner as to be seen or heard from any public place.

50 State of Mysore v. Susheela & Ors., 1965 SCC OnLine Kar 183; Mathew v. State of Kerala, 2022 SCC OnLine Ker 6263 51 Dinesh Tiwari v. State of U.P., 2024 SCC OnLine All 419.

166. As can be seen, a crucial ingredient in both these sections is the "public place" factor. The idea being that although individual acts of prostitution are not sought to be directly shunned, yet public decency and social morality require that visible overtures even for such singular, non-commercial forms of prostitution be deterred in areas surrounding public institutions and other notified regions; even at the cost of punishing the prostitute. Such a crackdown on open prostitution has also been justified by lawmakers from a public nuisance standpoint.

167. Section 10A provides an alternative to the imprisonment of the female offenders found guilty under Sections 7 and 8 respectively by placing them in 'corrective institutions', which, as a concept, came to be introduced via the 1978 amendment for the first time. Not only offenders, but even undertrials may be placed in such institutions according to the definition under Section 2(b). Despite gender- neutralising the entire Act, the word "female" has been retained here. Under Section 10A, the Court takes into consideration three aspects in arriving at a decision on whether a female offender under Section 7 and 8 should be subject to detention in a corrective institution for a specific term – one, the character of the offender; two, her state of health and mental condition; and three, the other circumstances of the case. In passing such an order, the offender is to be given an opportunity to be heard, and the court is to consider the report of the probation officer appointed under the Probation of Offenders Act, 1958 (for short, the "PO Act"). The court must also record its satisfaction that the offender is "likely to benefit" by such instruction and discipline. It is evident that the goal of detention in a corrective institution is to provide a female offender under Sections 7 and 8 with such instruction and discipline as is conducive to her correction.

168. One of the things of note under this provision is that, although the maximum period of imprisonment under Sections 7 and 8 (in cases not involving a minor or child and on second or subsequent conviction) is three months and one year respectively, yet even the minimum period for which an order of detention could be passed is two years – which is at least double or more of the maximum punishment prescribed under the offences. The State governments can, however, make specific rules for the discharge of the female offender from the corrective institution after the expiry of a minimum period of six months upon satisfaction that there is a reasonable probability that the offender will lead a useful and industrious life. There remains some ambiguity as regards what the provision intends to "correct" as also the kind of and the manner in which any "instruction" or

"discipline" would be imparted during such a detention, or what qualifies as a "useful and industrious life" which would motivate the discharge of the offender. All of this is left open for the State Governments to demystify under their rule-making powers in Section 23.

169. Some obvious contradictions, however, inhere in the scheme of Sections 7 and 8 respectively; contradictions which have a direct bearing on understanding who is a victim under the ITPA? The 64th Report of the Law Commission of India which suggested the inclusion of a separate definition of corrective institutions has itself observed that "Corrective institutions will be reserved for women who need corrective training, and who are criminals rather than victims".52 From this observation and the language of Section 10A which emphasizes on the term "offender", it can be inferred that the prostitutes falling within the scope of Sections 7 and 8 respectively cannot be called victims. The problem, however, is that this stance completely negates the possibility or rather, the harsh reality that a prostitute who might be a victim of exploitation by actors figuring in Sections 3, 4, 5, 6 or 9 of the ITPA is also most likely to be found in a brothel falling within the notified areas mentioned under Section 7 or found soliciting in a public place under Section 8. In other words, although she might be an offender under Sections 7 or 8, yet she might simultaneously be a victim as well. However, the scheme of Sections 7, 8 and 10A respectively, at least through its legislative language, refuses to acknowledge such a dual identity by singularly placing them into the category of offenders who can either be subject to imprisonment or detention upon conviction, and not be afforded protection or rehabilitation.

170. Another provision which places its focus on the prostitute is Section 20.

The provision states that upon receipt of information that any person who is residing in or frequenting any place within the local limits of the magistrate's jurisdiction is a prostitute, he/she could be removed from such place by the magistrate. The mere factum that the said person is a prostitute is all that is required for invocation of the provision. In other 52 Law Commission of India, Report on Suppression of Immoral Traffic in Woman and Girls Act, 1956, No. 64, at 4.7, 1975; See also, Id at 4.34 "4.34. "Exclusion of 'corrective institution' from the definition of protective home.—The expression "corrective institution", should be reserved for institutions where women and girls who are not rescued but are themselves guilty of offences should be kept. The basic object in keeping 'protective homes' separate from corrective institution is that the former are really meant for women and girls who are victims of circumstances, while the latter are meant for women who have reached a stage of criminality, though it is hoped that they can be reformed by suitable treatment. That is why we are excluding corrective institutions from protective homes." words, the triggering conditions that otherwise exist in the other provisions i.e., the requirement of an offence under the ITPA having been committed, or the person living or residing in a brothel, or that prostitution is being undertaken in a notified area or within 200 meters of public place etc., are all irrelevant. This is reinforced by the use of the words "any place". There is an implicit understanding that this section relates purely to adult 'willing prostitutes' who are individually carrying on their trade and therefore, the legislature has also consciously omitted the term "rescue" from the description of the provision.

171. The further steps to be taken under Section 20 also differs starkly from that of the other provisions. After recoding the substance of the information received, the magistrate issues a show-cause notice to the concerned prostitute who must personally appear and make his/her case as to why they should not be removed from the said place and prohibited from re-entering it. After inquiring into the matter and taking necessary evidence, if it appears that such person is indeed a prostitute and that it is necessary in the interests of the general public, a requisite order that he/she must be removed and prohibited from re- entering the place would be passed.

172. What requires some keen attention is that the satisfaction that the prostitute's removal is "necessary in the interests of the general public" is not required at the stage when the information reaches the magistrate; that consideration only weighs in when the magistrate is called to make a decision under sub-section (3). Therefore, this provision could potentially be used to target any individual prostitute and moves well- beyond the secondary intent of the ITPA as well i.e., to curb 'open' non-

commercialised prostitution,. We say so because any overt act by the prostitute in a public place is also not made a pre-requisite here. In other words, it moves even beyond the scope of Sections 7, 8 and 10A respectively • Mechanism for intervention – removal under Section 15, rescue under Section 16 and voluntarily application under Section 19

173. For each area to be specified by the State Government, the Act, under Section 13, envisages the appointment of a 'special police officer' for dealing with the offences under the ITPA. Section 2(i) defines a special police officer as a police officer appointed by or on behalf of the State government who is to be in charge of the 'police duties' within a specified area for the purposes of the ITPA. The expression "police duties" includes the detection, prevention and investigation of offences and other duties which have been specifically imposed on these officers under the Act.53 To efficiently discharge these functions, the special police officer is to be assisted by such number of subordinate police officers as the State Government may think fit. 'Wherever practicable', it is stated that this team shall also include women police officers indicating that it has been left to the discretion of the special police officer who is entrusted with duties under the ITPA to include women police officers as and when they are available.54

174. Moreover, the respective State Governments 'may' also associate with the special police officer a non-official advisory body which consists of not more than five leading social welfare workers of that area who 53 Delhi Administration v. Ram Singh, 1961 SCC OnLine SC 96. 54 Kumari Sangeeta & Anr. v. State & Ors, 1995 SCC OnLine Del 337.

would advise him on questions of general importance regarding the working of the ITPA. For offences having inter-State implications, the Central Government may appoint 'trafficking police officers' having pan-India jurisdiction. It is these officers, i.e., special police officers or trafficking police officers, who carry out searches under Section 15 of the Act.

175. Section 15 provides the special police officer or the trafficking police officer as aforesaid the powers to enter and search a premises without a warrant whenever they have reasonable grounds to

believe that - first, an offence punishable under the ITPA has been or is being committed in respect of a person who is living in any premises, and secondly, that a search with warrant cannot be made without undue delay. However, the officers are required to record the grounds of such belief before carrying out the search.

176. Sub-sections (4) and (5) respectively provide that such officers shall be entitled to remove therefrom "all the persons" found therein and forthwith produce them before the appropriate magistrate. The original version of the ITPA as enacted in 1956, was different in one major way i.e., the provision only envisaged the removal of a girl (under the age of 21 years of age). The 1978 amendment did away with this and allowed the removal of "all persons" from the premises where a search is conducted.

177. Sub-section (5A) requires that all such removed persons who are produced before a magistrate be examined by a registered medical practitioner for the purpose of determining their age, detecting any injury inflicted as a result of sexual abuse or the presence of any sexually transmitted diseases. Being aware that the persons removed under this provision may predominantly be women, sub-section (6A) requires that the trafficking or special police officer be mandatorily accompanied by at least two women police officers during the search. Additionally, where any woman or girl who is removed is sought to be interrogated, the same must be done by a woman police officer or in case of unavailability, in the presence of a female member of a recognized welfare institution or organization.

178. Apart from the special or trafficking police officer as aforementioned, a rescue effort can also be triggered by the jurisdictional magistrate under Section 16. Herein, when the magistrate has reason to believe that any person is either living, or is carrying on, or is being made to carry on prostitution in a brothel, he may direct a police officer to enter such brothel, remove the specific individual and produce the removed individual before himself. On a closer look it comes to light that the three categories of individuals who may be rescued are (a) persons who are living in a brothel, irrespective of whether they are in fact carrying on prostitution or not; or (b) those who are carrying on prostitution in a brothel, even willingly (adults); or (c) those who are being made to (through the use of some coercive or other means) carry on prostitution in a brothel. Therefore, the anchor on which the rescue efforts under this provision operates is the location i.e. the brothel.

179. The reasonable belief of the magistrate which activates the powers under this provision can also be from three sources – one, any information received from the police, or two, from any other person authorized by the State government, or three otherwise from any source. Moreover, the police officer who is directed to remove any person need not necessarily be a special or trafficking police officer as recognised under Section 13; it is sufficient if they are officers not below the rank of a sub-inspector. Needless to say, that such removed person(s) must also be forthwith produced before the magistrate issuing such an order.

180. A key distinction vis-à-vis Section 15 would be that under the former "all persons" found in the premises can be removed, whereas under the latter, the words "such person" indicates that the order for removal is passed with respect to a specific individual(s) and the police officers can only remove

the said individual(s) in a targeted manner.

181. Finally, Section 19 provides recourse to the prostitute themselves to make an application seeking an order that they be kept in a protective home or be provided care and protection by the court in the manner specified under sub-section (3). By far, it is the only provision within the entire scheme of the ITPA that allows the prostitute to directly seek a remedy without any prior intervention by the trafficking or special police officers (section 15) or the magistrate (sections 16). Herein, a person who is both (a) carrying on prostitution, or (b) is being made to carry on prostitution, may make an application to the jurisdictional magistrate. An aspect that deserves specific attention is that one of the persons eligible to make an application under this provision is simply someone "carrying on prostitution". To clarify, they are not even required to be carrying on prostitution 'in a brothel'. In other words, they can be adult 'willing prostitutes' carrying out prostitution on an individual basis as well.

• Dealing with the persons making an application under Section 19 and those removed under Sections 15 and 16 respectively

182. The manner in which the applicants under Section 19 would be dealt with is provided under sub-sections (2) and (3). A peculiarity under Section 19, however, lies in sub-section (2) thereof. Pending the inquiry under sub-section (3), the magistrate may direct that the applicant be kept in appropriate custody, having regard to the circumstances of the case. Unlike Section 17 (as we will see later), there is no outer time-limit for such pending-inquiry custody under sub-section (2). The inquiry and consequentially, the custody, both are not tethered to any maximum time-limit and therefore, there is a possibility for the applicants to be kept in this pending-inquiry custody for extensive periods of time. Another anomaly is the noticeable absence of the pre- fix "safe" before the word "custody" under Section 19(2). Therefore, it begs some question as to what kind of pending-inquiry custody is contemplated under Section 19(2) and how practically different it may be from that under Section 17(3).

183. Under sub-section (3), while deciding the application, an opportunity of hearing is given to the applicant and the magistrate proceeds to make such inquiry as he deems necessary, which may include an inquiry by a probation officer appointed under the PO Act. This endeavour includes looking into three things – one, the personality of the applicant, two the conditions of their home, and three, the prospects of their rehabilitation. Thereafter, if satisfied that an order should be made, the magistrate shall, for reasons to be recorded, order that the applicant be kept in (a) a protective home, or (b) a corrective institution, or (c) under the supervision of a person appointed by the magistrate, for such period as he may specify. There is no indicative minimum or maximum period for the operation of the said order of final custody55. To put it simply, there is no guidance on the exact period for which the applicant could be subject to detention in (a), (b) or (c) as aforesaid.

184. While the applicant originally makes an application for the sole purpose of care and protection, discretion is given to the magistrate to also direct that the applicant be detained in a corrective institution for corrective instruction and discipline – an option that may not have been in the initial contemplation of the applicant. However, since the detention in a corrective institution is reserved

either for undertrials or female offenders under Sections 7 and 8 respectively, it is implicit that an applicant must be charged with or convicted of an offence under those sections before an order for detention in a corrective institution could be passed. Irrespective, applicants under this section must submit themselves to the uncertainty or risk that they may be sent into corrective detention as well.

185. Bearing very little resemblance to Section 19 is Section 17 which, on the other hand, provides for the intermediate custody of the persons either removed under Section 15 or rescued under Section 16. Once removed or rescued under Section 15(4) or Section 16(1), if the police officers are unable to produce the persons before the appropriate magistrate, then Section 17(1) requires that they be forthwith produced before the nearest magistrate who shall then pass appropriate orders for the "safe custody" of the removed/rescued persons for the interim period. The provision cautions that no such removed/rescued person shall be (a) detained in 55 The use of the term "final custody" implies the custody which emanates from the final order of the magistrate under Section 17(4) or under Section 19(3).

such intermediate custody for a period exceeding 10 days or, (b) restored to or placed in the custody of a person who may exercise a harmful influence over them. This condition has been inserted in cognisance of the vulnerability of the removed/rescued persons and the potential for their abuse during this transitionary period.

186. Sub-section (2) states that when the rescued/removed persons are produced before the appropriate magistrate, an opportunity of being heard is given to such persons and thereafter, an inquiry is caused to be made. This inquiry broadly covers six aspects – first, the correctness of the information received if the person concerned has been rescued under section 16(1); two, the age of the person; three, their character; four, their antecedents; five, the suitability of their parents, guardian or husband for taking charge of them; and six, the nature of the influence which the conditions in their home are likely to have on the removed/rescued person in the event that they are sent home. For this purpose, the magistrate may direct a probation officer under the PO Act to inquire into the aforesaid and also look into the personality of the removed/rescued person and the prospects of their rehabilitation. Discernibly, the scope of the inquiry under Section 17 is much wider than that under Section 19 which only included an inquiry on three broad aspects. In discharging such functions, the magistrate may also summon a panel of 5 respectable persons to assist him, of which 3 of them shall, wherever practicable, be women. For this purpose, the magistrate may also maintain a list of experienced social welfare workers, particularly women social welfare workers operating in the field of suppression of immoral traffic in persons. What must be kept in mind is that the seeking out any assistance from all these stakeholders i.e. the probation officer or the panel of social welfare workers, are all left to the complete discretion of the magistrate.

187. While the inquiry as aforesaid is being made, the magistrate is empowered to pass orders under Section 17(3) for the pending-inquiry "safe custody" of the removed/rescued person. However, as per the second proviso Section 17(3), such a pending inquiry-safe custody cannot exceed a period of 21 days and cannot be under the charge of a person who is likely to have any harmful influence over the removed/rescued person. As pointed out previously, such a proviso stipulating a time-limit to the pending-inquiry custody is unique to the "safe custody" under Section 17, and plainly missing

from the language of Section 19.

188. After conducting the aforesaid inquiry, sub-section (4) states that where the magistrate is satisfied on two fronts i.e., first, that the information received is correct and secondly, that the removed/rescued person is in need of care and protection, he may make an order that that such person(s) be 'detained' for a period between one and three years, either in a protective home or in such other custody as shall be considered suitable. The choice of words here, especially the use of the term "detained" would raise some additional questions as to whether the stay at a protective home or such other custody can be enforced against the will of the removed/rescued person.

189. The section mandates that some heed be paid to also ensure that such final custody56 is not entrusted with a person or a body of persons of a 56 The use of the term "final custody" implies the custody which emanates from the final order of the magistrate under Section 17(4) or under Section 19(3).

different religious persuasion than that of the removed/rescued person.

Additionally, those entrusted with such final custody including the persons in charge of a protective home may be required to enter into a bond which may contain certain undertakings, wherever necessary and feasible. These undertakings would pertain to directions relating to the

(a) proper care, (b) guardianship, (c) education, (d) training, (e) medical and psychiatric treatment of the removed/rescued person, and (f) supervision by a person appointed by the court which will be in force for a period not exceeding 3 years. The words "wherever necessary and feasible" renders these undertakings non-mandatory and may not be uniformly required of all persons or protective homes taking the final custody of someone under this provision.

190. We wish to again succinctly underscore a few of the nuanced differences which exist between Sections 17 and 19 respectively – First, on the one hand, Section 17 limits the pending-inquiry custody to a maximum of three weeks whereas no such limit is found in Section 19. Secondly, while Section 17 lays down three years as the maximum period for final custody/detention in a protective home or such other custody, there exists no such legislatively carved out duration under Section 19.

191. Section 17A, which was inserted through the 1986 amendment lays down the conditions that are to be observed by the magistrate before placing the persons rescued under Section 16(1) with parents or guardians. At the outset, the explicit and solitary mention of Section 16(1) leads to the conclusion that this provision does not relate to those persons removed under Section 15(4) by special or trafficking police officers. The reason for excluding such removed persons from its ambit is unclear. The provision reads that, notwithstanding anything contained in Section 17(2), the magistrate making an inquiry under Section 17 may satisfy himself about the capacity or genuineness of the parents, guardian or husband to keep the rescued person, by causing an "investigation to be made by a recognized welfare institution or organization", before passing an order for handing the rescued person over to the parents, guardian or husband, as the case may be. In short, what Section 17A does is create yet another mechanism through which the magistrate can

conduct an inquiry apart from seeking assistance from probation officers and the panel of social workers under Sections 17(2) and 17(5) respectively. The need to carefully investigate into the parents, guardians or husband, in detail, is due to the unfortunate empirical reality that family members are frequently found to be complicit in the exploitation of the rescued persons.

• Protective homes

192. Section 2(g) of the ITPA defines a protective home as an institution in which persons who are in need of care and protection may be kept under this Act, and where appropriate, technically qualified persons, equipment and other facilities have been provided. As has become clear from our discussion of the preceding provisions, it is obvious that not all persons who are in need of care and protection are mandatorily placed in a protective home. The magistrate also looks into the feasibility of handing the removed/rescued person (who also may be in need of care and protection) into the custody of the parents, guardian, husband or other persons. Therefore, it is only a smaller sub-set of those needing care or protection who are placed within these protective homes.

193. The requirement of having appropriate technically qualified persons, equipment and other facilities was brought in by way of the 1986 amendment and the same being included within the very definition indicates that the Act regarded them as being an intrinsic component and essential to the functioning of the protection home. All the three terms i.e., “technically qualified persons”, “equipment” and “other facilities”, have been intentionally worded in the widest manner so as to provide flexibility and encompass any and all requirements of the persons needing care and protection from the State.

194. Section 21 dealing more substantively with protective homes provides a double-layered discretion to the State governments - first to establish as many protective homes as it thinks fit and secondly, when established, to maintain them in such manner as may be prescribed by rules formulated in that regard. It was considered necessary to leave it to the competencies of each State to individually assess the infrastructural capacity they would require for housing the persons in need of care and protection in their respective jurisdictions. Sub-section (2) clarifies that it is only the State governments themselves or the persons/authorities who have been issued a licence by the State government who would be allowed to establish and/or maintain a protective home under the ITPA. Such a safeguard was deemed essential to prevent persons from turning the protective homes into places of exploitation.57 The nitty- gritties of several details are sought to be left to the rule-making powers of the State governments including the mode of application for a licence 57 Statement of Objects and Reasons, Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India). “[...] But a special feature of the Bill is that it provides that no person or authority other than the State government shall establish or maintain any protective home except under a licence issued by the State government. This will check the establishment of homes which are really dens for prostitution.”.

to establish/maintain a protective home, the conditions which may be imposed upon the licence holder, the post-application investigation into the application received, amendment of a licence etc. Wherever practicable, the management of the home may be entrusted to women.

• Establishment of special courts

195. The concept of "ITPA special courts" was only introduced via the 1978 amendment. Like several other matters, the power to establish special courts under the ITPA has also been assigned to the respective State governments. As per Section 22A, if the State government is satisfied that it is necessary to establish one or more courts in any district or metropolitan area, for the purpose of providing speedy trial of offences under this Act, it may do so by notification in the official Gazette and after consulting with the concerned High Court. Unless otherwise directed by the concerned High Court, such a court would exercise its jurisdiction exclusively in respect of cases under the ITPA only. Section 22AA provides the Central government similar powers to establish one or more special courts in relation to offences under the Act which are committed in more than one State. However, the use of the word "may" along with terms like "if the State Government is satisfied that is necessary" or "if the Central Government is satisfied that it is necessary", indicates that the question whether such courts must be established or not has been left to the discretion of the respective governments.

196. On a conspectus, what comes to light is that the ITPA seeks to punish all those who profit by exploiting the prostitution of others, be it be it the brothel keeper, the landlord, the procurer, the transporter, the detainer, the pimp or the middle-man – all of them are considered offenders. The Act also makes punishment for offences involving children more stringent. In addition to charting out the offences, the ITPA designates special police officers, provides mechanisms for search and rescue, and lays down how such rescued or removed persons are to be dealt with in law. The rescued or removed persons are either handed over to the custody of a parent, guardian or husband, or sent to a protective home, or placed in such other custody as the magistrate may find suitable. Several particulars on the minute workings of all the provisions have been left to be filled in by the rules which may be brought by the respective State governments under Section 23.

c. BNS, 2023

197. From the exhaustive discussion in the preceding section on the ITPA, it is evident that despite the nomenclature of the statute, it nowhere defines 'trafficking'. In fact, for the longest time, i.e., until 2013, the term 'trafficking' or 'trafficking in persons' was not defined in the Indian legal framework.

198. In 2012, a committee was formed under the chairmanship of Justice J.S. Verma (Retd.) to look into possible amendments to the criminal law which would provide for quicker trials and enhanced punishment for criminals committing sexual assault of an extreme nature against women (hereinafter, the "Justice Verma Committee). The Committee submitted a report in which it dedicated an entire chapter discussing various issues surrounding the handling of the offence of trafficking, especially of women and children, in India. One of the primary recommendations of the Committee was that the definition of 'trafficking' contained in the Palermo protocol should be incorporated as an independent definition in the Penal Code as a separate offence.

The Committee was of the opinion that the lack of definition of trafficking, along with the lack of enforcement of already existing provisions in the Penal Code, were the primary reasons behind the proliferation of the crime of trafficking.

199. In light of the Justice Verma Committee recommendations, the Criminal Law (Amendment) Act, 2013 (for short, the "2013 Amendment") was passed. Amongst other things, the 2013 Amendment substituted Section 370 of the IPC with new Sections i.e. 370 and 370A respectively. It was via this amendment that the definition of "trafficking in persons" as contained in the Palermo Protocol was introduced and adopted into the IPC. After the repeal of the IPC, Sections 370 and 370A respectively are now reflected in Sections 143 and 144 of the BNS respectively which read thus:

> "Section 143 - Trafficking of person (1) Whoever, for the purpose of exploitation recruits, transports, harbours, transfers, or receives a person or persons, by--
>
> (a) using threats; or
>
> (b) using force, or any other form of coercion; or
>
> (c) by abduction; or
>
> (d) by practising fraud, or deception; or
>
> (e) by abuse of power; or
>
> (f) by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.--The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, beggary or forced removal of organs.

Explanation 2.--The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a child, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one child, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of a child on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Section 144 - Exploitation of a trafficked person (1) Whoever, knowingly or having reason to believe that a child has been trafficked, engages such child for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

(2) Whoever, knowingly or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine." (Emphasis Supplied)

200. For ease of reference, we have captured the offences and the respective punishments in Sections 143 and 144 of the BNS, 2023, in a tabular format below:

Punishment [Term of S. Rigorous Imprisonment] Section Offence No. AND Fine Minimum Maximum

1. 143 (2) Trafficking 7 years 10 years Trafficking of more than one

2. 143 (3) 10 years Life imprisonment person

3. 143 (4) Trafficking of a child 10 years Life imprisonment Trafficking of more than one

4. 143 (5) 14 years Life imprisonment child Imprisonment for life, which Trafficking of a child on more shall mean imprisonment for

5. 143 (6) than one occasion the remainder of that person's natural life A public servant or a police Imprisonment for life, which officer is involved in the shall mean

imprisonment for

6. 143 (7) trafficking of any person the remainder of that person's natural life Knowingly or having reason to believe that a child has been

7. 144 (1) trafficked, engages such child 5 Years 10 Years for sexual exploitation in any manner Knowingly or having reason to believe that a person has been

8. 144 (2) trafficked, engages such person 3 Years 7 Years for sexual exploitation in any manner On a perusal of the above table, it is clear that the punishment which is to be awarded to someone convicted of the offence of trafficking under the BNS has been classified on the basis of the age of the victim, the number of persons victimised, whether the crime was repetitive and the vulnerability of victim including the amount of influence that could have been exercised by the accused upon the victim.

201. Sections 370 and 370A of the IPC and Sections 143 and 144 of the BNS respectively, are largely identical. To put it simply, Sections 370 and 370A have been adopted into the BNS without significant change. However, there so exist some minor differences, they include: (i) in Explanation 1 of Section 143 of BNS the term 'beggary' has been added to the list of practices that would be covered under the expression 'exploitation'; (ii) for the offence that is now covered under Section 144(1) of the BNS, the maximum punishment has been enhanced from 7 years to 10 years; and (iii) for the offence that is now covered under Section 144(2) of the BNS, the maximum punishment has been enhanced from 5 years to 7 years.

• Section 143

202. On a bare perusal of Section 143(1) of the BNS, it is evident that the broader elements present in the Palermo Protocol's definition have been incorporated therein, namely: (i) the need to fulfil the three elements of acts, means and purpose respectively, in order to constitute the offence of trafficking; (ii) providing an open-ended list of activities that would constitute 'exploitation' instead of defining it, as is evident from the use of the word "include" in Explanation 1 of Section 143(1); and (iii) the irrelevance of consent in determination of the offence of trafficking upon fulfillment of the 'means' element. The discussion on the Palermo Protocol in the above section, specifically regarding each element and the irrelevance of consent, would also shed light and assist in interpreting Section 143(1). As discussed, to establish the offence of trafficking under Section 143: (i) the actus reus element has to be established via the 'action' and 'means' elements; and (ii) the mens rea element has to be established via the 'purpose' element i.e., the individual intended that the action (made possible through one of the means) would lead to exploitation.

203. While the acts mentioned as constituting the 'action' element in both the protocol and Section 143(1) are one and the same, there are certain differences in the components forming part of the 'means' and 'purpose' elements. In the 'means' element, Section 143(1) omits the 'abuse of position of vulnerability' component, while introducing a new component referred to as 'inducement'. In the 'purpose' element, while the list has been left open-ended, Explanation 1 to Section 143(1) differs

from the Palermo Protocol in the following ways: (i) 'physical exploitation' and 'beggary' are additional forms of exploitation that have been explicitly mentioned; (ii) 'forced labour or services' as form of exploitation doesn't find explicit mention and; (iii) reference to 'the exploitation of the prostitution of others or other forms of sexual exploitation' is reflected simply as 'any form of sexual exploitation'. Due to the wide ambit of the term 'any form of sexual exploitation', it is safe to assume that trafficking for sexual exploitation of any nature or form will be amply covered as an offence under Section 143.

204. However, the most important difference between the two definitions is that, unlike the Palermo Protocol, under the BNS all the three elements must be established for the offence of trafficking to be constituted, even for children. If we recall our discussion on the Palermo Protocol, it explicitly states that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking even if this does not involve any of the 'means' stated therein. However, no such explicit omission of the 'means' element for children is found in Section 143 of the BNS, 2023.

205. The definitional uncertainties and ambiguities inherent to the protocol's definition will inevitably be reflected in the definition adopted in Section 143 of the BNS, 2023, as well. Section 143 also doesn't define any of the terms mentioned in the 'means' and 'purposes' elements. Nor does it provide any guidance as to the required threshold of severity, i.e. how serious the 'means' must be or how extreme the exploitation must be for the situation to qualify as trafficking. Thus, the question even in the Indian context remains the same: at what point along the continuum does the offence of trafficking begin? Considering the very grave nature of the punishments prescribed under Section 143, it becomes even more pertinent and necessary to address this question.

206. However, as we noted earlier, the flexibility inherent in the definition should not be viewed as a detriment, nor should an effort be made to definitively resolve all ambiguities surrounding it. Rather, a balancing exercise should be undertaken to ensure that the definition is neither underinclusive nor overinclusive. Thus, whether or not an act should be brought under the purview of Section 143(1) has to be decided on a case- by-case basis, by giving consideration to: (i) the totality of the circumstances and (ii) by not losing sight of the fact that trafficking is a grave offence with a grave a punishment regime under the BNS.

207. When dealing with sexual exploitation, the uncertainty and ambiguity that characterise other forms of exploitation, such as labour exploitation, are, to some extent, reduced. Unlike labour exploitation, where it can be difficult to distinguish between exploitation and merely poor working conditions, sexual exploitation in all its forms leaves little scope for such doubt. Further, the term 'sexual exploitation' is wide in its ambit and would include all forms of sexual exploitation, including but not limited to trafficking for prostitution, pedophilia, pornography, cyber sex, and other disguised forms of sexual exploitation.58 However, as noted above, what distinguishes an offence under Section 143 from offences under other provisions pertaining to sexual abuse is the requirement that all three elements of act, means, and purpose have to be fulfilled to constitute the offence of trafficking for sexual exploitation, i.e., where sexual exploitation is committed without either the 'act' or 'means' element being fulfilled, the same would not constitute an offence under

Section 143.

208. Let us now understand the correlation and overlap that exists between the provisions of the ITPA and Section 143 of the BNS. The ITPA, despite having the word 'trafficking' in its title, does not define the term. As discussed above, what it does instead is proceed on the premise that all 58 ¶ 17, Bachpan Bachao & Ors. v. Union of India & Ors., 2010 SCC OnLine Del 4613.

prostitution is exploitative, and on that basis, criminalises all third parties involved in and all acts done in furtherance of prostitution. Over time, owing to the association between prostitution and trafficking in popular and legal discourse, the acts of third parties done in furtherance of prostitution came to be equated with trafficking itself. This conflation was further entrenched by the absence, for a long period, of any other legislative provision dealing with trafficking in India. The consequence was that trafficking in India came to be understood as synonymous with trafficking for the purposes of prostitution to the exclusion of all other forms of trafficking. It was only with the enactment of Section 370 that trafficking was defined and recognised as a phenomenon extending beyond sexual exploitation.

209. However, with both Section 143 of the BNS and the ITPA now in force, we are seemingly confronted with two different understandings of what constitutes 'trafficking for the purposes of CSE'. Under Section 143, for an act of sexual exploitation to amount to trafficking, all three elements of act, means, and purpose must be fulfilled. In other words, the act of bringing a person towards prostitution must have been done through one of the specified means, such as force, coercion, inducement, or deception, for it to constitute trafficking. The ITPA, on the other hand, operates on a fundamentally different logic. As is evident from our discussion of its offence-creating provisions, the ITPA requires no such 'means'. Any act done by a third party ('act' element) in furtherance of prostitution ('purposes' element) is sufficient to attract liability under the Act. The result is that under the ITPA, all prostitution involving third parties is, in effect, treated as trafficking for CSE, regardless of whether any force, coercion, or inducement was employed. Thus, conduct that would not qualify as trafficking under Section 143 may nevertheless constitute an offence under the ITPA. The two frameworks, operating simultaneously, produce a situation where the threshold for what amounts to 'trafficking for CSE' differs depending on which provision is being applied.

• Other aspects

210. From our discussion of Article 5 of the Palermo Protocol, it is evident that the protocol intended to criminalise not only completed offences and the principal actors involved in trafficking. It puts an obligation on states to extend the ambit of criminal law to (i) situations in which perpetrators attempt to traffic; (ii) persons who knowingly participate as aiders or facilitators, and (iii) organisers and directors who oversee trafficking ventures and instruct others to commit trafficking. The aforementioned acts of attempting, aiding, facilitating, organising and directing are criminalised under various provisions of the BNS.

