
PROSTITUTION & ITS LEGAL ASPECTS

Bhagyashikha Saptarshi, Amity University, Lucknow, U.P.

ABSTRACT

Prostitution is one of the prominent issues of our country. The cases of human trafficking are increasing day by day and most of the times trafficking takes place for the purpose of carrying out prostitution. Women and children are compelled to engage in prostitution and if they refuse to do so they get threatened and their lives goes in peril. And once they enter into such work, they face criticism from the society which often leads them to end their lives. Also, it has been evident that the women who are engaged in sex works and are prone to sexual abuse and they are more likely to get into depression and commit suicide than those who are not sexually abused. This article deals with the issue of prostitution, rights of prostitutes, laws related and why it should get legalized and regulated by citing the status of prostitution in several other countries and in the last citing my opinion on the subject.

Introduction-

The term *prostitution* is originated from a Latin word *prostituere* which means to manifest publicly.¹ Prostitution is a practice in which a female proposes her body for an indiscriminate copulation in exchange of money. According to **The Immoral Traffic (Prevention) Act, 1956** prostitution means “*sexual exploitation or abuse of persons for commercial purposes.*”²

It is one of the primordial occupations which was practiced around the globe since the inception of the organized society. In ancient times, prostitution was the subject-matter of the Indian art and culture. There subsist various testimonials of a high-class prostitution in the form of celestial demigods working as a prostitute in Indian mythology. For example, Urvashi, Menaka, Rambha, Thilothamma, etc. These prostitutes are depicted as an excellent incarnation of beauty and feminine charms.

In India, sex workers are also called as *tawaif* or *devadasi*. In the era of devadasi system, there was a practice among Hindus of giving girl child in the temple for the motive of dancing and worshipping deity. Nonetheless, due to declination of feudalism, these devadasis were maltreated by the priests of temple.

This practice was continued in British era and by now prostitution has been turned into as a way of livelihood. These conditions continued to worsen and due to lack of state control and regulation prostitution flourished on a large mercantile scale.

Kinds of Prostitutes-

Prostitutes can be categorized on the basis of their ‘modus operandi’ i.e., mode of operation in the following kinds:

- ❖ **Brothel Prostitutes-** Their work is accomplished in the brothel possessed by an old prostitute. They work for remuneration in exchange of their sexual service.
- ❖ **Whores-** Prostitutes work autonomously from their venue and may be accessible directly or seek clients via mediator.
- ❖ **Street Prostitutes-** They seek clients on the streets and take them to a place of meeting.
- ❖ **Other Kinds-** Surreptitious kind of prostitution can be spotted in bars, massage parlours, amusement centres, clubs, etc.

¹ Simran Bhaskar, Prostitution: Law & Analysis, The Daily Guardian, January 25, 2021

² Section 2(f) The Immoral Traffic (Prevention) Act, 1956

Factors Aiding Prostitution-

It is quite onerous to enlist all factors aiding prostitution as it has been repeatedly argued that prostitution has its origin in the structure of the society. One of the main causes of the prostitution which has been often cited is the women's status in the society and their inferiority to men. A few research studies suggest following factors aiding prostitution:

- **Economic factors-** It is an important cause of the prostitution. The situation in India is disparaging. Many prostitutes stand for themselves as well as their families for their livelihood. As per the global data, poverty is the chief cause of crime in the society, prostitution being one of them. It forms a pattern i.e.,

Poverty —————> **Illiteracy**

Illiteracy —————> **Unemployment**

Unemployment —————> **Criminality.**

- **Struggle for jobs-** Because of the difficulty and hurdles in getting jobs, most of the woman opt to become prostitute in their active sexual age for their survival.
- **Underage Employment-** Because of poverty many underage females are compelled to work in offices, hotels, stores, industries. And due to their tender age, they easily get exposed to sexual harassment and are exploited sexually.
- **Abduction-** Young girls are abducted from their villages/places, exploiting their integrity and chastity. The shocking fact is that most of the times kidnappers are females or couples.
- **Rape-** For about 6% of the girls joined this occupation after the incident of rape as most of the times due to social stigma they are not accepted at their house³. When they are unable to locate themselves at some secured venue and did not perceive any fortune, these girls join brothels. Approximately 8 percent of the girls draws themselves towards prostitution after the events of inbreeding⁴. The most pervasive interbreeding is between a man & his daughter, a man & his niece, etc. In many situations, after interbreeding, colleens are trafficked by their own fathers, brothers-in-law and uncles.

