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Prostitution in India: A Comparison of Ancient and Present Legal Outlook

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ABSTRACT

There have always been issues relating to the social, moral and legal legitimacy of 'prostitution'. Prostitution is always not forceful; it can also be a wilful profession sometimes. Immoral Trafficking and forceful Prostitution should be dealt with strictness but how should the wilful profession of prostitution be treated legally is an unsolved pertinent question which needs to be answered as the persons involved in the wilful profession are major and do the same with their own consent but this at the same time involves moral questions too. This article focuses on the ancient and present state of laws relating to prostitution including the rights of prostitutes in India along with providing few guideposts for future course of action.

Keywords: *prostitution, legal legitimacy, immoral trafficking, wilful profession, rights of prostitutes, future course of action.*

I. INTRODUCTION

Prostitution in India is seen as a black spot and has remained to be among the least discussed topics of high importance. Prostitution as defined by **Oxford Dictionary** is the practice or occupation of engaging in sexual activity with someone for payment. Prostitution has been in existence in India from time immemorial and the position of the prostitutes has been changing from time to time as well. Existence of prostitution can be seen in ancient Indian texts as well as in the texts of prominent British Indian writers. Indian laws also deal with prostitution. Prostitution has also been recommended to be decriminalized by the **Aristotelian natural law doctrines** which signify that prostitution is not immoral and prostitutes should not be regarded as morally wrong. But the irony is, in India, the **principal Act** dealing with prostitution is headed as **Immoral Traffic (Prevention) Act, 1956**. Modern Indian laws too continued its negative approach in accepting prostitution. But the fact that private prostitution has not been made punishable in India can also not be denied. And the importance of a clear law on prostitution in special reference to voluntary and wilful prostitution is day by day increasing

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and it could specially be felt during Covid-19 pandemic situations where the existence and subsistence of the prostitutes were at stake as observed by many reports of the Government and non-government agencies. Whether there should be crystal clear law on the concerned subject has always been highly debated as whenever this question is taken into consideration the never ending debate between law and morality automatically comes into play and the question remains unsolved. The debate relation between law and morality was well explained in the famous Hart and Fuller Debate.³

II. ANCIENT AND PRESENT LEGAL SET UP DEALING WITH PROSTITUTION

(A) Ancient Perspective

Prostitution is said to be world's oldest profession, and **Catherine Salmon** referred prostitution to be the oldest profession of the world.⁴ **Kamasutra** is said to be the oldest piece of work on sex, love, desire, pleasure, dated back in 400 BC. And in this Kamasutra, matters concerning prostitution have been discussed. **Kamasutra has been written by Maharishi Vatsyayana** who is a Hindu philosopher and is an Indian indeed and hence, prostitution has been existing in India. Apart from it, prostitution has been discussed in various other works like "**Kuttanimata**" by **Damodargupta**, "**Samayamatrka**" by **Ksemendra** and many more. Kamasutra provides for the training of prostitutes for prostitution, which implies that prostitution was a well-established institution and trainings were given to produce well trained prostitutes as producing persons trained in any other respected professions. **S.C. Banarjee** put forward about secret and open prostitution⁵, which is in affirmation with the fact that prostitution was practiced in open, and as it was practiced in open, it can be inferred that it was legal and absolutely fine to practice prostitution without any objection. Prostitutes in ancient Indian society enjoyed some respect. **Arthasatra** says that human treatment is to be given to the prostitutes. **Dharmasatra** also shows that prostitutes were treated with respect. Arthasastra provides law regarding prostitution, not against it, but for proper functioning of it. Arthasastra asks about punishment for prostitutes for denying royal order of meeting man and also for denying to yielding her body after accepting money. She would be liable to fine of double the amount of money she received, if she denies after accepting the money. Also Arthasastra provides law for protection of the prostitutes in as much as it states punishment for enjoying a prostitute, against her will. The above discussion shows that prostitutes were treated with respect and dignity and their administration and protection was done by the throne. And which

³ The Hart-Fuller Debate in the Twenty-First Century. (2010). United Kingdom: Bloomsbury Publishing.