211. Section 62 of the BNS, 2023, deals with punishing the attempt to commit offences. This section applies where no specific provision for attempting to commit an offence has been provided in the

self-same Act. Since there is no specific provision punishing attempts to commit trafficking, Section 62 will be applicable in dealing with those cases of trafficking in which the offence was not completed. A person commits the offence of "attempt to commit trafficking" when (i) he intends to commit trafficking; and (ii) he, having made preparations and with the intention to commit trafficking, does an act towards its commission.59 For constituting "attempt", it is not necessary that the act done must be the 59 ¶ 24, Abhayanand Mishra v. State of Bihar, 1961 SCC OnLine SC 67.

penultimate act towards the commission of trafficking.60 It is sufficient if such an act or acts were deliberately done, and manifest a clear intention to commit trafficking, being reasonably proximate to the consummation of the offence.61 What would constitute an "attempt" to commit trafficking is a mixed question of law and fact, largely depending on the circumstances of a particular case. 62

212. Similarly, while there are no specific provisions punishing those who knowingly aid, facilitate, organise, or direct the commission of trafficking, several provisions in the BNS, especially those in Chapter IV dealing with abetment and criminal conspiracy, could be used to deal with such players involved in committing the offence of trafficking. In addition to these provisions, Section 111 of BNS, addresses organised crime. In the IPC, prior to its repeal, organised crime was not recognised as a separate offence. With the addition of Section 111, there is an additional armour in the law enforcement's corpus to deal with the offence of trafficking. This is especially so considering the fact that trafficking is usually undertaken as an organised criminal activity. Further, the very wide ambit of people brought under the purview of Section 111 would enable law enforcement agencies to bring to justice a wide variety of players involved in undertaking trafficking. Section 111 of BNS reads thus:

> "1) Any continuing unlawful activity including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offence, cyber-crimes, trafficking of persons, drugs, weapons or illicit goods or services, human trafficking for prostitution or ransom, by any person or a group of persons acting 60 Id.
>
> 61 ¶ 13, State of Maharashtra v. Mohd. Yakub, (1980) 3 SCC 57. 62 Id.

in concert, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means to obtain direct or indirect material benefit including a financial benefit, shall constitute organised crime.

Explanation.—For the purposes of this sub-section,—

(i) "organised crime syndicate" means a group of two or more persons who, acting either singly or jointly, as a syndicate or gang indulge in any continuing unlawful activity;

(ii) "continuing unlawful activity" means an activity prohibited by law which is a cognizable offence punishable with imprisonment of three years or more, undertaken by any person, either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding

period of ten years and that Court has taken cognizance of such offence, and includes economic offence;

(iii) [...] (2) Whoever commits organised crime shall,—

(a) if such offence has resulted in the death of any person, be punished with death or imprisonment for life, and shall also be liable to fine which shall not be less than ten lakh rupees;

(b) in any other case, be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees.

(3) Whoever abets, attempts, conspires or knowingly facilitates the commission of an organised crime, or otherwise engages in any act preparatory to an organised crime, shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees.

(4) Any person who is a member of an organised crime syndicate shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees.

(5) Whoever, intentionally, harbours or conceals any person who has committed the offence of an organised crime shall be punished with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees:

> Provided that this sub-section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.
>
> (6) Whoever possesses any property derived or obtained from the commission of an organised crime or proceeds of any organised crime or which has been acquired through the organised crime, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than two lakh rupees.
>
> (7) If any person on behalf of a member of an organised crime syndicate is, or at any time has been in possession of movable or immovable property which he cannot satisfactorily account for, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for ten years and shall also be liable to fine which shall not be less than one lakh rupees." (Emphasis Supplied)

213. Moving on to Section 144, on a bare reading, it is apparent that it deals with those people who: (i) knowingly or having reason to believe that a child or a person has been trafficked, (ii) engages

such a child or person for sexual exploitation in any manner. Section 144 appears to differ from Section 143 in two major ways: first, while Section 143 addresses the offence of trafficking itself, Section 144 appears to address something different, i.e., the actual engagement of trafficked people for the purpose of sexual exploitation. Secondly, unlike Section 143, which deals with both sexual and non-sexual forms of exploitation, Section 144 is restricted only to cases of sexual exploitation. Thus, the realms in which Sections 143 and 144 operate are different. However, this is not to say that such realms are completely disconnected at all times. There will undoubtedly be overlap, considering that many a times, it is the same traffickers who also engage victims for sexual exploitation, thereby committing offences under both Section 143 and 144 respectively.

214. Further, when dealing with instances of trafficking for CSE, an investigating officer must take into consideration a host of other provisions beyond those that have been discussed in the foregoing paragraphs of this judgment. When dealing with an offence of trafficking for CSE, the applicable legal provisions are not static. They vary depending on a combination of factors, such as the age of the victim, the means employed by the trafficker, and the specific nature of the exploitative acts to which the victim was subjected. To illustrate with some examples: where the victim is a child, the various provisions in the BNS pertaining to procuring children and dealing with offences against children may apply, and, in appropriate cases, the POCSO would also come into the picture. Where the victim is a woman, in appropriate cases, provisions in Chapter V of BNS relating to offences against women would need to be invoked. Where the means employed involve kidnapping or abduction, the relevant provisions of the BNS governing such offences will be applicable. Where the exploitation involves the creation or dissemination of sexually explicit material, the provisions of the IT Act would become relevant. Although this list is merely illustrative and not exhaustive, it is indicative of how different offences may interact with one another.

215. The point we seek to drive home is that no single piece of legislation operates in isolation when it comes to the crime of trafficking for CSE.

An investigating officer must, therefore, approach each case with a holistic appreciation of the applicable legal framework and remain alive to the full range of provisions that the facts of a given case may attract.

d. On a reading of the Palermo Protocol, ITPA and BNS respectively, who can be referred to as “victims of ‘trafficking’ for CSE”?

216. Before proceeding to the provisions of certain other legislations which cohesively form the legislative ecosystem governing trafficking and the CSE of all persons including children, having discussed in detail the ITPA and relevant provisions under the BNS, we must pause at this juncture to answer a pertinent question – whether the victims under the ITPA and BNS respectively could be collectively viewed as “victims of ‘trafficking’ for CSE”?

217. As discussed previously, two different thresholds for offenders exist under two different legislations for the same crime of trafficking for sexual exploitation through prostitution - (a) a lower threshold under the ITPA without the absolute necessity of a ‘means’ element to invalidate

consent, and (b) a higher threshold under Section 143 BNS which makes the 'means' element indispensable for invalidating consent. The practical implication of this would be that, on the one hand, not all perpetrators under the ITPA regime would fall within the ambit of Section 143; however, on the other hand, all traffickers who sexually exploit others through prostitution falling under the BNS would inevitably be covered by some provision of the ITPA as well. In simpler terms, the ITPA would criminalise certain persons as 'traffickers' despite the fact that they may not be viewed as such under the BNS.

218. However, this dual system could also be said to be intentional and be reflective of the stance that the legislature seeks to continue punishing all those benefitting or simply involved in the prostitution of others as traffickers under a special legislation (irrespective of whether their actions may or may not also constitute an offence under Section 143 BNS) due to its sustained opinion that all prostitution is inherently exploitative. Since we are not tasked with untangling whether such an assumption which the ITPA makes is right or wrong, we wish to only go as far as identifying this duality and possibly bridging them for a limited purpose – to legislatively locate who all could be said to be victims of trafficking for CSE. Such a limited exercise was necessary in the facts of our present case wherein a "Victim Protection Plan" is being sought because the necessary first-step for us, if we reach the conclusion that such a protocol is indeed necessary, would be to delineate who these 'victims' are according to the present laws including that of the ITPA and BNS. We do not wish to leave out those victims of the ITPA from the protective umbrella of any protocol on trafficking which may be laid down by us upon on a strict reading of the ITPA through the lens of the Palermo Protocol and/or the BNS, especially when there is legislative admission that victims under the ITPA are also victims of trafficking.

219. Hence, for all further purposes, when any reference is made to "victims of trafficking for CSE", it would include those persons who have been identified as victims under the ITPA regime and those persons who have been victimised by persons alleged to have committed an offence under Section 143 of the BNS.

e. Legislations dealing specifically with children • JJA– Children in need of care and protection and the CWC

220. Before proceeding to analyse the provisions of these statutes in greater detail, it is useful to pause and explain why this exercise is necessary in the context of the present matter. The central concern of this judgment is the protection of victims of trafficking for CSE. A meaningful victim protection framework cannot be constructed in a vacuum. It must be built upon a clear understanding of what protections the law has already envisaged (if any). It is with this approach that we have, in the preceding paragraphs, examined the protection mechanism available under the ITPA, 1956. The same approach must be extended to child victims of trafficking for CSE, who form a significant and particularly vulnerable subset of all trafficking victims. For such victims, the JJA and, to some extent, POCSO Act, are legislations that provide protection.

221. The JJA is a special legislation that deals with both children alleged to be in conflict with the law and children in need of care and protection, respectively. We are primarily concerned in this

discussion with children in need of care and protection. As per Section 2(2) of JJA, a child is defined as a person who has not completed eighteen years of age. Section 2(14) of JJA defines the term "child in need of care and protection" and reads thus:

> "(14) "child in need of care and protection" means a child—
>
> (i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or
>
> (ii) who is found working in contravention of 5[the provisions of this Act or] labour laws for the time being in force or is found begging, or living on the street; or
>
> (iii) who resides with a person (whether a guardian of the child or not) and such person—
>
> (a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or
>
> (b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or
>
> (c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or
>
> (iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or
>
> (v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or
>
> (vi) who does not have parents and no one is willing to take care of and protect or who is abandoned or surrendered;
>
> (vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or
>
> (viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or
>
> (ix) who is found vulnerable and has been or is being or is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;" (Emphasis Supplied)

222. From a bare reading of the definition, it is clear that all child victims of trafficking, including child victims trafficked for CSE, would be considered as children in need of care and protection. The observations of this Court in Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India & Ors, reported in (2017) 7 SCC 578, further support such an interpretation. When dealing with the question of who is a child in need of care and protection, this Court explicitly noted that the category would include victims of child trafficking who must be given protection under the provisions of the JJA. The relevant observations made by this Court are as follows:

"64. Even though a child in need of care and protection is defined in Section 2(14) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "the JJ Act") the definition does not specifically include some categories of children. Consequently, we are of the view that since the JJ Act is intended for the benefit of children and is intended to protect and foster their rights, the definition of a child in need of care and protection must be given a broad interpretation. It would be unfortunate if certain categories of children are left out of the definition, even though they need as much care and protection as categories of children specifically enlisted in the definition. Beneficial legislations of the kind that we are dealing with demand an expansive view to be taken by the courts and all concerned.

65. In Workmen v. American Express International Banking Corpn. this Court held in para 4 of the Report that:

"4. The principles of statutory construction are well settled.

Words occurring in statutes of liberal import such as social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced."

66. A similar view was expressed in ESI Corpn. v. Francis De Costa when it was observed that:

"5. ... It is settled law that to prevent injustice or to promote justice and to effectuate the object and purpose of the welfare legislation, broad interpretation should be

given, even if it requires a departure from literal construction."

67. The necessity of giving a purposeful interpretation to a provision in a statute was recognised in MSR Leathers v. S. Palaniappan when this Court observed that: (SCC p. 194, para 29) "29. ... one of the salutary principles of interpretation of statutes is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. This Court has in a long line of decisions recognised purposive interpretation as a sound principle for the courts to adopt while interpreting statutory provisions." A similar view was expressed, though in a different context, in Badshah v. Urmila Badshah Godse. A far more detailed discussion on the subject is to be found in the Constitution Bench decision of this Court in Abhiram Singh v. C.D. Commachen.

68. Read in this light, the definition of a child in need of care and protection given in Section 2(14) of the JJ Act should be given a broad and purposeful interpretation — it ought not to be treated as exhaustive but illustrative and furthering the requirements of social justice. This understanding would also be in consonance with Article 40 of the CRC which stipulates that the "States parties shall recognise rights of every child accused of an offence and treatment of such a child shall be in a manner consistent with promotion of the child's dignity and worth...."

69. The learned Amicus Curiae drew our attention to the decisions rendered by some High Courts which have taken a broad-based approach to the meaning of a child in need of care and protection and some other High Courts that have adopted a comparatively narrow interpretation. These decisions were rendered in the context of the Juvenile Justice (Care and Protection of Children) Act, 2000 and would not really be applicable insofar as the JJ Act is concerned.

However, this does not detract from her submission that a child in need of care and protection must be given a wider meaning and in addition to some children in conflict with law as discussed above, it must also include victims of sexual abuse or sexual assault or sexual harassment under the Pocso Act as also victims of child trafficking. Such children must also be given protection under the provisions of the JJ Act being victims of crime under the Pocso Act and the Immoral Traffic (Prevention) Act, 1956." (Emphasis Supplied)

223. Where the victim of trafficking for CSE is a child, the JJA and the rules framed thereunder become the governing framework in all respects. This encompasses the entire spectrum of procedural decisions that follow upon the identification or rescue of such a victim, i.e., the forum before which the child is to be presented, the authority vested with the power to make decisions regarding the child's care, the factors to be taken into account while making such decisions, and the nature of the institutions or homes to which the child may be sent. To the extent that another legislation, such as the ITPA, prescribes a different procedure for any of these aspects, it is the JJA that must prevail.63 Section 1(4) of the JJA, furthers this view as it states that, notwithstanding anything contained in any other law, the provisions of JJA shall apply to all matters concerning

children in need of care and protection. Section 1(4) of the JJA reads thus:

> 63 See ¶ [119-133], Delhi High Court Legal Services Committee v. UOI & Anr., 2014 SCC OnLine Del 4101.

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including—

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social reintegration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, reintegration, and restoration of children in need of care and protection." (Emphasis Supplied)

224. Having established that child victims of trafficking for CSE would be considered as children in need of care and protection, it would be helpful to briefly understand the mechanism put in place by JJA to deal with such children. First and foremost, Section 3 of the JJA sets out the fundamental principles that should guide all decisions in implementing the Act. Amongst other things, they include the principles of best interest, safety, family responsibility, institutionalisation as a measure of last resort, and repatriation and restoration.

225. Under the JJA, it is the Child Welfare Committee ("CWC") of each district which has the power to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection.64 The JJA further states that the CWC has the power to deal exclusively with all proceedings under the Act relating to children in need of care and protection.65 The CWC is vested with a host of functions and responsibilities, primary among them is ensuring care, 64 § Section 29(1), The Juvenile Justice (Care and Protection of Children) Act, 2015. 65 § Section 29(2), The Juvenile Justice (Care and Protection of Children) Act, 2015.

protection, and appropriate rehabilitation or restoration of children in need of care and protection, based on the individual care plan.66

226. The procedure applicable to a child who has been identified as a child in need of care and protection commences with Section 31 of the JJA, which provides for the production of such a child before the CWC. A notable feature of Section 31 is the breadth of persons who are empowered to produce a child before the CWC. This is not limited to the police or state institutions. Social workers, non-governmental organisations, public-spirited citizens, doctors and nurses, and even the children themselves are recognised as persons who may produce a child before the CWC. Equally significant is the fact that the CWC is vested with the responsibility of taking suo motu cognisance of cases and reaching out to children in need of care and protection who have not been produced before it.67

227. Once a child is produced before the CWC, or the CWC takes suo motu cognisance of a case, the inquiry process under Section 36 of the JJA is initiated. At this stage, the CWC may pass interim

orders directing where the child should be placed pending the inquiry. Simultaneously, it may direct a speedy social investigation to be carried out by a social worker or a Child Welfare Police Officer.

228. Sections 31 and 36 of the JJA respectively, must be read alongside the rules framed thereunder. The said sections themselves provide only a broad framework. It is the rules which prescribe the detailed procedure to be followed at each stage. In this regard, Rules 18 and 19 of the 66 § Section 30(vi), The Juvenile Justice (Care and Protection of Children) Act, 2015. 67 § Section 30(xii), The Juvenile Justice (Care and Protection of Children) Act, 2015.

Juvenile Justice (Care and Protection of Children) Model Rules, 2016 ("Model Rules") respectively are particularly relevant. Rule 18 sets out the procedure governing production before the CWC. It prescribes, among other things, the directions the CWC may issue for the child's interim placement and the requirement for an immediate medical examination, where necessary. Rule 19 sets out the procedure governing the inquiry. Among other things, Rule 19 envisages: (i) formulating an individual care plan based on case history and monitoring the implementation of such individual care plan; (ii) steps towards rehabilitation to begin from the date of first production of the child itself; and (iii) follow-ups to be undertaken even after the case is disposed of. 68 Together, Rules 18 and 19 give operative content to the framework under Sections 31 and 36 of the JJA, respectively and must be scrupulously followed in all cases involving child victims of trafficking for CSE.

229. Upon being satisfied, through the inquiry, that the child before itself is indeed a child in need of care and protection, the CWC is empowered under Section 37 of the JJA to pass a wide range of orders. These orders may relate to the restoration of the child to her parents or guardian, with or without supervision, where such restoration is found to be in her best interest. Alternatively, the CWC may direct the placement of the child in a children's home, a fit facility, or with a fit person, for long-term or temporary care. The CWC may issue detailed directions regarding the care, protection and rehabilitation of the child, including directions 68 See also Rule 82, The Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

relating to shelter, medical attention, psychological support, skill training, legal aid and educational services.

230. The process of rehabilitation, social reintegration and restoration under the JJA is governed by Sections 39 and 40, respectively. Section 39 provides that rehabilitation shall be undertaken in accordance with the child's individual care plan, and preferably through family-based care, such as restoration to the family or a guardian, sponsorship, adoption, or foster care. It is only where such restoration is not in the best interest of the child that the child may be placed in an institution registered under the Act or with a fit person or a fit facility, on a temporary or long- term basis. In such cases, the process of rehabilitation and reintegration is to be undertaken wherever the child is so placed.

231. As per Section 53 of the JJA Act, 2015, the services to be provided in the course of rehabilitation and reintegration shall be those prescribed in the relevant rules and may include: (i) basic requirements such as food, shelter, clothing and medical attention; (ii) mental health interventions

including need-based counselling; (iii) educational services; (iv) skill development; (v) occupational therapy and life skill education; (vi) legal aid where required; and recreational activities including sports and cultural activities. The Model Rules add further specificity to these requirements, prescribing standards for each of the elements mentioned above.69 Finally, the State's obligations do not cease when a child leaves institutional care. Section 46 provides for after care support to be extended to any child leaving a child care institution upon attaining the 69 See Rules 29-38, The Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

age of eighteen years, with the aim of facilitating her reintegration into mainstream society.

232. It must be noted that the foregoing discussion was never intended to be a comprehensive analysis of how child victims of trafficking for CSE are to be dealt with under the JJA, 2015. The Act and the rules framed thereunder are exhaustive, and we have not delved into a detailed treatment of every provision. Our purpose in laying out the legislative scheme of the JJA was to merely provide a broad overview of how child victims of trafficking for CSE will be dealt with by the CWC. It is clear that when dealing with child victims of trafficking for CSE, it is the CWC, implementing the provisions of the JJA and the rules framed thereunder, that will conduct the inquiry and decide all questions relating to the custody, placement, rehabilitation, and restoration.

• POCSO Act

233. When the victim of trafficking for CSE is a child, the provisions of the POCSO Act would, in most cases, apply alongside Sections 143 and 144 of the BNS and/or the provisions of ITPA. The reason for this is two- fold: (i) there is no ambiguity in Indian law regarding the fact that every act of sexual exploitation involving a child is non-consensual as a matter of law70, and (ii) POCSO Act was designed to cover all forms of sexual abuse against children, including sexual harassment, aggravated sexual assault, and the production, storage or possession of child sexual abuse material, among others.71 Therefore, in all cases where the sexual 70 See Independent Thought v. Union of India, (2017) 10 SCC 800. 71 See § 3,5,7,9,11,13,14 & 15, The Protection of Children from Sexual Offences Act, 2012.

exploitation of a child involves acts punishable under the POCSO, the perpetrators would be charged and prosecuted under it.

234. The primary legislative intent behind the enactment of the POCSO Act was to create a comprehensive legal framework that would not only punish offenders but also provide a child-friendly system for recording evidence, investigating, and trying offences. It aimed to ensure the safety and dignity of child victims during the legal process, with specific provisions that mandate in-camera trials, the presence of a trusted adult during the proceedings, and the prohibition of aggressive questioning of child victims.72

235. Traffickers who sexually abuse child victims would be prosecuted as perpetrators under the relevant provisions of the POCSO Act. Those traffickers who do not themselves engage in acts of sexual abuse but form part of the trafficking network could be tried as abettors under Section 16 of

the POCSO Act. It is worth noting that Explanation III to Section 16 specifically covers conduct of the nature involved in trafficking, such as employing, harbouring, receiving or transporting a child through coercion, fraud, deception or abuse of a position of vulnerability, as a form of abetment under the POCSO Act. The punishment for such abetment is the same as that prescribed for the primary offence.

236. The crucial point to note is that once the POCSO Act is attracted, several aspects of the prosecution change significantly. First, the procedure for reporting the offence, recording the victim's statement and conducting the medical examination of the child will be governed by the specific 72 See Just Rights for Children Alliance & Anr v. S.Harish & Ors, 2024 INSC 716.

provisions of the POCSO Act which are designed to be more sensitive and protective of the child's interests.73Secondly, the offence will be tried before a Special Court.74 Importantly, while trying an offence under the POCSO Act, a Special Court shall also try an offence with which the accused may, under the Code of Criminal Procedure, 1973 ("CrPC"), be charged at the same trial i.e., trafficking offences under the BNS and the ITPA respectively, could thus potentially be tried along with the offences under the POCSO Act.75 Thirdly, the trial before the Special Court is required to be conducted in camera,76 and specific protections are put in place to ensure that the child is not exposed to the accused at the time of recording of evidence. Fourthly, for certain categories of offences under the POCSO Act, the Special Court shall presume that the accused committed or abetted or attempted to commit the offence, unless the contrary is proved.77 The culpable mental state of the accused shall also be presumed under the POCSO Act.78

237. Section 42A of the POCSO Act provides that the Act operates in addition to, and not in derogation of, any other law in force. In cases of inconsistency, the POCSO Act, shall prevail.79 Thus, where a victim of trafficking for CSE is also a child, and the acts of exploitation committed constitute offences under the POCSO Act, it is the procedure prescribed under the POCSO Act that must govern the various aspects of the trial. To the extent that the procedure prescribed under the ITPA, 1956, or any other legislation is inconsistent with the procedure prescribed under the 73 See Chapters V & VI, The Protection of Children from Sexual Offences Act, 2012. 74 See § 28, The Protection of Children from Sexual Offences Act, 2012. 75 See § 28(2), The Protection of Children from Sexual Offences Act, 2012. 76 See § 37, The Protection of Children from Sexual Offences Act, 2012. 77 See § 29, The Protection of Children from Sexual Offences Act, 2012. 78 See § 30, The Protection of Children from Sexual Offences Act, 2012. 79 Supra note 70.

POCSO Act, the procedure prescribed under the POCSO Act would prevail.

238. Section 19 of the POSCO Act makes it clear that the Act itself envisages the mandatory reporting of the matter by the police authorities to the CWC, including the need for care and protection and the steps taken in this regard.Thereafter, the CWC shall take all steps mandated under the JJA to protect the victim.80 Even if the matter is not reported, the CWC has the duty to take suo motu cognisance of such cases and reach out to the children in need of care and protection who are not produced before it. The Protection of Children from Sexual Offences Rules, 2020 ("POCSO Rules") also provide for the care and protection of the victims.In such cases, the POCSO

Act and the POCSO Rules have to be read along with the JJA and the relevant rules thereunder, in order to determine the procedure to be followed and the full scope of care and protection benefits to which the victim is entitled.

239. The discussion above makes the distinction between the roles of the JJA and the POCSO Act, respectively, reasonably clear. The JJA is the legislation that governs how child victims of trafficking for CSE are to be dealt with, i.e., where they are to be produced, what the inquiry must encompass, and what measures must be undertaken to ensure their rehabilitation and reintegration. These are victims' rights, and they exist independently of the trial or prosecution of the perpetrators. The POCSO Act, on the other hand, is primarily concerned with prosecution-related matters, i.e., prescribing harsher punishment, ensuring speedier trials, and making the trial process more sensitive to 80 ¶ 34-35, In Re: Right to Privacy of Adults, 2024 INSC 614.

the needs of child victims. While, the JJA applies to all child victims of trafficking for CSE, the POCSO Act is attracted only when the acts committed upon the child constitute offences punishable under the self- same Act.

f. Other institutional and policy measures

240. A lot of initiatives and measures taken by the Central and State governments work in tandem with all the legal provisions aforementioned, especially on the investigation and rehabilitation fronts. Although it would not be possible for us to discuss all of them exhaustively yet, the respondent no.1 has made particular reference to a few measures that, according to them, play an especially crucial role. They are: (a) the Anti-Human Trafficking Cell under the MHA along with the district-level AHTUs, (b) the NALSA, Scheme and (c) the Mission Shakti Programme. Their broad aims, objectives and actions are elaborated below.

• Anti-Human Trafficking Cell and AHTUs

241. The Anti-Human Trafficking Cell which has been established in the year 2006 within the MHA has focused its attention on coordinating the 'law enforcement response' to human trafficking. Its functions, however, exclude legislative, welfare and other aspects of response mechanism whose responsibility lies solely within the purview of the MWCD.81 The mandate of the cell being thus restricted, its duties are as follows:

> providing suitable guidelines to States/UTs from time to time on 81 MINISTRY OF HOME AFFAIRS, https://www.mha.gov.in/en/divisionofmha/Women_Safety_Division/anti-trafficking-cell, (last visited 4th May, 2026).

strengthening law enforcement responses; acting as an interface between the different Central ministries to address issues of human trafficking; providing guidance and assistance to States/UTs for holding colloquiums and conferences for the purpose of sensitizing police officers, judicial officers, etc.; and the signing of bilateral/multilateral MoUs with various countries to address the

subject issue. So far, MOUs have been signed with Bangladesh82, UAE83 and Cambodia84.

242. Since 'Police' and 'Public Order' are subjects which fall within the purview of the States as per the Seventh Schedule of the Constitution, the Cell only provides necessary guidance and advice for the State government authorities to strengthen their efforts, and this is evident from the different advisories issued from time to time.

243. The MHA has released funds to State/UT governments from time to time to provide final assistance in the establishment of AHTUs at the District-level across the country. The respondent no.1 has submitted that, as on date, 827 AHTUs have been set-up.

82 MINISTRY OF EXTERNAL AFFAIRS, Memorandum of Understanding between the Government of the Republic of India and The Government of the People's Republic of Bangladesh on Bilateral Cooperation for Prevention of Human Trafficking especially Trafficking in Women and Children; Rescue, Recovery, Repatriation and Re- integration of Victims of Trafficking, https://www.mea.gov.in/Portal/LegalTreatiesDoc/BG15B2411.pdf. 83 MINISTRY OF EXTERNAL AFFAIRS, Memorandum of Understanding between the Government of the Republic of India and The Government of United Arab Emirates on Cooperation in Preventing and Combating of Human Trafficking, https://www.mea.gov.in/Portal/LegalTreatiesDoc/AR17B2980.pdf. 84 MINISTRY OF EXTERNAL AFFAIRS, Memorandum of Understanding between the Government of the Republic of India and The Government of the Kingdom of Cambodia on Cooperation for Prevention of Human Trafficking especially Trafficking in Women and Children: Rescue, Recovery, Repatriation and Re-integration of Victims of Trafficking, https://www.mea.gov.in/Portal/LegalTreatiesDoc/KH18B3195.pdf.

• NALSA Scheme on Victims of Trafficking and Commercial Sexual Exploitation, 2015

244. In pursuance of Section 4(b)85 of the Legal Services Authorities Act, 1987, the NALSA Scheme86 recognised that victims of trafficking for CSE, face a great deal of trauma not just in the immediate aftermath of their traffic but even after their rescue. It was acknowledged that they require protection from their traffickers and that their livelihoods must be secured by the provision of a viable alternatives to avoid the chances of being re-trafficked. Broadly, the NALSA Scheme tasks the State Legal Services Authorities ("SLSAs") and the District Legal Services Authorities ("DLSAs") with the responsibility to create awareness amongst the victims of trafficking about the existence of several existing welfare measures and providing assistance in completing the due diligence procedure for availing various entitlements. This would range from enabling the applicant to get all identity and supportive documents to ensuring that the benefit reaches the recipient. For this purpose, the NALSA Scheme envisions a three-tiered partnership: (a) at the micro-level with the CSOs and NGOs working in the field; (b) at the meso-level with and between district administrative mechanisms such as the district offices of the Department of Women and Child Development, Child Protection/Welfare Committees and AHTUs; and

(c) at the macro-level with the State and Central governments, their Departments of Women and Child Development and other relevant 85 The Legal Service Authorities Act, 1987, No. 39, § 4(b),

Acts of Parliament, 1987 (India). “The Central Authority shall perform all or any of the following functions, namely:— […]frame the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act”. 86 NATIONAL LEGAL SERVICES AUTHORITY, NALSA (Victims of Trafficking and Commercial Sexual Exploitation) Scheme, 2015, https://cdnbbsr.s3waas.gov.in/s32e45f93088c7db59767efef516b306aa/uploads/2025/04/2025040816 71720977.pdf.

ministries. Through such coordination mechanisms, the DLSAs are also required to map out vulnerable areas and vulnerable populations within its jurisdiction so that preventive strategies can be put into motion.

245. A team of panel lawyers, social workers and Para-Legal Volunteers (“PLVs”) are to be used for the aforesaid. Moreover, the lawyers and PLVs are also required to help the victims of trafficking in getting the FIRs registered and be present during all legal proceedings including opposing the bail of the accused, obtaining court orders for protection of the victim and witnesses, assisting in recording the statement of the victim during trial, release of compensation under the provisions of the CrPC and/or the State Victim Compensation Schemes etc. Finally, the Scheme also envisages the creation of a sound Management Information System (“MIS”) within the DLSAs and SLSAs respectively so that every activity under the NALSA Scheme can be recorded, monitored, followed up and assessed. This MIS would also enable the monitoring of the successful rehabilitation of the trafficked victims for a period of three years.

• Mission Shakti Programme for Women: OSCs and Shakti Sadans

246. The ‘Mission Shakti – Integrated Women Empowerment Programme’ is an umbrella scheme whose objective is to provide all women including differently-abled, socially and economically marginalized and vulnerable groups who are in need of care and protection, with both short term and long-term services and information for holistic development and empowerment. All its components have the broad objectives of protecting or assisting women who are (a) victims of violence, or (b) in difficult circumstances, or (c) are in need of empowerment. The integration of various former sub-schemes was effected to overcome the implementation problems which arose as a result of various organs working in silos without adequate linkages, lack of standardization and adequately trained staff, absence of appropriate monitoring etc. Presently, the Mission has only two sub- schemes i.e., ‘Sambal’ for the safety and security of women and ‘Samarthya’ for the empowerment of women.

247. The One-Stop Centres (“OSCs”) which are a part of the ‘Sambal’ sub-

scheme are of some significance to us. They are intended to act as the mainstay of all activities at the District level. They facilitate immediate emergency and non-emergency access to a range of services including medical, legal, temporary shelter, police assistance, psychological and counselling support etc. under one roof for women affected by violence and distress which would include victims of trafficking. Temporary shelter can be availed at the OSCs for a maximum period of 5 days and for long-term shelter requirements, arrangements are made in coordination with the Shakti Sadans. In

the event, girls below the age of 18 years are referred to the OSC, they are provided services in coordination with the authorities established under the JJA and the POCSO respectively. OSCs are, by priority, established either within or near existing hospitals or medical facilities so that medical care is made realistically accessible. An important aspect is that a common pool of referral staff for legal, psychological and medical facilitation for the OSCs and Shakti Sadans are prepared in a combined manner.

248. The Shakti Sadans which are a part of the 'Samarthya' sub-scheme is a merged version of two previously separate initiatives i.e., 'SwadharGreh' for women in difficult circumstances and the Ujjawala home which were the protective homes provided for under Section 21 of the ITPA. The following are the range of services that are to be provided by the Shakti Sadans:

(i) Basic necessities such as food, clothing and other items of personal use.

(ii) Legal assistance requirements through DLSAs or through lawyers arranged separately by the implementing organisations.

(iii) First aid facilities which are to be made available within the homes. However, health check-up and other medical facilities would be provided through the district hospital/health and wellness centers/CHC/PHC. Notwithstanding the above, the implementing organisations are required to engage a part-time doctor(s) who is required to visit the home at least once in a week to conduct a general health check-up of the residents. Such a doctor(s) must also be available should any emergency arise at the home. Expenditure towards the purchase of medicines prescribed by the doctor is to be met by the implementing organisations through their management costs.

(iv) The common pool of counsellors under the overall charge of the OSCs would provide psycho-socio counselling to the residents.

(v) Arrangements for vocational training and skill development classes are also to be provided by the implementing organisations through the Vocational Training Institutes recognized by the Directorate General of Employment and Training under the Ministry of Labour and Employment, or the Training Partners of the National Skill Development Council ("NSDC"). The training and examination fee for the same, if not covered by any existing scheme, would be reimbursed to the implementing organization on the submission of the completion certificate. Expenditure for the travel etc., are to be met from the contingencies head.

(vi) Micro Credit would be facilitated through SIDBI, Mudra and other relevant schemes of the Central/State government in case the residents want to start any small-scale industry/business.

(vii) Opening bank accounts in their names is also facilitated in which an amount of Rs. 500 per month per resident is deposited. This amount cannot generally be withdrawn by the residents during their stay in the home. The amount along with any interest accrued is intended to act as seed money for the resident at a time when she leaves the home.

(viii) Social security benefits shall also be arranged for the residents in convergence with the relevant departments.

249. The facilities at the Shakti Sadan homes could also be availed by the children accompanying the women i.e., unmarried girls of any age and boys up to the age of 12 years would be allowed to stay with their mothers. The maximum period for which women can stay in Shakti Sadan homes is three years. However, extensions can be granted on a need basis by the jurisdictional magistrate.