³ Dr. Tulsing Sonwani, *Factors Conducive to Prostitution*, PROSTITUTION IN INDIAN SOCIETY: ISSUES, TRENDS AND REHABILITATION, <https://www.ugc.ac.in/mrp/paper/MRP-MAJOR-SOCI-2013-25158-PAPER.pdf>

⁴ Ibid.

- **Children of women in Prostitution-** Due to lack of any programme for the betterment of the children of the prostitutes, over 98% of female child end up in prostitution. There subsists no suitable or safe place for them. 10% of the prostitution occurs due to this factor.
- **Social Factors-** The image of a woman in a society is as a commodity. Those women who are not virgin are considered to be as "used commodities" and face difficulty in getting married. It is believed that a woman without a husband has no cause of income, and due to this sometimes they get exhibited to prostitution. Even the widows and divorced women are also exposed to this social stigma because they cannot remarry as they have loosed their virginity. Many a times due to non-acceptance of the child from the step mother leads to the sexual exploitation of a girl child as she along with her street friends may indulge in committing crimes and during police custody other than only being beaten, she may be harassed sexually. After such repetitive harassment she may choose to be a prostitute to earn and get herself a place to reside.

Hardship and Distress in Prostitute's Life

Prostitutes are not treated humanely at an initial stage of their living in brothels. They are frequently get harassed physically to create a fright in them. And once they become adult and capable to entertain the customers they are compelled to do so. After achieving the target, the brothel owner keeps these workers under house arrest to avert their evasion.

According to the government's evaluation there are approximately 6.8 lakhs sex workers in India⁵. Most of these sex workers suffers from serious diseases such as *Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)*, *Human Papillomavirus (HPV)*, *Genital herpes*, *Chlamydia*, etc. And the sad part is that they are not facilitated with proper medical treatment and aftermath facilities.

They get exploited by the clients, especially police officers and other public authorities takes advantage of these sex workers. They not only obtain money from these workers but also coerce them.

⁵ Dipak Kumar Dash, 6.8 lakh sex workers in India, Delhi red-light capital, Times of India, July 21, 2010 at Para 1.

Laws Related to Prostitution in India-

According to the **Immoral Traffic Prevention Act, 1956**, prostitution means “*the sexual exploitation or abuse of persons for commercial purposes.*”

According to **Article 23** of the Constitution of India which is ***Prohibition of Traffic in human beings and forced labor*** prohibits trade in human beings and begar and other parallel kinds of coerced labor and any infringement of the provision shall be a crime punishable conforming to law.⁶

In the case of **Raj Bahadur v. Legal Remembrancer**⁷, the High Court of Judicature at Calcutta held that “*traffic in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose of. It would include traffic in women and children for immoral or other purposes.*”

The Indian Penal Code, 1872 too talks about prostitution however it is restricted to minors. Section 366A and 366B prohibits export and import of colleens to prostitution. Section 370 deals with trading of human beings, Section 370A talks about exploitation of a traded human, Section 372 and 373 deals with trading of minors for purposes of prostitution, etc. These provisions in detail are as follows-

Section 366A. Procuration of minor girl. – According to this section, whoever, intentionally or knowingly, induces any minor colleen below the age of 18 years through any means to go through one venue to other or to perform any act where the person knows that such girl will be compelled or seduced to illegal copulation with other man shall be penalized with incarceration which can be stretched to 10 years, as well as will be accountable to amercement.⁸

Section 366B. Importation of girl from foreign country. – According to this provision, whosoever bring in India from any State outside India or from the State of J & K any colleen below the age of 21 years with the intention that she might be, or probably knows that such girl will be coerced or seduced to illegitimate copulation with any other individual, will be

⁶ Shukla, V.N., *Constitution of India*, 201, (M.P.Singh Ed., Lucknow: Eastern Book Company, 13th Ed., 2017)

⁷ Raj Bahadur v. Legal Remembrancer, AIR 1953 Cal 522

⁸ PSA Pillai, *Criminal Law*, 832 (KI Vibhuti Ed., LexisNexis, 14th ed., 2019)

penalized with incarceration which may confer up to 10 years as well as will be accountable to amercement.⁹

- The expression “illegitimate copulation” used in the above provisions implies copulation between a male and female not being husband and wife.¹⁰
- The term “seduced” in the above provisions implies persuading or alluring or wheedling a girl of a definite age to accede to illegal copulation not only once but at any period of time or occasion.¹¹

Section 370. Trafficking of person. – This section describes the crime of trading of humans in a broader manner apart from slave and confers least to intense scope of penalty that are consistent with the magnitude of the respective kind or category given in this provision.

