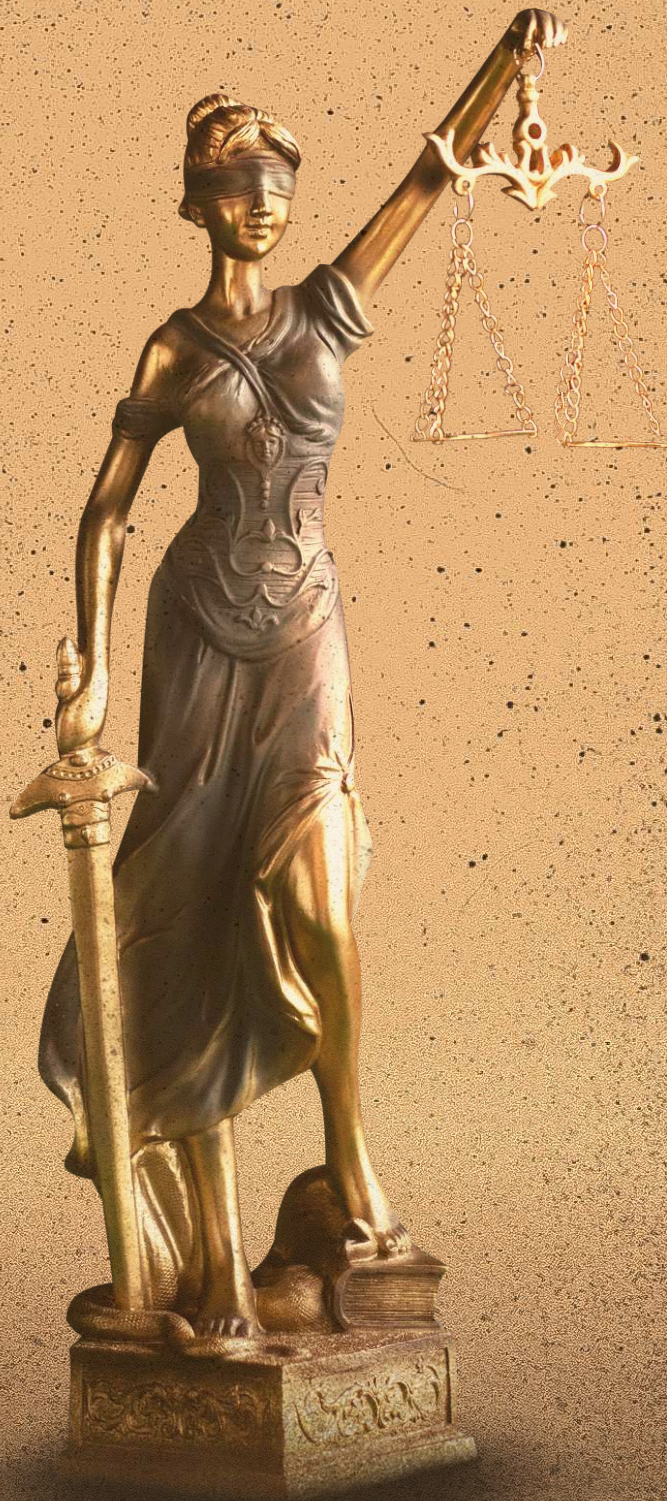


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Tiruchirappalli – 620102

Phone : +91 94896 71437 – [info@ilededu.in](mailto:info@ilededu.in) / [Chairman@ilededu.in](mailto:Chairman@ilededu.in)



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**PROSTITUTION: LEGAL POSITION IN INDIA****Author** - AYUSH B. GURAV, STUDENT AT ILS LAW COLLEGE, PUNE**Best Citation** - AYUSH B. GURAV, PROSTITUTION: LEGAL POSITION IN INDIA, *ILE Journal of Equity and Justice*, 1 (1) of 2023, Pg. 77-82, ISBN - 978-81-961791-3-7.**Abstract**

Prostitution is a promiscuous sexual intercourse or sexual practices, done or permitted by a person usually for reward. The causes of prostitution are various, including male lust, female unemployment, need for money or desire for more luxurious life. The need for gratification of sexual urge has impelled men and women, of all ages and in all countries of the world to exploit either sex. A perusal of the relevant provisions of the Immoral Traffic (Prevention) Act, 1956, shows that the purpose of the Act is not to abolish "prostitution" or "prostitute". There is no provision under the Act which makes prostitution *per se* a criminal offence. What is punishable under the Act is sexual exploitation for commercial purpose or to earn bread thereby. The article also analyses the provisions related to prostitution under the Constitution and the Indian Penal Code, along with the relevant case laws.

**Keywords-**

Prostitution, Immoral trafficking, Devadasi, ITPA, SITA, Prostitute, illicit intercourse, Rape.

