

## AN EMPIRICAL STUDY ON LEGALIZATION OF PROSTITUTION IN INDIA

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### ABSTRACT

*Prostitution is as old as civilization itself, and has been a part of Indian society ever since the idea of marriage came into existence. In recent days, prostitution has become synonymous with violence, discrimination and exploitation. Prostitution is often seen as a taboo in Indian society, and requisite attention has not been paid for its regulation. This paper examines the connection of prostitution with exploitation and violence, and looks into the possible effects of the legalization and regulation of prostitution on the exploitation and assault on sex workers. There have been various acts by the post and pre – independence governments regarding prostitution, and also various books and articles on its legalization. While these works examine a broader aspect of the problem, two very specific aspects are scrutinized in this research paper. Prostitution is here to stay, whether criminalized or not. Thus, it is better to address the elephant in the room and possibly find techniques to alleviate the problems faced by women and children in prostitution.*

**Keywords:** Prostitution, Civilization, Discrimination, Exploitation, Legalization.

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### Introduction

In ancient India, sex and sexuality were not the taboo subjects they are today. The references to sex workers held in high esteem in the epics of Ramayana and Mahabharata show the status and dignity they had in those days. Their role as entertainers and relaxation artists was well recognized and accepted. Nowadays, sex workers are exploited, harassed, physically beaten and otherwise abused by the police, gangsters and moralists in society simply because of their status as sex workers. Known sex workers are marginalized in the health system and frequently receive inadequate medical care. They are fined for carrying out their work, but the only way they can access money to pay off fines is through more sex work. They have no legal and political rights, making it impossible to make a legal case for physical or sexual violence experienced while at work.

Prostitution belongs to a class of profession which involves great amount of physical tolerance, endurance and risk. This profession is further effected by various social and cultural norms; this means that they are victims of social stigma and poverty. In this scenario it is necessary that law injects in this vicious cycle in order to strike a balance and to empower and safeguard those who are abused. The case of these sex workers are much worth or on the same level of that as transgender individuals and poverty stricken individuals. These persons become the victims of sexual abuse, public bashing, lack of health care facilities, several variances of mental diseases, etc. Though prostitution is illegal in India the situation is different in other countries where they have been given a legal status and hence curbing plethora of malpractices adjacent with the profession. Like, how a coin has two sides legalizing prostitution has its own pros and cons. While the pros would be that it provides continuity to the government, provides a system of equality to the government structure, it offers more security than other forms of government and it creates a higher level of neutrality And cons would be: it can be implemented with varying levels of power, it focuses political power onto people, it provides no guarantee on the quality of rule, it can discourage needed social change etc., analyzing the effects of both these situations

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according to the existing conditions a determined body of laws can be constructed to match the needs. The constitution though does not expressively speak about the rights of sex workers it does implicitly provide basic human rights in Article 14 which speaks about Right to equality, Article 15 ensures that There shall be no discrimination on the basis of sex, caste, race, religion or place of birth, Article 21 ensures right to personal liberty and life, and Article 32 ensures that every citizen has a right to approach the supreme court for the enforcement of the right if he or she has been deprived of the same.

### Statement of the Problem

Street and off-street prostitution have very different effects on the surrounding community. Indoor prostitution has little, if any, negative impact on the environment and, if discreet, there is normally little public awareness of it. Street prostitution, by contrast, is associated with a host of problems, including disorderly conduct, sex in public places, discarding of condoms and syringes in public areas (public health hazards), customer harassment of women on the streets, increased noise and traffic. This result in Low self esteem of the commercial Sex Workers. But at the same time being the bread winner of the family these sex workers have Satisfaction in their Life. Though they choose a profession which is marginalized in our society, they feel satisfied as they were able to face the basic needs of their day to day life along with their family members.

### Scope of the Study

The researcher intends to study the legalization of prostitution in the context of India. All states of India are covered in a general sense, and the recommendations made are also broad in sense. The research contains an account of the history of prostitution, making the timeline broad as well. The research however does not cover the effect of legalization of prostitution with respect to the health of sex workers, society in general, etc., and also refrains from taking into account the status of prostitution in other countries.

