

HARNESSING THE MENACE OF SEX WORKERS INTO AN ULTIMATE GOOD THROUGH LEGALIZATION

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Prostitution has been a well-known phenomenon of all societies in the world which has all together be seen from an moralistic and commercial views, thereby, it has been neglected the very being of the women involved in it ipso facto ignored from all the rights they have as a human being and a very citizen of a country. Due to this down seeing them in the eyes of the people, state must take steps for their protection in more empirical sense. There can be no doubt wherever the prostitutes have their birth, growth and nourishment, they trap in man's selfish ego, he is all too ready for everything that brings him satisfaction. This applies to power money, sexual freedom, and wanton enjoyment. The situation is further getting worse by rapid industrialization and urbanization that have increased sex industry. This paper focuses on legalization of prostitution in India, on the origin and the historical background, on the types of prostitution prevailing in our society to have a clear idea on the ground.

The theme of this paper lies on the point of legalization by the burning example of Germany which legalized and controlled it very aptly with benefits of both sides i.e. country revenue and societal safety and of sex workers. The researcher has also examined the legislative provisions, both international and national, which indirectly deals with this so called problem of prostitution. This research paper has also a feature of the judicial trends or the response of the judges towards prostitution and last but not the least suggestions of the researcher which might be helpful in finding the solution to the global problem of prostitution and casting the same. This paper shall analysis the position of prostitution in India and tries to outline a clear picture of the ongoing industry and laws laid down by the state. An arguments for the need and impact of the legalization of it in India and on the other side its backdrops.

INTRODUCTION

"Prostitution is criminal, and bad things happen because it's run illegally by dirty-bags who are criminals. If's its legal, then the girls could have health checks, unions, benefits, any other worker gets, and it would be far better"

Jesse Ventura, Playboy Interview, Nov. 1999

Prostitution is the crudest manifestation of societies where women have been driven to sell their bodies as a means of survival. It's a commercialized sex which involves two parties, seller and buyer. It can be described as random sexual doings without the normal motives that is reproduction or pleasure, but it is economically

aggravated so far as the seller is concerned. The seller generally is a women and a man the buyer, also there is a male prostitution in which there is one male with another. In ordinary parlance the word "prostitute" means women who offer her body to indiscriminate sexual intercourse, especially for hire.[1]

Many laws have been made by the law makers to prevent it yet it is practiced, promoted and protected overtly. Also there are police raids, rehabilitation and reformation programs, still this mark to the society is growing day by day.[2]

Social Background

The institution of prostitution is as old as human civilization as the hyperbolic statement which refers to it as the oldest profession conveys substantial truth. In our country, prostitution has existed from times immemorial. Prostitutes in different parts in India known are by different names, Devdasi , Devadiyal, Kannerikam, Basivi, Kanjais, Kuleenas, Jaunsar Bawars, Harbedas, Bahio Kojeers, etc.

In presidency of Madras, Periyar E.V. Ramaswamy and his disciples waged a relentless battle against the institution of devdasi system. On October 9th 1947, Thiru P. Subbaryan introduced the Madras Devdasi (Prevention of Dedication) Act, 1947. This act prohibited the dedication of girls to temples and also permitted devdasi girl to marry in the Southern Province. With the linguistic reorganization of states in the year 1953 came following acts in states other than Tamil Nadu .[3]

1982. The Karnataka Devdasi (Prohibition of dedication) Act, 1982.

1983. The Andhra Pradesh Devdasi (Prohibition of Dedication) Act, 1989.

PROSTITUTION AND THE TRAFFICKING IN WOMEN

1. INTERNATIONAL ANTI-PROSTITUTION CONVENTIONS –

Trafficking of women and children and their inclusion into the sex trade is a growing form of organized crime which certainly transform into an industry of upto 8 billion USD each year.

The spectrum of involuntary sex and of despoilment of innocent white maidens seized the world's attention in the late 1800's and early 1900's. Overtones of that appalled, fascinated, and condemnatory prurience continue to pervade public and institutional perceptions of the traffic in human beings in the early twenty-first century.[4] The 1904 Agreement and the 1910 Convention are gender and race biased and the 1921 **International Convention for the Suppression of the Traffic in Women and Children** further supports the definition contained in the 1910 Convention. The

1933 **International Convention for the Suppression of the Traffic in Women of the Full Age** defines trafficking as the transfer of women across nation-state borders for immoral purposes, in spite of their consent or coercion. This definition removes the element of coercion or fraud contained in previous definitions but retains the international character of trafficking. Unfortunately these conventions don't gave a great effect.