250. The Guidelines of the Mission Shakti scheme itself envisage that the Shakti Sadans and the OSCs work in close coordination with the AHTUs in the Police Stations. While the reintegration and repatriation of the victims of trafficking will be facilitated through the AHTUs, the Shakti Sadan Scheme is to provide the following services in the process:

(i) Set up Half-way Homes, which is a home within the community, wherein a group of victims/survivors, ready for reintegration, live and work out of. These homes facilitate a smooth transition from life in the rehabilitation center to independent living in the community. The women here are gainfully employed and can live semi-independently with minimum supervision. This facility has been created keeping in mind that a phased approach to re- integration is required.

(ii) For inter-State repatriation, they would cover travel and other incidental expenses of the victim and one accompanying person from the destination area to her home city/town/village with a view to enable restoration of the victim/survivor to their families.

(iii) As far as facilitating cross-border repatriation is concerned, the expenses incurred in fulfilling various formalities for obtaining a repatriation order, as well as the travel expenses to the country of origin or the border (for both the victim/survivor and one accompanying person) is covered by the scheme.

C. Victims of Trafficking for CSE and their Right to Rehabilitation

251. From our discussion of the Palermo Protocol in the preceding section, it is evident that the Protocol's primary aims were three-fold: prevention, punishment, and protection. While Articles 6–8 provide for certain measures to protect and assist trafficked persons with full respect for their human rights, these provisions are soft obligations. The criminalisation obligation under Article 5 stands in sharp contrast, as it is mandatory and has been widely followed. At its core, therefore, the Protocol is a crime-suppression treaty. It views trafficking primarily as a crime involving criminals

who have to be prosecuted and punished.

The protection of victims, though present in its text, has never been its driving purpose.87

252. In earlier paragraphs of this judgment, we briefly discussed the multiple approaches developed to understand and combat trafficking. We noted that no single approach would suffice, and that an effective response must draw on elements of each. The Palermo Protocol, to its credit, attempts to address trafficking as both a crime and a human rights violation. However, its overwhelming emphasis on the crime-control approach has produced a weak human rights framework.88

253. Such a lack of primacy afforded to protection and assistance holds true for the Indian legal landscape dealing with victims of trafficking for CSE as well. From our detailed discussion of the primary legislations governing trafficking and CSE, i.e., the ITPA and the BNS respectively, it is clear that the overwhelming focus of both statutes is criminalisation, prosecution, and punishment. The victim, though not entirely absent, appears at the margins. There are provisions that address certain aspects of protection and assistance, such as provisions in the ITPA, which provide for protective homes, and the BNSS provisions, which provide for compensation. These are not without value. But they are piecemeal and do not reflect the victim's broader needs. More fundamentally, none of these provisions categorically recognise the victim as a person whose rights have been violated, i.e., a person who 87 Tom Obokata, Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach 164 (Brill Nijhoff 2006).

88 Julie Kaye, Hayli Millar & Tamara O'Doherty, Exploring Human Rights in the Context of Enforcement-

Based Anti-trafficking in Persons Responses, in The Palgrave International Handbook of Human Trafficking 603, 603–607 (John A. Winterdyk & Jackie Jones eds., Palgrave Macmillan 2020).

has been wronged, and who is therefore entitled to a response commensurate with that wrong.

254. The overwhelming emphasis on criminal justice, at the expense of a human rights framework, rests on a flawed assumption: that the victim's interests are somehow encapsulated within the public interest in prosecuting and punishing the perpetrators. Of course, the public has a genuine interest in punishing criminals and many victims would, in fact, demand exactly that. But prosecution and punishment alone do not improve a victim's condition. A trafficking victim's needs do not disappear when a conviction is recorded. In fact, while trafficking affects the larger society, its most tangible effects are felt and experienced by the victims. Trafficking victims, especially those trafficked for CSE, have diverse and deeply personal needs. They may need safety, medical care, financial support, or reunification with their families. None of them is addressed by a sentence handed down in a courtroom.

255. The consequence of a primarily crime-control approach is this. It does not place the victim and her needs at the centre of the response. It conflates punishment of the trafficker with fulfilment of the victim's interests. And in doing so, it denies them the protection and assistance they actually

require. The result, well-documented and deeply troubling, is that many victims are re-trafficked. They are returned, without support, without safety assessments, without resources, to precisely the conditions of vulnerability that made them targets in the first place. A framework that does not address the needs and interests of the victims concretely cannot be said to have addressed the problem of trafficking at all.

256. A human rights approach to trafficking reframes the problem.

Trafficking is not only a crime to be prosecuted, but also an act which violates the fundamental rights of real people. Shifting to a human rights framework means shifting the lens: to seeing trafficked persons as people who have been wronged and who bear rights. In this framework, the victims are no longer at the periphery. They are at the centre; and with that shift comes a corresponding change in what the response must accomplish. The goal is not merely to punish the perpetrator. It is also to empower the victims by guaranteeing and realising their rights and by ensuring access to the remedies they are owed.

257. To be clear, a human rights framework to addressing trafficking is grounded in three propositions. First, victims are rights-holders, i.e., persons with legal entitlements arising from the wrong done to them. Secondly, their needs are not met solely by criminal justice measures. Thirdly, victims are not a monolithic group. Their needs and interests are deeply personal and varied. What one victim requires may be entirely different from what another needs.

258. It is important to clarify what the human rights approach does not mean. It does not mean abandoning the criminal justice response to trafficking. Prosecuting traffickers and imposing proportionate punishment remains necessary. Criminal justice and human rights are not competing frameworks. Criminal justice is, in fact, an important component of the broader human rights framework. The human rights approach insists that prosecution cannot be the sole response; it simply requires that, alongside arresting traffickers and securing convictions, we also guarantee the protection and assistance to those who have been trafficked.

259. The human rights framework for addressing trafficking also finds support in core international law instruments, such as the International Covenant on Civil and Political Rights (“ICCPR”). Article 2(3) of ICCPR obliges every State Party to ensure that persons whose rights are violated have access to effective remedies. The Human Rights Committee, in General Comment No. 31, has elaborated on what this obligation requires. It makes clear that an effective remedy is not limited to prosecuting the perpetrator. It also encompasses reparation and, crucially, measures to prevent recurrence of the violation. The Committee further clarified that reparation need not take a single form. Depending on the circumstances, it may include restitution, compensation, rehabilitation, public acknowledgement, and other measures.

260. In terms of soft law on the right to remedies for victims, the most important instrument is the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“2006 Basic Principles”). The 2006 Basic Principles indicate that the concept of

remedy includes both substantive and procedural components. As a procedural matter, often termed as “access to justice,” individuals whose rights are claimed to have been violated ought to have effective access to a competent legal system to seek remedies in the State where the violation occurred.89 In a substantive sense, often termed “reparation,” individuals whose rights have been violated should obtain remedies effective enough to redress the harm.90 The 2006 Basic Principles also envisage multiple forms of reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.91

261. A human rights approach to trafficking, which places victims at its centre, can find recognition in the Indian legal landscape as well. The clearest and most fundamental articulation of such an approach can be found in Articles 21 and 23 of the Constitution respectively.

i. Right to Live with Dignity – What does it include?

262. Article 21 of the Constitution casts an obligation on the State to preserve life.92 Preservation of human life is of paramount importance because life, once lost, cannot be given back. On multiple occasions, this Court has held that the right to life guaranteed under Article 21 cannot be restricted to mere animal existence.93 The right to life encompasses more than mere physical survival. It includes the right to live with dignity, for without dignity, human life is substantially diminished. The right to 89 General Principle No. 12, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147.

90 General Principle No. 15, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147.

91 General Principle Nos. 19-22, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147. 92 ¶ 7-8, Pt. Parmanand Katara V. Union of India and Ors., (1989) 4 SCC 286. 93 ¶ 7, Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608; ¶ 5, Chameli Singh v. State of U.P., (1996) 2 SCC 549.

life, thus understood, incorporates the right to dignity. But what does a life lived with dignity actually require?

263. Dignity is an ambiguous and malleable concept. It is difficult to define, and is perhaps best left undefined. In a world with so many different life views and value systems, a single, universal conception of dignity is impossible to sustain. Dignity’s malleability, however, also means it can be invoked to support competing positions. This tension was on full display when this Court considered the permissibility of passive euthanasia under the constitutional framework in Common Cause v. Union of India, reported in (2018) 5 SCC 1, and Harish Rana v. Union of India, 2026 SCC OnLine SC 358, respectively. Dignity was invoked to support the view that life must be preserved at all times. At the same time, it was invoked to support the view that there are circumstances in which allowing life

to end naturally may itself be the dignified choice. Viewed in this context, the right to live with dignity is open-ended in nature. It does not prescribe specific content for every context.

264. Despite this ambiguity and open-endedness, certain facets of dignity are undeniable. This Court has returned to them time and again. First and foremost is the recognition that every person has inherent dignity.94 Dignity belongs to every human being simply because they are human. It does not admit degrees. It cannot be gained or lost. Inherent dignity is not a contingent feature of a person; it is a necessary one. Every person possesses it equally, not because they meet some external standard of what it means to be dignified, but simply because they are human. It is Preamble, Universal Declaration of Human Rights; Preamble, International Covenant on Civil and Political Rights; ¶ 20 & 26, M. Nagaraj And Others v. Union Of India, 2006 SCC 8 212; ¶ 69 & 70, Dr. Jaya Thakur v. Government of India, 2026 INSC 97.

intrinsic to humanity itself. One scholar aptly describes this conception of dignity as follows:

> "to ascribe human dignity to human beings not as empirical matter, but as a moral matter – that is, to treat it as an inherent aspect of humanity – is to treat human beings as creatures of intrinsic, incomparable, and indelible worth, simply as human beings; no further qualifications are necessary. In this basic sense, dignity is ascribed to human beings independently of their particular accomplishments or merits of praiseworthiness. It refers to a kind of worth that is not contingent on being useful, or attractive, or pleasant or otherwise serving the ends of others."95 (Emphasis Supplied)

265. The concept of inherent dignity furthers the idea that every human being is an end in themselves and not merely a means to another's purposes. This is because the intrinsic dignity of a person consists in being acknowledged as an independent personality. To treat a person as an object is to assign to them only the value they hold in another's hands. It is, in effect, to say that they have no worth of their own. This is the essence of objectification. When a person is trafficked for the purpose of commercial sexual exploitation, this is precisely what occurs. The entire transaction proceeds as though their humanity is irrelevant and they are nothing more than mere objects. There is perhaps no act more directly at odds with the recognition of inherent dignity than these acts of trafficking, which in essence reduce a person to a thing.

266. This Court has not stopped at recognising the inherent dignity of every human being. Although every person is born with the same dignity, many, especially the poor and downtrodden, often struggle to live in 95 Rinie Steinmann, The Core Meaning of Human Dignity, 19 Potchefstroom Elec. L.J. 1, 10 (2016).

conditions that sustain it. Having dignity as a birthright is not enough.

One must also be able to live in conditions that give it meaning. Dignity, in this sense, needs sustenance from the material circumstances of a person's life.96

267. This Court gave direct expression to this idea in Francis Coralie Mullin v. Administrator, Union Territory of Delhi, reported in (1981) 1 SCC 608 by observing thus:

> "8. But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.[...]" (Emphasis Supplied)

> 268. The passage above is clear: without a minimum level of basic necessities, how can life be lived with dignity? This Court has firmly established that there is an inextricable link between dignity and material well-being.97 Viewed thus, the right to live with dignity is not 96 Erin Daly, Dignity Rights: Courts, Constitutions, and the Worth of the Human Person 55 (Univ. of Pa. Press 2012).

> 97 Also see ¶ 13, Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 (Supp-2) SCC 549; ¶ 8, Mohini Jain (Miss) v. State Of Karnataka, 1992 SCC 3 666.

a static condition. It is shaped by the circumstances a person lives in, i.e., the situations they encounter and the conditions they inhabit. These circumstances can either sustain dignity or erode it.

269. A certain level of material well-being allows a person to exercise real control over their life. It frees them from the constant pressure of want. It is also the foundation on which the effective exercise of civil and political rights depends, i.e., rights that remain theoretical and often inaccessible for those who cannot meet their most basic needs.98 Further, this Court has, on multiple occasions, recognised that to make rights meaningful to the poor and disadvantaged, the State must provide facilities and opportunities to fulfil them.99

270. It is important, however, to draw a distinction. The provision of basic goods promotes dignity and is an aspect of it. But it is not dignity itself. Inherent dignity is, as discussed earlier, universal and inalienable. It is not conferred by the State. What the State can do and is constitutionally obligated to do is to create and sustain the conditions in which a person's dignity can be lived. The obligation is not to give dignity, but to ensure that the conditions for its expression are present.

271. However, it is also important to note the qualification that is present in this Court's observation in Francis Coralie (supra). What constitutes bare necessities and to what extent and to whom they should be provided are aspects which are not fixed. They depend, to a significant degree, on the extent of the country's economic development. The 98 Id at ¶ 16; Chameli Singh, Supra note at 93 ¶ 16.

99 ¶ 16, Vincent Panikurlangara V. Union of India and Ors., (1987) 2 SCC 165; ¶ 2, Vikram Deo Singh Tomar v. State of Bihar, 1988 AIR SC 1782; ¶ 16, Charu Khurana And Others v. Union Of India, 2015 SCC 1 192.

determination of which specific measures are necessary and the allocation of resources toward them are decisions that fall primarily within the domain of the legislature and the executive. However, this does not mean that the Court stands apart entirely. Where the State has failed to take even the minimum steps necessary to give content to the rights of its citizens or where it has made commitments it has not honoured, this Court has consistently held that it is its duty to identify those failures and to call upon the State to remedy them.100

272. The linkages between dignity in the form of a certain minimum material well-being and the right to be free from exploitation are apparent. A person without material security, i.e., without income, shelter, or the means of an independent livelihood, is a person exposed to exploitation. He/she cannot negotiate from a position of choice, and it is this very desperation that makes them a target. As discussed in the earlier section, lack of access to the bare basic necessities of life is what makes people most vulnerable to being trafficked. Thus, for victims trafficked for CSE, material deprivation of this nature merely doesn't diminish dignity. It actively creates conditions in which their dignity can be stripped away altogether.

273. There is a third dimension to dignity that has received increasing recognition. Dignity is not only about inherent worth, nor only about material well-being. To live with dignity, a person must not be humiliated, must not be excluded from the community they belong to, and must not be treated as lesser simply because of who they are or 100 ¶ 10, Paschim Banga Khet Mazdoor Samity and others V. State of West Bengal and Another, (1996) 4 SCC 37; Centre for Environment & Food Security v. Union of India, (2011) 5 SCC 676.

what they have been through.101 This is because the harm of indignity is not only material. It is the humiliation, the frustration and the sense of being told that one is unacceptable as a member of society.102 Dignity, in this sense, depends on recognition by the State and society of a person and their lived experiences.

274. For victims of trafficking for CSE, this third dimension of dignity is violated in a particularly acute and enduring manner. As will become evident from the discussion in the succeeding parts of this judgment, victims of trafficking for CSE carry a deep and pervasive stigma. Victims find themselves isolated from their families and communities, excluded from social life, and treated as persons whose suffering is, in some measure, self-inflicted or undeserving of concern. When victims of trafficking for CSE are met with stigma and marginalisation, it is their dignity as persons whose

identity and suffering deserve acknowledgement that is fundamentally undermined.

275. Thus, the right to live with dignity, as this Court has understood it, broadly includes: (i) the right not to be treated as an object, (ii) access to the minimum material conditions for a meaningful life, and (iii) the right to be recognised. For victims trafficked for CSE, the crime violates their right to live with dignity directly, i.e., it commodifies, impoverishes, and stigmatises. But the absence of dignity also precedes the crime, i.e., lack of access to minimum material necessities, is predominantly what makes victims vulnerable to traffickers in the first 101 ¶ 3-4, 132 & 529, Navtej Singh Johar & Ors. v. Union Of India, 2018 SCC 101. 102As Justice Goldberg writes in Heart of Atlanta Motel, Inc. v. United States: Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.

place. When dealing with victims trafficked for CSE, this right to live with dignity needs to be necessarily read alongside Article 23 of the Constitution as well. Such a reading opens up a new perspective on what the law owes to these victims.

ii. Victims' Right to Rehabilitation

276. Article 23, as we noted earlier in this judgment, is a fundamental right that guarantees freedom from exploitative structures. It prohibits the trafficking of human beings and all forms of forced labour. Its sweep is deliberately wide. It is enforceable not only against the State but also against private actors.

277. That trafficking constitutes an affront to dignity and life is beyond question. But the same can be said of many heinous crimes. To protect against such violations of the right to life, the State establishes a criminal justice system, one that aims to prevent crime, rescue victims, and punish perpetrators. However, this Court, on a combined reading of Articles 21 and 23 respectively, has made clear that the obligations owed to victims of exploitative structures go beyond this prevention, rescue and punishment paradigm.

278. A closer look at this Court's decisions in Bandhua Mukti Morcha (supra), Neeraja Chaudhary v. State of M.P, reported in (1984) 3 SCC 243 and Public Union for Civil Liberties v. State of T.N., reported in (2004) 12 SCC 381 respectively, makes this clear. This Court identified a three-fold duty when dealing with victims of exploitative structures: (i) identification of victims, (ii) their rescue, and (iii) their rehabilitation. The relevant observations from each of these judgments, which reflect this understanding, are as follows:

> Bandhua Mukhti Morcha (supra) "26. The other question arising out of the implementation of the Bonded Labour System (Abolition) Act, 1976 is that of rehabilitation of the released bonded labourers and that is also a question of the greatest importance, because if the bonded labourers who are identified and freed, are not rehabilitated, their condition would be much worse than what it was before during the period of their serfdom and they would become more exposed to

exploitation and slide back once again into serfdom even in the absence of any coercion. The bonded labourer who is released would prefer slavery to hunger, a world of "bondage and (illusory) security" as against a world of freedom and starvation. The State Governments must therefore concentrate on rehabilitation of bonded labour and evolve effective programmes for this purpose. Indeed they are under an obligation to do so under the provisions of the Bonded Labour System (Abolition Act), 1976. [...] xxx

28. We may point out that the problem of bonded labourers is a difficult problem because unless, on being freed from bondage, they are provided proper and adequate rehabilitation, it would not help to merely secure their release. Rather in such cases it would be more in their interest to ensure proper working conditions with full enjoyment of the benefits of social welfare and labour laws so that they can live a healthy decent life. But of course this would only be the next best substitute for release and rehabilitation which must receive the highest priority." (Emphasis Supplied) Neeraja Chaudhary (supra) "1.This is yet another case which illustrates forcibly what we have said on many an occasion that it is not enough merely to identify and release bonded labourers but it is equally, perhaps more, important that after identification and release, they must be rehabilitated, because without rehabilitation, they would be driven by poverty, helplessness and despair into serfdom once again. Poverty and destitution are almost perennial features of Indian rural life for large numbers of unfortunate ill-starred humans in this country and it would be nothing short of cruelty and heartlessness to identify and release bonded labourers merely to throw them at the mercy of the existing social and economic system which denies to them even the basic necessities of life such as food, shelter and clothing. It is obvious that poverty is a curse inflicted on large masses of people by our malfunctioning socio-economic structure and it has the disastrous effect of corroding the soul and sapping the moral fibre of a human being by robbing him of all basic human dignity and destroying in him the higher values and the finer susceptibilities which go to make up this wonderful creation of God upon earth, namely, man. It does not mean mere inability to buy the basic necessities of life but it goes much deeper; it deprives a man of all opportunities of education and advancement and increases a thousand fold his vulnerability to misfortunes which come to him all too often and which he is not able to withstand on account of lack of social and material resources. We, who have not experienced poverty and hunger, want and destitution, talk platitudiously of freedom and liberty but these words have no meaning for a person who has not even a square meal per day, hardly a roof over his head and scarcely one piece of cloth to cover his shame.

What use are 'identification' and 'release' to bonded labourers if after attaining their so-called freedom from bondage to a master they are consigned to a life of another bondage, namely, bondage to hunger and starvation where they have nothing to hope for — not even anything to die for — and they do not know whether they will be able to secure even a morsel of food to fill the hungry stomachs of their starving children. What would they prize more: freedom and liberty with hunger

and destitution staring them in the face or some food to satisfy their hunger and the hunger of their near and dear ones, even at the cost of freedom and liberty? The answer is obvious. It is therefore imperative that neither the Government nor the Court should be content with merely securing identification and release of bounded labourers but every effort must be made by them to see that the freed bonded labourers are properly and suitably rehabilitated after identification and release.

xxx

5.[...] It is the plainest requirement of Articles 21 and 23 of the Constitution that bonded labourers must be identified and released and on release, they must be suitably rehabilitated. The Bonded Labour System (Abolition) Act, 1976 has been enacted pursuant to the Directive Principles of State Policy with a view to ensuring basic human dignity to the bonded labourers and any failure of action on the part of the State Government in implementing the provisions of this legislation would be the clearest violation of Article 21 apart from Article 23 of the Constitution.

(Emphasis Supplied) Public Union for Civil Liberties (supra) "2. [...] The report correctly pointed out that the implementation of the Act encompasses three functions, namely, identification, release and rehabilitation of bonded labour. [...] xxx

4. After going through the detailed report of the Expert Group, responses to it by the Governments and that of the learned amicus curiae, the report of NHRC and the various affidavits-on-record, we could easily arrive at the conclusion that the major issue that is to be solved are the aspects relating to rehabilitation of bonded labours. Once the bonded labourers are identified and released, they have to be rehabilitated forthwith. It is a sad reality that the rehabilitation and related aspects of bonded labourers have not been given adequate consideration till now. If we are now concentrating our attention to identification and release of bonded labourers, they will languish in streets, if there are no well-chalked-out corresponding plans for rehabilitation. Hence, in our considered opinion the primary direction shall be aimed at evolving and implementing rehabilitation plans." (Emphasis Supplied)

279. What emerges from these decisions is that when dealing with victims of exploitative structures, rehabilitation is not a secondary concern. Rather, as the Court in Neeraja Chaudhary (supra) recognised, it is equally, perhaps more, important. The reason is straightforward. Rescue without rehabilitation returns the victim to the very same conditions of poverty and vulnerability that made her a target in the first place. As this Court observed in Bandhua Mukhti Morcha (supra), if bonded labourers are identified and freed but not rehabilitated, their condition may well be worse than it was before, as they are more exposed to exploitation, with no protection and nowhere to turn. The same logic applies with equal, if not greater, force to victims of trafficking for CSE. Identification and rescue are necessary, however, they are not sufficient.

280. It may be pointed out that the above decisions of this Court arose in the context of bonded labour and the Bonded Labour System (Abolition) Act, 1976. However, in our opinion, it would be impossible to read those decisions as confined to that context alone. The principle that these cases establish, i.e., that the constitutional obligations owed to victims of exploitative structures extend to

rehabilitation and not merely to rescue, flows directly from Articles 21 and 23 respectively. There is no basis, in law or in reason, to hold that it applies to bonded labourers but not to victims trafficked for CSE. Both are victims of exploitative structures and both are protected by Article 23. To draw such a distinction would be to betray the spirit of this Court's dictum in each of those cases.

281. The discussion thus far leads to a clear conclusion. A combined reading of Articles 21 and 23 respectively establishes that victims of trafficking for CSE have a right to rehabilitation. In recognising this right, the Constitution adopts, in the clearest possible terms, a human rights approach to trafficking, i.e., one that places the victim at its centre, and measures the adequacy of the response to trafficking not only by the convictions secured but also by the rehabilitation that is afforded.

282. Further, the statutory framework reinforces this conclusion. As we discussed earlier in this judgment, the ITPA, itself envisages rehabilitation and protection for victims to some extent. While the BNS provides for compensation, this Court has consistently held that compensation alone does not exhaust the State's obligations and that victims of crime must be rehabilitated.103 Significantly, the respondent no. 1 has also accepted, in its submissions, that victims of trafficking for CSE are entitled to rehabilitation. Viewed from any angle, the right of victims of trafficking for CSE to rehabilitation is beyond question.

iii. Scope of the right to rehabilitation of victims of trafficking for CSE

283. Having established the right to rehabilitation for the victims of trafficking for CSE, it is necessary to briefly address its scope and contents. This Court, in the cases discussed above, whilst dealing with the right to rehabilitation, didn't expand on its scope or content. However, as discussed in the previous section on Article 23, it is evident that, to be in line with this Court's interpretative approach, the right to rehabilitation must be understood and be given an expansive meaning.

284. At its most fundamental level, the right to rehabilitation includes the right to be protected, both from the traffickers and from being trafficked again. This is because Article 23 promises freedom from exploitative structures and for freedom to be meaningful, it must also be lasting. Thus, embedded within this right to protection is a right to be prevented from further harm. What would such a right exactly include?

285. At the most basic level, the right to be protected from further harm requires the State to take measures to secure the victim's physical safety from her traffickers. In general, the State extends protection to all citizens through the ordinary mechanisms of the criminal justice 103¶ 1,3 & 7, Mallikarjun Kodagali v. State of Karnataka, (2019) 2 SCC 752; ¶ 24, Gang-Rape Ordered by Village Kangaroo Court in W.B., In re, (2014) 4 SCC 786.

system, i.e., the police, courts, and penal law respectively. However, the protection owed to victims of trafficking for CSE is qualitatively different and places a far heavier obligation on the State. Trafficking is sustained through high levels of violence and intimidation, and the networks that support it do not dissolve simply because a victim has been freed from them. In fact, the risk to a

victim's safety can intensify after rescue.

286. At a further level, the right to protection from further harm should address the consequences of wrongdoing and place the victim in a position where she can build a life that is not defined by the wrong she suffered. To understand what this entails, it is useful to return to the three dimensions of dignity we recognised earlier. Each dimension tells us something different about what rehabilitation must accomplish. Together, they ensure that the right to rehabilitation is not understood narrowly.

287. The most readily recognised dimension of rehabilitation is the one corresponding to dignity as material well-being. This encompasses the provision of goods, shelter, medical care, psychological support, compensation, and vocational training, i.e., all that is necessary to enable the victim to sustain herself independently. Without this, rehabilitation is an empty promise. However, the scope of the right to rehabilitation cannot stop here.

288. The dignity as recognition dimension (the third dimension) demands that rehabilitation also include measures that actively work to reduce the stigma, isolation, and marginalisation that victims of trafficking for CSE face. Measures that facilitate genuine reintegration into the community, i.e., measures that address the social conditions which perpetuate exclusion or cause humiliation, are therefore as much a part of rehabilitation as any material provision.

289. The inherent dignity dimension, on the other hand, can be said to entail not what rehabilitation must include but how it must be carried out. To respect a victim's inherent dignity is to refuse to treat her as a passive object upon whom measures are imposed. It means that rehabilitation must, to the greatest extent possible, be designed and implemented with the victim's own choices, wishes, and specific circumstances at its centre.

290. The above discussion establishes that the right to rehabilitation imposes positive obligations on the State. This raises the question: what specific measures is the State obliged to provide to actualise the right to rehabilitation of victims of trafficking for CSE? There is no single, precise answer. Protection and rehabilitation can take many forms, and the specific measures required will depend on the victim's circumstances, available resources, and the structures in place. It is not the function of this Court to delineate the exact scope of the right and all that it entails. Those are decisions for the legislature and the executive to make, after considering a host of factors and perspectives. This Court's role is more focused. It is to assess whether the State is taking reasonable measures towards the progressive realisation of the minimum core of this right, and whether those measures are being implemented in both letter and spirit. In the next sub-section, we seek to assess these two factors with respect to the right to rehabilitation of victims of trafficking for CSE.

D. Whether the State could be said to have taken "reasonable measures" to safeguard the right to rehabilitation of the victims of trafficking for CSE?

291. In order to gauge whether 'reasonable' measures are being taken by the State to guarantee the right to rehabilitation to the victims of trafficking for CSE, it is important that we go back to the start and refocus on the reason which impelled the very institution of the original writ petition – the

absence of a comprehensive "Victim Protection Plan". The effects of its void have been long-lasting and reverberating for the victims. This very lacuna comes with the danger of throwing any and all rescue efforts wayward because there is no clear, guiding and binding framework on how the victims are to be dealt with, both during and after their rescue. Naturally, this would also mean that the manner of protection and rehabilitation which is to be offered to such victims is without method and contingent on the will or whims of the person charged with their care at the ground-level, thereby seriously and systemically impairing the realisation of the victim's fundamental rights.

292. Upon a detailed perusal of all the materials which form a part of the record of the original writ petition, the first M.A. and the present M.A. respectively, it can be seen that the necessity of a victim protection plan which must, in all cases, augment the State's anti-trafficking efforts, was duly acknowledged by the respondent no. 1. It was in furtherance of such an acknowledgement that concerted efforts were taken under the supervision of this Court to formulate such a plan. This very exercise was indicative of the fact that 'reasonable' measures were yet to be implemented; those measures which would sufficiently enable the full exercise of the victim's right to rehabilitation. What we are trying to convey is that it was everyone's view that much more needs to be done to secure the aforesaid right for the victims, even at its minimum level.

293. We have tried to recapitulate what was, in the respondent no. 1's own opinion, essential to the Victim Protection Plan. This would serve as a good baseline for what was conceded to be necessary and 'reasonable' by the State itself. To begin with, both in the prayer-wise response given by the respondent no. 1 to the original writ petition dated 30.03.2006 and the reply affidavit furnished by the MWCD to the additional guidelines sought by the petitioner respectively, the respondent no. 1 had expressed agreement with the petitioner on several individual guidelines which were proposed. This agreement was afforded in a coherent and exhaustive manner, against each guideline and in two ways: One, through simpliciter agreement and two, through an averment that a similar guideline existed under their Protocol for Pre- rescue, Rescue and Post-rescue operations of child victim of trafficking for commercial sexual exploitation (hereinafter, the "Child Protocol") which could be analogously extracted and applied for adult women as well. These aforesaid guidelines on which both parties saw eye-to-eye inter-alia included the following:

Stage Guideline Pre-Rescue providing proper training to the officials forming part of the rescue team, particularly with respect to educating them on victim-appropriate behaviour, non-coercive rescue methodologies, HIV sensitivity etc.;

ending the practice of unplanned and publicised 'mass raids' as the default method of rescue;

Rescue the inclusion of female police officer(s) and female member(s) of NGOs in the rescue efforts;

assigning criminal liability on erring police officials who treat the victims akin to criminals or who commit any misdemeanors or offences in the course of the rescue and during the post-rescue period;

rescue of all women/girls from the brothel along with their children (if any);

ensuring that the rescue team helps the victim in recovering her belongings, identity documents etc., during the time of rescue;

ensuring that the children of the trafficked victim(s) are also located and placed in safe custody along with their mothers;

ensuring that the victims and perpetrators are separated from each other at the place of rescue itself and are thereafter, not placed together for any reason including at the police station;

Post-rescue ensuring that police stations meet the minimum standards required for the reception of victims like provision of drinking water and toilet facilities, safe space to sit, access to translators etc.;

providing adequate training to police officers about the relevant provisions of the multiple laws which would cover the offences committed by the perpetrators, media training to ensure confidentiality, etc.;

transferring the victims from the police station to the protective homes at the earliest;

deferring the recording of the victim's statement until after her safety is ensured and her initial trauma is overcome;

providing psychological and counselling support to the victim at all times to ensure that no statement is taken and no examination is done without her consent;

ensuring that victims are not isolated for any reason, even for recording their statements and that they are always accompanied by a female police officer or NGO worker;

ensuring that age verification is done through scientifically approved procedures;

producing a rescued child before the CWC immediately in accordance with the JJ Act without retaining her at the police station for production before a court of law;

securing the privacy of the victim and ensuring that her identity is kept confidential at all stages;

Rehabilitation extending protection to victims themselves and their family members (wherever necessary) throughout the period of their stay at the protective homes and/or trial due to the persistent risk of attack or interference from the traffickers;

creating sufficient capacity at rehabilitation homes to accommodate all victims needing care and protection;

making the protective home victim-friendly in terms of both its social and physical environment including adequately trained and sensitive staff, necessary infrastructure etc.;

providing immediate psychiatric counselling and medical care including emergent trauma care, de-

addiction and de-toxification support etc., along with mandating visiting physicians and gynecologists to check on the victims at the protective homes at regular intervals;

providing access, with the informed consent of the victim, to HIV/AIDS management including the management of opportunistic infections, prevention of mother to child transmission in case of a pregnant positive victim, free access to anti-retroviral drugs etc.;

providing adequate material items like clothing, toiletries etc., to victims at the protective homes and ensuring adequate budgetary allocation for the same;

ensuring transparency in the functioning of the protective homes and putting in place a system for social audit;

installing safeguarding measures in the protective homes to prevent intrusion by the traffickers and ensuring supervised visitation of the victims by outsiders;

providing basic education and life skills to the victims through both formal and non-formal systems;

ensuring access to learning livelihood skills that are suitable in the contemporary job market, keeping in mind the aptitude and ability of the individual victims;

safeguarding the right to information of all victims by obligating the counselor in all protective homes to provide all information including those regarding legal recourse, entitlement to welfare measures etc.;

Prosecution/Trial provision of free and professional legal aid to the victims;

sensitising all judicial officers and prosecutors on victim appropriate behaviour and court procedures;

involving a trained NGO worker or a PLV at all stages of judicial proceedings to counsel and support the victim;

Reintegration/ devising individualized plans for the victim's repatriation reintegration after due consultation with them once the victim's evidence has been recorded and/or the case is concluded. This is to be done in recognition of her right to self-determination;

if the victim is unwilling to go back to her native state, protection must be accorded to her to start a meaningful life at the destination point or State itself;

if the victim is willing to go back to her State of origin, then the process of her restoration must be effected under the protective care of police personnel;

obtaining the victims consent and conducting due diligence through a proper home investigation report furnished by the probation officer to satisfy the relevant authorities that the victim will not be abused or re-trafficked, before she is sent back to her family; and conducting a monthly follow-up on the victim for the first six-months post her reintegration/repatriation at her village/town/city of origin or at the destination State and thereafter, at regular intervals for a period of three years. This supervision must be done by the CWC or some other competent authority dealing with women and children with the cooperation of recognized welfare organisations.