The present study focuses on to explore the sociodemographic details of the Sex Workers, the study also focus on the perceived Self esteem level and also their Life satisfaction. All the respondents in this study are Street sex Workers Wherever sex worker or respondents are mentioned it is referred to Commercial Female Sex Worker.

### Objects of the Study

The current research involves a descriptive and prescriptive approach. Hence, the following are the objectives of the study:

- To examine the status of prostitution in India.
- To analyze the effects of legalization on sex workers.
- To suggest policies and regulations relating to prostitution in India.

### Review of Literature

There are many related work available which is related to prostitution. The primary source of information is *the Immoral Traffic (Prevention) Act, 1956*<sup>1</sup> which lays down the definition of prostitution and provides the conditions under which prostitution can be practiced. It also contains the provisions for punishment in case the conditions are breached. The researcher has depended on this to analyze the status of prostitution in India. *Bengal Suppression of Immoral Traffic Act, 1933*<sup>2</sup> by the Bengal government is also of similar nature as the ITPA. It imposes restrictions on prostitution in the state of Bengal. *Contagious Diseases Act, 1868*<sup>3</sup> (now repealed) was an act in Colonial India which aimed to regulate prostitutes to curb the spread of diseases within the British navy and army. It was repealed in 1886.

The book *'Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade'*<sup>4</sup> lays down an analysis of the stigma, paradoxes and the challenges in framing effective policies with respect to prostitution. It also analyses policy regulation on both local and national levels. It examines the national policies of Austria and the Netherlands, which will help the current research in implementing the advantages of the policies in India.

Some of the articles written by researchers and social scientists are *'For Debate: Should Prostitution Be Legalized and Regulated'*<sup>5</sup> Which talks about the legalization of prostitution with respect to the health concerns is present. The spread of diseases like AIDS and other Sexually transmitted diseases through sex workers and their clients is analyzed, which is the very essence of the undertaken study. *Protection of Sex Workers*<sup>6</sup> is another article in which exploitation and abuse of sex workers in the absence of adequate laws and regulation of prostitution is analyzed. This brings out the

importance of regulation of prostitution and helps the undertaken research in this way. Prostitution in the United Kingdom in particular is subjected to scrutiny in this article. The harms of criminalization of prostitution are applicable even in the context of the spread of AIDS, and can be interpreted in the context of Indian society as well.

### **Constitutional and Legal Provisions**

Prostitution as defined in the Oxford English Dictionary is, "the practice or occupation of engaging in sexual activity with someone for payment."<sup>7</sup> Prostitution is often regarded as one of the oldest professions in the world. In the 21st century, females are not the only ones practicing this profession. Men and transgender persons are also involved in prostitution, although in lesser number than women. Prostitution can be of various forms, including street prostitution<sup>8</sup>, escort prostitution<sup>9</sup> and brothels<sup>10</sup>. The legal status of prostitution is different in different countries. Currently, Austria, some states in Australia, New Zealand, Canada, Belgium and Brazil have legalized and regulated prostitution. Prostitution is illegal in a majority of the African states, Brazil, Argentina, Italy, Spain, United Kingdom, Singapore and Sri Lanka, to name a few. In countries like India, prostitution is legalized but not regulated.

The laws overseeing sex work in India are involved in the Constitution of India, 1950; the Indian Penal Code, 1860 and the Immoral Traffic (Prevention) Act, 1956. The Constitution apart from the equality provisions and provisions of freedom of association, Right to life and Personal Liberty, guarantees prohibition of trafficking of human beings and forced labour, ensures denial of trafficking of individuals and constrained work.