**Introduction-**

Prostitution is "the act or practice of engaging in sexual activity for money or its equivalent; commercialized sex."<sup>85</sup> It is the practice of engaging in an indiscriminate sexual activity generally with someone who is not a spouse, friend or a known person, in exchange for immediate payment in money or other valuables. According to Merriam-Webster Dictionary, Prostitution is "*the act or practice of*

*engaging in promiscuous sexual relations especially for money.*"<sup>86</sup>

The word "prostitution" is not confined to acts of natural sexual intercourse but includes any act of lewdness. Prostitution is proved if it is shown that the woman offers her body for purposes amounting to common lewdness in return for the payment of money.<sup>87</sup> Prostitutes historically are considered to be mostly female and their clients being male although it is a generalization, prostitutes may also be male or transgender and entail heterosexual or homosexual activity.<sup>88</sup> Prostitution by itself is not an offence except when it is committed in the vicinity of a public place or somebody seduces or solicits a person for the purposes of prostitution.<sup>89</sup> In order to constitute an act of prostitution certain ingredients have to be present- firstly, there must be sexual exploitation or abuse of any person; secondly, it must be for commercial purposes.<sup>90</sup>

**I. Impact of British Rule and Prostitution in India.**

Prostitution is considered to be one of the oldest professions practiced in the world since the emergence of an organized society. The sacred system of 'Devadasi' is distressingly a living example of the impact of Britishers resulting in prostitution at the highest level. It is a kind of religious practice followed in the southern part of India. The Devadasis after attaining puberty consider the Gods as their husbands and in this manner cannot wed any other person. They are

<sup>86</sup> "Prostitution." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/prostitution>.

<sup>87</sup> Emperor v. Lalya Babu Jadhav, AIR 1929 Bom. 266.

<sup>88</sup> Jenkins, J. Philip (2023, February 15). prostitution. Encyclopedia Britannica. <https://www.britannica.com/topic/prostitution>.

<sup>89</sup> Km. Sangeeta v. State and another, 1996 Cr. Ruling 129 (Delhi).

<sup>90</sup> After Amendment Act 44 of 1986 (ITPA).

<sup>85</sup> According to Black's Law Dictionary, Eighth Edition at page 1259.

dedicated to worship of deity or temple for the rest of their life by their parents. After their marriage to the deity, they must perform activities such as cleaning the temple, dressing the deities, etc.<sup>91</sup> Thus, they were considered to be respected members of society, and were called upon by the royals and the rich to dance and sing. No man, including the Kings, set out to even touch them. However, this system was misunderstood by the Mughals and European rulers. They were unaware of the idea of art as an offering to God and hence considered girls singing and dancing in the temples as a form of entertainment to the rich and were not better than prostitutes.<sup>92</sup>

The position of women worsened during the British regime. They had their own conception of how terribly prostitute women lived and how undignified their profession was considered, in Britain. Without even trying to understand the position of prostitutes in India, they oppressed prostitute women to satisfy the natural sexual desires of the British people. They institutionalized this profession of prostitution through the state, and it was achieved by opening several state-run brothels, predominantly in the Cantonment areas where they were called *chaklas*. In the *chaklas*, these women were treated as incarcerated and were abused, both physically and sexually by the soldiers.<sup>93</sup>

Thus, there was a change in the concept of Devadasi into prostitution, it prompted the decrease of dances in the temple. As with the passing of time during the British rule the Indian economy depleted and most people were not able to achieve their basic livelihood and then began an unfortunate and painful trend for the women to started selling their bodies to the British people in exchange of money.

<sup>91</sup> S.K. Ghosh, "The World of Prostitutes," (2<sup>nd</sup> Volume), A.P.H. Publishing Corporation, New Delhi, 2006.

<sup>92</sup> 'Manipal Blog', 2021, The Less Known Traditions of Prostitution in India. [<https://manipalblog.com/the-less-known-traditions-of-prostitution-in-india/>]

<sup>93</sup> Narayan, Sathya, 2018, Prostitution: A Brief History; [<https://www.speakingtree.in/allslides/prostitution-a-brief-history/child-prostitution-in-india/>].