294. Over the period of time, in an effort to make the anti-trafficking response more holistic, different stakeholders suggested the creation of a new legislation altogether which would incorporate the aforesaid victim protection guidelines within its provisions and/or within the rules/SOPs which were to be notified under it so that its implementation could be better and binding.

295. However, having acknowledged the said lacuna, having made an undertaking before this Court to comprehensively and conscientiously address it, and having also made several efforts in furtherance of that undertaking, the respondent no. 1 has now adopted a completely contradictory stance by stating that a new legislation and thereby, the victim protection plan that was to be incorporated within it, are not necessary. It is of the view that existing measures, both legislative and otherwise, are sufficient and that some developments which have taken place since the year 2015 obviate the need for any further discussion on this matter.

296. We must examine to some extent whether this pivot from its original stance is substantiated by reason. On a plain overview, it can be seen that not much has changed since the years 2015 (when the original writ petition was disposed of) or 2018 (when the first M.A. was disposed of) respectively, except two things. First, an amendment was brought to the NIA Act in the year 2019 whereby Sections 370 and 370A IPC respectively were added to its Schedule and therefore, such offences were made scheduled offences which could be investigated by the NIA.

Secondly, a new provision on “organised crime” was included within the legislative scheme of the BNS under Section 111. The former i.e., the empowerment of the NIA to investigate offences under Sections 370 and 370A IPC respectively, is directly connected to the second prayer of the petitioner seeking the creation of a pan-India investigative and coordinating body i.e. the OCIA. Therefore, we will deal with this specific change in detail in a subsequent section. As far as the latter change i.e. Section 111 BNS is concerned, the recognition of human trafficking as an ‘organised crime’ was already made clear through an advisory notification dated 30.04.2012 issued by the MHA.104 Hence, it could be said that its inclusion within the BNS regime was a way in which statutory validation was given to the advisory notification, and a separate offence along with separate punishment were carved out with a view enhance investigation and prosecution standards to eradicate such organised crimes. Moreover, we agree with the averment made by the respondent no.1 in its last affidavit dated 20.06.2025 that this “enables law enforcement agencies to target not merely the individual offenders but the entire network or syndicate engaged in trafficking, thereby addressing the systemic nature of this crime”. However, this inclusion, by itself, cannot in all conscience be said to have brought any radical change to the approach that was already taken

towards human trafficking for CSE.

297. Apart from what has been pointed out above, all current efforts/measures are either the same or similar in nature; The ITPA continues in its original form, Sections 370 and 370A IPC respectively is 104 Ministry of Home Affairs, Government of India, Advisory on Human Trafficking as Organised Crime dated 30.04.2012, No. 15011/27/2011-ATC. https://www.mha.gov.in/sites/default/files/2022-12/AdvisorycrimeHumanTrafficking_29092022%5B1%5D.pdf.

reflected under Sections 143 and 144 BNS respectively without any significant change, the POSCO, JJ Act and IT Act regimes respectively largely persist without alteration, and the former Ujjawala homes have simply been amalgamated into the Shakti Sadan Programme. To put it simply, what existed in 2015 continues till date and not much has changed in terms of both the legislative and institutional framework. Consequentially, the guidelines to which the respondent no. 1 had expressed its agreement with (which we have tabulated above) have also not found their way into the present framework in any manner. Therefore, we can without any doubt, state that the respondent no. 1 seems to have taken a completely contradictory stance when there are no substantive or demonstrable reasons for it to have reversed its position. The lacuna has still not been addressed or remedied.

298. Coming to the secondary question of whether, at the least, the pre-

existing efforts are sufficient and/or measuring up to their stated aims or goals, we are afraid to observe that they are also riddled with several issues which have resulted in subpar and piecemeal implementation. The foremost reason behind this is the absence of rules being notified by all the State governments under the ITPA in exercise of their powers under Section 23 thereof. Only a handful of States i.e., Orissa, Uttar Pradesh, Punjab, Andhra Pradesh, Goa, Karnataka, Rajasthan and Mizoram respectively have made rules. Such rules are crucial to the scheme of several provisions including Sections 13, 17, 19 and 21 of the ITPA respectively which largely pertain to the rescue and rehabilitative efforts which are to be undertaken under the Act. For ready reference, the relevant sub-sections of Section 23 ITPA are reproduced thus:

> “23. Power to make rules. — (1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for— [...]
>
> (b) the placing in custody of persons for whose safe custody orders have been passed under sub-section (1) of section 17 and their maintenance;
>
> (c) the detention and keeping in protective homes or, as the case may be, in corrective institutions of persons under this Act and their maintenance;

[...]

(e) the delegation of authority to appoint the special police officer under sub-section (1) of section 13;

[...]

(g)(i) the establishment, maintenance, management and superintendence of protective homes and corrective institutions under section 21 and the appointment, powers and duties of persons employed in such homes or institutions;

(ii) the form in which an application for a licence may be made and the particulars to be contained in such application;

(iii) the procedure for the issue or renewal of a licence, the time within which such licence shall be issued or renewed and the procedure to be followed in making a full and complete investigation in respect of an application for a licence;

(iv) the form of a licence and the conditions to be specified therein;

(v) the manner in which the accounts of a protective home and a corrective institution shall be maintained and audited;

(vi) the maintenance of registers and statements by a licensee and the form of such registers and statements;

(vii) the care, treatment, maintenance, training, instruction, control and discipline of the inmates of protective homes and corrective institutions;

(viii) the visits to and communication with such inmates;

(ix) the temporary detention of persons sentenced to detention in protective homes or in corrective institutions until arrangements are made for sending them to such homes or institutions;

(x) the transfer of an inmate from,—

(a) one protective home to another, or to a corrective institution,

(b) one corrective institution to another or to a protective home, under sub-section (9A) of section 21;

(xi) the transfer in pursuance of an order of the court from a protective home or a corrective institution to a prison of a 1[person] found to be incorrigible or exercising bad influence upon other inmates of that protective home or the corrective institution and the period of his detention in such

prison;

(xii) the transfer to a protective home or corrective institution of persons sentenced under section 7 or section 8 and the period of their detention in such home or institution;

(xiii) the discharge of inmates from a protective home or corrective institution either absolutely or subject to conditions, and their arrest in the event of breach of such conditions;

(xiv) the grant of permission to inmates to absent themselves for short periods;

(xv) the inspection of protective homes and corrective institutions and other institutions in which persons may be kept, detained and maintained;

(h) any other matter which has to be, or may be, prescribed."

299. Additionally, since "Police" and "Public Order" are State subjects under the Seventh Schedule of the Constitution, the respondent no. 1 has issued a few advisories largely pertaining to the law enforcement response to human trafficking and optimisation of the efforts of the AHTUs by the State governments. However, owing to its advisory nature, such notifications are unfortunately not being readily adopted and incorporated in real life responses by the concerned authorities at the different State/UT level, thereby creating a serious divide between what remains on paper and what is being translated into reality.

300. Moreover, vide order dated 05.05.2025, amongst other queries, we had requested the respondent no. 1 to procure some additional information as regards the implementation and functioning of its Mission Shakti Programme from all the State/UT governments. Without minutely going into all the complex data that was furnished, we wish to only highlight some basic inferences that could be drawn from the numbers provided to us which created cause for some serious concern.

(i) In several States, there is a discrepancy between the number of approved OSCs and those that are actually functional. For example, in Chhattisgarh despite approval for 42 OSCs, only 27 are functional; in Delhi despite approval for 22, only 11 are functional. The same is true for States including Arunachal Pradesh, Bihar, Jharkhand, Nagaland, Rajasthan, Tamil Nadu and Uttar Pradesh respectively.

(ii) In several States, the common pool of referral staff maintained by the OSCs for necessary services like legal, psychological and medical needs, at both the OSCs and the Shakti Sadans are grossly inadequate. For example, Chhattisgarh, Delhi, Uttar Pradesh, etc.

(iii) In several States, the number of Shakti Sadans which have been established are also not sufficient. For example, Arunachal Pradesh has one home, Bihar has five, Chhattisgarh has four, Delhi has two, Gujarat has zero, Haryana has zero, Himachal Pradesh has one, Jharkhand has one, Punjab has two, Uttarakhand has zero and Uttar Pradesh has zero. When seen from the perspective that these homes are intended not just for victims of trafficking but for women who are victims of

other crimes or are in distress, these numbers are quite disappointing.

(iv) In several States, there is admittedly no mental health care, de-

addiction or de-toxification support being provided to victims of trafficking for CSE at the Shakti Sadan homes. Many States/UTs including Bihar, Delhi, Goa, Himachal Pradesh, Manipur, Puducherry and Sikkim respectively which have Shakti Sadan homes have also stated that no education or vocational training support has ever been offered to the residents.

(v) Despite the Mission Shakti Guidelines highlighting the importance of Half-way homes in the phased approach to rehabilitation and reintegration of victims, no State/UT has provided information on the number of half-way homes which have been set up by them.

301. In the aforesaid context what becomes clear is that the implementation of the existing measures on rescue methodology, post-rescue care and rehabilitation, which according to the respondent no. 1 robustly address the crime of human trafficking for CSE and the rights of the victims, is poor and non-uniform across all States.

302. All this leads us to one undeniable conclusion – that the respondent no.

1 along with all the States/UTs have not taken 'reasonable measures' which adequately safeguard the right to protection and rehabilitation of the victims of trafficking for CSE. There are a serious gaps or lacunae in the measures adopted thus far and even the ones that exist on paper have not been completely translated into reality for the want of necessary and proper implementation.

E. Directions pertaining to the "Victim Protection Plan" i. Exercise of powers under Articles 32 and 142 of the Constitution respectively for the issuance of guidelines

303. The reasons, both constitutional and otherwise, supporting the necessity of such a plan are plenty and have sufficiently been identified by us. Taking into specific consideration the manner in which this matter has progressed and the unjustified abandonment of efforts to formulate the said comprehensive plan despite the lacunae in the existing legislative and policy measures, we are left with no option but to pass detailed directions in exercise of our powers under Articles 32 and 142 of the Constitution respectively, detailing the manner in which preventive, protective and rehabilitative measures are to be taken to safeguard the fundamental rights of the victims of trafficking for CSE. These guidelines would hold the field until the Parliament enacts a law on the subject.

304. This Court, in several decisions, has exercised such powers when faced with issues wherein there were identifiable gaps either in the legislative, institutional or policy responses of the State under different subject areas. The landmark decision of Vishaka and Others v. State of Rajasthan reported in (1997) 6 SCC 241, was concerned with a writ petition seeking enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution respectively. While recognising that the primary responsibility to secure rights through suitable legislation along with the creation of mechanisms for its enforcement lay with the legislature and executive

respectively, owing to a vacuum which endangered the rights of working women including that of gender equality, dignity at the workplace and a safe working environment protected from sexual harassment and abuse, detailed guidelines and norms were laid down by this Court. The relevant observations are thus:

> "3. [...] The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.
>
> -xxx-
>
> 16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution." (Emphasis supplied)

305. In Dr. Ashwani Kumar v. Union of India and Another reported in (2020) 13 SCC 585, a three-judge Bench of this Court had, amongst other things, emphasised on three important aspects before directions of such nature could be issued by constitutional courts. First, it was cautioned that such an exercise must be done exceptionally and only when there exists a vacuum or non-existing position. Secondly, that such guidelines would operate as law only until a time the Parliament addresses the same through a legislation and that they are interim in nature. Lastly, when the issue whether legislative action is required on the subject is pending consideration by the Parliament, it would be improper for this Court to act in haste. The relevant observations are thus:

> "29. [...] Secondly, these directions were given subject to the legislature enacting the law and merely to fill the vacuum until the legislature takes upon it to legislate. These judgments were based upon gross violations of fundamental rights which were noticed and in view of the vacuum or absence of law/guidelines. The directions were interim in nature and had to be applied till Parliament or the State Legislature would enact and were a mere stop-gap arrangement. [...]
>
> 30. Such directions must be issued with great care and circumspection and certainly not when the matter is already pending consideration and debate with the executive or Parliament. This is not a case which requires Court's intervention to give a

> suggestion for need to frame a law as the matter is already pending active consideration. Any direction at this stage would be interpreted as judicial participation in the enactment of law. [...]
>
> 31. [...] It is only in exceptional cases where there is a vacuum and non-existing position that the judiciary, in exercise of its constitutional power, steps in and provides a solution till the legislature comes forward to perform its role.
>
> -xxx-
>
> 34. When the matter is already pending consideration and is being examined for the purpose of legislation, it would not be appropriate for this Court to enforce its opinion, be it in the form of a direction or even a request, for it would clearly undermine and conflict with the role assigned to the judiciary under the Constitution. [...]" (Emphasis supplied)
>
> 306. All the three aspects delineated in Dr. Ashwani Kumar (supra) which have to be kept in mind before this Court can proceed with issuing directions have duly weighed with us. Since no Bill or law on the subject is presently under active consideration by the Parliament according to the submission made by the respondent no.1 and we are of the view that the existing vacuum seriously impairs the fundamental rights of the victims of trafficking for CSE, we have no doubt in our minds that some directions insofar as the Victim Protection Plan is concerned are necessary until relevant measures are taken by the legislature.

ii. Precursor – Setting the Context to the Victim Protection Plan

307. Before we formulate the victim protection plan, it is necessary to reflect upon the broader debates surrounding the following questions: (i) who is trafficked and who is not? and (ii) who is to be rescued and who is not to be rescued?

308. Reflecting on these questions is imperative for formulating a clear and coherent victim protection plan. This is because the contours of the plan will inevitably be determined by whom it seeks to protect and how it seeks to protect them. Accordingly, in the succeeding paragraphs, we examine who is considered a "victim of trafficking for CSE" and how such persons are identified and protected under the Indian legal framework. Before doing so, however, we briefly discuss the theoretical underpinnings that led to the conflation between sex trafficking and prostitution, as well as the critiques thereof. An understanding of these debates is necessary to appreciate the design of the ITPA, which, in turn, would help us evaluate the choices we have when formulating the Victim Protection Plan.

a. Conflation between Sex Trafficking and Prostitution – Supporters v. Opponents

309. In earlier parts of this judgment, we had briefly referred to the conflation that existed between sex trafficking and prostitution and how this was reflected in the 1949 Convention and the ITPA respectively. Both the 1949 Convention and the ITPA respectively, treated all forms of prostitution as inherently exploitative and supported the criminalisation of all acts associated with it, although prostitution in itself was not criminalised. As a result, acts done by third parties for the purpose of prostitution, even with the consent of the person, were considered to amount to trafficking in persons.

310. To better understand this conflation, it would be instrumental to assess the viewpoint of the 'abolitionists'. For the abolitionists, all prostitution is an abuse of women's bodies, reflective of violence, male domination, objectification and the most severe form of female oppression.105 To those holding this position, prostitution is forced by definition because of its violent and inhuman subtext, thus making any consideration of consent irrelevant. In other words, even in the absence of force and coercion, prostitution undermines the dignity of women. Consequently, they reject the notion of 'voluntary prostitution' and seek to completely abolish prostitution and penalise all those profiting from sexual exploitation, except the prostitute herself. Further, for abolitionists, the dynamics of sex trafficking and prostitution are the same and their commonalities far overshadow their differences, and thus the difference between the two is at best one of degree and not of kind.106

311. Opposing such abolitionists are the sex work advocates, who are agnostic to the commodification of sex per se. They view sex work as a 105 Joyce Outshoorn, The Trafficking Policy Debates, in Global Human Trafficking: Critical Issues and Contexts 7, 12-19 (Molly Dragiewicz ed., Routledge 2015); Prabha Kotiswaran, Dangerous Sex, Invisible Labor: Sex Work and the Law in India 24, 25-29 (Princeton Univ. Press 2011); Also see Andrea Dworkin, Prostitution and Male Supremacy, 1 Mich. J. Gender & L. 1 (1993). 106 Dorchen A. Leidholdt, Prostitution and Trafficking in Women: An Intimate Relationship, 2 J. Trauma Prac. 167, 178-179 (2003).

form of labour, not fundamentally different from other jobs involving interpersonal and bodily skills. The body is something one has, not something one is, and selling sexual services no more diminishes the self than any other form of wage labour.107 As per such advocates, prostitution itself is not the problem, rather exploitation and abuses such as forced prostitution, trafficking, and bad working conditions are. Consequently, they advocate for recognising women's autonomous decisions in prostitution and insist on separating consensual sex work from trafficking and treating sex workers as entitled to the same rights and protections as other workers. Fundamental to such advocacy is the emphasis on sex worker agency, even when considering the sub- optimal circumstances in which sex workers engage in prostitution, i.e., due to structural constraints such as poverty and the absence of alternative livelihood options.108

312. It is worth briefly noting how each group counters the other's policy preferences. Abolitionists argue that legalisation and decriminalisation only render the harm invisible and lead to an increased demand for sexual services.109 On the other hand, sex work advocates argue that the criminalisation of prostitution: (i) pushes sex work into the realm of unregulated spaces, thereby increasing the risk for sex workers undertaking it; (ii) causes further stigmatisation of a group which

is already treated with little dignity and respect; and (iii) reduces the already slim number of livelihood options available to poor women.110 Sex worker advocates further argue that the criminalisation of 107 See generally, Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 J. Legal Stud. 693 (1998).

108 Joyce Outshoorn, Supra note 105; Kotiswaran, Supra note 105 at 20-32. 109 Supra note 106.

110 Supra note 107.

prostitution adds another layer of criminality to trafficked victims and thereby worsens their already terrible circumstances.111

313. Broadly speaking, the two camps are animated by questions of: (i) whether prostitution is a form of work or violence? (ii) whether prostitution reflects consent or coercion? and (iii) whether prostitutes are agents or victims? For the purposes of our discussion, the perspectives of consent, coercion, agency and victimhood are especially important.

314. It can be stated that since the abolitionists view prostitution through the lens of coercion, they perceive all prostitutes to be 'victims' who ought to be 'rescued.' On the other hand, since sex work advocates differentiate between 'forced' and 'voluntary prostitution', they view those who engage in prostitution voluntarily, even when compelled by structural factors such as poverty, as 'agents' who are making decisions to chart their own lives. However, as many scholars point out, the problem that arises is that the line between forced prostitution and voluntary sex work is not clear and often shifting. This is because the difference is based on 'consent' and often consent cannot capture the fluid dynamics of real life. A paradigmatic example of this is the lives of many women who are trafficked into prostitution but thereafter adopt and engage in sex work voluntarily. Many even return to prostitution after being rescued from situations of trafficking. In such situations, do we view them as 'victims' or as 'agents'? Do we view their engagement with prostitution as being borne out of coercion, consent, or compulsion? All of these are extremely difficult questions for which this 111 Id.

Court has no clear answer, and given our institutional role and limitations, we should not provide them either.

315. However, one conclusion does emerge from the above discussion:

> prostitution and those engaging in it cannot be reduced to simplistic binaries of victimhood/agency and consent/coercion. The reality is much more complex. The question then is how do we move beyond such binaries?

316. It is particularly important to understand the consequences that follow from placing those engaging in prostitution in binaries of victim and agent. If we view them simply as 'victims' who lack agency, there is a risk that we might turn a deaf ear to their desires and wishes. On the other hand, if we view them as 'agents', we might not provide any measures of intervention at all, despite the host

of vulnerabilities that such prostitutes face, both structural and non-structural. Rather, it is best to view prostitutes as persons in whom vulnerability and agency coexist.112

317. In all of us, agency and vulnerability coexist. What varies is the extent to which one bears upon the other, and this is determined largely by the circumstances of our lives. For a person who faces poverty, social exclusion, and the absence of livelihood alternatives, their vulnerability may significantly narrow the range of choices available to them. But it does not extinguish choice altogether. Acknowledging this co-existence has two important implications when it comes to those who engage in prostitution. First, viewing a woman who has entered prostitution 112 See Giorgia Serughetti, Rethinking Force and Consent, Victimisation and Agency: A Feminist Approach to Prostitution Policy, 3 Femeris: Revista Multidisciplinar de Estudios de Género 79 (2018).

voluntarily as an 'agent' does not mean that one becomes blind to the vulnerabilities that shaped and constrained her decision. Understanding her agency requires understanding the circumstances in which it was exercised, thereby necessitating measures in cases where agency is severely constrained. Secondly, viewing a trafficked or coerced woman as a 'victim' does not mean she is without agency. Even within conditions of exploitation and coercion, she retains the capacity to make decisions about her present and her future.

b. ITPA – Identifying the 'victims' and applicable procedures

318. As discussed in detail in an earlier section, this conflation between sex trafficking and prostitution is also reflected in the ITPA. This is evident from the two interrelated features of the Act: First, the manner in which it defines prostitution, and secondly, the manner in which its offence- creating provisions are constructed. To explicate:

> (i) Section 2(f) defines prostitution as sexual exploitation or sexual abuse for commercial purposes. Thus, all acts of prostitution, even those undertaken with consent, are either treated as exploitative or abusive in nature.
>
> (ii) The conflation established by the definition is solidified by the offence-creating provisions of Sections 3, 4, 5 and 6 respectively. In punishing those persons involved in keeping or allowing a premises to be used as a brothel (section 3), or those living on the earnings of prostitution (section 4), or those procuring, inducing or taking persons for the sake of prostitution (section 5), or those detaining someone in a brothel (section 6), the existence of any threat, coercion, force, deception or abuse of power is made entirely immaterial.

319. Thus, the legal framework under the ITPA penalises all modes of commercial sex, reflective of the abolitionist position we had delineated above. However, it is equally important to note that the ITPA does not abolish or criminalise prostitution in all its forms. Prostitutes who wish to engage in prostitution for their own benefit without the involvement of any third party are neither prohibited nor penalised for doing so (except in instances covered under Sections 7 and 8 respectively). Thus, whilst defining it to be exploitative or abusive in all its forms and manifestations, the ITPA leaves,

albeit very little scope for an individual to engage in prostitution without attracting any criminal liability. To sum up, the ITPA is not endorsing sex work but not abolishing it either, treating the institutions as exploitative while technically preserving the individual's right to sell sex in isolation.

320. Further, it is also important to note that in none of the offence-creating provisions under the ITPA are the prostitutes themselves made liable for criminal punishment. In fact, in all cases where a prostitute is engaging in prostitution within the circumstances described under Sections 3, 4, 5, and 6 respectively, she will be considered to be a victim of those offences. Thus, strictly speaking, the ITPA envisages all those prostitutes engaged in prostitution in circumstances falling within the offence-creating provisions as victims. While, due to the definition, all prostitutes could be termed to be in some sense victims, they are not, in a strict sense, always victims of any offence within the ITPA.

321. In the above section, we examined at length why, under the current legal framework, "victims of trafficking for CSE" would include both victims of offences under the ITPA and victims of offences under Section 143 BNS respectively. We had reasoned that such an understanding was necessary, given the legislative framework in place. The conflation between prostitution and trafficking is, therefore, firmly embedded in the Indian legislative framework, and thus, the victim protection plan for 'victims of trafficking for CSE' has to be constituted within this framework itself.

322. Additionally, we had also discussed how all trafficking offences for the sexual exploitation of others through prostitution falling under the BNS would inevitably be covered by some provision of the ITPA as well. Thus, in all cases dealing with victims of trafficking for CSE, the mechanism that has been put in place to deal with 'victims' under the ITPA would get triggered. Therefore, the victim protection plan must necessarily take into account the mechanism already established under the ITPA.

323. By way of context, we may briefly recall how persons interact with the ITPA's protective mechanisms. Section 15 contemplates the removal of persons found on the premises where a search is being carried out. Under Section 16, a magistrate may direct the removal of a specific individual from a brothel. Those removed under both these provisions are then produced before the magistrate, who deals with them as prescribed under Section 17. Separately, Section 19 provides a voluntary pathway wherein a person who is carrying on, or is being made to carry on prostitution may herself approach the magistrate seeking protection. Thus, depending on the circumstances of her interaction with the system, a victim of trafficking for CSE will be dealt with either under the procedure prescribed by Sections 15 or 16 read with Section 17, or under Section 19 respectively.

324. A "raid" under Section 15 results in the removal of 'all persons' found in the premises and thus, could include both persons involved in prostitution voluntarily and those involved in prostitution involuntarily. Similarly, the removal under Section 16 can encompass persons who are 'carrying on prostitution' of their own choosing, as well as those who are 'being made to carry on prostitution' against their will. As a result, those produced before the magistrate under Section 17 may include: (i) those who have been trafficked into prostitution against their will; (ii) those who were initially trafficked but have since continued to pursue prostitution voluntarily; and (iii) those who have

entered and remain in sex work as a matter of their own choosing, however structurally constrained that choice may be. As a result of the conflation we discussed above, all three categories of persons are clumped together as 'victims of trafficking for CSE' and therefore processed under the same framework in Section 17.

c. Consequences of the Conflation

325. To understand why this might be problematic, let us take a small detour to try to gauge the complexity involved in prostitution as a phenomenon and those engaging in it. Extensive ethnographic work undertaken on prostitution and those involved in it reveals that there is no singular, monolithic version of a 'prostitute' or 'prostitution'.113 113Kotiswaran, Supra note 105 (See Chapter 2-3); Vibhuti Ramachandran, Immoral Traffic: An Ethnography of Law, NGOs, and the Governance of Prostitution in India (Cambridge Univ. Press 2025);

Prostitution is undertaken by a variety of persons and across a variety of institutional settings. For each form and each setting, the factors that bring a person into prostitution, the persons they interact with, and the risks they are exposed to differ significantly. The inevitable consequence of this complexity is that those involved in prostitution do not constitute a homogeneous group with homogeneous interests.114 Their experiences and needs are deeply varied.

326. This complexity is further compounded by the deep subjectivity involved in determining whether a person is engaging in prostitution with or without consent. As we discussed earlier, consent is not a fixed, objectively verifiable fact. It is fluid, contextual and subjective, and therefore incapable of being fully captured or understood by an external observer through an objective test. The answer, to the extent there is one, lies within the person herself.

327. Both the above-discussed aspects of complexity and subjectivity have important consequences on how we deal with 'victims of trafficking for CSE'. A one-size-fits-all approach, applied to the heterogeneous group of 'victims of trafficking for CSE', is unlikely to serve their interests properly. In fact, it might lead to unintended consequences. There is ample research which has shown that anti-trafficking measures, especially those dealing with victims of trafficking for CSE, have had negative consequences for those they were intended to benefit.115 Thus, Svati P. Shah, Street Corner Secrets: Sex, Work, and Migration in the City of Mumbai (Duke Univ. Press 2014).

114 Id.

115 Mike Dottridge, Introduction, in Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World 1 (Mike Dottridge ed., Global Alliance Against Traffic in Women 2007); Ratna Kapur, India, in Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World 114 (Mike Dottridge ed., Global Alliance Against Traffic in Women 2007).

the lesson that we have to be cognisant of is that the wrong approach applied to victims can be counterproductive and, in fact, violate their rights and dignity. Further, it helps us gauge that, to the

greatest extent possible, the victims' choices and desires must be accorded due weight.

328. With this background, we return to the fact that, under Section 17, the victims who are presented before the magistrate may belong to any of the three categories we described above. Since heterogeneity and subjectivity should guide our approach to these victims under Section 17, the victim protection plan should adequately account for them. Currently, Section 17, broadly, envisages the following:

> (i) an inquiry into the following aspects of the victim: (a) age, (b) character and antecedents, (c) the suitability of the parents, guardian or husband for taking charge, (d) nature of the influence which the conditions in the home are likely to have;
>
> (ii) intermediate safe custody of the victims; and
>
> (iii) based on the inquiry, the magistrate is to exercise discretion and pass a final order. When satisfied that the victim needs care and protection, the magistrate may order that the victim be placed in a protective home or in other custody.

329. Section 17, through the aspects of inquiry and magisterial discretion, does contemplate, to some extent, an individualised approach to dealing with victims. It envisages that every victim's case would tell a different story, and the decision on how to deal with them will depend on such a story; thus, it is necessary to inquire into the aspects that are currently mentioned in Section 17(2). However, Section 17: (i) first, applies the same framework uniformly to all persons produced before the magistrate, without necessitating any threshold inquiry into whether or not the persons before the magistrate are voluntary adult sex workers who have no desire to be placed in long term safe custody or restored to their families; (ii) secondly, the section does not make explicit that the magistrate must take into account the wishes of the person before him before passing any order under Section 17(4). Let us deal with each of these aspects individually.

• Need for a threshold inquiry for adult voluntary sex workers

330. In order to understand why a threshold inquiry is necessary, it would be useful to look into the crucial observations made by the Law Commission of India in its 64th Report as regards whether women who are voluntarily carrying on prostitution could be brought within the fold of rescue under Sections 15(4) and 16(1) ITPA respectively. The relevant observations are thus:

> "6.9. Need for amendment.—[...] No doubt, even after the Act is amended on the above lines, cases of women who are voluntarily carrying on prostitution will remain outside the provisions for rescue in Ss. 15(4) and 16(1) or the provision for subsequent custody contained in S. 17. We do not think that the law could appropriately make a provision for rescuing such women because, ex hypothesi, they are carrying on prostitution voluntarily and the question of their "rescue" cannot arise. Since prostitution in the abstract is not an offence punishable under the Act, it would not be proper for the present Act to empower the police or the court to take

> any action for the removal or custody of such women."116 (Emphasis supplied)

331. In addition to the above, this Court in Budhadev Karmaskar v. State of W.B. reported in (2022) 20 SCC 220 while issuing certain directions pertaining to the rehabilitation of sex workers/prostitutes observed that 116 As reproduced in ¶ 27, Vinod @ Vijay Bhagubhai Patel v. State of Gujarat, 2017 SCC OnLine Guj

446. the police must refrain from 'interfering' if it is found that the sex worker is an adult participating in the trade with consent and during a raid on any brothel, voluntary sex workers must not be harassed or victimised. The relevant observations are thus:

> "5.1. Sex workers are entitled to equal protection of the law. Criminal law must apply equally in all cases, on the basis of "age" and "consent". When it is clear that the sex worker is an adult and is participating with consent, the police must refrain from interfering or taking any criminal action.
>
> [...] 5.4. Whenever there is a raid on any brothel, since voluntary sex work is not illegal and only running the brothel is unlawful, the sex workers concerned should not be arrested or penalised or harassed or victimised.

(Emphasis supplied)

332. What comes across from the aforesaid is that the Commission had categorically concluded that the provisions for rescue under Sections 15(4) and 16(1) respectively, and the provision for subsequent custody under Section 17, would not apply to women who are voluntarily carrying on prostitution. Its reasoning was simple; since such women are engaged in prostitution voluntarily, the question of their 'rescue' does not arise. Consequently, the Commission was of the view that it would not be appropriate for the ITPA to empower the police or the court to take any action for the removal or custody of such women. This position has been affirmed by this Court in Budhadev Karmaskar (supra), where it was unequivocally observed that since voluntary sex work is not illegal and only the running of a brothel is, voluntary sex workers found during raids on such brothels must not be victimised, i.e. be taken into custody and dealt with under Sections 15, 16 and 17 ITPA respectively. This Court further emphasised that rehabilitation of the sex workers will not be coercive in any manner, and it shall be voluntary on the part of the sex workers.

333. It is amply evident from the above that the intent of Sections 15-17 ITPA was not to interfere with the lives of voluntary adult sex workers. This is further reinforced by the clarification issued by the Justice Verma Committee on the intent of Section 370 IPC as formulated by the Committee. As per its report, the term exploitation under Section 370 included the word 'prostitution' and a clarification was sought by the National Network of Sex Workers on the intent of Section 370, particularly whether it would criminalise people in sex work. Responding to this clarification, the Committee noted:

> "The Committee, however, notes your representation on behalf of the National Network of Sex Workers to the effect that the Section 370, IPC, after being amended by the Ordinance, could be misused by police and other governmental authorities to harass (i) sex workers who engage in prostitution of their own volition, and not pursuant to inducement, force or coercion, as the amended Section 370 provides, and (ii) the clients of such sex workers, by bringing the act of gratification for a sex worker's services under the scope of the amended Section 370.
>
> The members of the Committee wish to clarify that the thrust of their intention behind recommending the amendment to Section 370 was to protect women and children from being trafficked. The Committee has not intended to bring within the ambit of the amended Section 370 sex workers who practice of their own volition. It is also clarified that the recast Section 370 ought not to be interpreted to permit law-

enforcement agencies to harass sex workers who undertake activities of their own free will, and their clients. The Committee hopes that law enforcement agencies will enforce the amended Section 370, IPC, in letter and in spirit." (Emphasis Supplied)

334. An intent which is further evident from the observations made by the law commission report and by this Court in Budhadev Karmaskar (supra) respectively, is that the principle of non-interference with respect to adult voluntary sex workers must be manifested at the earliest possible stage i.e., voluntary adult sex workers who are found during a raid ought not to be subjected to the machinery of ITPA under Section 17 in the first place. Under Section 15, it is the police who conduct the search and carry out the removal. It is therefore open to the police, at the time of such removal, to make a determination as to whether a particular person is engaged in sex work voluntarily and, on that basis, refrain from removing her. This is reflected under Section 15(4) where the legislature has been careful to mention that the special police officer shall be "entitled" to remove therefrom all the persons found in the premises, indicating that although the officer can potentially remove all persons, yet it is not a strict and inflexible rule. However, under Section 16, the position is different. Here, the police are acting pursuant to the magistrate's specific directions, ordering the removal of a particular individual. In such a situation, the police cannot exercise any independent judgment and are bound to carry out the magistrate's directions. Consequently, the person must necessarily be produced before the magistrate.