As mentioned in the preamble of the constitution of India is a sovereign, socialist, secular, and democratic and republic country and equality of status, dignity, and opportunity must be secured for all the citizens of our country. Irrespective of gender, caste, religion, status etc. the constitution of India provides for certain laws which ensure right to equality, freedom etc. some of rights ensured under the constitution are:

- **Article 14:** Article 14 ensures right to equality under law which means that every citizen has a right to equality before law and has a right to live a life free from discrimination on any grounds. It provides every citizen with equal opportunities.
- **Article 15:** Article 15 of Indian constitution ensures that there shall be no discrimination done on the basis of sex, caste, race, religion or place of birth. It states that state shall not discriminate any citizen on the basis of above mentioned cases.
- **Article 21:** Article 21 ensures right to personal liberty and life. It ensures that there shall be no person who would be deprived of personal liberty and life.
- **Article 32:** this article ensures that every citizen has a right to approach the Supreme Court for the enforcement of the right if he/she has been deprived of the same.
- **Indian Penal Code, 1860:** As a result of rising crimes such as sexual harassment against women there was a new section which was added in the Indian Penal Code in the year 2013 through the Criminal Law (Amendment) Act, 2013, which enlists the acts constitute offences of sexual harassment and it also imposes punishments/penalties such as act committed against women. The person committing any such offense against women will be punishable with 1-3 years of imprisonment or fine or both.
- **Section 354 of IPC:** Under the Indian Penal Code, section 354 states that, when without any consent of the women, acts of any kind or physical attack or intentional force are committed to outrage her modesty, then the offender shall be fined or sentenced to 2 years of imprisonment or convicted with both; it ensures punishments and penalties for the offenders who commit crimes against women and sexually abuse them.
- In the chapter of 22 of criminal intimidation, insult or annoyance, commission act; any kind of words used or intentional gestures to insult the modesty of a woman or to hurt her privacy in an offense which is cognizable, bailable and triable by any magistrate and can be punished by way of fine or sentence upto 2 years of imprisonment or with both.

Under Part IV of Directive Principles of State Policy: the State is required to coordinate its strategies towards securing, inter Alia, that both men and women have an equal right to satisfactory methods for livelihood, that wellbeing, health and strength of workers not be abused, and that citizens are not forced by necessity to enter avocations unsuited for their age and strength, promotion of education and economic interests of weaker sections of society, ensuring their protection from social injustice and

exploitation, requirement of fostering respect for international law and treaty obligation. The Andhra Pradesh High Court has observed that these rights and duties are imposed on the citizens as well as on the state (Government). The citizens, when, have a right, the duty lies in the state and when the duty is imposed on the citizen, the rights vests with the state. (Co-relative rights and duties).

The Indian Penal Code has at least 20 provisions that make trafficking punishable. Most of them deal with abduction for illicit intercourse, wrongful confinement after abduction inter alia. A large portion of them deal with unlawful intercourse, wrongful confinement after abduction inter alia.

#### **Immoral Traffic (Prevention) Act, 1956**

The essential bit of enactment managing sex work is the Immoral Traffic (Prevention) Act, 1956 (hereinafter ITPA). The Act primarily makes pimping and different exercises culpable, which gives a business angle to prostitution that is probably going to abuse the individual of the prostitute. The Act prohibits commercial activities of flesh but it does not prohibit prostitution per se. It is held that in order to prove prostitution a woman or girl is required to show that she has offered her body for sexual intercourse for hire. Section 3 of the ITPA provides for punishment of any person who allows or is in charge of the premises, uses such premises or knowingly allows someone else to use it as a brothel or conducts any activity prohibited by the act. According to this act, even a single incident is enough to prove that prostitution was being help in a particular place. Offenses under ITPA are provided from section 3 to section 9.<sup>11</sup> In a couple of judgments it was explained that ITPA aimed at abolishing the commercialized trafficking in women.<sup>12</sup> In one of the cases in Gujarat, The High Court refused to recognize prostitution as a legitimate means of living.<sup>13</sup> This is because, such recognition by law would give an open invitation for women to be trafficked and also recognize such recognition to be misunderstood as a fundamental right.