⁴ Catherine Salmon, "Evolutionary Insights into prostitution" pg-121

⁵ S.C Banarjee "Crime & Sex in Ancient india" KOTHA PUBLISHERS, pg- 84.

also shows that prostitution was a lawful profession.

The existence of dignity of the prostitutes also became evident from the existing culture or custom of Bengalis “**Durga Pujo**”. For preparing the idol of Goddess Durga, soil from the courtyard of prostitute is required.

Prostitutes in past, also had contribution in revenue. According to Arthasastra, a part of income from the prostitute’s quarter was paid as revenue. Also prostitutes had to pay a certain amount every month towards revenue, as income tax.

Literatures were based on real life incidents. In the novel “**Srikanto**” by **Sarat Chandra Chattopadhyay**, it is found that Srikanto, a gentleman from a well to do upper class hindu family falls in love with Rajlakshmi, aka Piyari Baiji, a prostitute. This signifies that not all people of society treated prostitutes with hatred. Some respected them as well as dreams of making family with them, dreams of marrying them, though at the end nothing happens as such, but somewhere or the other Srikanto accepted Rajlakshmi despite the fact that she had been a prostitute. In another Sarat Chandra Chattopadhyay novel named “**Devdas**” it can be seen that Devdas is the son of a Brahmin Zamindar. He involves in love affairs with a girl called Parvati (Devadas calls her paro) from neighbour, whose father was also a kind of Zamindar and her mother belong from such a family where the daughter of the family was married off on acceptance of money from the family of the bride groom, which is kind of selling of the daughter to the family of the bridegroom for money and the ultimatum of every (almost) marriage was (is) sex. And hence, it can be said that Parvati belonged from such a family where the daughter of the family were sold in veil of marriage. Though Devdas and Parvati didn’t end up marrying each other, but Parvati, who belongs from such a family ended up being a Thakurain (wife of Thakur), i.e. wife of Zamindar. This signifies that she was accepted in the society. Also in the same novel, it can be seen that, Chandramukhi, a prostitute, falling (in love) for Devdas and he also, somewhere in mind keeps on comparing **Chandramukhi** with the love of his life ‘Parvati’. At the end, it can be seen that Devdas didn’t ignore Chandramukhi for being prostitute. He impliedly accepted the fact that he also somewhere had a soft corner for **Chandramukhi**.

Both the above discussed novels reflect the then status of the prostitutes in Bengal, India.

III. RIGHTS OF PROSTITUTES

The prostitutes just an ordinary citizen of India is also entitled to the Fundamental rights enshrined in India such as, Art. 14 (Right to equality before law and equal protection of the law); Art.19 (1)(g) (i.e., right to carry on any profession, occupation, trade or business subject

to limitations prescribed); Art. 21 (Right to life and personal liberty including right to live with dignity); Art. 23 (1) (which prohibits traffic in human beings and beggars along with other similar forms of forced labor). Further, the Immoral Traffic (Prevention) Act, 1956 also provides some rights to the prostitutes such as Section 16 of the Act talks about rescue the prostitutes, Section 21 mandates to protect her home.

In the case of **Budhadev Karmaskar v State of West Bengal**⁶, the Supreme Court of India observed that sex workers are human beings and no one has a right to assault or murder them as they also have the right to live. The judgment also highlighted the plight of sex workers and empathizes that these women are compelled to indulge in prostitution not for pleasure but because of abject poverty and directed the Central Government and State Governments to open rehabilitation centers and impart technical and vocational skills like sewing so that they attain other means of livelihood. Following the direction, the Immoral Traffic (Prevention) Act has incorporated **Section 21** as a rule for the State Governments to establish and maintain protection homes and these should be regulated by licenses issued by them. An appropriate authority should be appointed for making an investigation for the application of the license for the protection homes. These licenses are not transferable and they are valid only for the specified period. The Government is empowered to make ancillary rules in respect of license, management, and maintenance of protection homes, or ancillary matters by virtue of Section 23 of the Act.