335. If the intent of non-interference is so evident at the stage of removal itself, it is only natural that the procedure under Section 17 must also reflect and give effect to such intent. Under Section 15, while the police have the latitude to make a determination at the time of removal, rescue operations are often conducted in difficult and time-sensitive circumstances. The result is that voluntary sex workers may end up being removed and produced before the magistrate, despite the intent that they should not be subjected to this process. Under Section 16, as we noted above, no such determination is possible at the removal stage at all, and all persons will invariably be produced before the magistrate regardless of their circumstances. It therefore follows, as a matter of logic, that when persons are produced before the magistrate under Section 17, the magistrate must conduct an initial threshold inquiry into whether the person before him is a voluntary adult sex worker who does not

wish to be subjected to long term safe custody.

336. Such a threshold inquiry, while furthering the goal of non-interference, also serves to ensure that adult voluntary sex workers are not put through the deeper inquiry contemplated under Section 17(2) and thereby, spare them the intrusion of a process never meant for them. The deeper inquiry contemplated under Section 17(2) is extensive. It involves a detailed examination of the person's age, character, antecedents, and family circumstances. Such an inquiry subjects a voluntary sex worker to an intrusive examination of her personal circumstances and compels her to remain away from her life and her family for the duration of the process.

• Need for Consent to be the driving factor

337. Now, unlike a voluntary adult sex worker, there are victims who are trafficked into prostitution and thereafter removed/rescued and subjected to the procedure under Section 17. How should we proceed with respect to such victims? Should such victims, due to their trafficked status, be afforded no role in the process of deciding their fate? In other words, the primary question is this: when the magistrate, after completing the inquiry under Section 17, concludes that a victim should either be placed in a protective home or restored to her family, can he proceed with that decision without taking into account the victim's wishes and consent?

338. As noted above, the bare text of Section 17 does not provide an explicit answer to the above question. Based on such a textualist reading, one might argue that the victim's consent should play no role and that the magistrate should proceed with his decision of detention or reintegration without considering it. However, such an approach would be incorrect because whilst Section 17 explicitly does not state that the victim's consent is to be taken into consideration, it does so implicitly.

339. Section 17(4) provides that where the magistrate is satisfied that the information received is correct and that the person before him is in need of care and protection, he may order that such person be detained in a protective home or in such other custody as he considers suitable. The use of the word 'may' is significant as it indicates that even after reaching the conclusion that a person is in need of care and protection, the magistrate retains the discretion not to order detention. In other words, the satisfaction of the two conditions under Section 17(4) does not automatically lead to a detention order; the decision rests with the magistrate's discretion. Now, the question is: what should guide this discretion? Undoubtedly, the victim's consent should be a central consideration. It is the victim's life, liberty, and future that the order will determine, and thus it would be incongruous to hold that all of this can be decided without any regard for what the victim wants.

340. Support for such an interpretation can be found in the contrast between Section 17(4) and Section 19 respectively. Under Section 19, a person who approaches the magistrate voluntarily, seeking care and protection of her own accord, is dealt with differently. Once the magistrate makes the requisite determination under Section 19(3), he shall pass an order directing that the applicant be kept in a protective home or under appropriate care. Thus, under Section 19, the mandate to pass an order is absolute because the very act of approaching the magistrate voluntarily carries with it the

person's consent to undergo the process.

341. Even setting aside these textual nuances, it is important not to lose sight of the fundamental point that the persons before the magistrate under Section 17 are victims, not offenders. They are not wrong doers. On the contrary, it is they who have been wronged and, as a consequence, are constitutionally entitled to reparation for the harm caused. If the law recognises them as victims deserving of protection and rehabilitation, the natural corollary is that it recognises them as persons whose voices matter. To afford them the status of victims on the one hand, and not to pay heed to their choices, is a position that cannot be defended.

342. Thus, the answer to the question we started this sub-section with is that before proceeding with either placing a victim in a protective home or reintegrating her with her family, the magistrate must take into account the victim's consent and wishes. However, this should not be construed to mean that the victim's consent/wishes replace the procedure prescribed under Section 17. The magistrate must still conduct the inquiry, consider the findings, and satisfy himself that the proposed course of action is appropriate. For instance, if the inquiry reveals that the victim's family is unsuitable or that reintegration would expose her to harm, the magistrate cannot order reintegration simply because the victim wishes it.

343. Having established that the victim's consent must be taken into account, the next question is how much weight it should carry. If the magistrate concludes that detention in a protective home or reintegration with family is appropriate, but the victim does not consent, should he proceed regardless? We are of the strong view that if the victim does not consent to long-term safe custody, the magistrate must not proceed with it. The victim's consent should be the primary and governing consideration when taking such decisions. A departure from the victim's expressed wishes must be the exception, not the rule, and any such departure must be grounded on cogent reasons.

344. To adopt any other position would be to fall back into the very trap we noted earlier in this section of viewing the victim as a passive object, bereft of agency. Further, as we noted above, the complexity and subjectivity involved in these matters are such that the person who, in most circumstances, is best placed to determine the best path forward is the victim herself.

345. The rationale for our primacy and emphasis on consent becomes evident and is further strengthened when we analyse it in the context of the potential courses of action provided under Section 17. First, there is the option of reintegration with family. Under Section 17 r/w Section 17A, a magistrate will adopt such a course of option only when, amongst other things, there are findings to the effect that the family is genuine, has the capacity to take care of the victim, and the conditions at home would not have a negative impact on her. However, even where all these conditions are met, there may be any number of reasons a victim may not wish to return, for example, she may have simply built a stable life in a new city. To send the victim back regardless, on the grounds that the magistrate has found the conditions suitable, is to infantilise her and treat her as lost property that is being restored to its rightful place. Such an action also has an undertone of treating victims as people incapable of taking care of themselves.

346. Secondly, the other option under Section 17 is to send the victim who needs care and protection to a protection home and place them in long- term safe custody. However, it should be noted that the ITPA envisages these protective homes to be closed, i.e., victims are detained in them and aren't allowed to move in and out on their own volition. Further, a perusal of the state rules formulated under ITPA makes it evident that these protection homes severely restrict an inmate's access to the outside world, including their own family members.

347. In such circumstances, the consequences of placing a victim in a protective home without her consent are far-reaching and serious. Among other things, they include the following: first, they displace and disrupt the family life of the victims, wherein victims are removed from their homes and separated from those they are close to. Secondly, they completely curtail the victim's freedom of movement. Thirdly, the victim's privacy ceases to exist in any meaningful sense, as every aspect of her daily life becomes subject to institutional control. Fourthly, her ability to earn a livelihood is directly and immediately impaired, leaving her economically dependent and without the means to support herself or those who may rely on her. Thus, in other words, such detention entails complete control over a victim's person, time and place.

348. Setting aside the consequentialist concerns, the forcible imposition of rehabilitation is also wrong in principle. A victim may have her own understanding of what rehabilitation means and how she wishes to pursue it. She should not be merely treated as a passive recipient of care and protection. The constitutional right to rehabilitation obligates the State to provide victims with the means and support to pursue rehabilitation. However, it does not authorise the State to impose a rehabilitative process upon her against a victim's will. In fact, our discussion in the above section clearly establishes that rehabilitation measures would further the inherent dignity of a victim only when they are designed and implemented with the victims own choices, wishes, and specific circumstances at their center. This position also finds support in international law which recognises that care, protection, and rehabilitation must be offered to victims of trafficking in a non-coercive manner.117

349. In light of all the above, it is beyond doubt that the norm should be that neither placement in a protective home nor reintegration with family should proceed without the victim's consent. Any departure from this norm must be the exception, permissible only where specific and identifiable circumstances justify it.

117 Council Directive 2011/36/EU, Article 11 as amended by Directive (EU) 2024/1712, 2024.

d. Qualifications & Clarifications

350. The above discussion, both on the need for a threshold inquiry for voluntary adult sex workers and on the primacy of consent, is relevant only in the context of adult victims of trafficking for CSE. As we have noted in an earlier part of this judgment, child victims of trafficking for CSE are to be dealt with by the CWC under the procedure prescribed by the JJA, 2015. Consequently, they fall outside the scope of the ITPA procedure prescribed in Section 17, which is concerned solely with adult victims.

351. It is a known fact that traffickers exercise deep and pervasive control over their victims through a variety of means, including physical force, psychological manipulation, coercion, and sustained intimidation. In such circumstances, there is a real risk that both the threshold inquiry and the primacy accorded to consent may be exploited. A trafficker may tutor or coerce a victim into claiming that she is a voluntary sex worker, or into withholding consent to rehabilitation or reintegration, thereby ensuring her return into his control under the garb of choice and consent. The victim protection plan must be aware of this risk and should seek to implement measures to mitigate it.

352. It is for this reason that while consent must be the norm and the primary governing factor, the magistrate must retain the discretion, in exceptional circumstances, to depart from the victim's expressed wishes. However, such departure should be permissible only when the magistrate concludes, on a totality of the circumstances before him, that

(i) proceeding in accordance with the victim's wishes would expose her to a risk to her safety; and/or (ii) the consent or wishes expressed by the victim are not the product of her own free volition but are the result of coercion, tutoring, or undue influence. Further, the magistrate must record his reasons in writing.

353. Moreover, our discussion in the above section should not be read as suggesting that detention in a protective home or placement in custody can never be justified in any circumstances where there is no consent. That is not our position. What we are saying is that such detention, without the victim's consent, is not the appropriate or proportionate response in every case. However, where the circumstances genuinely warrant it, as in the two scenarios set out in the above paragraph, it may be justified.

354. It must also be clarified that nothing stated in the above section, in relation to consent, should be made applicable to the period of interim safe custody under Section 17(3). Such custody is a necessary and temporary measure that enables the inquiry to proceed. It is only the final orders passed by the magistrate relating to detention in a protective home or restoration to family which we have dealt with.

355. The foregoing discussion was animated by the question of how the law should treat the diverse range of persons who come within the scope of the Victim Protection Plan. ITPA, by conflating prostitution and trafficking, brings within its net a wide and heterogeneous group of persons, from those trafficked against their will, to those who were trafficked but continue voluntarily, to those who have chosen sex work for themselves. All of these persons are, under the current framework, processed through the same mechanism under Section 17, without differentiation. We also noted why a one-size-fits-all approach, which doesn't factor in subjectivity, will not be appropriate when dealing with victims of trafficking for CSE.

356. To avoid the Victim Protective Plan reflecting such an approach, we identified two measures that, based on the procedure in Section 17, should be factored into the plan. First, is the need for a threshold inquiry to identify voluntary adult sex workers at the outset, and spare them the full

machinery of the process, i.e., the principle of non-interference. Second, is the recognition of the victim's consent as the governing factor in the magistrate's final decisions on detention and reintegration, i.e. primacy of the victim's consent. Being cognisant of the nature of the trafficking offence, we have also identified circumstances in which such a departure from the principle of non-interference and primacy of the victim's consent would be warranted, i.e., situations where the victim's safety is at risk, or the consent/wishes expressed by the victim are a product of threat, coercion or undue influence.

e. Other aspects

357. While the earlier sections have primarily focused on how the Victim Protection Plan should better enable the procedure under Section 17 to address the heterogeneity and complexity inherent to the issue, there are certain broader aspects that also deserve attention and have accordingly been addressed in the plan. The first among them is the conduct of raids and rescue operations, which are, regrettably, often accompanied by humiliation and verbal and physical abuse of those found on the premises. While it is acknowledged that when dealing with hidden crimes such as trafficking, rescue operations of this nature are a necessary feature of enforcement, the punitive and degrading manner in which they are frequently conducted cannot be overlooked.

It is therefore imperative that the Victim Protection Plan lays down, in detail, measures that curb the human rights violations associated with such operations.

358. Secondly, some research on conditions within protective homes where victims of trafficking for CSE are housed appears to indicate that such institutions are marked by severe shortage of funds, lack of material resources, and an inability to provide meaningful assistance to victims.118 Protective homes have also been widely criticised for mirroring penal custodial institutions in their setup, with rules drawn along lines similar to those governing prisons.119 The consequences of this approach are well-documented, including instances of residents attempting to escape, as was evident in proceedings before the Bombay High Court.120 The Victim Protection Plan, therefore, addresses this aspect by emphasising the creation of a genuinely supportive environment in which victims have access to sufficient material resources and their rights are respected and advanced.

359. Thirdly, the core purpose of placing a victim in long-term safe custody is to enable her rehabilitation. Central to this process is equipping her with skills that open up alternative livelihood options. However, available evidence indicates that the rehabilitative measures currently provided are neither aligned with the victim's wishes nor with 118 See, Barnali Das, 'Who Would Like to Live in This Cage?': Voices from a Shelter Home in Assam, 51 Econ.

& Pol. Wkly. 77 (2016); Vibhuti Ramachandran, From 'House of Horrors' to 'Sensitive' Governance: Sex Workers' Shelter Detention in India, 32 Contemp. S. Asia 223 (2024); Imrana Begum, Getting Back to Society:

> Rehabilitation of Trafficking in Assam, India, 6 J. Hum. Trafficking 255 (2020); Kimberly Walters, Moral Security: Anti-trafficking and the Humanitarian State in

South India, 93 Anthropological Q. 289 (2020).

119 Ramachandran, Id.

120 Ms. Purnima Upadhyay v. State of Maharashtra, Bombay High Court, Suo Motu Writ Petition No. 113 of 2012.

contemporary market realities and, as a result, are of limited value in helping her rebuild her life.121 The Victim Protection Plan, therefore, provides the impetus for rehabilitation measures that are responsive to the victim's choices and reflective of present economic realities. We are acutely conscious that rehabilitative measures which do not account for the socio-economic realities of victims of trafficking for CSE, or for the economic calculus that may have led a woman to enter prostitution in the first place, are measures that are unlikely to succeed.

360. Lastly, we are aware of the practical difficulties that victims face in asserting their rights and accessing the entitlements which are intended for them. We are equally aware that pursuing such rights and entitlements, without adequate support, can deepen the debt burden that many such victims already carry. With this reality in view, the Victim Protection Plan, at every stage, seeks to ensure that victims are provided with the legal and social support necessary to meaningfully access the rights and benefits to which they are entitled.

361. There are many other aspects that have been addressed in the Victim Protection Plan. For brevity, we do not intend to discuss each such aspect here. Broadly, the approach that underpins our plan is: (i) our understanding of the complex and varied realities that define the lives of those who come within its scope i.e., the heterogeneity of circumstances, subjectivity inherent in questions of consent and agency, and the impossibility of any uniform response; and (ii) our conscious effort to shift the treatment of victims of trafficking for CSE from mere passive objects to be rescued to that of persons with agency who have 121 Kimberly Walters, Humanitarian Trafficking: Violence of Rescue and (Mis)calculation of Rehabilitation, 51 Econ. & Pol. Wkly. 55 (2016).

the capacity to make decisions on how they wish to be empowered.

Such an approach would further enable her to exercise her right to rehabilitation in its truest and fullest sense. It is with such an understanding and intent that the Victim Protection Plan has been formulated.

iii. Guidelines on the "Victim Protection Plan"

362. The Victim Protection Plan is as follows:

a. Fundamental Principles:

The following principles shall guide all authorities in the implementation of this plan:

(i) Primacy of human rights and dignity: All measures taken under this plan shall be implemented in a manner that places the victim's human rights at the centre. No action taken in the name of care, protection, or rehabilitation shall compromise the dignity of the victims or adversely affect any of their human rights.

(ii) Non-criminalisation: Victims shall not, at any stage, be treated as criminals or subjected to measures associated with criminal liability. All actors shall at all times accord them the status of a crime victim.

(iii) Informed consent: No measure of care, protection, or rehabilitation under this plan shall be imposed upon victims without their free and informed consent, except in exceptional circumstances concerning their safety and protection, and only upon a specific and reasoned finding to that effect. Consent once given may be withdrawn in accordance with lawful procedure.

(iv) Non-stigmatisation & Non-Discrimination: All actors implementing this plan shall remain conscious that victims belong to sections of society that are deeply stigmatised and marginalised and shall conduct themselves in a manner that does not reinforce or perpetuate such stigma. Victims and their involvement in prostitution shall not be the basis for any discrimination, adverse judgment or diminished respect.

(v) Safety and Protection: Every victim shall be protected from further exploitation and harm and shall be provided with adequate basic care at every stage of this plan. Protection shall not be made conditional upon the victim's willingness or capacity to cooperate with law enforcement or to participate in any legal proceedings.

(vi) Privacy & Confidentiality: The privacy of every victim shall be respected and protected at all stages, to the maximum extent possible. To this end, there should be no public disclosure of the victims' identities or any information relating to them.

(vii) Right to information: All victims shall be informed, promptly and in a language and manner they understand, of all rights and entitlements that accrue to them under law.

(viii)Individualised care and protection: All care, protection and rehabilitation measures shall be tailored to the individual victim's situation following a proper assessment of circumstances, needs and desires. All decisions relating to care and protection must be made with the active participation of the victim.

(ix) Best interest of the victim: All decisions taken with regard to care, protection and rehabilitation shall be based on the primary consideration that they are in the best interest of the victim.

b. Pre-rescue • Strengthening the AHTUs

(i) Composition: The Anti-Human Trafficking Unit shall be comprised of the following members:

• An officer of the rank of Deputy Superintendent of Police ("DSP") who would head the AHTU.

• Such number of inspectors/sub-inspectors of police, head constables/constables as may be necessary. However, this team shall mandatorily consist: (a) at least two or more officers who are designated as "special police officers" under Section 13(1) ITPA; (b) at least two or more police officers who are women; (c) one or more Child Welfare Police Officers designated as such under Section 107, JJ Act; and (d) wherever possible, one or more police officers from the cybercrime unit or cybercrime police stations.

• Social workers of that area who (a) form a part of the "non- official advisory body" advising the special police officer on questions of general importance regarding the working of the ITPA as provided under Section 13(3)(b), ITPA, and/or (b) are members of an NGO recognised as a "welfare institution or organisation" by the State Government under the explanation to Section 15(6A), ITPA, and/or (c) are members of an NGO which is an implementing organisation running a protective home under Section 21, ITPA or a Shakti Sadan Home under the Mission Shakti Programme.

• Such number of officials as may be necessary from the Departments of Women and Child Welfare, Labour, Social Welfare, Health, Prosecution and/or any other relevant line departments existing at the district-level.

(ii) All the members of the AHTU including police, government officials, NGOs etc., must be given regular training on all aspects of human trafficking in order to enhance/refresh their knowledge (of the law, procedures, human rights principles, etc.), skills (technical and scientific as well as psychosocial methods in attending to victims/witnesses etc.) and all related aspects.

(iii) The AHTU would be notified by the State Government as a Police Station for the entire district for registration and investigation of all cases relating to the crime of human trafficking which would be in addition to the other police stations in the district.

(iv) The following shall be the broad responsibilities of the AHTUs:

• Ensuring focused attention in dealing with offences of human trafficking and providing a multidisciplinary approach and a joint response by all stakeholders.

• Ensuring an 'organised crime' perspective in dealing with trafficking crimes.

• Bringing about inter-departmental collaboration among the police and all other government agencies and departments, such as women and child, labour, health etc.
• Conducting rescue operations with the assistance of NGOs wherever they receive information about trafficking activities, either from police sources, NGOs or civil society.

• Ensuring a victim-centric approach which prioritises the 'best interest of the victim' and prevents secondary victimisation/re-

victimisation of the victim as well as ensuring a gender sensitive and child rights sensitive approach in dealing with trafficked victims.

(v) Developing and sharing a database on traffickers and victims should be an equal focus area of the AHTUs apart from existing efforts pertaining to prevention, investigation, rescue and post-

rescue care. Building such a comprehensive database on traffickers and exploiters (including recruiters, buyers, sellers, harbourers, transporters, financiers etc.) will help in dismantling their 'organised crime' networks. Similarly, a database on victims and vulnerable persons/communities will help to prevent such persons from being trafficked or re-trafficked.

(vi) It must be ensured that the DSP heading the AHTU at the district-

level updates, on a monthly basis, the information in such a database and forwards the same to the Additional Director General of Police ("ADGP") heading the State-level Anti-Trafficking Bureau. The Anti-Trafficking Bureau shall thereafter compile such data into a State-level database and disseminate it to all police stations within said State so that they can serve as critical intelligence for commencing prompt investigative and rescue efforts.

(vii) At the same time, the AHTUs shall send such a database to the District and State Crime Records Bureau for further transmission to the National Crime Records Bureau.

• Initiation of Rescue

(i) Upon receipt of any information that an offence punishable under the provisions of the ITPA or the relevant sections of the BNS relating to human trafficking for the purpose of CSE, has been or is being committed in respect of a person living in any premises within their jurisdiction, the police station concerned must forthwith relay the same to the special police officer appointed under Section 13(1), ITPA within the said jurisdiction (in a district where an AHTU exists, this special police officer must already be a member of the AHTU).

(ii) The special police officer shall, without any delay whatsoever, relay such information to the District Superintendent of Police ("DSP") (in a district where an AHTU exists, he/she would be heading the AHTU), the Deputy Commissioner of Police ("DCP") along with the trafficking Police

Nodal Officer of the concerned State ("PNO") and trafficking Government Nodal Officer of the concerned State ("GNO").

(iii) If direction that a person be rescued from a brothel is given to a police officer by the Magistrate in exercise of his powers under Section 16(1) ITPA, then it shall be responsibility of such police officer to forthwith inform the DSP, DCP, PNO and GNO respectively.

(iv) For the purpose of the rescue operation, such special police officer or the officer authorised by the Magistrate under Section 16(1) shall, in coordination with the AHTU of the said district (if it exists), convene the members of the rescue team which shall consist such number of members as the situation may require. In areas where an AHTU already exists, the existing manpower/human resources of the AHTU can be fully utilised and they shall form the rescue team.

(v) However, there might be circumstances in which there exists no AHTU in the area. In such cases, it must be ensured that the rescue team mandatorily consists of the following members:

> • The special police officer or the officer authorised under Section 16(1) ITPA (who shall be the leader), • A Child Welfare Police Officer as specified under Section 107, JJ Act.
>
> • Such number of subordinate police officers as specified under Section 13(3)(a) ITPA, • Two women police officers of any rank as specified under Section 15(6A) ITPA, and • a female social worker/an NGO representative, preferably from the non-official advisory body specified under Section 13(3)(b) ITPA or, from an NGO recognised as a "welfare institution or organisation" by the State Government under the explanation to Section 15(6A) ITPA or, from the implementing organisation running the protective home to which the rescued persons are to be transferred.
>
> (vi) The leader of the rescue team or the head of the AHTU shall, based on the information received, satisfy himself that adequate capacity is available for the rescued persons (approx. number must be estimated based on the information received) at the protective home in which they are intended to be kept in pre-production or interim safe custody. If not, he/she shall explore the availability of capacity at nearby protective homes. It shall be the responsibility of the Child Welfare Police Officer in the team to ensure the availability of similar capacity at a suitable Child Care Institution for the child victims (approx. number to also be estimated based on the information received).
>
> (vii) The rescue team shall also arrange for adequate transport and streamline other logistical requirements for both the rescue team and the estimated number of victims. It needs to be ensured that the victims are always segregated from the offenders and are accompanied by police escorts during their travel from the rescue site.

(viii) Prior recce of the search and rescue area/site should be conducted.

For this purpose, a police official(s) conversant with the local language must be sent incognito along with local NGO workers. After obtaining necessary information from the recce and obtaining an understanding of the layout of the area/site/building, the leader/head of the rescue team must brief and assign specific duties to the team members including cordoning off entry and exit points, locating hide-outs, local crowd management etc. The utilization of decoys, informants and conducting pre-rescue confidential interviews of the victims would be within the discretion of the leader/head of the rescue team depending on the situation at hand.

(ix) It is important that all the members of the rescue team be briefed regarding their respective roles, responsibilities including the do's and don'ts during the rescue operations.

(x) The leader/head of the rescue team shall also arrange for two respectable persons from the locality of the rescue site who will attend and witness the search in accordance with Section 15(2) ITPA. Of the two persons, one person must be a woman and as per the proviso to Section 15(2), it may not be necessary that such a female witness be from the same locality.

(xi) Once the rescue operation has taken some shape, the leader/head of the rescue team must again inform all the authorities including the DSP (where the rescue operation is not conducted by the AHTU), DCP, PNO and GNO respectively regarding the places to be visited, proposed time, approximate manpower required, etc. At the same time, the in-charge of the organisations running the protective homes/child care institutions shall also be informed about the approximate number of victims who may be rescued and the probable time at which they would be brought to the home (if the rescue operation is conducted by the AHTU, then such persons in-charge would already be members of the AHTU).

(xii) All persons including the members of the rescue team, authorities of the protective homes etc., shall be bound to ensure confidentiality and prevent the leakage of any intelligence or information to outsiders including to the media.

c. Rescue

(i) Upon reaching the rescue site, every member of the rescue team (police officials, NGO members, witnesses) should take their respective positions as agreed upon during pre-rescue briefing. The area must be immediately cordoned off and all entry and exit points must be sealed before entering the premises upon which the search is to be conducted.

(ii) Officials forming part of the rescue team must keep certain non-

negotiables and mandatory rules in mind at all times. Non- adherence to the same shall expose them to criminal prosecution which may be instituted by the victim herself or by any social worker on behalf of the victim. They are:

• No person shall be abused either verbally or physically. • The manner in which the persons are rescued must not involve elements of unnecessary physical force or 'man-handling'. • No misdemeanours or offences otherwise punishable under the BNS shall be committed in the course of the rescue.

(iii) The members of the rescue team shall endeavour, to the best of their capacity, to identify whether the persons intended to be rescued are voluntary sex workers or not, in adherence to the dictum of this Court in Budhadev Karmaskar (supra).

(iv) The victims may be kept hidden in cubicles, false ceilings, basements, boxes, attics, wardrobes, toilets and surrounding areas.

The rescue team must make all efforts to locate these hidden places.

(v) Special attention and care must be given in the course of the rescue to children, transgender persons, persons with disabilities and persons who are mentally ill.

(vi) The rescued persons must be allowed to take their possessions and personal belongings like clothes, valuables, identity documents etc. at the time of the rescue itself.

(vii) It must be ensured that while photography and videography of the rescue site is done, the victims are excluded.

(viii) The rescued persons must be treated as victims at all times and no victim must be arrested.

(ix) The rescued persons must be separated from the offenders at all times to avoid any threat, pressure or intimidation.

(x) The rescued persons shall be transported to the police station in vehicles and be escorted by such number of police officers as may be necessary. However, if they require any emergency medical/trauma care, they shall be escorted to the nearby government hospital as soon as possible.

d. Post-rescue Prior to production before the Magistrate/CWC

(i) At the police station/AHTU, the rescued persons must be kept in a comfortable place suitable for victims (not be kept in lock-ups or with other offenders) and provided access to drinking water, sanitation facilities, food etc. The AHTUs/police stations must be allowed to utilise the funds available under their contingency head for this purpose.

(ii) For the provision of legal assistance to the victims, members of the DLSA or other lawyers must be made available at the police station. A list of such lawyers must be prepared and maintained at all police stations, at all times.

(iii) In the event that the rescued victims do not speak the local language, the team leader/head must make one or more translators available who shall assist the victims. Prior assistance from the NGO forming part of the rescue team may be taken for this purpose.

(iv) Individualised interviews of the victim must be conducted after their rescue in the presence of a member of the DLSA/lawyer who shall inform the victims of their rights, obligations etc., and ensure that the interview is conducted in a sensitive manner. In the case of victims who are women, statements shall only be taken by a woman police officer and if no woman police officer is available, by any police officer but in the mandatory presence of a female social worker in accordance with Section 15(6A) ITPA. Such interview will be necessary to obtain information including the age, native place, health status, family history etc., of the victim and the same would thereafter be duly considered in identifying the victim's "best interest" for orienting further post-rescue measures.

(v) A victim's statement must only be recorded once her safety is ensured and her initial trauma is overcome. Therefore, if the victim is not in a condition to give a statement, either physically or mentally, then upon having consulted the social worker or counsellor, the officer taking the statement would have the discretion to conduct another interview after such period as may be considered necessary.

(vi) The rescue team must identify persons who are less than 18 years if age so that they can be sent to the CWC as "children in need of care and protection" under the JJ Act. Such identification shall be done by the leader/head of the rescue team in consultation with the social worker, and based on the preliminary interview conducted along with the prima facie appearance of the victim. If there is any doubt regarding the age of the person, they shall be considered to be children and the further call on age determination must be left to the CWC.

(vii) Upon rescue or removal, every victim shall be produced before the appropriate authority without delay. If the necessary documents and reports have been prepared and the appropriate Magistrate/CWC is in office on the same day, then the adult victims shall be escorted for production before the Magistrate in accordance with Section 15(5), 16(2) or 17(1) respectively, and the child victims shall be escorted to be produced before the CWC.

(viii) In the event that such a production before the Magistrate/CWC is not possible on the same day, the rescued persons shall be immediately transferred to the protective homes and/or the child care institutions by the special police officer and child welfare police officer respectively. The rescued persons shall not be detained over-night at the police station/AHTU under any circumstance for any reason whatsoever.

[For child victims, all proceedings relating to their care, protection, and rehabilitation shall thereafter be governed by the JJA, 2015 and the applicable rules. Where the victim is an adult, all proceedings shall be conducted in accordance with the ITPA read with the further directions contained in this plan.] Proceedings before the Magistrate

(ix) During the very first production of the adult victim before the Magistrate, and at every subsequent hearing, the Magistrate shall ensure that a lawyer who effectively represents the interest of the victim is present throughout the course of the proceedings. If not, the Magistrate shall appoint any such lawyer at his/her discretion or those empanelled by the DLSA to represent the victim. It must be ensured that the lawyer representing the victim is different from the lawyer representing the offender(s). No substantive step in the proceedings shall be taken until such legal representation has been made available to the victim. Where practicable, a social worker with experience in working with such victims shall also be present to assist the victim in understanding the nature of the proceedings.

(x) At the outset, the Magistrate shall inform the victim of her right to be heard at every stage, and shall ensure that she is given a genuine and meaningful opportunity to express her views and wishes. Further, the Magistrate shall ensure that the victim has been informed about the nature and purpose of the proceedings, the steps that will follow, and the choices available to her at each stage.

(xi) The Magistrate shall, at the earliest opportunity, make a prima facie assessment as to whether the victim produced before her is an adult or a child. Where the Magistrate has any doubt as to the victim's age, she shall be treated as a child at this stage, and the matter shall be referred to the CWC, which shall deal with the victim in accordance with the provisions of JJA, 2015. If the CWC concludes that the victim is an adult, the matter shall be returned to the Magistrate.

(xii) At the first hearing, the Magistrate shall hear the victim, among other things, on: (i) whether she considers herself to be engaging in prostitution on her own volition and without coercion, fraud or force, whether direct or indirect, and (ii) whether she wishes to be placed in long-term safe custody by virtue of an order under Section 17(4), ITPA.

(xiii)Where the victim clearly and unequivocally states that she is engaging in prostitution voluntarily and does not wish to be placed in long-term safe custody under Section 17(4), the Magistrate shall pass an order directing a preliminary inquiry into whether her engagement in prostitution is voluntary in nature. This specific inquiry shall be conducted by one or more social workers from the panel maintained under Section 17(5), ITPA, who have experience in working with victims of CSE. The preliminary inquiry report shall be submitted to the Magistrate within 7 (seven) days from the date of the order. Where the victim makes no such statement, or is unable to clearly express her position, the matter shall proceed directly to the deeper inquiry under Paragraph (xviii) of this section.

(xiv) The aforesaid inquiry shall be conducted in the victim's preferred language, and, if a social worker proficient in that language is unavailable, an interpreter shall be arranged. The inquiry shall be held in a private setting, without the presence of the police or any person who may have influence over the victim.

(xv) Upon completion of the preliminary inquiry, the social worker(s) tasked with it shall submit a report to the Magistrate, which, among other things, shall include the following:

a. First, the victim's own statement on whether she considers herself to be engaging in prostitution voluntarily.

b. Secondly, the social worker's assessment of the conditions in which the victim was undertaking prostitution, including her manner of entry, her control over her earnings, and her freedom of movement, and any other indicators which would shed light on whether the victim is being coerced or forced into prostitution and/or whether her statement of voluntariness is manufactured through threats of coercion, force or undue influence.

c. Thirdly, the social worker's overall assessment, based on the victim's statement and working conditions, of whether the victim engages in prostitution voluntarily. Where this assessment differs from the victim's own statement, the report shall record specific and concrete reasons for the difference, with particular reference to any circumstances that would pose a real risk to the victim's safety were she to be released and/or which indicate that the statement of voluntaries is manufactured through threats of coercion, force or undue influence.