The restrictions which were imposed in section 7 under the Act were held not to be discriminatory. Under the Act if ITPA, a Magistrate has a right to remove a prostitute from any place for the purpose of public good. It is also important to know that, this act does not punish the client whatsoever. This law expresses that prostitutes are permitted to carry out their specialty in private however they can't do their business in the open.

In the case of *Smt. Afjal vs State of U.P.*<sup>14</sup>, the accused ran a brothel and detained minor girls for prostitution. The accused was found guilty under the provisions of the act, and the minor girls were rescued.

There are laws regarding prostitution in *The Indian Penal Code* as well. Section 366 Clause (A) of the IPC<sup>15</sup> talks about the procurement of a minor girl for illicit sexual intercourse and prescribes punishment for the same. Clause (B) of the same talks about the importation of a girl from an alien country for the purpose of prostitution. In the case of *Fateh Chand v. State of Haryana*<sup>16</sup>, a man was booked under section 366 for procuring a minor girl for prostitution. Section 372<sup>17</sup> and 373<sup>18</sup> of the IPC prohibit the selling or disposing of a minor girl knowing that such a girl will be roped into prostitution, and buying or hiring of a minor girl to force her into prostitution respectively.

Again, the law is silent on punishing clients or brothel keepers for subjecting a prostitute to violent harm. It also neither compels the use of condoms, nor contains provisions for the healthcare of sex workers, as a result of which there is a spread of HIV/AIDS and also pregnancy causing a population boom. As opined by Justice Ramaswamy in the case of *Gaurav Jain v. Union of India and others*<sup>19</sup> that "women found in flesh trade should be viewed more as victims of socio-economic circumstances and not offender of the society, some police authorities have already set out the process of sensitization towards the sex workers and their treatment."

#### **Conclusion and Suggestions**

Prostitution is one profession that has been considered shameful by the society, while the prostitutes are considered impure and shameless individuals. In India, laws related to prostitution are inadequate and have no clear approach. Due to this, there is an utmost necessity of regulation for such activities. Since sex work will still continue to exist, even after imposing strict laws, it is better to have regulations rather than banning the act completely. Prostitution is a profession that also brings along violence and exploitation in certain cases. However, for some individuals, it may help in running a family. Additionally, the people must be sensitized with respect to problems relating to women so that they do not commit such inhumane atrocities against them, which is where the key concern persists. Considering these aspects, the researcher feels that prostitution should be legalized with a regulatory body overlooking the practice and concludes by saying that legalizing and regulating prostitution ensures protection of sex workers and children, and their rights.

**References**

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4. Hendrik wagenaar et al., designing prostitution policy: intention and reality in regulating the sex trade (bristol university press 2017).
5. Website of British Medical Journal, bmj, <https://www.bmj.com/>
6. Michael D.E Goodyear & Linda Cusick, *Protection of Sex Workers*, 334 British Medical Journal 52, 52-53.
7. *Prostitution*, Oxford English Dictionary (2d ed. 2013).
8. Street Prostitution is a form of sex work wherein a sex workers solicits customers from a street.
9. An escort is someone who offers companionship that may or may not be in the form of sex.
10. A brothel is a place where people may engage in sexual activities with prostitutes, usually owned by third parties.
11. Section 3 provides for discipline for keeping a brothel or allowing premises to be used as a brothel, section 4 provides for punishments for living on the earning of a prostitute, section 5 provides for procuring, inducing or taking persons for the sake of prostitution, section 6 provides for detaining a person in premises where prostitution is carried on, section 7 provides for punishments for offences regarding prostitution taken place in public places, section 8 provides for alluring or requesting with end goal of prostitution, section 9 provides for seduction of a person in custody.
12. *Ratnamala and Another v. Respondent AIR 1962 Madras 31.*
13. *Sahyog Mahila Mandal v. State of Gujarat (2002) 2 GRL 1764.*
14. Smt. Afjal vs State Of U.P., 2012 (77) ACC 7 (HC).
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17. Sec. 372, The Indian Penal Code.
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