An abolitionist approach to prostitution is most pronounced in the 1949 **Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others** which declares prostitution as ignominy. This convention consolidates and extends the scope of the four previous WSTA and of the League of Nations 1937 draft conventions adopting an abolitionist approach. The 1949 convention utilizes race, gender and age neutral terminology and removes the transnational element of trafficking in persons, thereby extending the definition of conceptualizing of trafficking in persons, while retaining the focus on the sex industry. The present convention explicitly connects trafficking in persons and the exploitation of prostitution. Article 1 requires States Parties to punish any person who, to gratify the passions of another, 'procures, entices or leads away, for the purpose of prostitution, another person, even with the consent of that person; exploits the prostitution of another person, even with the consent of that person'. This approach assumes that prostitution was the sole precursor for trafficking, and equates trafficking with prostitution, thereby relegating all women in the sex industry to the status of victims requiring rescue. The focus on prostitution rather than trafficking fails to protect those trafficked for purposes other than prostitution, and limits the sphere of application to this specific form of exploitation in the context of trafficking in persons.

Recognition that the 1949 Convention was outdated and unsuccessful ultimately led to negotiations of the **Trafficking in Persons Protocol**, and also provided thrust to the implementation of the 1979 **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW). CEDAW was a clear attempt to sever ties with the 1949 Convention, and the abolitionist approach to prostitution, which was viewed as a failure to recognize and protect the rights of women. Article 6 of the CEDAW requires State Parties to take all appropriate actions, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women. Hence, CEDAW restated and reinforced traditional conceptualizations of the woman victim of trafficking for the purpose of commercial sexual exploitation. Such stereotypes continue to remain predominant in contemporary conceptualizations of, and responses to, trafficking in persons.

Apart from the above conventions, one more has been enacted i.e. **Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000**. On the recommendation of the Commission on Crime Prevention and Criminal Justice, the United Nations General Assembly adopted the Convention against Transnational Organized Crime with its Protocol on 15th November 2000. The protocol committed to-

1. prevent and combat trafficking in persons, and
2. Protect the victims of trafficking in persons especially women and children from re-victimizations. [5]

Altogether SAARC has also came up with **SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002** to curb this issue which was highly similar to that of other conventions.

1. NATIONAL ANTI-PROSTITUTION LAWS-

Exploitation which means the utilization of persons for one's own ends, is opposed to the dignity of the individual, to which the preamble to our Constitution refers. In *Raja Bahadur Singh v. Legal Remembrancer* [6], court said that for centuries women have been humiliated, exploited, tortured and harassed in all walks of life- physically, mentally and sexually. "Traffic in human beings" means selling and human beings as slaves and also includes immoral traffic in women and children for immoral or other purpose. **Article 23** of the **Indian Constitution** prohibits traffic in human beings and other similar activities. Under the aforesaid article 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. In this context traffic in human beings includes "devdasi system". The Supreme Court has directed the State Governments to instruct their law enforcing authorities to take actions under the law to eradicate child prostitution. [7] Similarly in *Gaurav Jain v. UOI* [8] through public interest litigation, a two bench judge took cognizance of the matte. The court issued several directions related to the rehabilitation of the children of the prostitutes, child prostitutes and establishment of juvenile homes for them. Under **Article 35** of the constitution, laws punishing acts prohibited by this Article shall only be made by Parliament, though existing laws on the subject until altered or repealed by Parliament, are saved. [9]

In *Shefali Banerjee v. State* [10], it was again held that act has come up to destroy the social evil in pursuance of the International Convention signed at New York in May 1950. This act has been introduced to give punishment to those who are involved in sex trafficking and to solve the

problem of prostitution. The intention of the legislature was not only to penalize the wrong doers but also to rehabilitate the victims of prostitution. In *Vishal Jeet v. Union of India* [11], the court held that the provisions of the legislation are more preventive than punitive because this also deals with the socio economic problem.

- *Rehabilitation*

Rehabilitation of prostitutes is important. Weak strategies and ineffective execution of policies might result in the reverting back of the prostitutes to their profession.

19. Under section 19. A person carrying on or made to carry on prostitution may make an application to Magistrate for an order that she may be kept in a protective home or provided care and protection by the court and if the Magistrate is satisfied he may make such an order.
 20. The Magistrate under Section 20 conclude that such person is a prostitute after making enquiry or receiving an information, he may order to removal of such prostitutes from a place and prohibit her re-entry.
- The Act empowers the State Government under Section 21 to establish protective homes and corrective institutions for the rehabilitation of any released person.