(xvi) Upon receipt of the report, i.e., after 7 (seven) days from the date of the order directing the preliminary inquiry, the Magistrate shall peruse the findings of the report and, before passing any order, give the victim and her lawyer an opportunity to respond to the report, particularly where the social worker's assessment differs from the victim's own statement. Thereafter, the Magistrate shall pass a reasoned order:

a. releasing the victim where the victim affirms her position as being engaged in prostitution voluntarily, and the social worker's report does not contradict this position and does not specify any circumstances that indicate safety concerns placing the victim at real and immediate risk if released and/or that the statement of voluntariness is manufactured through threats of coercion, force or undue influence;

b. directing a deeper inquiry under Paragraph (xviii), where the victim herself acknowledges upon reflection or during the inquiry that she was coerced or forced to engage in prostitution or where the victim maintains her position as engaging in prostitution voluntarily, but the social worker's report identifies circumstances that indicate safety concerns placing the victim at real and immediate risk if released and/or that the statement of voluntariness is manufactured through threats of coercion, force or undue influence, and the Magistrate, upon consideration, finds such concerns to be well-founded.

(xvii) For the purpose of such preliminary inquiry, in all cases, the victim's own statement shall be accorded primacy and shall form the basis for the Magistrate's decision. This primacy may be displaced only where the Magistrate finds, for reasons to be recorded in writing, that there exist cogent grounds to believe that the victim's

safety would be at risk upon her release or that her statement of voluntariness is manufactured through threats of coercion, force or undue influence.

(xviii)Where a deeper inquiry is ordered either directly under this Paragraph or under Paragraph (xvi)(b) of this section, the Magistrate shall direct an inquiry as contemplated under Section 17(2), ITPA which shall cover the following aspects: (i) the circumstances of removal or rescue of the victim including the veracity of the information received; (ii) character and antecedents of the victim; (iii) the suitability, capacity and genuineness of the victim's parents, guardian or husband to take charge of the victim;

and (iv) the likely influence of the victim's home environment on her well-being if she is returned.

(xix) Given the multi-faceted nature of the inquiry under Section 17(2), ITPA, the Magistrate shall necessarily seek the assistance of a probation officer appointed under the Probation of Offenders Act, 1958, and a panel of social workers constituted under Section 17(5) of the ITPA with experience in working with victims of trafficking for CSE and/or a recognised welfare institution or organisation under Section 17A.

(xx) After competition of the deeper inquiry as mentioned under Paragraph (xviii) of this section, a joint report shall be submitted to the Magistrate within 21 days of the date of the order (in a case where no preliminary inquiry had been ordered under Paragraph

(xiii) of this section) and within 14 days of the date of the order (in a case where a preliminary inquiry had already been completed and an order for deeper inquiry had been made under Paragraph (xvi)(b)). Where a preliminary inquiry has already been conducted, the report prepared thereunder may be referred to in the course of the deeper inquiry, and the social worker who conducted the preliminary inquiry may, where appropriate, form part of the deeper inquiry process.

(xxi) During the course of the deeper inquiry, the victim's own views, among other things, shall be sought and recorded on: first, whether she wishes to return to her family and secondly, whether she wishes to be placed in long-term safe custody under Section 17(4), ITPA. The victim's responses shall form part of the joint inquiry report and shall be placed before the Magistrate alongside the findings of the probation officer, the panel, and/or a recognised welfare institution or organisation under Section 17A.

(xxii) Upon receipt of the joint inquiry report, the Magistrate shall peruse it and thereafter, hear the victim. No order placing the victim with her family shall be passed without the victim's consent. Further, except where the Magistrate finds that there exists cogent grounds to conclude that any release would be seriously prejudicial to the victim's safety or that the victim withheld consent to be placed in long-term safe custody under Section 17(4) under the influence of threats, coercion, or undue influence, no order shall be passed placing the victim in a protective home without the victim's consent.

(xxiii) Where the victim consents to placement with her family, and the Magistrate is satisfied, on the basis of the joint inquiry report which includes the investigation conducted by the recognised welfare institution or organisation under Section 17A, ITPA, that the family is genuine, capable and that such placement would not expose the victim to harm, the Magistrate shall pass an order accordingly. Where, despite sufficient efforts, the family of the victim cannot be traced, the Magistrate shall ask the victim whether she wishes to be placed in long-term safe custody under Section 17(4) and pass an order in accordance with Paragraphs (xxiv) and (xxv) respectively.

(xxiv) Where the victim consents to be placed in long-term safe custody, or where the Magistrate finds, for reasons to be recorded in writing, that release would be seriously prejudicial to the victim's safety or that her consent was withheld under the influence of threats, coercion, or undue influence, the Magistrate shall pass an order directing her placement in a protective home or such other suitable custody, in accordance with Section 17(4), ITPA. Whether placement in a protective home was ordered with or without the victim's consent, the victim may, at any time after 90 days from the date of the order, make an application to the Magistrate seeking her release. The Magistrate shall consider such application on its own merits and pass an appropriate order thereafter. This right to apply for release before the magistrate is without prejudice to the victim's right to appeal an order made under Section 17(4), ITPA provided under Section 17(6), ITPA .

(xxv) In scenarios not covered by Paragraphs (xxiii) and (xxiv) respectively, i.e., where the victim does not wish to be placed with her family or in long-term safe custody, and wishes to be released, the Magistrate shall record such a choice and pass an order for release accordingly. In such a release order, the Magistrate may, if he deems fit, assign a social worker to help and guide the victim in availing herself of the benefits to which she may be entitled under various government schemes.

(xxvi) A victim's choice not to be placed under long-term safe custody shall not be treated as an adverse inference against her at any stage, present or future, and shall not preclude her from making an application under Section 19, ITPA should she later wish to avail for herself care, protection, or rehabilitation.

(xxvii) From the date of the first production and throughout the inquiry process (both the preliminary inquiry under Paragraph (xiii) of this section and the deeper inquiry under Paragraphs (xvi)(b) and (xviii) of this section respectively), the Magistrate shall pass appropriate orders for the interim safe custody of the victim, which shall provide for the victim to be placed in a protective home under Section 21, ITPA and be provided with adequate basic care, including medical attention, psychological support/counselling, food, and shelter. The provision of such care shall not be contingent on the outcome of any inquiry and shall not be withheld or deferred at any stage.

(xxviii) Every endeavour shall be made to complete the inquiries contemplated under this plan and to pass an order under Section 17(4) within the maximum period prescribed for interim safe custody under Section 17(3) ITPA. Where, for any reason, there is an unreasonable delay in the completion of the inquiry or the passing of such an order beyond this period, the victim shall be entitled to file an application before the magistrate bringing such delay to his notice. Upon receipt of such an application, the magistrate shall take due cognisance of the delay, record his reasons for the same,

and take all necessary steps to ensure that the matter is concluded without further delay.

(xxix) Necessary legal and social support shall be made available to every victim, free of cost, to assist her in filing any application or appeal contemplated under this plan or under the ITPA.

(xxx) Any victim produced before a Magistrate must be examined by a registered medical practitioner for the purposes of detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases as per Section 15(5A), ITPA. Such an examination shall be done with the informed consent of the victim and without any delay. It must be ensured, as far as possible, that such examination is done by a female medical practitioner and if no female practitioner is available, it shall be done in the presence of a women social worker or counsellor. Arrangements for specialists like gynaecologists may be made, if required. Male police officers and attendants must not be present in the examination room.

(xxxi) All proceedings before the magistrate, and all orders passed thereunder, to the extent possible, shall be conducted and maintained with strict regard to the confidentiality and privacy of the victim. No information that may lead to the identification of the victim shall be disclosed to any person not directly involved in the proceedings.

(xxxii) The concerned AHTU or the police rescue team who rescued the victims shall keep track of all the victims who have been directed by the Magistrate to be placed in long term safe-custody and those who have been placed with their family/guardian/husband respectively, and forward a list thereof to the PNO and GNO of the concerned State.

e. Rehabilitation

(i) In the event an order for release is passed by the Magistrate under Paragraph (xxv) of the previous section, and a social worker is assigned to provide help and guidance to her in availing social welfare benefits which she may be entitled to, then such social worker shall bear the responsibility to aid the victim, in the best possible manner, in actually and realistically availing such benefits from different schemes and shall provide such other necessary assistance as is required to fulfil such responsibility. For the said purpose, the social worker may liaison with the officials from the Departments of Women and Child Welfare, Labour, Social Welfare, Health and/or any other relevant line departments existing at the district-level who are members of the AHTU in the concerned district and/or the concerned DLSA.

(ii) The protection homes at which the victims are placed in interim or long-term safe custody in consequence of an order passed by the magistrate under Sections 17(2) and 17(4) respectively, must be victim-friendly in terms of their environment, both physical and social. The basic and minimum criteria for the same are delineated as follows:

> • The protective homes must be victim-friendly and shall not emulate a jail or lock-up in any manner whatsoever. • If, according to the terms and conditions of the licence granted to the protective home, a capacity to house ‘n’ number of residents is

indicated, it must be ensured that such a number is not unduly exceeded. Should the need for more homes arise, it shall be the responsibility of the Department of Women and Child Welfare of the concerned State to ensure the establishment of more homes in the area.

• Each protective home shall have a Management Committee for the overall management of the home and for monitoring the progress of every resident.

• Each protective home must have an adequate number of dormitories, toilets, bathrooms, a sick room/first aid room, a counselling/guidance room, a kitchen, a dining hall, a store and a recreation room, at a minimum.

• Each protective home must have sufficient treated drinking water, ventilation, proper drainage systems, arrangements for garbage disposal, fire extinguishers, first-aid kits, etc. • It shall be the responsibility of the Management Committee of the protective home to ensure that the physical environment is hygienic and safe, and that the nutritional needs of the residents (especially that of pregnant and lactating mothers) are being adequately met.

• The Management Committee shall also draw up a daily routine for the residents.

• Unless necessitated by circumstances and deemed fit by the superintendent of the home on an individual case-by-case basis for a pre-defined period, there must be no default and strict rule mandating any form of classification or segregation amongst the residents. Such rules have the consequence of perpetuating discrimination and stigmatising the victims of trafficking for CSE.

• The Management Committee shall ensure that the staff are well-trained and sensitive to the diverse needs and circumstances of their residents, especially the victims of trafficking for CSE.

(iii) The superintendent of the protective home shall ensure that, upon the immediate arrival of the victim;

• A case worker is assigned to each victim.

• Necessary materials such as clothing, toiletries etc. are provided.

(iv) Each protective home shall maintain a list of empanelled case workers, who are independent and not associated in any manner with the NGO or implementing organisation running the protective home. They must have demonstrated experience in working with victims of trafficking for CSE. This list shall be reviewed and updated periodically. In discharging their responsibilities, case workers shall at all times act as guides and facilitators, and shall not, in any manner, seek to influence the victim's choices or decisions.

(v) Upon assignment, the case worker shall serve as the victim's primary point of contact throughout her stay. The case worker shall: (i) inform the victim of all entitlements, benefits, and schemes available to her; (ii) coordinate between all agencies and service providers involved in delivering care and rehabilitation services to the victim and provide necessary logistical/managerial support;

(iii) interact with the victim on a regular basis to understand her evolving needs and wishes; and (iv) ensure that such needs and wishes are duly communicated to and reflected in the formulation of the victim's individual care plan, as laid down in paragraphs (xviii) and (xix) of this section.

(vi) In all protective homes, a general physician and gynaecologist shall be made available on call for the regular medical check-up and treatment of the residents. Such doctors may be chosen from the common pool of referral staff maintained by the OSCs. A nurse or a para-medic shall also be available round the clock. The Management Committee shall maintain a medical record of each resident and update it on the basis of their regular medical check- up. The protective home must have a standing liaison with the nearby district hospital/CHC/PHC in case of any medical emergencies.

(vii) Every protective home shall make available the services of trained counsellors/psychiatrists/psychologists either in-house or through collaboration with external agencies or on a part-time basis from the common pool of referral staff maintained by the OSCs, for specialised and regular individual therapy of the residents, especially victims of trafficking for CSE.

(viii) Special de-addiction and de-toxification support must be provided to residents, especially victims of trafficking for CSE who have been diagnosed with substance abuse issues, including alcoholism, drug addiction, etc.

(ix) All medicines must be administered to the residents only by trained medical staff or the nurse or para-medics and strictly, upon the prescription of doctors and/or psychiatrists.

(x) Every protective home shall provide opportunities for education, depending on the age and ability of the residents, both inside the home or outside, as per their requirement. The range of educational opportunities shall include mainstream inclusive schools, bridge schools, open schooling, non-formal education etc. Where necessary and possible, the protective home shall collaborate with reputed external institutions and organisations that are willing to provide such services. A sufficient budget should be allocated for arrangement of materials like books, stationary etc.

(xi) Every protective home shall provide gainful vocational training to the residents according to their age, aptitude, interest and ability, both inside and outside the protective home. It must be ensured that the provision of life skills, vocational training and skill development is suitable for employment in the contemporary job market. For training outside the home, collaborations with vocational training institutes recognised by the Directorate General of Employment and Training under the Ministry of Labour and Employment or, training partners of the National Skill Development Council ("NSDC") may be made.

(xii) The protective home shall, wherever feasible, include indoor and outdoor recreational activities like games, music, television, outings, cultural programmes, gardening, reading etc., for the overall well-being of the residents. Regularity of such activities shall be maintained with support from other protective homes and NGOs, if needed.

(xiii)It shall be the duty of the Management Committee to ensure the allocation of adequate funds for all the aforesaid or to explore whether the victim may be entitled to monetary or other support from existing welfare schemes of the State and Central governments. The superintendent may take assistance from the DLSA for the said purpose.

(xiv) The protective homes shall allocate a portion of their budget for the procurement of vehicles or arrangement of safe transport facilities for the purpose of taking the victims to and from the hospital, schools, vocational training institutes etc.

(xv) The protective homes must also have a protocol in place for ensuring supervised visitation of the victims by outsiders. Such protocol may require visitation under the supervision of the superintendent or the case worker concerned. The visitors shall subject themselves to a search at the main gate and women visitors shall be searched by women staff only. During such a search, it must be ensured that the visitors are not carrying any prohibited articles or substances. No meeting must be permitted with those persons who have been found to be involved in subjecting the victim to trafficking, abuse or other forms of exploitation. While the residents would be entitled to communicate with their lawyers, it must be ensured that the rules of such a search shall also apply to them, and any interview with the victim shall take place within the sight of the case worker or a home official, though at a safe distance so as to be out of hearing.

(xvi) If any resident does not have legal representation and/or requests for a lawyer for legal advice and/or consultation, the protective home must forthwith arrange for a lawyer empanelled with the DLSA who shall assist the resident.

(xvii) Where police officers (preferably women) of the rescue team/AHTU wish to conduct an interview for the purpose of taking the statement of the rescued victim, the same shall be done with prior intimation to the superintendent of the home, who shall be responsible for informing the lawyer of the victim and the case worker concerned. Such a statement shall only be taken in the presence of the lawyer and/or the case worker.

(xviii)When a victim is placed in a protective home for interim safe-

custody by virtue of an order passed by the Magistrate under Paragraph (xxvii) of the previous section, the Management Committee of the home shall forthwith, in consultation with the concerned case worker, visiting doctor and counsellor/psychiatrist/psychologist, prepare an individualised care plan for the victim, with her consent (wherever necessary and/or possible), for such interim period. This plan would predominantly focus on:

• The nutritional needs of the victim and deviation from the default diet plan, if necessary.

• Daily routine and deviation from the default routine, if necessary.

• The provision of psychiatric or psychological counselling, de-

addiction and detoxification support, non-emergent medical care etc. • For victims who have tested positive for HIV/AIDS and after obtaining necessary consent in this regard, a management protocol including the management of opportunistic infections, prevention of mother to child transmission in case of a pregnant positive victim, free access to anti-retroviral drugs etc.;

• Basic life skills and vocational training which may be provided within the home.

• Recreational activities which may be suitable for the victim. • A security plan taking into account any immediate threat to the safety of the victim. This may involve periodic wellness visits from the police officers of the AHTU/rescue team/local police station, scrutiny of visitors and supervised visitation etc. (xix) When a victim is placed in a protective home for long term safe-

custody by virtue of an order passed by the Magistrate under Paragraph (xxiv) of the previous section, the Management Committee of the home shall forthwith, in consultation with the concerned case worker, visiting doctor and counsellor/psychiatrist/psychologist, prepare an individualised care plan for the victim, with her consent (wherever necessary and/or possible), for such period as may be necessary. In addition to the aspects mentioned under the previous Paragraph, such a plan shall also focus on:

• The provision of education through formal school systems, open schools, home schooling and the arrangement for materials like books etc. for the said purpose. • The provision of life skills, vocational training and skill development that is suitable for employment in the contemporary job market both in-house and outside through vocational training institutes recognised by the Directorate General of Employment and Training under the Ministry of Labour and Employment or, through training partners of the National Skill Development Council (“NSDC”). Priority must be given to the choice of the victim in deciding what life skills or training shall be imparted to her.

• The opening of a bank account in the name of the victim in which the deposit of a pre-decided amount would be made every month by the superintendent of the protective home according to the implementation guidelines of the Mission Shakti Programme. The amount along with any interest accrued is intended to act as seed money for the victim at a time when she leaves the home.

(xx) Such an individualised care plan for long term residents must be re-evaluated after a period of 30 days and re-tailored according to the changing needs of the victim.

(xxi) Such an individualised care plan shall be formulated by offering the victim a range of options for each aspect of the plan, especially those relating to vocational and educational skills, which would help the victim find alternative livelihoods upon release. To maximise the choices available to the victim, the protective home shall, wherever necessary, collaborate with reputed external agencies and organisations.

(xxii) The protective homes must have adequate safeguarding measures including the installation of CCTVs in the common areas, all entry and exit points etc., to prevent and monitor intrusion by the traffickers or other persons who may cause a threat to the safety of the victim. Security personnel including security guards for security from outside the home shall be appointed. In case of any immediate threat to the safety of the victim and/or any other extenuating circumstances, it must be ensured that such number of police officers of the AHTU or local police station, as may be necessary, are deputed outside the protective home.

(xxiii) During the course of their stay in a protective home, if the victim is required to attend any hearing or court procedures, she shall be escorted by two police officers, of which one shall mandatorily be a women police officer.

(xxiv) Every protective home shall evolve a system which ensures that there is no abuse, neglect and maltreatment of the residents including by the staff of the home. Such abuse shall be brought to the notice of the superintendent and the lawyer of the resident, who shall take appropriate action including the registration of a complaint under the relevant provisions of the law before the local police station. In such circumstances, the resident, through her lawyer, may to move the Magistrate for an order that she be placed in a different protective home, wherever feasible.

(xxv) Every protective home shall endeavour to constitute a committee composed solely of victims currently residing in that home. Such a committee shall be encouraged to participate in the following activities: (i) improvement of the condition of the protective home;

(ii) reviewing the standard of care being followed; (iii) developing educational, vocational and recreational plans; and (iv) reporting abuse and exploitation. The protective home shall ensure that the victims' committee is provided with the necessary support and materials required for its effective functioning.

(xxvi) The superintendent of the protective home must maintain a confidential case file of each resident placed in safe custody (whether interim or long term) and shall produce the same before the Magistrate in the event of any hearing/proceeding

before him.

Such a case file, would contain, amongst other things, a copy of the FIR, photo ID, medical and psychological/counselling reports, drug de-addiction progress reports, report of the superintendent and case worker, report of initial interaction with the resident, information from family/relatives/friends etc., observation report from staff members, report of education/vocational training given and its progress, the individual care plan and its periodic changes, complaints/feedback given by the resident, reports of visitors, etc. The maintenance of all such report should be computerised, wherever possible.

(xxvii) The Committee headed by the Chief Secretary of each State/UT tasked with overseeing the implementation of the Mission Shakti Programme must in coordination with the District-level Committee headed by the District Magistrate/Collector conduct a quarterly inspection and social audit of the protective homes for evaluation and assessment of their functioning. To ensure transparency, a member of the DLSA shall also be present during such an inspection. This shall include, amongst other things, the examination of the books of accounts, conducting anonymous interviews of the residents as regards their well-being, quality of their stay, complaints and feedbacks, etc. The district-level Committee shall also carry out random inspections in the presence of a member of the DLSA, as and when deemed necessary. Based on the social audit, the district-level Committee shall make recommendations for the improvement and development of the conditions of the home. The district-level Committee shall require reasons to be furnished by the implementing organisation for deficiency in any service and/or other complaints, and allow a fixed period for improvement/rectification/corrective measures. In the event of failure to comply, the district-level Committee, in conjunction with the State-level committee, shall take a call on whether the same shall be considered to be a violation of the terms and conditions of the licence, leading to its cancellation.

f. Repatriation/Reintegration

(i) Two months or 60 days before the victim is scheduled to leave the protective home, it shall be the responsibility of the superintendent of the protective home along with the case worker and the members of the AHTU, to prepare an individualised post-release plan for her reintegration and/or repatriation to the village/town/city of her home State. During this time, the victim shall mandatorily be consulted on whether she wishes to be sent back home or not. Utmost priority shall be given to her consent and should the victim choose not to go back to the village/town/city of her home State, a plan for her reintegration shall be made at the destination State itself.

(ii) In a case where reintegration at the destination State is contemplated, the individualised plan would include aiding the victim in finding a job suitable to the skills/vocational training received during the period of stay, transfer to half-way homes maintained under the Shakti Sadan programme along with the period of stay in such half-way homes, exploring accommodation in existing Working Women Hostels, facilitating micro credit through SIDBI, Mudra and other relevant schemes of the Central/State government in case the victim wishes to start any small-scale industry/business, providing all documents necessary for accessing the funds in the back account

opened in their name during their stay, making an application for compensation from Victim Compensation Schemes of the concerned State in accordance with Section 396, BNSS and providing all information on other social security benefits like entitlements to existing housing schemes etc., amongst other considerations.

(iii) However, if the victim indicates that she wishes to be sent back to the village/town/city in her home State, then the members of the AHTU will initiate a due diligence process by conducting a home investigation to re-convince themselves that the victim would be safe and not be exposed to abuse or chances of re-trafficking. This process shall commence before 45 days of the intended release of the victim and be concluded within 15 days of her intended release. If the investigation reveals the existence of any danger to the safety of the victim, then such information shall be disclosed to the victim by the case worker concerned or a social worker from the AHTU and efforts shall be made to reintegrate her, with her consent, at the destination State in accordance with Paragraph (ii) of this Section.

(iv) However, if the home investigation does not reveal the existence of any danger to the safety of the victim, then necessary arrangements for her repatriation shall be made. During the journey to the village/town/city of her home State, the victim shall be accompanied by two police personnel (preferably members of the AHTU) of which one shall compulsorily be a women police officer. Such officers shall take all measures to ensure that they do not disclose the circumstances in which the victim was rescued, her history of engagement in prostitution (whether forced or not), or any other information that could potentially stigmatise the victim. Expenses related to the travel of the victim and the police escorts shall be borne by the AHTU and/or the protective home.

(v) A list of all the victims of trafficking for CSE who were rescued and who have either been reintegrated in the destination State or repatriated to the village/town/city of the home State shall be forwarded by the AHTU concerned or the police rescue team to the PNO and GNO of the destination State respectively. This shall also contain necessary information including where the victim is presently housed (if she is reintegrated in the destination State), the village/town/city to which she has been repatriated along with the names of the police officers who escorted her during her return etc.

(vi) The NGO members of the AHTU operating in the area where the victim is reintegrated/repatriated in coordination with the NGO members of the AHTU who conducted the rescue of the victim shall conduct a monthly follow-up of the status and well-being of the victim for the first six months post her reintegration or repatriation. Thereafter, the frequency of such follow-up shall be reduced to a quarterly basis and shall continue for a period of three years post her reintegration or repatriation. During such follow- ups, the NGO workers shall also ensure that they do not disclose the circumstances in which the victim was rescued, her history of engagement in prostitution (whether forced or not), or any other information that could potentially stigmatise the victim

(vii) After effecting the repatriation or reintegration of the victim, all efforts must be made by the police officers investigating the crime of human trafficking and prosecutors alike, to not

re-traumatise the victim by requiring them to give additional statements, physically attend court proceedings etc. g. Prosecution and Trial

(i) All State Governments shall in consultation with the High Court, re-evaluate the need for establishing special courts under Section 22A, ITPA in any district or metropolitan area for the speedy trial of offences under the said Act, having particular regard to the number of cases reported and pending under the ITPA before different forums of the concerned State.

(ii) The State government must ensure that protection from existing witness protection schemes which have been prepared and notified in accordance with Section 398 BNSS is extended to the victims of human trafficking for CSE and their families.

(iii) During trial, the prosecution shall keep in mind the various decisions of this Court pertaining to the recording of evidence of victims of sexual abuse including that of the permissibility of recording evidence by way of video-conferencing as held in State of Maharashtra v. Praful B. Desai reported in (2003) 4 SCC 601.

(iv) All the High Courts shall ensure the effective implementation of Section 395, BNSS i.e., Order to pay compensation, by all trial courts under their jurisdiction, giving particular regard to sub-sections 395(1)(b) and 395(3), BNSS respectively.

h. Prevention and training

(i) Police officers and AHTUs must keep vigil at transit areas such as railways stations, bus stops, etc. to spot trafficked victims and carry out all steps for timely intervention.

(ii) The AHTUs must identify vulnerable source areas and initiate targeted interventions including awareness and empowerment programmes to prevent trafficking.

(iii) All relevant stakeholders including special police officers, police officers assisting the special police officer, NGO workers, social workers, officials of the various departments at the district and State-level, DLSA members, lawyers, PLVs, medical officers, counsellors, judicial officers, prosecutors etc., must be given regular and adequate training on handling victims of human trafficking and victim-friendly procedures. It must be ensured that such training is not sporadic and is scheduled at regular intervals. Such training must not only be conducted at national or State levels but trickle down to the district-level so as to ensure that such efforts translate into realistic implementation. It shall be the responsibility of the Anti-Trafficking Cell under the MHA at the national-level; the Anti-trafficking Bureau, the PNO and GNO respectively at the State-level and the AHTU at the district-level to coordinate and initiate such training activities. They may collaborate with the Bureau of Police Research and Development ("BPR&D") State Police Academies and State Judicial Academies for the purpose of imparting such training.

(iv) For such training, the Anti-Human Trafficking Cell shall develop comprehensive and standardised training resource materials including manuals/SOPs drawing from the best practices

of several State governments. Such standardised resource materials, manuals or SOPs shall form the foundational base upon which all training shall be imparted to different stakeholders. Reference can also be drawn to manuals already prepared by the MWCD in collaboration with several organisations.

i. Guidelines for persons making an application under Section 19 ITPA

(i) Where any person who is carrying on or is made to carry on prostitution makes an application before the magistrate under Section 19 ITPA for an order that she may be either kept in a protective home, or be provided care and protection by the court, it shall be ensured that the following guidelines laid down in the Victim Protection Plan apply to her case with full force:

> • Provision of legal representation and right to a fair and adequate hearing under Paragraphs (ix) and (x) of the section on post-rescue;
>
> • interim safe-custody along with the care, protection and rehabilitation to be afforded to her in terms of Paragraph (xxvii) of the section on post-rescue;

• Remedy available to the victim and the procedure to be followed by the magistrate in the event of delay in passing an order for final safe custody under Paragraph (xxviii) of the section on post-rescue;

• Scope to make an application to the magistrate seeking release from custody at any time after 90 days from the date of the order of the magistrate under Section 19(3);

• Provision of necessary legal and social support under Paragraph (xxix) of the section on post-rescue;

• Confidentiality of the proceedings under Paragraph (xxxi) of the section on post-rescue;

• All guidelines under Paragraphs (ii) to (xvi) and (xviii) to (xxvii) respectively of the section on rehabilitation; and • Such other guidelines from the Victim Protection Plan, as may be applicable.

F. Constitution of the Organised Crime Investigation Agency (OCIA)

363. The setting up of a dedicated pan-India investigative and coordinating body for the crime of trafficking in the name of the OCIA was one of the two commitments made by the respondent no. 1 in the second affidavit which led to the disposal of the original writ petition. However, despite such an undertaking, it is now the stance of the respondent no. 1 that the NIA has been empowered to investigate offences under 370 and 370A IPC respectively (corresponding to Sections 143 and 144 BNS respectively) and having made such an arrangement, there remains no need to set-up the OCIA. As a consequence, the respondent no. 1 is of the firm view that there is substantial compliance of its undertaking in this regard.

i. Reasons due to which the setting up of the OCIA was considered necessary by all stakeholders

364. The original writ petition largely placed a solitary focus on the "Victim Protection Plan". It was only through an interim application being I.A. No. 2 of 2015 that, amongst other things, the petitioner sought the creation of a multidisciplinary national bureau-like body (similar to the Narcotics Control Board) which "evolves and implements interventions on the lines of the protocol coordinating with all agencies engaged in prevention, rescue, rehabilitation and re-integration in addition to prosecution".

365. While initially its importance was under-acknowledged by the respondent no. 1, the several stakeholders involved in the CAC meetings and other consultative processes highlighted the acute need for such a body. The predominant reasons that favoured its creation were as follows: First, the lack of institutional linkage between the responses at the source, transit and destination areas. Secondly, the lack of institutional mechanisms facilitating inter-state rescue and inter-state operations. Thirdly, the lack of institutional mechanisms for monitoring or facilitating the aftercare of persons rescued in the inter-state operations. Lastly, the lack of an institutional network between the NGOs and other service providers with the law enforcement agencies.

366. Therefore, the stakeholders requested the MHA to work-out a proposal for the creation of the OCIA, which would investigate and provide other support in respect of human trafficking cases along with other organised crimes. Due to the fact that the MHA had a wide field presence across the country through its AHTUs, it was preferred that the OCIA be constituted as a nodal agency under the aegis of the MHA.

367. This suggestion was positively considered by the respondent no. 1 and a proposal was drawn up. The proposal stated thus:

> "Human trafficking is a group of crime involving the exploitation of men, women and children for financial gains which is violation of fundamental rights. Victims are lured or abducted from their homes and subsequently forced to work against their wish through various means in various establishments, indulge in prostitution, begging and trade in human organs or subjected to various types of indignities and even killed or incapacitated for the purpose of begging.
>
> Human trafficking is a borderless organised crime, as declared in the UN Convention on Transnational Organised Crime (UNCTOC 2000), and its protocol on trafficking in Persons (Trafficking Protocol), both ratified by the Government of India. The Action Research by NHRC on Trafficking in Women and Children in India, 2002-2004, has shown the inter-state ramifications of the problem. It has also de-mystified the concepts, exposed the fault lines in the response systems and come out with recommendations in addressing the issues in a holistic manner. No doubt, human trafficking is one of the gravest crimes against human rights and human dignity and therefore, Government of India is concerned about the issues and is committed to address the issues in the best possible manner.

Therefore, the Ministry of Home Affairs is proposing to set up a nodal agency against human trafficking to be called Organised Crime Investigation Agency (OCIA) at New Delhi. The objective of the Agency will be to collate intelligence, investigate the crime of Human Trafficking having national and international ramifications and strengthening of capacity building mechanism. The Agency will also coordinate rescue and rehabilitation efforts with other Ministries of the Government of India and State Governments" (Emphasis supplied)

368. A reading of this excerpt reveals that the respondent no. 1 took special note of the fact that human trafficking: (a) is a borderless organised crime which almost always manifests with inter-state ramifications, and

(b) carries grave human rights implications. Therefore, in furtherance of its seriousness to launch a targeted attack against such crimes, the OCIA was proposed to be set up as a nodal agency within the MHA. The broad responsibilities that were sought to be assigned to the OCIA are as follows:

> (i) Collating intelligence along with knowledge sharing among all stakeholders;
>
> (ii) Investigating the crime of human trafficking having national and international ramifications;
>
> (iii) Strengthening of capacity building mechanisms; and
>
> (iv) Coordinating rescue and rehabilitation efforts with other Ministries of both the Government of India and State governments, along with the maintenance of a national database for missing, found and trafficked persons as well as the traffickers.

369. Therefore, while effective intelligence and investigation of this crime that transcends borders and is regulated by multiple legislations was considered necessary, the OCIA was not envisioned with a unidirectional intent to simply conduct and coordinate investigation. Several other essential functions were also assigned to its domain.

370. While the proposal for the OCIA did not see much progress thereafter, the comprehensive legislation on human trafficking which was being drafted through the Inter-Ministerial Committee took forward the idea of creating a national-level body and made provisions for it under the draft legislation. A reading of the minutes of several of its meetings reveals that the OCIA was temporarily rechristened as the Human Trafficking Investigation Agency ("HTIA") – a body that would exercise jurisdiction in respect of inter-State crimes. The triggering mechanism through which the HTIA would begin investigation was two-fold i.e., either suo motu or when specifically referred to it by the States/UTs.122

371. Later, under the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2022 (hereinafter, the "2022 Bill"), it can be seen that the HTIA was finally renamed as the National Anti-Trafficking Bureau ("NATB")123 The relevant provisions of the Bill which include the broad

122 Summary Record of the 1st meeting of the Inter-Ministerial Committee (IMC) on

comprehensive legislation for tackling various aspects of human trafficking held on 27.01.2016. 123 The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2022, §3.

functions of the NATB and the manner in which it would carry out investigations are reproduced thus:

> "3. National Anti-Trafficking Bureau. - (1) The Central Government shall, by notification, establish a Bureau to be called the National Anti-Trafficking Bureau for exercising the powers and discharging its functions under this Act.
>
> (2) The Bureau shall have police officers and other officers of such appropriate ranks, as may be necessary, for the discharge of its functions.
>
> (3) The manner of selection, deputation, functioning and reporting of the officers and employees of the Bureau shall be in such as may be prescribed.

