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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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LEGALIZATION OF PROSTITUTION IN INDIA **AND ITS IMPACT ON THE EXPLOITATION** **AND VIOLENCE AGAINST WOMEN**

AUTHORED BY - SHEFALI PANDEY¹

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.

I. INTRODUCTION

Prostitution can be defined as non-selective sex work done for money or other material assets. 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. In the context of India, there is a mention of prostitution in the Rig Veda². In medieval India, the Tawaifs served the nobility in dance, music and the likes. This was a nascent form of prostitution, which later evolved into sexual favors for the common people. In the present era, this is called prostitution. The most significant question that arises with respect to prostitution is whether its legalization is for the better or for the worst.

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²Sukumari Bhattacharji, *Prostitution in Ancient India*, 15 SOCIAL SCIENTIST 32, 32-34 (1987).

Currently, Austria, some states of Australia, New Zealand, Canada, Belgium and Brazil have legalized prostitution. In India, prostitution is neither explicitly illegalized nor regulated.

Associated work such as owning or working in a brothel, pimping, and organized sex work have been made illegal under The Immoral Traffic (Prevention) Act, 1956³ (ITPA), colloquially known as the SITA act (hereafter referred to as the same). In this act, prostitution is referred to as ‘sexual abuse’. However, the act does not recognize men who have taken up the profession of prostitution.

Prostitutes often undergo healthcare because of the stigma about prostitution. This includes unwanted pregnancies, HIV/AIDS and other STIs among prostitutes. Thus, the regulation of prostitution and brothels will help in curbing this menace.

(A) Research Questions

The following are the questions dealt with in this paper:

1. What is the potential effect of legalization on the exploitation of women in the name of prostitution?
2. What are the laws which govern prostitution?

(B) Objectives of the Study

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

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

(C) Statement of Research Problem

There are many debates going on about whether prostitution should be legalized or not. There are pros and cons to both. The researcher has tried to analyze the effect of legalization on exploitation of women and children and has tried to establish what good it can do. Atrocities on women is gaining traction in recent years, and there have been many efforts to protect the rights of women and

³ The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India).

children. Considering this, the researcher has given their perspective on the effectiveness of legalization of prostitution on women who are victims.

(D) Research Methodology

In order to scrutinize the topic at hand and provide a better understanding of the legalization of prostitution, doctrinal research was conducted. The research conducted involved analysis of qualitative data such as books, articles, judgments, websites, and law journals. These were collected from online database and sources such as JSTOR, Hein Online and SCC online. The reference to the same provided opinions of various researchers and social scientists and also helped conclude the research. The advantages of such a method of research includes better analysis of the topic at hand and helps in identifying certain loopholes and ambiguities in it. The books, articles and case laws used are not restricted to a particular time period. This research paper spans legislations in various countries where prostitution is legalized and regulated and compares the situation in India. The analysis and interpretation of previous or already existing data fall under the range of doctrinal research. This is why doctrinal research is best suited for analyzing the impact and advantages of the legalization of prostitution.

(E) Significance of the study

Prostitution has existed in India since centuries. It has recently gained a lot of supporters for it to be made a legal and normal profession without any stigma. In India, prostitution rackets are run and this is often linked to trafficking and sexual abuse by men. The prostitutes involved are victim to societal isolation and are sometimes denied basic fundamental rights owing to the stigmatization. Legalization of prostitution in India is also associated with curbing health complications such as STIs and unwanted pregnancies.

In this context, there have been supporters of legalizing prostitution which includes sex workers themselves. Legalization, especially in India, will help ridding prostitutes of exploitation and lack of healthcare. The countries where prostitution is legalized have shown a prominent decrease in STIs. Thus the analysis of these policies in the current research can be taken as a precedent for framing policies in India. It analyzes and suggests liberal action plans regarding the legalization of prostitution. In this respect, the research can serve as a suggestion for the executive.