A survey conducted in 2013 by the All India Network of Sex Workers (AINSW) in Delhi, Mumbai, Chennai and Kolkata found that few sex workers willing to be shifted to remand homes, nari niketans or other such facilities. They say that these shelter homes are no better than prison, cutting them off from friends and family. Many also complained of being treated poorly by the administrators and unhygienic conditions in most of the shelters they were taken after raids. None of the women wanted to live in a shelter. They saw them as jails. Most of them had families and children, for them, staying in shelters did not mean rehabilitation.[12]

Critical Analysis of the Immoral Traffic (Prevention) Act 1956-

The Immoral Traffic (Prevention) Act (ITPA), 1956 does not prohibit sex work per se but sex workers can be booked by invoking its provisions which ban brothel keeping, living on earnings of sex work and soliciting in public places. Sex workers and activist have been demanding amendments to the Act, which they allege has been disproportionately used against sex workers. Some of the loopholes and limitations in ITPA are:

1. The term sexual exploitation is not defined anywhere in the Act. It is a cardinal principle of criminal law that seeks to convict persons for certain acts, that what constitutes an offence must be clear and not vague. The

fact that sexual exploitation is defined may be a ground of acquitting a lot of persons, even those who had the intention of having sex with a trafficked victim. Otherwise it is open to constitutional challenge for being vague. It may be further pointed out that though sex work or prostitution is not illegal under the ITPA, the way it has been implemented as if all acts of sex work or prostitution are seen as sexual exploitation.

2. For the Police, the act of visiting a brothel is sufficient grounds for arrest, as the Section does not require the offender to have sex with the trafficked victim. How will the police determine that the person who visits or is found in a brothel is there for sexual exploitation of any victim of trafficking in person? The Police will intercept and arrest any person present in a brothel irrespective of the object of the visit. Increased powers in the hands of the police will give them a handle to harass and extract money not only from sex workers but now, even clients.
3. Section 4 of the Act says an individual over 18 years of age, dependent on the income of a sex worker shall be punishable with imprisonment for a term which may extend of two years, or with fine which may extend to Rs 1000. This means children of all sex workers can be punished because, by the time they are 18 they are barely out of school and unlikely to be financially independent. This also comes in the way of children aspiring for higher education, since after 18 they can no longer depend on the earnings of their mother. [13]
4. The ITPA prescribes detention of sex workers in a home for a period ranging from one to three years. Meeting the family is almost impossible. Even the lawyers need special permission to meet them. Women fear their children are most vulnerable to being introduced to sex trade when they are separated to them. And if women escape from these homes face imprisonment.
5. Seeking clients by soliciting in Section 8, in many ways, indispensable to earning a livelihood out of sex work. The criminalization of soliciting by imposing fines and/or imprisonment is one of the most obvious legal afflictions for sex workers, who are faced with arrests, court hearings and convictions on a routine basis. Besides the actual application of the provision to apprehend sex workers, the section lends clout to local police, who are known to harass sex workers by threatening to invoke this section and use it just to extract bribes and free sex.
6. Furthermore, it may be pointed out that trafficked survivors are unable to seek assistance of the enforcement machinery, including the Police and Magistracy for various reasons.

PROSTITUTION: A COMPARISON OF LEGISLATION ACROSS DIFFERENT COUNTRIES

Over the last 30 years, the Government of various Western Nations has significantly changed their

approach to managing prostitution and street soliciting. Little consensus exists, however, with regard to the most appropriate legislative response; in various countries, attempt to adopt the new laws (whether to enact or dismantle criminal legislation) have met with severe controversy. Each of the countries and states has different approach towards the so called problem called prostitution and in summing up –

1. Countries having prostitution legalized
2. Countries having prostitution illegal
3. Countries having prostitution legal but organized prostitution as brothels as illegal.

Nearly 50% countries have prostitution been legal, 11% as limited legal and 39% as completely illegal.[14]

A BURNING EXAMPLE OF GERMANY

Germany in the year 2002, Prostitution became legal. Brothels are registered businesses that do not need a special brothel licence; if any food or drinks are offered, the standard restaurant licence is mandatory.

Prostitutes levied with the taxation bracket of paying income tax as well as service tax to be charged from them. The *Länder* North, Rhine-Westphalia, Baden Württemberg and Berlin have initiated a scheme where prostitutes have to pay fixed taxes in advance and a proper record of the brothel would be maintained and checked. North Rhine-Westphalia charges 25 euros per day per prostitute, while Berlin charges 30 euros.[15]

Until 2002, prostitutes and brothels were not allowed to make any advertisements but this was nowhere enforced properly. A Berlin court has ruled-out in July 2006 that, as a consequence of the new prostitution law, advertising of sexual services is no longer illegal.[16]

Pimping and contract for sex services from any person younger than 18, per Article 182 (paragraph 2) of the Criminal Code.[17] (Before 2008 this age limit was 16.)are absolutely illegal and highly punishable This law also applies to Germans traveling abroad, to combat child prostitution occurring in the context of sex tourism.