According to this section, a person is said to perpetrate the crime of trading of human beings while the person has a motive of corporeal or venereal oppression or enslavement or operates similar to enslavement, subjugation or persecution or coerced displacement of body parts-appoints, conveys, harbors, shifts or accrues any individual or individuals by coercion, abduction, deceit or chicanery, abuse of power or persuading or conferring or taking remuneration or incentives for gaining assent of an individual who has command over the individual appointed, conveyed, harbored, shifted or accrued.

- If an individual perpetrates such crime, he is punishable with severe incarceration of minimum 7 years which can be stretched to 10 years.
- If an individual perpetrates the crime of trading of 2 or more persons, his tenure of severe incarceration is minimum of 10 years which can extend to incarceration for life.
- When an individual perpetrates the offence against a minor, the tenure of his severe incarceration can't be below 10 years, in fact it can last for whole life.
- Also, if the offence perpetrated is against 2 or more minors, the tenure of such person's severe incarceration can't be below 14 years. And such person can also be convicted for life incarceration.
- When the case is such that man indulged in the offence is civil servant or cop then such man will be convicted for lifetime, which requires to be deemed as incarceration till his death.¹²

⁹ Ibid.

¹⁰ Kesal Mal v. Emperor, AIR 1932 Lah 555

¹¹ State of Bombay v. Gopichand Fattumal, AIR 1961 Bom 282: (1960) 63 Bom LR 408

¹² PSA Pillai, Criminal Law, 832 (KI Vibhuti Ed., LexisNexis, 14th ed., 2019)

Section 370A. Exploitation of a trafficked person. – According to this section if any person knows or has a reasonable faith that a minor has been trafficked and then also, he ill-treats or involves that minor in sexual oppression in whatever way, shall be penalized with severe incarceration for minimum 5 years, which can be stretched to 7 years as well as will be accountable to amercement.

Also, when any person has a knowledge or reasonable faith that any other individual has been trafficked and still indulges such individual for venereal oppression in whatever way, will be penalized with severe incarceration for minimum 3 years which can be stretched to 5 years & also shall be accountable to amercement.¹³

Section 372. Selling minor for purposes of prostitution, etc. -- When a minor girl child i.e., below 18 years of age is vended, allowed to rent or otherwise delivered to a sex worker or to any individual who owns or handles a brothel, the individual delivering such minor shall, till the converse is established, be reckoned to have delivered her with an intention that she will be used for the cause of prostitution. Person involved in such act will be penalized with incarceration for a tenure which can be stretched to 10 years, as well as will be accountable to amercement.¹⁴

Section 373. Buying minor for purposes of prostitution, etc. -- According to this provision, any sex worker or any other individual owns or manages a brothel, purchases, lets or otherwise gets seisin of a woman below eighteen years of age will, till the converse is established, be reckoned to have taken seisin of such girl with an intention that she will be manipulated for the cause of sex work or prostitution. Person involved in such act will be punished with incarceration which can be stretched to 10 years as well as will be accountable to amercement.¹⁵

The Immoral Traffic (Prevention) Act, 1956

The ITPA, 1956 governs the act of prostitution in India. In the case of **State of Uttar Pradesh v. Kaushaliya**¹⁶ the constitutionality of **ITPA, 1956** was in question. In this case there was a need to remove number of prostitutes from their residential place for the maintenance of decorum in the city of Kanpur. The Allahabad High Court pronounced that **Section 20** of the

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ State of U.P. v. Kaushalya, 1964 AIR 416.