This study will benefit academicians, lawyers and students who would want to carry out further research on the matter, since prostitution is a sphere of society which needs more research and

perspective of the aforementioned groups. It will help the general readers in viewing prostitution in the perspective of a victim, and also helps in gaining knowledge of the plight of sex workers and possibly clear the stigma.

(F) Scope and Limitations 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.

(G) Sources of data

There are many sources, primary and secondary, which the researcher has referred to. The primary sources of data include international as well as national statutes, acts and legislations. Articles, journals and books written by significant authors form the secondary sources of data.

The above mentioned sources were taken from databases and online libraries.

(H) Literature Review

There are many related work available which is related to prostitution. The primary source of information is *the Immoral Traffic (Prevention) Act, 1956*⁴ 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*⁵ 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*⁶ (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.

⁴*Supra* note 2.

⁵Bengal Suppression of Immoral Traffic Act, 1933, No. 6, Acts of Bengal State Legislature, 1933 (India). The Contagious Diseases act was by the British administration in colonial India. (2007).

The book '*Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade*'⁶ 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?*'⁷, 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*⁸ 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 is applicable even in the context of the spread of AIDS, and can be interpreted in the context of Indian society as well.

II. PROSTITUTION: EXPLOITATION AND VIOLENCE

Prostitution as defined in the Oxford English Dictionary is, "the practice or occupation of engaging in sexual activity with someone for payment."⁹ 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 prostitution¹⁰, escort prostitution¹¹ and brothels¹². 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.

⁶ HENDRIK WAGENAAR ET AL., *DESIGNING PROSTITUTION POLICY: INTENTION AND REALITY IN REGULATING THE SEX TRADE* (Bristol University Press 2017).

⁷ Website of British Medical Journal, bmj, <https://www.bmj.com/> (last visited Nov. 23, 2020).

⁸ Michael D.E Goodyear & Linda Cusick, *Protection of Sex Workers*, 334 *BRITISH MEDICAL JOURNAL* 52, 52-53

⁹ *Prostitution*, *OXFORD ENGLISH DICTIONARY* (2d ed. 2013).

¹⁰ Street Prostitution is a form of sex work wherein a sex workers solicits customers from a street.

¹¹ An escort is someone who offers companionship that may or may not be in the form of sex.

¹² A brothel is a place where people may engage in sexual activities with prostitutes, usually owned by third parties.

Prostitution can be traced back to the Ancient Near East Civilizations¹³, where there are depictions of it in temples. In India, Prostitution took its form first in Ancient India, with the emergence of illicit love affairs or extra marital affairs. The Rig Veda suggests the existence of prostitution with the mention of the “Sadharani”¹⁴, which is equivalent to the term “prostitute”¹⁵. With the existence of the institution of marriage, prostitution came along. Even in the Mohammedan period, dancing girls were appointed in the Courts of the Sultans, who were sometimes prostitutes. The Sultans also kept these girls for the entertainment of the army personnel. These women were called “Tawaifs”. During the British period, brothels were established for the troops¹⁶. The British Raj enacted the *Cantonment Act of 1864* for the regulation of prostitution, which can be regarded as one of the first legislations with respect to prostitution in India.

Many contend that prostitution is a form of exploitation of women. This is true, at least in the context of India. In India, prostitution is more of a subjugating profession for women where women are mostly forced into it, either passively or actively. This is on account of being trafficked or sold as child prostitutes by their own parents, or opting for prostitution as a profession to earn a livelihood out of it (as a necessity). In this way, women and children are being exploited and forced into prostitution. Vulnerable or poor women are targeted and are roped into prostitution on the pretext of marriage or job opportunities. Many a times, they are forced into the profession by their own family members. After being trafficked this way, they are subjected to the most gruesome form of torture by their clients, which can be deduced by the several interviews of Indian prostitutes by various researchers and social workers. The clients, mostly men, refuse to wear condoms which increases the rate of HIV/AIDS. They pay off the brothel owners to continue to exploit the women.