With this new law in germany, it has been reported by the UNHR and germany's personal servey board that crime againse women has drastically reduced and the existing exploited sex worker before this government policy has put to their rights where they can approach proper authorities without a threat of being arrested first and avail their rights. Nonetheless, government has been benefited with all other sides as well i.e. before this legalization, country was spending huge cost on arresting and prosecuting them as they used to get free within a week or two and government spends thousands of Euros in the process, therefore, this expenditure has been reduced and additionally, they now required to pay taxes which bring revenue.

LEGALIZATION OF PROSTITUTION AND ITS IMPACT IN INDIA

In India prostitution is not illegal but an approach of limited legalized under it, prostitution isn't illegal but organized prostitution is illegal and punishable thereby, number of other activities like soliciting in public places, owning and managing a brothel, pimping, pandering, kern crawling are crimes.

Activists views on legalization of prostitution in India-

The SC in its recent judgment suggested to legalize prostitution to provide a better access to health care facility and trade practices. This suggested has been highly critised by some activists and also appreciated like Dr. Jana principal of the Kolkata-based Sonagachi Research and Training Institute (SRTI) and R.S. Chaurasia, Chairperson, Bachpan Bachao Andolan, Lalita Kumarmangalam, chairperson of the NCW and Ms Mahabal, Mumbai based lawyer and activist stated that legalization will protect prostitutes from exploitations from state agencies and they would able to address their issues and problems properly. If the prostitution legalizes then they will pay taxes and trade practices can be monitored to check their willingness which currently has been impossible as prostitution itself a crime wouldn't check it to be consensual or not.[18] On the other hand, activists like Madhu Kishwar and Mr. Pravin Patkar founder of NGO 'prema' arguing that by legalizing it would immensely results into flood of trafficking of women and children and enhancement of exploitation from pimps and society[19]. Kamlabai, a sex worker with Veshya Anyay Mukti Parishad (VAMP - Prostitutes Against Injustice) asks a question if we would have issued an identity card mentioning us prostitutes what would be attitudes of society towards us? By legalizing the state is justing lifting the cover we have.[20]

Reasons for legalizing prostitution in India

1. Legalizing will protect minors.

Around 10 million children are involved in this particularly in Asia and South America, by legalizing it, it would become possible to check the people and their consent age this would ensure their safety and well-being.

1. Regular medical checkups will reduce the spread of STDs.

Legalization will led to identification of prostitutes which further enables the state to conduct medical checkups and providing other birth control and STD control tools.

As in Singapore, a customer before having intercourse has to take bath and should wear a condom

and if any worker came across with any STD has to be medically treated first which has put a mandate on brothels.

- It will reduce the number of rapes and other sexual assaults.

Sexual urges are the natural phenomena which in higher state also led to heinous crimes like rapes, Queensland had experienced 149% increase in sex offences due to closure of brothels in 1959.

1. Removal of pimps and middlemen.

Legalization would no longer required pimps that led to higher earning of prostitutes.

1. Elimination of forced prostitution.

Once decriminalized, there will be no question of forceful prostitution arises as their will be a proper legal control over the willingness of sex workers.

1. Taxation.

In India sex industry has generating nearly 4 to 5 billion USD which also raises a problem of transformation of black money in the Indian markets. Legalizing will make them to pay taxes like any other business which will also could be utilized by the state for them.

Hitherto, the organization opposes legalization, arguing that more demand for sex would lead to more trafficking and also no politician is supporting this idea if legalization of sex industry like People will stop learning, and find a way to prostitution because it is easy money, Hazardous fallback option for people fed up with their jobs, It will affect education at all levels, Morally wrong, demeaning, degrading & objectifying women, Prostitution is often forced, not always voluntary, No job security or guarantee, The society might become unstable; our culture might head down the drain, legalizing will not stop assaults on prostitutes.

WOULD legalization or decriminalization of prostitution work for India?