act curtailed the fundamental rights of the defendant under Articles 14, 19(1)(d) and 19(1)(e) of the Indian Constitution. The act was held to be valid constitutionally as there was intelligible differentia and reasonable nexus between the Act and object sought to be achieved i.e., maintaining order and decorum in the society. This act attempts to criminalize the acts related to prostitution and gives mandate to the police officer to close such brothels and send the workers for their reformation. The central government may institute special courts for the trial of offences under this Act. A few sections of this act are as follows-

Section 3. Punishment for keeping a brothel or allowing premises to be used as brothel. –

According to this section if anyone administers, directs, performs or aids in either administering or managing of a brothel then such person will be accountable for the punishment with severe incarceration for at least one year however it may be stretched to three years as well as amercement up to ₹2000/-, on his 1st sentence; and a severe incarceration of minimum 24 months which may extend up to five years as well as amercement up to ₹2000/-.

If-

- (a) the dweller, lessee, inhabitant or the head of the property utilizes or despite having knowledge permits any individual to utilize such property as brothel; or
- (b) the owner, or landlord of any property or his liaison is aware of the fact that his property is intended to be used as brothel or if he has interest in the utilization of such property as brothel then

he will be accountable to be penalized with incarceration for up to two years and amercement up to ₹2000/- on his 1st sentence and severe incarceration up to five years as well as amercement, if he is sentenced for the same offence subsequently.

Section 5. Procuring, including or taking person for the sake of Prostitution. –

According to this provision of ITPA Act, whosoever (any person)- procures or attempts to procure or induces any person for the cause of prostitution; or takes or induces any person to carry on prostitution, shall be liable to be punished with severe incarceration of minimum three years but which may extend to seven years and amercement up to ₹2000/-.

If a crime is committed against the desire or intent of any individual, the culprit shall be penalized with the maximum tenure of seven years incarceration which shall stretched to that of fourteen years.

Sub- section 2 of this section also provides severe penalty for various aggravated offences committed under this section; which is as follows-

- i. the person of whom the offence committed is a child, the punishment provided shall extend to rigorous imprisonment for a minimum term of seven years which can stretched to incarceration for life; and
- ii. the person of whom the offence committed is a minor, the punishment provided shall extend to rigorous imprisonment for a minimum term of 7 years and maximum 14 years.

Any attempt made for poncing, including or obtaining an individual for the cause of prostitution, also amounts to an offence.

Sex Workers are Entitled to Article 21

In the year of 2011 in the case of *“Budhadev Karmaskar v. State of West Bengal”*¹⁷ the Supreme Court of India held that *“sex workers are also human beings and are entitled to right to life therefore, no one has right to assault or murder them”*.¹⁸

The Court also directed the Centre and States to devise schemes for the reformation of physically and sexually exploited women across the country. A bench of Justices **Markandey Katju** and **Gyan Sudha Misra**, in its mandate, stated; *“we are of the view that prostitutes also have a right to live with dignity under Article 21 of the India Constitution, since they are also human beings and their problems also need to be addressed.”*

According to the Bench *“a woman does not step into prostitution wilfully or for fun or enjoyment but because of destitution. If a woman is given a chance to get herself some training either technical or vocational, she would be able to earn to meet her basic needs by such training and skill rather by trading her body.”*

The Bench said that *‘Society must have sympathy towards these sex workers and must not look down upon them as they are also entitled to a life of dignity in view of Article 21’*.¹⁹ Hence, the bench instructed the central and state government/s to devise schemes for providing technical/vocational training to sex workers and sexually exploited females in all cities. The

¹⁷ Budhadev Karmaskar v. State of West Bengal [2011] 10 S.C.R. 577

¹⁸ J. Venkatesan, Sex workers entitled to a life of dignity: Supreme Court, The Hindu, February 14, 2011, Para 6

¹⁹ Id.

scheme should contain the details of trainer and in what way these workers can be reformed and settled down by proposing their employment.

Why Prostitution shall Legalize?