III. LEGAL ASPECTS OF PROSTITUTION IN INDIA

In India prostitution is partially legal. Prostitutes can practice the profession privately, but solicitation and organized prostitution such as brothel keeping are illegal. Prostitution can be practiced away from public spaces. Moreover, only female prostitution is recognized in India.

The rate of prostitution is hard to determine because it is a shadowed profession, and institutions of prostitutions like brothels are rackets. Even though brothels are illegal per say, there is little effort

¹³ Ancient Near East is the modern Middle East, which was earlier the home for many civilizations such as Mesopotamia, Babylonia, etc.

¹⁴ Sadharani is the term for a courtesan, who was not possessed by a man as was the trend in Ancient India.

¹⁵ *Supra*, note 1.

¹⁶ Ratnabali Chatterjee, *The Indian Prostitute as a Colonial Subject*, 13 CANADIAN WOMAN STUDIES 51, (1992).

made by the Government to track them down and bust the sex rackets. However, there are a few laws with respect to prostitution.

The *Immoral Traffic Prevention Act, 1956* is the main legislation drafted in view of prostitution in India. Section 3 of the Statute¹⁷ imposes imprisonment for two to three years with fine for keeping a brothel or allowing premises to be used as brothels. Section 5¹⁸ imposes three to seven years of imprisonment with fine for procuring a person for the purpose of prostitution without their consent. Section 7 of the statute prohibits prostitution in or near a public place. The act however is silent on the trafficking of children and on the violence and cruelty imposed by the clients on women. In the case of *Smt. Afjal vs State Of U.P.*¹⁹, 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 IPC²⁰ 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*²¹, a man was booked under section 366 for procuring a minor girl for prostitution. Section 372²² and 373²³ 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.

¹⁷ §. 3, Immoral Traffic Prevention Act, 1956.

¹⁸ §. 5, Immoral Traffic Prevention Act, 1956.

¹⁹ *Smt. Afjal vs State Of U.P.*, 2012 (77) ACC 7 (HC).

²⁰ The Indian Penal Code, 1860, §. 366, No. 45, Acts of Parliament, 1860 (India).

²¹ *Fateh Chand v. State of Haryana*, (1977) 2 SCC 670.

²² §. 372, The Indian Penal Code.

²³ §. 373, The Indian Penal Code.

IV. EFFECT OF LEGALIZATION OF PROSTITUTION ON EXPLOITATION AND VIOLENCE

The question whether prostitution must be legalized or not has undergone moral, medical and legal considerations. As stated earlier, prostitution is legal in India when done individually and privately. What is required is the regulation of prostitution, with government control of brothels and related activities. Although there are laws against the establishment of brothels and pimping, they still exist and continue to exploit women. As the brothel owners pay off the police with a bribe, police raids are not necessarily helpful. This is obviously a result of supply and demand. If the government takes control of such brothels, supply and demand will also be met, and middlemen will also not be required. Apart from this, prostitutes must be allowed to carry out the profession discretely, which will help them earn a livelihood by staying out of the public eye.

Once prostitution is decriminalized, governance of prostitution will be easier. This will help in reducing forced prostitution of women and children. The existing system makes it difficult to determine whether there is consent of the women to carry out prostitution. Bringing prostitution under the legal eye will make it easier to control criminal activity and also provide aid to the victims. By regulating prostitution, minor girls can be taken out of the profession and pedophilia can also be checked.

Sexual assault and violence towards prostitutes by the clients happens with the permission of the brothel owners who are given more money to allow the clients to perform violent acts towards the prostitutes. Prostitutes practically have no relief or escape from this kind of violence. Replacing these inhumane middlemen with government control will do wonders in curbing such atrocities committed against women in the name of prostitution.

These measures will of course not eradicate exploitation of women completely. Regulation also involves active involvement of the police to bust illegal rackets which may still exist. The government must ensure that police corruption does not take place. If prostitution is regulated in this way, it can significantly curb social evils such as exploitation and violence in the sex industry.

V. 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.