Decriminalization, as mentioned above, is nothing more than giving the prostitutes the rights to consent to sell their bodies to the customers. Upon their consent, their act of prostitution is legal under the system of decriminalized prostitution. Proponents of decriminalization of prostitution argue that more prostitutes will benefit from the government health care system as well as protection of law enforcement. The proponents assume that once decriminalized, the prostitutes will be willing to come forward to the police

station for help in case of violence or abuse by the customers. However, the New Zealand case blatantly disproved their assumption. Further in case of India, many prostitutes are illiterate and came for the low castes class. Whether prostitution becomes decriminalized, their understanding of their legal rights as well as their view of themselves will rarely be affected by it. Their illiteracy already prevents them from understanding their constitutional rights, and their self-image is deeply controlled by the attitude of Hindu culture towards people in the low castes classes. Hence, if decriminalization affects prostitution in India, it will only add certain problems that New Zealand is experiencing because of decriminalization to the current issues that India is already facing in prostitution industry.

Decriminalization and legalization of prostitution in India has their own advantages and disadvantages. The country should legalize or decriminalize the prostitution only if the country is ready to deal with further problems that some of the developed countries are facing because of legalized or decriminalized prostitution.

Centre for Feminist Legal Research (CFLR) Delhi, recommended giving statutory recognition to some specific rights which included a provision for women working in brothels to be entitled to all the benefits available under the existing labor laws.[21] If the above recommendations are implemented in India, it will contradict PITA, which punishes a brothel owner. Moreover, sex worker cannot be termed as work and for his reason, should not be governed by labor laws. [22] After analyzing the above points, the researcher has come up to the conclusion that people view prostitution on a morality ground not only amounts to exploitation of sex worker who are feeding themselves and their children on the income they generate but it also neglects the wide spread disease i.e. AIDS which transmits among them. Now, the time has come where society need to adopt the practical approach. By legalization of prostitution, prostitutes will not only free from the control of pimps, brothel owners and police who harassed them on the basis of their power. By making it legal, the chances of spreading the STDs would become much lesser. Timely education to prostitutes would also make them aware about venereal diseases. Employment opportunities for women who don't see any other alternative option would do wonder.

Recently, various provisions of the ITPA were discussed with the stakeholders at a consultation of a Supreme Court appointed panel. Sex workers and activists have been demanding amendments to the Act, pointing out that its various provisions are being used disproportionately against sex workers. There is also a demand from several sex workers collectives to legalize trade, and allow them to work with dignity. Organizations such as the All India Network of Sex Workers have maintained that by legalizing the trade not only will trafficking of women come down, but will also

help in availing benefits of various health and welfare schemes. [23]

Legalization is the only answer to curb this menace which is prevailing in the society. The time has come for the legislatures and bureaucrats to think more seriously about this issue.

CONCLUSION

Prostitution is the oldest profession on this earth and it is a prevalent and debatable issue for India. The prime law dealing with the status of sex workers is The Immoral Traffic (Suppression) Act (SITA). According to this, prostitutes can practice their trade behind closed doors but cannot solicit customers in public. Clients can be punished for sexual activity in a public place. Organized prostitution (brothels, pimping, and kern crawling) is illegal in India. In practice SITA is not commonly used. In practice, The IPC which antedates the SITA is often used to charge the prostitution with a crime like "public indecency" or "public nuisance". These terms are indistinct and do not explicitly say its meaning. In recent times, The Immoral Traffic (Prevention) Act or PITA has come in to being which amended SITA. PITA was essentially meant for women and it is the only legislation dealing with the so called problem of prostitution. Recently, India has signed the Palermo Protocol, 2001, which says about preventing, suppressing and punishing the criminals who are involved in trafficking of women and children and the researcher is astonished to see the Indian laws which deal about the trafficking and prostitution is not in accordance with any of the International Policies and Guidelines. This is very unacceptable because Article 23 of the Indian Constitution itself prohibits "traffic in human beings and all similar forms of forced labors".

Over the years, people witnessing the debate on legalizing the prostitution as a whole to avoid the exploitation of women and their children by the middleman and to avoid the menace of HIV/AIDS. The Supreme Court of India said that, despite of law which has been made to curb the growing problem of prostitution, after that also there is a rapid explosion of the sex trade. Thus, legalization would allow authorities to monitor the trade, rehabilitate and provide protection and medical aid to those who are involved. This has welcomed mixed response from activists who are working with the sex workers. After analyzing the arguments and debates among various authorities, activist researcher has come to the conclusion that India shall legalize the prostitution which is the most suitable step that can be taken. Laws should not be such to get rid of the prostitutes but also to change the mentality of people.

Prostitution is a good way out for such men and women to curb their sexual needs. If prostitution does not exist, they will experiment their sexual adventures with others, causing mayhem. Legalized prostitution will spare the unwilling ones from sexual trouble.

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