4. Functions of Bureau. - The Bureau shall perform the following functions in relation to trafficking of persons, namely: —

(i) co-ordinate and monitor surveillance and preventive efforts along with the known or probable routes;

(ii) facilitate surveillance, enforcement and preventive steps at source, transit and destination points;

(iii) maintain co-ordination between various law enforcement agencies and non-Governmental organisations and other stakeholders;

(iv) strengthen the intelligence apparatus to improve the collection, collation, analysis and dissemination of operational intelligence;

(v) increase international co-operation and co-ordination with concerned authorities in foreign countries and international organisations, in operational and long term intelligence in investigation, mutual legal assistance, to facilitate universal action for prevention and suppression and to implement any obligation under the various international conventions and protocols that are in force in respect of counter measures;

(vi) co-ordinate actions and enforcement by various bodies or authorities established under this Act;

(vii) co-ordinate actions taken by the concerned Ministries, Departments organisations of the Government, especially linking the source of transit to destination and connecting all stakeholders;

(viii) review measures for combating, preventing and formulating coordinated strategy of action by various law enforcement agencies;

(ix) make sustained efforts for capacity building and training of agencies;

(x) bring out resource material including education curriculum for children, Panchayat Raj institutions, enforcement agencies, judicial officers and other stakeholders;

(xi) co-ordinate investigating activities among the Districts, States and with other countries in case of cross-border trafficking of persons;

(xii) co-ordinate the investigation, where international ramifications are reported or suspected;

(xiii) co-ordinate investigation, where inter-State ramifications are reported or suspected across two or more States or Union territory administrations;

(xiv) undertake and facilitate other investigators for investigating offences from the organised crime perspective;

(xv) develop and monitor a database on every crime under this Act;

(xvi) co-ordinate with any national or international investigating or law enforcement agencies and civil society organisations; (xvii) facilitate inter-State and international transfer of evidence in investigation as well as video conferencing in judicial proceedings;

(xviii) facilitate frequent meetings of the State Police Nodal Officers to facilitate, monitor and evaluate the establishment and functioning of Anti-Trafficking Units;

(xix) provide necessary support for investigation by the Anti- Trafficking Units, where such requests are made;

(xx) undertake steps to enhance the professional skills of Anti- Trafficking Police Officers, Anti-Trafficking Units and all concerned with the investigation and prosecution of cases; (xxi) facilitate inter-State and trans-border transfer of evidence and materials, witnesses and others for expediting prosecution; (xxii) protection of witnesses, where referred by any State Government, victims, complainants and affected families, as the case may be;

(xxiii) undertake steps for timely and effective action on post- rescue care and protection of any person who is trafficked, including steps towards rehabilitation by the concerned agencies, so that their rights are ensured, and that they are not re-trafficked;

(xxiv) monitor and facilitate victim and witness protection protocols, rules and procedures including video conferencing during trial of offences which have ramifications across States and beyond borders; and (xxv) develop minimum standards of care and advice for all concerned, in matters of compliance.

5. Investigation by Bureau. - (1) The Bureau may take over investigation of any offence under this Act, where referred to it by two or more States.

(2) Where an offence is referred to the Bureau under sub-section (1), the State Government shall not proceed with the investigation of the offence and shall forthwith transmit the relevant documents and records to the Bureau.

(3) For the removal of doubts, it is hereby declared that till the Bureau takes up the investigation of the case, it shall be the duty of the officer- in-charge of the police station to continue the investigation of an offence under this Act.

(4) While investigating any offence under this Act, the Bureau, having regard to the gravity of the offence and other relevant factors, may—

(a) if it is expedient to do so, request the State Government to associate with the investigation; or

(b) with the previous approval of the Central Government, transfer the case to the State Government for investigation and trial of the offence.

(5) While investigating any offence under this Act, the Bureau may also investigate any other offence under any law for the time being in force, which the accused is alleged to have committed, if the offence is connected with such other offence.

(6) The State Government shall extend assistance and co-operation to the Bureau for investigation of an offence under this Act. (7) Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any offence under this Act or other offences under any other law for the time being in force. "

372. A reading of the aforesaid provisions of the 2022 Bill reiterates that the NATB was assigned multi-various functions in conjunction with the investigation of offences. Insofar as the scope of its investigative powers are concerned, a change from what was conceived for the HTIA was that the ability to suo motu investigate cases was done away with.

373. Now, in order to understand whether all the multivarious reasons for which the creation of the OCIA was originally suggested have been satisfied through other bodies/mechanisms, it is necessary to look broadly into the powers and functions of the NIA, along with the manner in which it takes up the investigation of scheduled offences.

ii. The NIA Act and the scope of investigative powers of the NIA

374. The NIA is a specialized body created for the investigation and prosecution of certain offences specified in the Schedule to the NIA Act (hereinafter, "scheduled offences").124 In relation to the investigation of such scheduled offences and the arrest of persons, officers of the NIA have all the powers, duties, privileges and liabilities which the police officers would generally have, but with the

difference that their jurisdiction would extend to the whole of India and subject to any international treaty or domestic law of the outside country, outside India as well.125 The superintendence of the NIA has been vested with the Central government.126

375. Insofar as the investigative process is concerned, it can be commenced or undertaken by the NIA in two distinct ways: (a) through a direction from the Central government when a report relating to the commission of a scheduled offence has been escalated to it by the State government or, (b) through a suo motu direction by the Central Government. To 124 The National Investigation Agency Act, 2008, § 3(1), No. 34, Acts of Parliament, 2008 (India). 125 Id, § 3(2).

126 Id, § 4(1).

elaborate, in the first scenario, when the officer-in-charge of a police station receives and records information under Section 173 BNSS relating to the commission of any scheduled offence, a report is forthwith forwarded to the State government127, which shall in turn be forwarded to the Central government as expeditiously as possible.128 Thereafter, within a period of 15 days from the date of receipt of the report, the Central government would make a determination along two lines: first, whether the offence in question is a scheduled offence and, secondly, whether it is a fit case to be investigated by the NIA having regard to its gravity and other relevant factors.129 The basis of such a two-pronged determination could either be the information made available in the said report or that received from other sources as well. If the aforesaid determination results in the affirmative, then a direction is given to the NIA to investigate the offence.130 As an alternative to this process, a suo motu direction could also be given by the Central Government if it is of the opinion that a scheduled offence which is required to be investigated by the NIA has been committed.131

376. Where investigation has been entrusted to the NIA in one of the two aforesaid ways, the State government or any police officer of the State government who is investigating the offence is mandatorily required to pause or halt its investigation and transmit the relevant documents and records forthwith to the NIA.132 However, this must not be understood to mean that when a scheduled offence has been committed, the 127 Id, § 6(1).

128 Id, § 6(2).

129 Id, § 6(3).

130 Id, § 6(4).

131 Id, § 6(5).

132 Id, § 6(6).

concerned police officer does not take up investigation at all. Until the NIA comes into the picture through a direction issued by the Central government, the primary duty to continue the investigation rests upon the officer-in-charge of the concerned police station.133

377. While investigating any scheduled offence, the NIA may (a) request the State government to associate itself with the investigation if it is expedient to do so, or instead (b) transfer the case to the State government for investigation and trial of the offence with the previous approval of the Central government.134 The NIA also has wide powers to investigate into any other offence which the accused is alleged to have committed if such an offence(s) is connected with the scheduled offence.135 Having said so, unless such a decision to assign the investigation of a scheduled offence to the NIA is taken by the Central government, nothing shall affect the powers of the State government to both investigate and prosecute the scheduled offences.136 iii. Could a direction still be issued for the constitution of the OCIA?

378. What is evident from the discussion on the functioning of the NIA is that, apart from the investigation of offences, no other related or ancillary functions, for example, undertaking preventive efforts, coordinating response with other stakeholders, capacity building or training, post-rescue care and protection etc., have been ordained by the language of the NIA Act. For that reason, the scope of its functioning could be said to be narrower than that of the OCIA (or the NATB for 133 Id, § 6(7).

134 Id, § 7.

135 Id, § 8.

136 Id, § 10.

that matter). However, having said so, we must record that as far as the investigation of cases of human trafficking is concerned, what was envisioned by the stakeholders for the OCIA (or the NATB) has been reflected within the NIA Act. To put it simply, it could be said that the Parliament has deemed it fit to empower an existing investigative body with powers similar to that of the OCIA (or NATB) as an alternative to establishing a parallel body. We are of the view that such parliamentary wisdom must not be subject to any scrutiny by us.

379. Moreover, the only reason that the petitioner has highlighted for justifying its persistent plea for an OCIA is that the NIA, owing to its wide discretion in taking up matters for investigation, has not given adequate focus to the cases of human trafficking and that therefore, only a handful of cases have been taken up for investigation by them. At present, we have no data placed on record before us to substantiate the veracity of these concerns. However, even assuming it is true, we would be remiss not to point out that such a grievance vis-à-vis the discretion to take over any investigation might exist in respect of the OCIA or the NATB as well. The language adopted under Section 5(1) of the 2022 Bill, particularly the use of the word “may” stands as testament to this. Such a latitude has been given taking into account a variety of reasons. Therefore, we are afraid that for this reason alone we would not be able to accept the contention of the petitioner that a separate body must be constituted.

380. Even assuming that we found such a ground sufficient on its own, there exist some obvious institutional limitations vis-à-vis issuing a writ of mandamus for the creation of a national

investigative body, one that has to inevitably draw its powers from the provisions of some statute.

Therefore, either a new legislation would have to be enacted or amendments to an existing one would have to be carried out to accommodate the OCIA and assign the necessary powers of investigation etc., to its officers. This can, at best, be conveyed as a suggestion to the respondent no.1 and cannot assume the nature of a mandate. We say so by duly taking into consideration the fact that it was the respondent no. 1 who undertook, in the first place, to create the OCIA through an affidavit submitted to this Court. However, the pivotal question before us is not merely whether the respondent no. 1 must be directed to fulfill the terms of its undertaking; rather, it is whether this Court could issue a writ of mandamus for the non- compliance of an affidavit furnished by the respondent no.1, giving careful and particular regard to the nature of the commitments made therein.

381. Union of India and Others v. K. Pushpavanam and Others reported in (2023) 20 SCC 736 reiterated that the Parliament cannot be directed to enact a law on a particular subject in a particular manner and observed thus:

> "13. The law regarding power of the writ court to issue a mandate to the legislature to legislate is well settled. No constitutional court can issue a writ of mandamus to a legislature to enact a law on a particular subject in a particular manner. The Court may, at the highest, record its opinion or recommendation on the necessity of either amending the existing law or coming out with a new law. The law has been laid down in this behalf in several decisions including a decision of this Court in Supreme Court Employees' Welfare Assn. v. Union of India [Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187 : 1989 SCC (L&S) 569] and State of J&K v. A.R. Zakki [State of J&K v. A.R. Zakki, 1992 Supp (1) SCC 548 : 1992 SCC (L&S) 427] . The only exception is where the Court finds that unless a rule-making power is exercised, the legislation cannot be effectively implemented." (Emphasis supplied)

382. Since efforts on part of the Parliament would also be necessary to set-up the OCIA, we are afraid that entertaining any prayer for issuing a direction or a writ in the nature of a mandamus for the creation of the OCIA, is out of the question.

383. We are conscious that some other functions apart from the power to investigate cases were additionally assigned to the OCIA. However, all such functions are already being performed by multiple existing authorities.

384. In order to provide a more holistic picture, the current nation-wide response more or less takes the following shape:

> (i) At the district-level, the AHTUs which are integrated task forces comprising of trained police officers, officials of the Women and Child Welfare Department and other relevant departments like Labour Department, Social Welfare Department etc., are tasked with the responsibility to prevent, combat and coordinate all activities

related to trafficking and post-rescue measures. This would include all investigative efforts, prevention measures, conducting rescue operations, ensuring provision of post-rescue care, maintaining a grass-root level database on the traffickers etc.137 The AHTU is to function under the supervision of a Superintendent of Police or Deputy Superintendent of Police level-

137 MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, Advisory on preventing and combating human trafficking especially during the period of COVID-19 pandemic dated 6th July 2020, No. 24013/4/2020-ATC.

officer.138 Women help-desks at each police station in the said district will be responsible to undertake tasks of rescue, prevention, protection and support the investigation of human trafficking cases involving women at the police station level, and perform such duties and activities as directed by the district AHTU.139 The Mission Shakti Scheme, more particularly the OSCs and the Shakti Sadans in each district would directly take charge of the rehabilitation measures in coordination with the AHTUs.140 A Committee headed by the District Magistrate/District Collector, meeting at least once every quarter, will oversee the overall implementation of the Mission Shakti Scheme.141

(ii) At the State-level, an Anti-Trafficking Bureau headed by an Additional Director General of Police level officer would oversee and coordinate all trafficking related measures within the State and with other States/UTs. The AHTUs would report to this State- Headquarter level Bureau.142 For the Mission Shakti Programme, a Committee headed by the Chief Secretary, meeting at least twice a year, will oversee implementation.143

(iii) At the national level, there are multiple bodies entrusted with several functions.

a) As indicated previously, first, the Anti-Human Trafficking Cell issues guidelines to States/UTs from time to time for 138 MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, Institutional mechanism for preventing and countering human trafficking at State level dated 1st December 2020, No. 15011.46/2020-ATC. 139 Id.

140 MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, 'Mission Shakti' (Integrated Women empowerment programme) Umbrella Scheme for Safety, Security and Empowerment of Women: Scheme Implementation Guidelines, (2022).

https://missionshakti.wcd.gov.in/public/documents/whatsnew/Mission_Shakti_Guidelines.pdf 141 Id.

142 Supra note 138.

143 Supra note 140.

strengthening law enforcement response, provides assistance in capacity building efforts to States/UTs, and enters into bilateral agreements with other countries on the subject. Moreover,

twice a year, meetings would be convened by the Cell with the Anti-Trafficking Bureaus existing at the State/UT level.144

b) Secondly, as far as intelligence gathering, investigation and prosecution is concerned, there are two pan-India bodies working simultaneously – one, the NIA, which may investigate and prosecute offences under Sections 370 and 370A IPC (143 and 144 BNS) and to whom the State governments are mandatorily directed to escalate a report. Two, the AHTU unit within the Special Crimes Zone of the Central Bureau of Investigation ("CBI"), Delhi which may investigate the human trafficking of women and children for the purpose of begging, prostitution, pornography, forced labour in industries and other forms of exploitation.145 All police officers of the rank of Inspector and above have been designated as "trafficking police officers" under Section 13(4) of the ITPA for investigating offences under the said Act as well.146 The AHTU, CBI is also tasked with collecting, collating and analysing data on kidnapping and abduction of 144 MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, Setting up and strengthening Anti Human Trafficking Units in all Districts of States and UTs under 'Nirbhaya Fund' dated 27.12.2019, No. 15011/31/2019-ATC.

145 MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, Advisory on human trafficking as Organised crime dated 30.04.2012, No. 15011/27/2011-ATC. https://www.mha.gov.in/sites/default/files/2022-12/AdvisorycrimeHumanTrafficking_29092022%5B1%5D.pdf 146 CENTRAL BUREAU OF INVESTIGATION, CBI establishes an Anti-Human Trafficking Unit sets up exclusive helpline number, https://cbi.gov.in/press-detail/NDEwNw== (last seen 15th May 2026).

persons pan-India and developing actionable intelligence to conduct operations against gangs involved in trafficking.

c) Lastly, for the Mission Shakti programme, a committee headed by the Secretary, MWCD, that meets at least once a year, serves as the Apex Committee reviewing the implementation and monitoring quality norms across India.147

385. The suggestion made by the stakeholders that a single nodal agency be entrusted with all these functions was in the interest of ensuring that there are no leakages in the response mechanisms due to multiple institutions working in silos without any coordination. While we see the merit in aggregating all these efforts within a single nucleus for better efficiency, the final call on whether this must be done, being a policy decision, would also be best left to the wisdom of the respondent no. 1.

386. To put it shortly, when there is no "gap or lacuna" as such in the existing mechanisms as far as both investigation and other functions originally envisioned for the OCIA are concerned and the only issue seems to be an allegation regarding the scattered functioning of the multiple existing systems, the prayer that an altogether new body be formed by this Court is of a sweeping nature which if entertained would have the consequence of us transgressing the delicate boundaries of the power under Articles 32 and 142 respectively. Therefore, for all these reasons, we are not inclined to issue any directions directing the creation of the OCIA. Nevertheless, we urge the respondent no. 1

to continue in its 147 Supra note 140.

efforts to optimise synergy between all these systems in the best possible manner.

VII. RECOMMENDATIONS AND SUGGESTIONS

387. Before we close this matter, we must address ourselves on a very important issue i.e., highlighting the urgent need to bring some changes to the present legislative framework on human trafficking for CSE, on several aspects.

A. Re-visiting certain provisions in light of the principle of 'non-

criminalisation' of victims

388. The Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the Office of the High Commissioner for Human Rights (hereinafter, the "Recommended Principles") has a significant persuasive and guiding value to member States in setting up robust anti-trafficking regimes. The Recommended Principles under Guideline 2, emphasises that a failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights and that therefore, all States must be placed under a strict obligation to ensure that such identification can and does take place realistically. It further explains that States must consider having measures "ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons". Additionally, Guideline 8 deals with ensuring that "children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons". Effectively, what these guidelines cumulatively indicate is that both adult persons and children respectively, must not be prosecuted for offences which may have been committed by them as a consequence of being trafficked. The existence of Sections 7, 8 and 20, ITPA respectively, especially in its present form, has a significant impact or rather, tussle with the aforesaid guidelines. These provisions which seek to target certain specific actions of prostitutes under the broader theme of securing 'public interest', have the consequence of also subjecting trafficked persons to prosecution in reality. In most scenarios where a rescue is conducted, the police officials are quick to register offences or initiate action under the aforesaid provisions against the rescued victims, thereby effectively denying and negating their victim-status.

389. At this juncture, we would also like to highlight that, the Immoral Traffic (Prevention) Amendment Bill, 2006 (hereinafter, the "2006 Amendment") which was introduced in the Lok Sabha, sought to remedy such a situation by deleting two of the aforesaid provisions i.e., Sections 8 and 20 respectively. The Statement of Objects and Reasons stated that several representations were received from all corners with the complain that "the implementation of the Act is hampered by the existence of certain provisions of the Act, such as sections 8 and 20, which are the most commonly invoked provisions for any enforcement being done under the Act, These provisions are directed towards prosecution of the trafficked persons and result in further victimizing the victim. It is represented that instead of prosecuting the trafficker under sections 3, 4, 5 and 6 of the Act, most

prosecutions take place under section 8 of the Act ". However, the said amendment did not come to fruition.

390. The aforesaid reality of extensive prosecution under Sections 8 and 20, ITPA respectively, could not be said to have escaped the attention of the respondent no. 1 even after the lapse of the aforesaid amendment Bill.

The same was, in fact, acknowledged under an advisory notification dated 09.09.2009148 issued by the MHA which reads thus:

> "It is generally noticed that Sections 8 and 20 of ITPA, which focuses on the victims, are more often invoked as a result of which the victim is re-victimised and the exploiters are not punished. It is, therefore, advised that sections 3, 6 and 7 which pertains to pimps, brothel owners, clients who are actual perpetrators of the crimes need to be invoked rather than sections 8 and 20. Law enforcement agencies need to adopt a victim centric approach in the investigations." (Emphasis supplied)

391. Despite the aforesaid acknowledgement, the ground reality, however, remains the same. A major reason could be that the solution carved out for the aforesaid issue is fashioned in the form of a suggestion to the police officers rather than a legislative mandate. A wide latitude of discretion is still made available to the police officials and prosecution alike to book victims under these provisions. Therefore, the scales continue to be perpetually tilted against the victims.

392. We understand the multivarious considerations and reasons that continue to justify the existence of the aforesaid three provisions. However, our appeal would be that the intention of the respondent no. 1 evident under the aforesaid advisory notification be given true force and for the said purpose, a legislative amendment translating the said intention onto the letter of the law be considered. This could take the form of a proviso or qualification within the language of Sections 7, 8 and 20, ITPA respectively, clarifying that the said provisions do not apply to situations where the prostitute either is or is suspected to be a victim of human trafficking.

148 Ministry of Home Affairs, Government of India, Advisory on preventing and combating human trafficking in India dated 09.09.2009, F.No. 15011/6/2009-ATC.

393. Moreover, the fact that the aforesaid three provisions, at least in terms of its language, do not expressly exclude children (whether victims of trafficking or not) from its ambit might also require the careful attention of the law makers.

B. Reimagining the mode and manner of rehabilitation offered to the victims – 'closed shelters'

394. Presently, the protection and rehabilitation framework of the ITPA strictly subscribes to an institutionalised model. In other words, any victim who is rescued and who either doesn't want to be or cannot be placed in the safe custody of a person, has no other option but to enforce her fundamental right to rehabilitation against the State by consenting to placement in a protective

home under Section 21, ITPA. Although this aspect, by itself, is not problematic yet when viewed from the perspective that such custody in a protective home is mandated for a fixed period of time by the order of a Magistrate under Section 17(4), ITPA, some issues as regards the true object of such a placement would inevitably arise. This is owing to the fact that such mandatory custody slowly begins to mimic a carceral stay or detention in a borstal institution.

395. The drafting history of the Palermo Protocol reveals that while no State argued for recognition of a right to detain victims, most resisted an explicit prohibition of the same because they feared that it would curtail their options in dealing with undocumented or otherwise irregular migrants. Therefore, while the Palermo Protocol is expressly silent on this aspect, it is only the Recommended Principles which addresses the issue of shelter-based detention directly. Guideline 1 requires that the human rights of the victim be placed at the center of all measures and further provides that States should consider "protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe this right". Guideline 2 further requires States to consider ensuring that "trafficked persons are not, in any circumstances, be held in immigration detention or other forms of custody". Therefore, what seems to be deprecated is the custodial nature of any post-rescue measure. It must be ensured that even rehabilitation efforts do not result in other rights violations.

396. If careful attention is paid to the language of Section 17(4), ITPA, the use of the term "detained" becomes apparent. This is combined with the fact that such detention is for a period between one to three years. Although, Section 19(3), ITPA does not use the word "detained" expressly, it also emulates a detention-type custody model by requiring the Magistrate passing the order to specify the period for which such an order shall operate.

397. When such a custody is mandated for any interim period, for instance under Sections 17(3) or 19(2) ITPA respectively, one could still realistically argue that the same is justified because the victim must be given some time to come to terms with the gravity of the crime which has victimized her or in other words, she must be afforded a 'reflection period'. Moreover, more often than not, the victims are psychologically conditioned and programmed over extended periods of time by the traffickers and therefore, some time may indeed be necessary for her to exercise her right to self-determination and autonomy in the truest sense. However, using the same analogy for making long term custody under Sections 17(4) and 19(3) ITPA respectively, tethered to a strict time-limit, may not in all circumstances be justified. As may have become evident throughout the course of our discussion in this judgment, there cannot be a one-size-fits-all approach, especially for victims of such crimes. Therefore, prescribing even a default minimum period of 'detention' might have very serious consequences.

398. Proponents of shelter detention commonly justify it with reference to the complexity of the operating environment and the need to protect the victims of trafficking. Sometimes, the very fact of detention is denied, and it is asserted that the victims agree to restrictions on both their freedom of movement and liberty in exchange for protection. Some other times, it is stated that the victims are required for criminal prosecution of traffickers and must be prevented from running away. In the case of migrant victims, their detention may be explained with reference to the fact that they have

no legal status in the country of destination and cannot be permitted to leave the shelter compound.

399. There are several countries which have adopted an 'open shelter' model and even in countries where victim detention is the norm, alternate means of looking after trafficked persons exist. On the other hand, there are laws, for example, in Malaysia, which take measures as extreme as imposing an additional period of detention for trafficked persons who escape the place of refuge or defy the protection order, without lawful authority.149 Some conversation and clarity on where in this spectrum the Indian model stands, might be necessary. This is more so, in light of the legislative history of the amendments made to the ITPA and the 149 §55, Anti-Trafficking in Persons and Anti-smuggling of Migrants Act, 2007.

persons for which a 'protective home' under the ITPA was originally contemplated.

400. In its original form, the ITPA defined a protective home as thus:

> "(g) "protective home" means an institution, by whatever name called, in which women and girls may be kept in pursuance of this Act and includes –
>
> (i) a shelter where female undertrials may be kept in pursuance of this Act; and
>
> (ii) a corrective institution in which women and girls rescued and detained under this Act may be imparted such training and instruction and subjected to such disciplinary and moral influences as are likely to conduce to their reformation and the prevention of offences under this Act;" (Emphasis supplied)

401. On a bare reading of the aforesaid erstwhile Section 2(g), it becomes evident that a protective home was an institution which was contemplated to house two categories of persons (i) female undertrials and (ii) rescued women and girls. However, it must also be noticed that the treatment of persons falling under category (ii) was significantly different. In other words, even rescued persons were treated as individuals who required 'training', 'education', 'discipline' and 'moral influences' to bring about their 'reformation' and prevent them from committing further offences under the ITPA. To put it shortly, rescued victims were not seen as persons requiring protection and rehabilitation but reformation and discipline. Therefore, it could be argued that it was in the aforesaid context that the term "detained" had been originally used and a fixed period of stay was mandated under sections 17 and 19 ITPA respectively.

402. However, the ITPA underwent a tremendous change, at least insofar as the aforesaid premise is concerned through the 1978 amendment to the Act. Through this amendment, the legislature sought to create two different institutions instead of one and found it appropriate to create "corrective institutions" which were different from protective homes. As evident from Section 2(b), ITPA such an institution is for "persons who are in need of correction who may be detained under this Act and includes a shelter where undertrials may be kept in pursuance of this Act". Section 10A, ITPA goes on to read thus:

> "Detention in a corrective institution – (1) Where –
>
> (a) a female offender is found guilty of an offence under section 7 or section 8, and
>
> (b) the character, state of health and mental condition of the offender and the other circumstances of the case are such that it is expedient that she should be subject to detention for such term and such instruction and discipline as are conducive to her correction, it shall be lawful for the court to pass, in lieu of a sentence of imprisonment, an order for detention in a corrective institution for such term, not being less than two years and not being more than five years, as the court thinks fit:" (Emphasis supplied)

403. In unison with this change, the definition of a protective home was changed and the same read thus:

> "(g) "protective home" means an institution, by whatever name called (being an institution established or licensed as such under section 21), in which persons, who are in need of care and protection, may be kept under this Act and where appropriate technically qualified persons, equipment and other facilities have been provided, but does not include—
>
> (i) a shelter where undertrials may be kept in pursuance of this Act, or
>
> (ii) a corrective institution;" (Emphasis supplied)

404. What then becomes clear is that not only did the 1978 amendment create two different institutions i.e., a corrective institution and a protective home, but it also reoriented the legislative approach towards victims rescued under Sections 15 and 16, ITPA respectively. It was clarified that

(a) it is only female undertrials/offenders found guilty under Sections 7 and 8 who would be kept in corrective institutions and (b) it is only such persons who would require 'instruction' and 'discipline' for their 'correction'. On the other hand, as far as a protective home is concerned, it was (a) completely insulated from a corrective institution and created solely for rescued victims, and (b) it was recognised that they need "care and protection" and not correction. Having acknowledged the object of a protective home to be such, the retention of the words "detained" under Section 17(4) and the prescription of fixed time periods for an order under Sections 17(4) and 18(3), ITPA respectively, seems to rather further some contradiction.

405. Even ignoring the legislative history brought forth above, questions including whether the State has any prerogative to insist on the long term detention of a victim and if yes, what are its parameters; Could compelling policy arguments like criminal justice imperatives, public order requirements or victim safety needs, justify long term detention in all circumstances; whether and how the State must secure the continued consent of victims to remain in a shelter home etc., are all larger questions which might need some demystifying.

406. We must clarify that we have thought fit to lay such an issue out for consideration by the respondent no.1 and refrained from expressing any substantive opinion on the same considering that we are not dealing with a specific challenge to the aforesaid provisions. Therefore, we hope that the respondent no. 1 takes a re-look into the strict detention model of rehabilitation mandated under the ITPA. Even if the detention model is insisted, we urge that the respondent no.1 brings out options for alternate modes of rehabilitation and protection so that the rehabilitation measures can be tailored to the specific needs of the victims. When diverse options pertaining to the mode and manner of rehabilitation are given, especially those that are alternatives to compulsory detention, then maximum impact can be achieved in terms of both the number of victims who could be rehabilitated and the quality of their rehabilitation. To put it simply, if the State offers better modes and methods of rehabilitation, only then will more people be willing to identify as victims, adopt such modes of rehabilitation and be successful in that pursuit.

C. Strengthening the rights framework for voluntary adult sex workers

407. In our discussion of the ITPA in this judgment, what stood out was the ambivalence with which it addresses prostitution. While defining prostitution as exploitation or abuse, the Act does not criminalise it in all its forms. The natural corollary of such a position would have been to recognise the rights of those engaged in prostitution in the manner permitted by the Act and to afford them adequate protection. This is because, despite all the differences that exist between those who argue for and against prostitution, there is broad agreement that the risk of exploitation and abuse is inherent to the practice, and that vulnerability and violation of rights characterise the conditions in which prostitution occurs.

408. The ITPA's failure to accord rights and protections to those engaged in prostitution voluntarily further entrenches the notion that, whilst prostitution may be exploitative, those engaging in it voluntarily are, in some sense, bringing harm upon themselves. Some might argue that the ITPA, by refraining from criminalising prostitution altogether, is recognising the agency of voluntary adult sex workers. While this is true to a limited extent, two difficulties arise with such an argument. First, it is precisely the approach we had cautioned against in an earlier section of this judgment, which attaches too much weight to agency without adequately recognising the vulnerabilities that attend to even voluntary prostitution. By declining to accord rights or protections to voluntary adult sex workers, the law effectively turns a blind eye to the conditions in which their prostitution takes place. Secondly, and relatedly, such an argument entirely overlooks the deeply unfavourable attitude that the larger society attaches to prostitution, an attitude whose consequences for voluntary sex workers are severe and which the absence of legal protection does nothing to ameliorate.

409. The larger society's view of sex work is deeply rooted in moral judgment. Where prostitution is not the result of force or trafficking, those engaged in it are frequently viewed not as persons deserving of support or protection but as willing participants in an enterprise considered immoral. This attitude is perhaps most starkly reflected in the deeply derogatory terminology that continues to be used in common parlance in Hindi and English to describe voluntary adult sex workers. The consequences of this stigma are severe and far-reaching. Voluntary adult sex workers are isolated, and their concerns are dismissed. More importantly, the protections that the legal framework

nominally extends to them are rendered inaccessible in practice, as the enforcement officials to whom such responsibility is entrusted are themselves biased and prejudiced. All this leads to a compounding of the very problem identified above: (i) the law does not adequately protect voluntary sex workers; (ii) social stigma means that community support is absent; and (iii) the protections that do exist are, in large measure, rendered ineffective by the attitudes of those responsible for their implementation.

410. Further, such notions of 'immorality' and 'decent work' allow grouping of those engaged in prostitution into groups of 'innocent victim' (trafficked victims) and the 'guilty participant' (voluntary adult sex workers). The former is accorded sympathy and legal protection, whilst the latter is met with moral disapproval. By characterising a person as 'immoral' or 'fallen', it becomes easier for law enforcement and for civil society alike to treat voluntary adult sex workers as people who are less deserving of dignity and legal protection.

411. Whilst this Court and various courts across the country have put significant effort into improving the lives of the victims of trafficking of CSE, including voluntary adult sex workers, judicial records show that courts too have, in some instances, mirrored such social attitudes described above.150 References to prostitutes as 'fallen women', observations casting doubt on their suitability for family life, or characterisations of prostitution as work which is not decent are observations that may indirectly lend legitimacy to the very stigma that the law must seek to dismantle.

412. A meaningful starting point in addressing the multifarious difficulties faced by voluntary adult sex workers is the recognition of their rights 150 ¶ 5 & 11, Vishal Jeet v. Union of India, (1990) 3 SCC 318; ¶ 1, Gaurav Jain v. Union of India, (1997) 8 SCC 114; ¶ 7, State of U.P. v. Kaushailiya, AIR 1964 SC 416.

and the provision of adequate protections to enforce them. While it would be advisable for the respondent no. 1 to re-examine the conflation between sex trafficking and prostitution that presently exists in the legislative framework, even within that framework, there remains sufficient scope to recognise and protect the rights of voluntary adult sex workers and to put in place mechanisms for the enforcement of such rights. It is our hope that such recognition will, to some extent, reduce the marginalisation, isolation, and stigmatisation that voluntary adult sex workers presently face, and thereby pave the way for their more meaningful reintegration into society.

413. To address the issues surrounding prostitution effectively, the law must first reckon with the reality of it. The widespread existence of prostitution in India is a fact that cannot be wished away. Yet the current legislative framework bears little relationship to that reality. The result is a serious and widening gap between the law as it stands in the books and the practical conditions in which prostitution is actually carried on, thereby necessitating a serious re-examination.