IV. LAWS PUNISHING PROSTITUTION IN PRESENT ERA

The Immoral Traffic (prevention) Act, 1956 defines prostitution. It says, prostitution means the sexual exploitation or abuse of persons for commercial purposes and the expression prostitute shall be constructed accordingly. But prostitute should include persons who are not only abused or exploited sexually for commercial purpose, but also persons who wilfully engage in this profession of prostitution for commercial gain, irrespective of their sex, whether male, female or being a part of LGBTQ⁷.

Immoral Traffic (Prevention) Act, 1956 specifically declares certain acts to be illegal including solicitation for prostitution, managing a brothel or allowing the usage of certain places as brothels (Sec. 3), living on the earnings of a prostitute's money (Sec. 4), inducing or kidnapping a girl for prostitution, detaining girls in brothels (Sec. 6), seducing a person under custody for prostitution (Sec. 8) and carrying out prostitution within two hundred metres of any public

⁶ Retrieved from <https://indiankanoon.org/doc/1302025/>, accessed on 12th July, 2021

⁷ L-Lesbian; G- Gay; B- Bisexual; T- Transgender; Q- Queer or questioning one's sexual identity.

place like schools, colleges, temples, hospitals (Sec. 7) etc.

Indian Penal Code, 1860 penalizes child prostitution, namely selling and buying of minors for the purpose of prostitution. **Section 370A** punishes any person who knowingly or having reason to believe that any minor or any person has been trafficked engages that minor for sexual exploitation and he/she shall be awarded **rigorous imprisonment** of not less than five years in case of minors and three years in case of any other person. **Section 372** of the Code awards imprisonment of **minimum ten years** for a **person selling a minor for the purpose of prostitution**. **Section 373** of the same Code awards imprisonment of **ten years for buying a minor person for the purpose of prostitution**. The explanations to these sections indicate only the trade of minor girls and not boys.

V. PLIGHT OF SEX WORKERS DURING COVID-19 PANDEMIC

Covid-19 presents a new problem for sex workers. In-person sex work is intimate by its very nature, and workers are at heightened risk of contracting the virus if they keep working. But without work, as strip clubs close and clients dwindle, sex workers struggle to survive.⁸

A new report by the International Committee on the Rights of Sex Workers in Europe (ICRSWE) notes that sex workers in the world live in the “economic margins” and often have less savings and government support to fall back on. They are also rarely benefitting from pandemic response and recovery plans.” And, hence they are treated as a type of excluded segment of our society which needs prompt attention.

A conservative estimate of the number of female sex workers in India is 1.2 million (UNGASS Country Progress Report 2010) with an estimated 6,88,751 “registered” female sex workers receiving services from the Ministry of Health and Family Welfare. Providing sexual services is the sole means of livelihood for them, and far from being a “non-essential” activity, sex work is their bread and butter. The lockdown has thus placed on hold the livelihoods of tens of thousands of sex workers, their physical and mental well-being and that of those dependent on them.⁹

VI. ISSUES

Prostitution as defined by the principal Act dealing with it in India, i.e. Sec. 2(f) of the Immoral Traffic (Prevention) Act, 1956, means the sexual exploitation or abuse of persons for

⁸ Retrieved from <https://www.hrw.org/news/2020/05/04/sex-workers-struggle-survive-covid-19-pandemic>, accessed on 8th September, 2021

⁹ Retrieved from <https://www.epw.in/engage/article/locked-down-sex-workers-and-their-livelihoods>, accessed on 2nd October, 2021

commercial purposes. And exactly here lies the problem. Our legislature had enacted the Act placing prostitutes as victims. Section 16 of this Act talks about rescuing the so called victims and Section 21 talks about protecting her home, and so on. It cannot be denied that many women and girls are dragged to this profession against their will, yet it can also not be denied that there are women who wilfully choose it to be their respected profession. Now, if one wilfully engages oneself for earning money in exchange of sexual pleasure then should they be considered prostitutes or sex workers or anything else as in such case there is no exploitation at all? Does it create public nuisance by causing annoyance to the public?¹⁰ One thing that is to be kept in mind is that the word prostitute in this article has everywhere been used absolutely in gender neutral way. Prostitute includes male, female and member of LGBTQ.