- ❖ Prostitution is not properly regulated in present times as seeking or soliciting sex is an offence but practicing it privately isn't. Due to lack of proper regulation and protection to sex workers the practice becomes more dangerous. There is an urgent need to legalize prostitution as we all know that prohibiting prostitution won't make any difference but create a ground for more crimes against women and children which would also affect society as a whole. For example, in 2018 approximately 353 women from the State of Andhra Pradesh were trafficked and trapped in prostitution. According to National Crime Records Bureau, all such victims were above the age of 18 except for two. Of such 21 were trafficked for forced labor, 8 for servitude and 335 women from Telangana for prostitution.²⁰
- ❖ Proper monitoring and administration of prostitution by govt. would cause them to avail proper medical facilities, regular check-ups and various contraceptives to prevent pregnancy. This will help in mitigating STDs from workers to clients and vice versa. And also, they should get a cleaner, healthier and safer environment as a matter of their fundamental right of right to life (Article 21) of the Indian Constitution.
- ❖ Legalizing prostitution will create a standard growth of the industry. The role of pimps and middlemen will come to an end which will lead to a deterioration of crimes against sex workers and incrementing their wages.
- ❖ Legalizing and regulating prostitution industry will help in determining and preventing forced prostitution and help the victims of such abuse. And in my opinion decriminalizing prostitution will create more perspectives and grounds for the determination of the willingness of sex workers i.e., whether they are interested in engaging with such activities or are compelled to do so.
- ❖ This will help in checking criminal tendency and mitigating the trafficking and slavery or bondage of women and children. In India the industry is of approximately \$8.4 billion.

²⁰ T. Appala Naidu, 9.7% Human trafficking cases in country are from A.P., says report, The Hindu, January 14, 2020

- ❖ Taxing the carrying of prostitution like other businesses will help government as an incentive which will enable government in accelerating or lubricating regular medical check-ups and safeguarding their rights.
- ❖ Legalizing prostitution would help in providing education to the children of sex workers so that they could also contribute in the growth of the country in future instead of indulging in the same profession.

Countries where Prostitution is Legalized-

There exist many nations where sex work is legalized, a few of them are -

- ✓ Sex work is legal in **Austria** and is regulated at 3 administrative stages i.e., national, provincial and communal.
- ✓ The Penal Code of **Bangladesh** does not criminalize prostitution but due to broader aspects and range of laws produces such atmosphere which ultimately criminalizes sex work and thus the workers.
- ✓ In **Belgium** neither prostitution nor buying of sexual service is penalized offence, but any kind of third-party intervention is usually prohibited. The penal law of Belgium prohibits procuring, aggravated pimping and advertising in all the forms for the sake of prostitution.
- ✓ In **Bulgaria** prostitution has been legalized since 1990 but is not regulated. Under the laws of Bulgaria prostitution is neither permitted expressly and nor banned.
- ✓ Under **Article 41** of the *Codigo Sanitario* the prostitution has been legalized and regulated in **Chile**.
- ✓ In **Colombia** the mere practice of prostitution is not forbidden. In the same manner the law of **Colombia** does not forbid the subsistence of regions in which sex work is carried out also the law protects sex workers by taking proper health measures. And simultaneously it also inflicts the duty on the state to foster its eradication and the reformation of such workers.
- ✓ In the year of 1999 the prostitution was decriminalized in **Denmark**, although certain deeds or things related to sex work is illegal. Trading of sexual services is legal but keeping or managing brothels and pimping are unlawful.
- ✓ **Dominican Republic** has made prostitution legal and in consequence of globalization the country is now a hotspot of sex tourism for foreigners.

- ✓ Sex work is legal in **Ecuador**, but it's not recognized as work by law. Also managing of brothels is legal in **Ecuador**.
- ✓ Prostitution and buying sexual favors are legal in **Finland**. However if customers seek sexual services from the victims of human trafficking, they shall be punished with imprisonment for a term not exceeding 6 months and fine.
- ✓ In **Germany** and **Greece** prostitution is not only legalized but also regulated, etc.

Conclusion-

Thus, by comprehending all the facts stated above I believe that prostitution should be legalized and regulated in order to prevent trading of human beings for the cause of prostitution and it will also protect women and children from sexual assault or exploitation. Establishment and maintenance of rehabilitation centers would help such workers in improving their lives and by training and creating job opportunities for their sustenance will help them to avail themselves a better life. Therefore, prostitution should be decriminalized and regulated so that government could also record through proper channel the willingness of a woman to indulge in such activities or coercion by men whether powerful or not, so that those compelling and manhandling the workers could get reasonable punishment. And in the last all I would like to say is that as '*sex workers are also human beings so they should be treated like one.*'