D. Introduction of a provision creating an offence for abuse of authority by police officers

414. Due to the prevalence of complaints against police officers engaging in abusive behaviour towards the rescued victims, either during the course of the rescue or during periods post their rescue and also considering the extreme vulnerability of the rescued victims, the 64th Law Commission Report examined the necessity of introducing a special provision. It was recognized that the abuse of authority, including sexual misconduct, by a public servant in various situations has already been dealt with under several sections of the IPC. However, having special regard to the possibility of misconduct in view of the nature of the duties which police officers have to perform under the ITPA, it was felt that a specific provision was indeed required. Therefore, it was recommended that a new section 17-A be inserted. The said provision read thus:

> "17-A. If a police officer having the charge or custody of a woman or girl under this Act, compels or seduces to illicit sexual intercourse with any such woman or girl, he shall be deemed to be guilty of—
>
> (a) an offence under S. 376 of the Indian Penal Code, if he compels her to such intercourse,
>
> (b) an offence under S. 376-A of that Code, if he seduces her to such intercourse."

415. In addition to the same, the Report also examined whether a provision penalising police officers who are guilty of delay in production of the rescued victims before the appropriate Magistrate, is necessary. In order to give true force to the term "forthwith" under Section 17 ITPA, it was considered desirable to insert another provision punishing such delay. In doing so, it was considered appropriate to introduce a rebuttable presumption that such police officer shall be presumed, until the contrary is proved, to have wrongfully confined the rescued person within the meaning of Section 340 IPC (now Section 127 BNS) if there is any delay. To that effect, a new Section 17-B was also recommended. The same reads thus:

> "17-B. If a police officer, having removed a woman or girl under sub- s. (4) of S. 15 or sub-s. (2) of S. 16, fails to produce the woman or girl—
>
> (a) before the appropriate Magistrate as required by sub-s. (5) of S. 15, or
>
> (b) before the Magistrate issuing the order as required by sub-s. (2) of S. 16, or
>
> (c) before the nearest Magistrate as required by sub-s. (1) of S. 17, it shall be presumed, until the contrary is proved that he has wrongfully confined the woman or girl within the meaning of S. 340 of the Indian Penal Code."

416. Considering the continued prevalence of instances of abuse and/or reports indicating the complicity of police officers in the crime of trafficking even today, it is necessary that the respondent no. 1 reconsiders the inclusion of the aforesaid provisions within the scheme of the ITPA.

E. Removing the requirement of a 'means' element for children under the definition of trafficking in BNS

417. As we have highlighted in our discussion on Section 143 BNS, a concerning anomaly that exists between the definition of human trafficking under the BNS and the Palermo Protocol is the requirement that the 'means' element be established even for an offence of human trafficking involving children. The deviation on this aspect from the Palermo Protocol needs some immediate attention.

418. Guideline 8 of the Recommended Principles also highlight that the particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons and therefore, it very clearly, advocates that any evidence of deception, force, coercion etc., should not form part of the definition of trafficking where the person involved is a child.

F. Continued consideration of the need for a comprehensive legislation on trafficking

419. The history of the present litigation has highlighted the need for a separate and comprehensive legislation on trafficking not just for sexual exploitation but for all other forms of exploitation including forced labor, removal of organs etc. Originally, such a dedicated legislation was considered important due to several reasons including that the present legislative framework is spread across several legislations like the BNS, ITPA, Bonded Labour System (Abolition) Act, 1976, POCSO, JJ Act, IT Act, PMLA etc.; that the need to protect and rehabilitate victims of trafficking must be legislatively recognised; that institutional mechanisms for both investigation and coordination of various response measures must be created at the national, State and District level; and that approaching the crime from an 'organised crime' perspective was necessary.

420. While we have issued a slew of guidelines in the form of a "Victim Protection Plan" with specific regard to victims of trafficking for CSE, the same cannot be said to completely obviate the need for a comprehensive legislation and therefore, we urge the respondent no. 1 to give some earnest consideration to the same keeping aside the stance that it has taken in the present litigation.

G. Addressing Cyber-enabled Human Trafficking

421. The democratisation of the internet has also come with some unintended consequences. Digital platforms have offered safe havens to criminal elements who exploit such platforms for illicit activities. With particular reference to the crime of human trafficking, technology has become a tool for traffickers to facilitate, organize, network, transact and evade authorities with greater speed, less cost and more anonymity. In such a background, instances of CEHT are perpetually on the rise whilst law enforcement measures to counter the same are still lagging behind.

422. Cyber-enabled CSE or CEHT needs specific attention from all stakeholders because it has created a radical shift in the exploitation landscape by capitalising on the anonymity, accessibility, and interconnectedness of the digital domain to facilitate crimes with unparalleled efficiency and

reach. Anyone using technology is made vulnerable to victimisation regardless of education, class, caste etc., since the predominant focus has now shifted to exploiting the emotional vulnerability of victims. Websites and applications hosting sexual abuse material that are accessed through Virtual Private Networks (VPNs) enable traffickers to produce, distribute and monetize exploitative content without falling under the radar of authorities. There is a permanent and ineffaceable trauma that is inflicted on victims of cyber- enabled CSE because the digital footprint remains permanent and the fear of circulation of any sexual abuse material or its re-emergence persists through the victim's life. Moreover, to camouflage their organised crime network seamlessly, the perpetrators can manipulate innocent online identities for financial transactions or communications, which can significantly complicate investigations.

423. Therefore, the respondent no. 1 is urged to find ways to effectively address the prevalence of this crime by bringing necessary advisories guiding the actions of the AHTUs and the other stakeholders including but not limited to providing training on relevant provisions of the law, providing SOPs for coordination with the cyber-crime units/police stations etc. H. Other recommendations

424. The following are certain other recommendations which may be considered by the respondent no. 1:

> (i) Bringing the definition of a child under Section 2(aa), ITPA in line with that of the BNS, POCSO etc.
>
> (ii) Notifying model rules under the ITPA, similar to the Juvenile Justice (Care and Protection of Children) Model Rules, 2016.
>
> (iii) Providing detailed SOPs for stakeholders including the police officers, judicial officers, social workers etc., addressing the rescue of a victim who is a foreign national under the provisions of the ITPA, and the manner in which (a) information pertaining to her rescue is escalated to the MHA for initiation of the process of repatriation in coordination with the Ministry of External Affairs ("MEA"), (b) the manner in which their case would be dealt with by the magistrate under Section 17 ITPA, and (c) the manner and scope of rehabilitative measures to be offered by the State, and all other aspects on which some clarity may be necessary.
>
> (iv) Research indicates that sex trafficking persists, in large measure, because of the significant profits it generates for traffickers.

Accordingly, an effective response to trafficking must go beyond criminal prosecution under the BNS or ITPA and extend to strategies that directly target its economic foundations.151 Thus, enforcement strategies aimed at identifying, attaching, and recovering the proceeds of trafficking for CSE through necessary PMLA prosecution needs to be emphasised.

(v) The current emphasis on raid and rescue operations as the primary method of identifying and rescuing victims of trafficking for CSE has well-documented limitations and, as we have noted, carries with it the risk of causing harm to those it is intended to protect. Therefore, efforts may be directed towards developing more nuanced and creative identification strategies.

VIII. CONCLUSION

425. A summary of our entire discussion is as follows:

> A. The legal landscape surrounding human trafficking for the purposes of CSE i. International legal framework – Palermo Protocol

426. The primary goal of the Palermo Protocol is to lay down measures: (i) to prevent trafficking, (ii) to punish traffickers, and (iii) to protect the victims of such trafficking, including by protecting their internationally recognised human rights. These three goals of prevention, punishment, and protection have commonly been referred to as the 3P's of the Palermo Protocol.

151 Siddharth Kara, Sex Trafficking: Inside the Business of Modern Slavery (Columbia Univ. Press 2008)

427. Article 3 of the protocol defines the term 'trafficking in persons', and it requires the presence of three key elements: (i) action (recruitment, transportation etc.), (ii) means (threat, force etc.) and, (iii) purpose (exploitation). Cumulatively, they constitute the crime of human trafficking. The definition also states that consent of a victim of trafficking in persons shall be irrelevant where any of the 'means' have been used. However, an exception to the three-element requirement is carved out when the victim is a child i.e., a person below the age of 18 years. The 'means' element is not a pre-requisite when the crime involves children. It is sufficient to only show that the 'action' was done for the 'purpose'.

428. In order to ensure that the definition provided in Article 3 was given effect to in domestic criminal laws, the Protocol under Article 5 obligates State parties to adopt legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3. Article 6 of the Palermo Protocol deals with the assistance to and protection of victims of trafficking in persons. The measures provided under Article 6 seek to protect victims from further harm and retaliation, support their recovery, minimise stigmatisation, protect their privacy and physical safety, assist in their rehabilitation and reintegration, facilitate their participation in legal proceedings, and enable them to remain informed about proceedings and obtain compensation for the damages suffered. Other Articles of the Protocol address repatriation (Article 8), prevention (Article 9), and border measures to prevent trafficking (Article 11).

ii. Domestic Legal Framework on Human Trafficking for the purposes of CSE

429. The legal infrastructure addressing human trafficking for the purposes of CSE in India is broad but fragmented, comprising multiple statutory instruments. In this judgment, we have discussed: (i)

Article 23; (ii) ITPA; (iii) BNS; (iii) JJA; and (v) POCSO respectively.

430. Article 23 of the Constitution prohibits traffic in human beings, begar, and all other similar forms of forced labour. Its sweep is wide and unlimited, and it strikes against traffic in human beings in whatever form it is found and is enforceable not only against the State but against any private person indulging in such practices. When dealing with Article 23 or legislations enacted to give effect to it, this Court has consistently adopted a liberal interpretation, presuming and extending protections and benefits to all those in conditions of exploitation.

431. A short conspectus of our discussion on the provisions of ITPA is as follows:

> a. The ITPA is based on the 1949 Convention. Both the 1949 Convention and the ITPA respectively, proceed on the understanding that prostitution is inherently exploitative and incompatible with the dignity and worth of the human person, and that no person can ever truly consent to it. As a result, all those involved in the prostitution of others are treated as traffickers, and the existence of consent is, as a default norm, rendered immaterial.
>
> ITPA aims for the inhibition and abolition of the 'commercialisation' of prostitution and the punishment of all those who profit from it. The abolition of prostitution itself, however, is not the Act's principal object.
>
> b. Prostitution is defined under Section 2(f) as "the sexual exploitation or abuse of persons for commercial purposes". Thus, all acts of sexual exploitation or sexual abuse for commercial purposes constitute prostitution.
>
> c. Keeping true to its object of criminalising the commercialisation and organisation of prostitution, the ITPA's offence-creating provisions cast a wide net over all those who profit from or facilitate the prostitution of others. Section 3 targets those who keep, manage, or are associated with a brothel, covering both those in operational control and those having proprietary control of the premises. Section 4 covers any person over the age of 18 who knowingly lives on the earnings of prostitution of another person, with a presumption operating against those living with or habitually in the company of a prostitute or exercising control over her movements. Section 5 addresses those who procure, induce, transport, or cause persons to carry on prostitution, with or without their consent. Section 5 renders consent irrelevant without requiring the existence of traditional 'means' as opposed to the Palermo Protocol. Section 6 brings within its scope any person who 'detains' another, with or without their consent, (a) in any brothel or (b) in any premises with the intention that such person may have sexual intercourse with an individual who is not their spouse. Section 9 targets those who abuse a position of authority or trust to seduce a person under their care or custody into prostitution. Across all these provisions, save Section 9, the existence of force, coercion, or deception is not considered necessary. It is the mere third-party involvement in prostitution that attracts criminal liability.

d. A notable departure from the Act's general stance of targeting perpetrators rather than prostitutes is found in Sections 7, 8 and 20 respectively. Sections 7 and 8 respectively penalise prostitution, seduction, or solicitation of prostitution carried on within notified areas or within 200 metres of public places, even where no commercialisation by a third party is involved. Section 10A introduces corrective institutions as an alternative to the imprisonment of female offenders/undertrials under Section 7 and 8 respectively, envisaging a regime of detention for purposes of correction, instruction and discipline. Section 20 moves further still, empowering the magistrate to remove any person found to be a prostitute from within their jurisdiction.

e. The ITPA envisages three distinct pathways through which persons are brought within its protective framework. The first is through a search and removal under Section 15, which empowers a special police officer or trafficking police officer to enter and search the premises without a warrant, having reasonable grounds for believing that an offence punishable under the ITPA has been or is being committed in respect of a person who is living in the said premises. All persons found on the premises may be removed and forthwith produced before the appropriate magistrate. The second pathway is through a targeted rescue under Section 16, which empowers the magistrate to direct a police officer to remove a specific individual from a brothel upon a reasonable belief that the person is living in, carrying on, or being made to carry on prostitution therein. The third pathway, uniquely, is initiated by the prostitute herself. Section 19 allows a person who is either carrying on prostitution or is being made to carry on prostitution to approach the magistrate directly, seeking care and protection.

f. Persons removed under Sections 15 and 16 respectively are dealt with by the magistrate under Section 17. Pending the inquiry under Section 17, the magistrate provides for their intermediate safe custody, which cannot exceed 21 days. The inquiry itself is wide-ranging, covering the age, character, antecedents and family circumstances of the removed or rescued person, as well as the suitability of the home environment. The magistrate may seek the assistance of a probation officer and a panel of five respectable persons, at least three of whom shall, wherever practicable, be women for the said inquiry. Where the magistrate is satisfied that the information received is correct and that the person is in need of care and protection, he may pass a final order directing that such person be detained in a protective home or in other suitable custody for a period between one and three years.

g. Section 21 of the ITPA provides for the establishment and maintenance of protective homes, institutions in which persons in need of care and protection may be kept under the Act. The power to establish such homes is left to the discretion of the State governments, who may establish as many homes as they think fit and maintain them in such manner as may be prescribed by rules stipulated vide the power vested in them under Section 23.

h. To put it succinctly, ITPA : (i) seeks to punish all those who profit by exploiting the prostitution of others, be it the brothel keeper, the landlord, the procurer, the transporter, the detainer, the pimp or the middle-man – all of them are considered offenders; (ii) makes punishment for offences involving children more stringent; and

(iii) designates special police officers, provides mechanisms for search and rescue, and lays down how such rescued or removed persons are to be dealt with in law. The rescued or removed persons are either handed over to the custody of a parent, guardian or husband, or sent to a protective home, or placed in such other custody as the magistrate may find suitable. Several particulars on the minute workings of all the provisions have been left to be filled in by the rules which may be brought by the respective State governments under Section 23.

432. A short conspectus of our discussion on Section 143 BNS, is as follows:

a. Section 143(1) of the BNS largely reflects the Palermo Protocol's definition, by (i) requiring the fulfilment of the three elements of acts, means and purpose respectively, in order to constitute the offence of trafficking; (ii) providing an open-ended list of activities that would constitute 'exploitation' instead of defining it, as is evident from the use of the word "include" in Explanation 1 of Section 143(1); and (iii) making consent irrelevant in the determination of the offence of trafficking upon fulfillment of the 'means' element. To establish the offence of trafficking under Section 143: (i) the actus reus element has to be established via the 'action' and 'means' elements; and (ii) the mens rea element has to be established via the 'purpose' element i.e., the individual intended that the action (made possible through one of the means) would lead to exploitation.

b. While the acts mentioned as constituting the 'action' element in both the protocol and Section 143(1) are one and the same, there are certain differences in the components forming part of the 'means' and 'purpose' elements. However, the most important difference between the two definitions is that, unlike the Palermo Protocol, under the BNS, all three elements must be established for the offence of trafficking to be constituted, even for children.

c. Further, explanation 1 to the section states that "exploitation" shall include "any form of sexual exploitation". The term 'sexual exploitation' is wide in its ambit and would include all forms of sexual exploitation, including but not limited to trafficking for prostitution, pedophilia, pornography, cybersex, and other disguised forms of sexual exploitation.

433. The ITPA, despite having the word 'trafficking' in its title, does not define the term. It instead proceeds on the premise that all prostitution is exploitative, and on that basis, criminalises all third parties involved in and all acts done in furtherance of prostitution. Over time, owing to the association between prostitution and trafficking in popular and legal discourse, the acts of third

parties done in furtherance of prostitution came to be equated with trafficking itself. This conflation was further entrenched by the absence, for a long period, of any other legislative provision dealing with trafficking in India.

434. However, with both Section 143 of the BNS and the ITPA now in force, we are seemingly confronted with two different understandings of what constitutes 'trafficking for the purposes of CSE'. Under Section 143, for an act of sexual exploitation to amount to trafficking, all three elements of act, means, and purpose must be fulfilled. In other words, the act of bringing a person towards prostitution must have been done through one of the specified means, such as force, coercion, inducement, or deception, for it to constitute trafficking. The ITPA, on the other hand, operates on a fundamentally different logic. The ITPA requires no such 'means'. Any act done by a third party ('act' element) in furtherance of prostitution ('purposes' element) is sufficient to attract liability under the Act. The result is that under the ITPA, all prostitution involving third parties is, in effect, treated as trafficking for CSE, regardless of whether any force, coercion, or inducement was employed. Thus, conduct that would not qualify as trafficking under Section 143 may nevertheless constitute an offence under the ITPA.

435. "Victims of trafficking for CSE" would include those persons who have been identified as victims under the ITPA regime and those persons who have been victimised by persons alleged to have committed an offence under Section 143 of the BNS.

436. Under the JJA, a child who has been trafficked for CSE falls squarely within the category of a "child in need of care and protection". It is the CWC that is the competent authority to deal with all matters concerning such a child. Where the victim of trafficking for CSE is a child, the JJA and the rules framed thereunder become the governing framework in all respects. This encompasses the entire spectrum of procedural decisions that follow upon the identification or rescue of such a victim, i.e., the forum before which the child is to be presented, the authority vested with the power to make decisions regarding the child's care, the factors to be taken into account while making such decisions, and the nature of the institutions or homes to which the child may be sent. To the extent that another legislation, such as the ITPA, prescribes a different procedure for any of these aspects, it is the JJA that must prevail. Thus, when dealing with child victims of trafficking for CSE, it is the CWC, implementing the provisions of the JJA and the rules framed thereunder, that will conduct the inquiry and decide all questions relating to custody, placement, rehabilitation, and restoration.

437. When the victim of trafficking for CSE is a child, the provisions of the POCSO Act may apply alongside Sections 143 and 144 BNS respectively and/or the provisions of ITPA. The reason for this is two-fold: (i) there is no ambiguity in Indian law regarding the fact that every act of sexual exploitation involving a child is non-consensual as a matter of law, and

(ii) the POCSO Act was designed to cover all forms of sexual abuse against children, including sexual harassment, aggravated sexual assault, and the production, storage or possession of child sexual abuse material, among others. Therefore, in all cases where the sexual exploitation of a child involves acts punishable under the POCSO Act, the perpetrators would be charged and prosecuted under it. Once the POCSO Act is attracted, several aspects of the prosecution change significantly.

The procedure for reporting the offence, recording the victim's statement, and conducting the medical examination is governed by the specific provisions of the POCSO Act, which are designed to be more sensitive and protective of the child's interests.

438. When dealing with an offence of trafficking for CSE, the applicable legal provisions are not static. They vary depending on a combination of factors, such as the age of the victim, the means employed by the trafficker, and the specific nature of the exploitative acts to which the victim was subjected. No single piece of legislation operates in isolation when it comes to the crime of trafficking for CSE. An investigating officer must, therefore, approach each case with a holistic appreciation of the applicable legal framework and remain alive to the full range of provisions that the facts of a given case may attract.

B. Victims of Trafficking for CSE and Their Right to Rehabilitation

439. A crime control approach to human trafficking treats the protection of victims as secondary to the prosecution and punishment of perpetrators. It views trafficking primarily as a crime involving criminals who must be prosecuted and punished. In this framework, the victim, though not entirely absent, appears at the margins. A human rights approach, by contrast, recognises that trafficking is not only a crime to be prosecuted but also an act that violates the fundamental rights of real people. It shifts the lens from the perpetrator to the victim, placing the victim and her needs at the centre of the response. In the Indian legal landscape, this human rights approach finds its clearest articulation in Articles 21 and 23 of the Constitution respectively, which, read together, establish the right to rehabilitation for victims of trafficking for CSE.

440. A combined reading of Article 21, i.e., the right to live with dignity, and Article 23, i.e., the right against exploitation, establishes that the obligations owed to victims of exploitative structures extend well beyond identification and rescue to include rehabilitation. The reason is that rescue without rehabilitation returns the victim to the very same conditions that made her a target in the first place. Thus, it is the plainest requirement of Articles 21 and 23 respectively that victims of exploitative structures must be suitably rehabilitated.

441. The right to rehabilitation, in line with this Court's interpretative approach under Article 23, must be understood broadly and expansively. At its most fundamental sense, it includes the right to be protected from further harm. At the most basic level, this would require the State to take measures to protect the victim's physical safety from her traffickers. At a further level, it should address the consequences of wrongdoing and place the victim in a position to build a life that is not defined by the wrong she suffered. For victims of trafficking for CSE, this would mean provision of measures that would ensure material well-being, aid in reducing stigma, help in recognition and, providing a voice to the victim's wishes and choices in her rehabilitation.

442. When dealing with the right to rehabilitation of victims of trafficking for CSE, the primary role of this Court is to assess whether the State is taking reasonable measures towards the progressive realisation of the minimum core of this right, and whether those measures are being implemented in both letter and spirit.

C. Whether the State could be said to have taken "reasonable measures" to safeguard the right to rehabilitation of the victims of trafficking for CSE?

443. The respondent no. 1, during the course of the original writ petition and the first M.A., respectively, acknowledged the need for a Victim Protection Plan and made earnest efforts in formulating the same in collaboration with several stakeholders under the supervision of this Court. However, to date, no such plan has been formulated. In fact, the respondent no. 1, contrary to its original position, has now taken the stance that the current legislative framework provides a robust system for the protection of victims of trafficking for CSE, thereby negating the need for a separate plan.

444. In assessing whether such an altered stance is backed by reason, we have found that apart from two changes i.e., the introduction of Sections 370 and 370A IPC respectively in the schedule to the NIA Act and the inclusion of "organised crime" as a separate offence under Section 111 BNS respectively, the legislative and institutional framework remain the same or are similar in nature. The ITPA continues in its original form, Sections 370 and 370A IPC respectively is reflected under Sections 143 and 144 BNS respectively without any significant change, the POSCO, JJ Act and IT Act regimes respectively largely persist without alteration, and the former Ujjawala homes have simply been amalgamated into the Shakti Sadan Programme. To put it simply, it is what existed in 2015 that continues till date.

445. After an exhaustive perusal of the legal framework surrounding the offence of trafficking for CSE, it is evident that there is no comprehensive protocol, plan, or policy which clearly delineates how such victims ought to be protected and how their right to rehabilitation is to be actualised. The lack of a Victim Protection Plan is a serious lacuna that carries the risk of derailing any and all rescue efforts, as there is no clear, guiding, and binding framework for how victims are to be handled, both during and after rescue. As a consequence, the manner of protection and rehabilitation to be offered to such victims is arbitrary and contingent on the will or whims of the person charged with their care at the ground level, thereby seriously and systemically impairing the realisation of the victims' fundamental rights.

446. Moreover, upon a thorough examination of the existing measures and the manner of their implementation, which, according to the respondent no. 1, creates a robust framework for addressing the crime of human trafficking for CSE, it is apparent that these measures are also riddled with serious flaws and are non-uniform across all States and Union Territories.

D. Directions pertaining to the Victim Protection Plan

447. Taking into specific consideration the manner in which this matter has progressed and the unjustified abandonment of efforts to formulate the said comprehensive protocol despite the lacunae in the existing legislative and policy measures, we are left with no option but to pass detailed directions in exercise of our powers under Articles 32 and 142 of the Constitution respectively, detailing the manner in which preventive, protective and rehabilitative measures are to be taken to safeguard the fundamental rights of the victims of trafficking for CSE.

448. Our formulation of the plan was developed being cognizant of the following pertinent factors:

a. All trafficking offences for the sexual exploitation of others through prostitution falling under the BNS would inevitably be covered by some offence creating provision of the ITPA as well. Thus, in all cases dealing with victims of trafficking for CSE, the mechanism that has been put in place to deal with 'victims' under ITPA would get triggered. Therefore, the victim protection plan must necessarily take into account the mechanism already established under ITPA.

b. There is no singular, monolithic version of a 'prostitute' or 'prostitution'. Prostitution is undertaken by a variety of persons and across a variety of institutional settings. For each form and each setting, the factors that bring a person into prostitution, the persons they interact with, and the risks they are exposed to differ significantly. The inevitable consequence of this complexity is that those involved in prostitution do not constitute a homogeneous group with homogeneous interests. Their experiences and needs are deeply varied. Hence, a one-size-fits-all approach, applied to the heterogeneous group of 'victims of trafficking for CSE', is unlikely to serve their interests properly. In fact, it might lead to unintended consequences.

c. There is deep subjectivity involved in determining whether a person is engaging in prostitution with or without consent. Consent is not a fixed, objectively verifiable fact. It is fluid, contextual, and subjective, and therefore incapable of being fully captured or understood by an external observer through an objective test. The answer, to the extent there is one, lies within the person herself. Thus, to the greatest extent possible, the victims' choices and desires must be accorded great weight.

449. ITPA, by conflating prostitution and trafficking, brings within its net a wide and heterogeneous group of persons, from those trafficked against their will, to those who were trafficked but continue voluntarily, to those who have chosen sex work for themselves. All of these persons are, under the current framework, processed through the same mechanism under Section 17, without differentiation.

450. To avoid the victim protective plan reflecting such an approach, we identified two measures that, based on the procedure in Section 17, should be factored into the plan. First is the need for a threshold inquiry to identify voluntary adult sex workers at the outset, and spare them the full machinery of the process, i.e., the principle of non-intereference. Second, is the recognition of the victim's consent as the governing factor in the magistrate's final decisions on detention and reintegration, i.e., primacy of the victim's consent. Being cognisant of the nature of the trafficking offence, we have also identified circumstances in which such a departure from the principle of non-interference and primacy of the victim's consent would be warranted, i.e., situations where the victim's safety is at risk, or the consent/wishes expressed by the victim are a product of threat, coercion or undue influence.

451. Some other pertinent aspects which also deserve attention and have been addressed in the plan are: (i) conduct of raid and rescue operations;

(ii) conditions that have to be maintained in protective homes and the obligation to provide sufficient material resources; (iii) rehabilitation measures that are responsive to the victim's choices and reflective of present economic realities; and (iv) provision of legal and social support to the victims, necessary to meaningfully access the rights and benefits to which they are entitled.

452. Lastly, the approach that broadly animates our plan is based on our conscious effort to shift the treatment of victims of trafficking for CSE from mere passive objects to be rescued to that of persons with agency who have the capacity to make decisions on how they wish to be empowered. Such an approach would further enable her to exercise her right to rehabilitation in its truest and fullest sense.

453. We have set out a detailed "Victim Protection Plan" covering the pre-

rescue, rescue, post-rescue, rehabilitation, repatriation/reintegration, prosecution/trial and prevention/training stages in Paragraph 362 of this judgment for strict compliance by all stakeholders.

E. Constitution of the Organised Crime Investigation Agency (OCIA)

454. Insofar as the prayer regarding the constitution of the OCIA is concerned, upon an examination of the existing systems in place, we are of the view that although the functions originally envisioned for the OCIA are scattered across several existing institutions and/or authorities, there is no gap or lacuna as such. In such circumstances, we are not inclined to issue any writ in the nature of mandamus for the constitution of the OCIA. Nevertheless, considering that the issue we have dealt with is serious and sensitive, we leave it to the discretion of the respondent no. 1 to establish such a body, should they consider it necessary and appropriate in the future.

F. Recommendations and Suggestions

455. We have highlighted the urgent need to bring some changes to the present legislative framework on human trafficking for CSE on the following aspects:

> a. Sections 7, 8 and 20 of the ITPA respectively, as they presently stand, have the consequence of subjecting trafficked persons to prosecution. In most rescue scenarios, police officials invoke these provisions against the very victims they are meant to protect, thereby effectively denying and negating their victim status. In this light the respondent no. 1 may consider introducing a proviso or qualification within the language of Sections 7, 8 and 20 ITPA respectively clarifying that these provisions would not apply to situations where the prostitute either is, or is suspected to be, a victim of human trafficking. Additionally, the fact that these provisions do not expressly exclude children from their ambit also merits the careful attention of the

legislature.

b. The ITPA's protection and rehabilitation framework subscribes strictly to an institutionalised, detention-based model. Under this model, victims placed in protective homes may be detained for a fixed period between one and three years under an order of the magistrate. This mandatory, fixed-period custody slowly begins to mimic a carceral stay. There cannot be a one-size-fits-all approach, especially for victims of such crimes. We therefore urge the respondent no. 1 to re-examine this strict detention model of rehabilitation. Even if the detention model is insisted upon, we urge that options for alternate modes of rehabilitation be made available, so that rehabilitative measures can, in the truest sense, be tailored to the specific needs of the individual victim.

c. The ITPA's failure to accord rights and protections to those engaged in prostitution voluntarily, combined with the deep social stigma attached to sex work, results in voluntary adult sex workers being isolated, marginalised, and unable to access protections that the law extends to them. A meaningful starting point in addressing these difficulties is the recognition of the rights of voluntary adult sex workers and the provision of adequate protections to enforce them. While it would be advisable for the respondent no. 1 to re- examine the conflation between sex trafficking and prostitution that presently exists in the legislative framework, even within that framework, there remains sufficient scope to recognise and protect the rights of voluntary adult sex workers and to put in place mechanisms for the enforcement of such rights i.e., the rights of sex workers can exist without there being a right to sex work.

d. Considering the continued prevalence of instances of abuse and reports indicating the complicity of police officers in the crime of trafficking, we recommend that the respondent no. 1 reconsider the inclusion of two provisions recommended by the 64th Law Commission Report. The first would create a specific offence for police officers who compel or seduce a victim in their charge or custody to illicit sexual intercourse. The second would create a rebuttable presumption that a police officer who delays the production of a rescued victim before a magistrate has wrongfully confined her within the meaning of Section 127 of the BNS.

e. A concerning anomaly exists between the definition of human trafficking under the BNS and the Palermo Protocol, i.e., the requirement that the 'means' element be established even where the victim is a child. The deviation on this aspect from the Palermo Protocol needs immediate attention.

f. The history of the present litigation has highlighted the need for a separate and comprehensive legislation on trafficking, one that addresses not only trafficking for CSE but all other forms of exploitation. We urge the respondent no. 1 to give earnest consideration to this, setting aside the stance it has adopted in the present

proceedings.

g. Technology has become a tool for traffickers to facilitate, organise, network, transact and evade authorities with greater speed, less cost and more anonymity. In such a background, instances of CEHT are perpetually on the rise, whilst law enforcement measures to counter the same are still lagging behind. Cyber- enabled CSE or CEHT has created a radical shift in the exploitation landscape by capitalising on the anonymity, accessibility, and interconnectedness of the digital domain to facilitate crimes with unparalleled efficiency and reach. The respondent no. 1 is urged to find ways to effectively address the prevalence of this crime by bringing necessary advisories guiding the actions of the AHTUs and the other stakeholders.

456. With a view to give full force to the Victim Protection Plan, we are inclined to pass the following additional directions:

a. That all the States/UTs notify "recognised welfare institutions or organisations" in accordance with the explanation to Section 15(6A) ITPA.

b. That all States/UTs prepare a State-wide list of social welfare workers, with sufficient representation from all districts, who may be eligible to form a part of the non-official advisory body under Section 13(3)(b) ITPA.

c. That all States/UTs designate the ADGP level police officer heading the Anti-Trafficking Bureau in their respective States/UTs as the Police Nodal Officers for the purpose of performing the functions as delineated by us in the Victim Protection Plan.

d. That all States/UTs shall designate the Secretary, Department of Women and Child Development in their respective States/UTs as the Government Nodal Officers for the purpose of performing the functions as delineated by us in the Victim Protection Plan.

457. It shall be the responsibility of the respondent no. 1 to ensure that the aforesaid directions are duly complied with within a period of three months from the date of this judgment.

458. For the purpose of reporting compliance with the additional directions mentioned in Paragraph No. 456, the Registry shall notify this matter once again sometime in September, 2026.

459. Tackling human trafficking for CSE, with its hidden nature and multifarious forms, is indeed a very daunting task. However, there is recognition from all corners that it is an evil which needs urgent and consistent attention. Various measures have been undertaken by the multitude of stakeholders involved. However, throughout this judgment, we have noted that these measures have not yielded concrete positive results. Thus, there is no hiding away from the fact that much more needs to be done. By formulating a victim protection plan, we believe we have taken a major step in

that direction. We hope this effort will have a domino effect, leading to much more sustained and coordinated action from all stakeholders.

460. We are aware that a single plan will not be the answer to all the trials and tribulations victims face. However, our effort here should reflect more than just the formulation of a plan. It should reflect an endeavour to give the victim centre stage and to prioritise their needs. It should reflect an attempt to view victims not as passive beings but as agents in need of empowerment. Lastly, but most importantly, it should reflect a commitment to the victims that this Court will accord them the dignity that was always theirs.

461. We direct the Registry to send one copy of the judgment to:

a. All the High Courts;
b. Home Secretary, Ministry of Home Affairs, Union of India
c. Principal Secretary, Ministry of Women and Child Development, Union of India.

462. This Miscellaneous Application stands disposed of accordingly in the aforesaid terms.

.....J. (J.B. Pardiwala) .....J. (R. Mahadevan) New Delhi.

29th May, 2026.