In an Article in the “**Los Angeles Times**” on 5th December 1994, an interview of Gloria Allred was published, where she asked a question which reads as “Why is it immoral to be paid for an act that is perfectly legal if done for free?” Answer to her question is yet to be given.

Practically, what is prostitution? Prostitution is a practice, where one offers one’s own body for sexual pleasure of the other who in return is paying back in cash or kind to the one offering his/her body. In majority of the cases the girl offers her body to a boy who pays her back, but male prostitutes do also exist.

In an Article by **Prerna Mankad** in the website “foreignpolicy.com” as dated January 8, 2008, 3:24 PM, it had been stated that a BBC reported on Kolkata reveals that India women also prey on male prostitute. And it is absolute truth that women do have sexual urge like men and need to satisfy their urge.

Who is a prostitute? **A prostitute is simply someone who hates poverty more than sin.** But prostitution can also not be called as a sin. Justifying it, 1957’s British committee report which was published by the committee headed by **Sir John Wolfenden**, which recommended that prostitution should be decriminalized, and opposing **Lord Devlin**, **H.L.A Hart** supported the recommendation of the committee by stating that “a society does not require a shared morality, as published in the book “ Understanding Jurisprudence” by Raymond Wacks.

VII. DECRIMINALISATION OF PROSTITUTION AND ITS EFFECT¹¹

Countries like New Zealand, which have decriminalized all acts of prostitution, seem to have better luck in terms of the wellbeing of sex workers, perhaps because their focus was on

¹⁰ Section 268 of I.P.C., 1860 defines the term ‘Public nuisance’.

¹¹ Retrieved from <https://www.harpersbazaar.com/culture/politics/a20067359/why-prostitution-should-be-legal/>, accessed on 6th October, 2021

creating legislation that “safeguards the human rights of sex workers and protects them from exploitation.”

Reforms in countries like New Zealand seem to show no increase in trafficking, and research suggests that “decriminalization has had little impact on the sex worker population at all, apart to provide it with protection.”

Amnesty International has likewise pushed for decriminalization of prostitution, claiming that, in addition to pushing for policies that protect sex workers from harm and coercion, “Sex workers must also have a say in developing laws that affect their lives and safety. But without decriminalization, they cannot expect equal treatment under the law to achieve these ends.”

VIII. CONCLUSION AND SUGGESTION

Although India has penalised sexual exploitation of persons for commercial purpose but it does not penalise voluntary sexual activity for commercial purpose, yet it has also not set it free to be legal like that of Aruba, Australia, Austria, Belgium, Colombia, Hungary and many more. Also India has not come up with any constructive answer as to why is it wrong to practice voluntary sex work, despite of the fact that it was completely legal in ancient India. Also India lacks in any constructive laws for governing Indian prostitution and distinguished peoples immorally trafficked and dragged to this profession and peoples who join this very profession willingly. India should come up with a constructive law governing the act of prostitution which should deal with forced prostitution and wilful prostitution differently. Immoral trafficking of people in this very profession should be stopped and handled strictly and also a systematic way should be brought in to existence for allowing the persons who wilfully joins the profession with free consent and obviously are major, to carry out their business peacefully and with dignity.

Thus, it can be said that Prostitution is a gender neutral profession and as far as it relates to voluntary and wilful sex it is neither an offence as punished by the Immoral Trafficking (Prevention) Act, 1956 (as amended till date) nor it is a nuisance as per Section 268 of I.P.C., 1860 provided practised without compromising the rights of any person in any manner, and so with proper precautions and guidelines it should be allowed to be practiced in India freely. Right to profession is a fundamental right under Article 19 of the Constitution of India and prostitution should also be seen in this very light. Every adult in India should be allowed to choose the profession freely, assisted by proper effective Law.