## **II. Causes for Prostitution.**

It is true that the profession or trade of a prostitute has existed in all civilized countries from time immemorial though it has always been subject to regulation by law or custom. The need for gratification of sexual urge impelled men & women, of all ages and in all countries of the world to exploit either sex. Over a period of time the sexual factor ceased to be the only factor in prostitution and other reasons also contributed to the growth of this evil practice. The most important ones are: -

1. unemployment
2. Exploitation at work
3. gender discrimination
4. poverty
5. Obscenity
6. lure of luxury
7. moral degradation; and
8. over population etc.,

It cannot also be denied that the abovementioned causes are some of the several external causes which induce women to turn to prostitution for livelihood over which they have no control.<sup>94</sup>

## **III. State Involvement with Prostitution.**

In the World today, there've been three different trends in regards to state involvement with prostitution since the second half of the 20<sup>th</sup> century. They're as follows;

1. Towards complete ban, declaring prostitution as illegal.
2. Towards regulation, which involves government control of prostitution through procedures such as registration and licensing of prostitutes, their mandatory medical checks, identification cards issued by the police.
3. Towards decriminalization which consists of freedom from police and court actions and ending of degrading system under which prostitutes are repeatedly arrested, fined and released to go back to work.

<sup>94</sup> Dr. G.B. Reddy, "Prevention of Immoral Traffic and Law," (2<sup>nd</sup> Edition), Gogia Law Agency, Hyderabad, 2007.

The later system has been adopted by most countries and promoted by the United Nations General Assembly 1949 Convention (Annexure-G).<sup>95</sup>

#### **IV. The Immoral Traffic (Prevention) Act, 1956.**

The Immoral Traffic (Prevention) Act, 1956, Act No. 104 of 1956<sup>96</sup>, was enacted by the Parliament on 30<sup>th</sup> December, 1956. It extends to the whole of India. The title of the Act states, “An Act to provide in pursuance of the International Convention signed at New York on the 9<sup>th</sup> day of May, 1950, for<sup>97</sup> [the Prevention of Immoral Traffic].”<sup>98</sup>

##### **A. Legislative background of the Act-**

With the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in an International Convention<sup>99</sup> opened for signatures at Lake Success, New York on the 21<sup>st</sup> March, 1950. It was signed by Shri Gopala Menon on behalf of India on 9<sup>th</sup> May 1950. A Bill No. 58 of 1954, containing the ‘objects and reasons’ was published in the Gazette of India<sup>100</sup>. The Bill received the assent of the President on the 30<sup>th</sup> December, 1956 and became an Act, Section 1 whereof came into force from the 31<sup>st</sup> December, 1956, while the remaining sections came into force from the 1<sup>st</sup> May, 1958. This in brief is the legislative background of the Act.<sup>101</sup>

##### **B. Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA)-**

The Act of 1956 was called ‘Suppression of Immoral Traffic in Women and Girls Act, 1956’ (SITA for short). It aimed at suppressing the evils

of prostitution in women and girls, and to provide opportunity to fallen women and girls to rehabilitate themselves as decent members of the society.

The SITA did not succeed in ample measures to eradicate or suppress the evils of prostitution, and so it was drastically amended in 1978. Besides other stringent measures taken, one progressive measure was the opening of probation under the “Probation of Offenders Act”. However, it was soon realised that the measures needed to be made more stringent and provisions for release on probation was being abused. So the Parliament again intervened by Amendment Act 44 of 1986.

##### **C. Amendment of 1986-**

It completely repealed the provisions relating to probation and provided stricter and higher penalty for offences under the Act. It also realised that time had come when male prostitution should also be covered by the Act, and so it changed the name of the Act SITA to Immoral Traffic (Prevention) Act, 1956 (ITPA for short). In place of women and girls to which SITA was confined, the ITPA uses the expression “person” thus covering both male and female.

The definition of prostitution has also been changed and mere gratification of sex without anything more has been taken out of the purview of prostitution. Only where the exploitation or abuse of person is for commercial purposes, it is prostitution, and any place used for such abuse or exploitation is a brothel. The validity of the Act was also upheld in *Sharma Bai vs. State of U.P.*<sup>102</sup>

##### **D. Prostitution ‘per se’ is not an offence under the Act. -**

The Act is not aimed at abolition of prostitutes and prostitution as such and make is *per se* a criminal offence or punish a woman because she prostitutes herself; and that the purpose of the enactment is to inhibit or abolish commercialised vice namely the traffic in

<sup>95</sup> S.K. Ghosh, “The World of Prostitutes,” (2<sup>nd</sup> Volume), A.P.H. Publishing Corporation, New Delhi, 2006.

<sup>96</sup> This Act has been extended to Dadra and Nagar Haveli (w.e.f. 1-7-1965) by Reg. 6 of 1963, s. 2 and First Schedule, to Goa, Daman and Diu by Reg. 11 of 1963, s. 3 and Schedule and to the Union Territory of Pondicherry by Act 26 of 1968, s. 3 and Schedule.

<sup>97</sup> Subs. by Act 44 of 1986, s. 2 for “the suppression of immoral traffic in women and girls” (w.e.f. 26-1-1987).

<sup>98</sup> The Immoral Traffic Prevention Act, 1956. [<https://legislative.gov.in/>]

<sup>99</sup> The United Nations Convention on the ‘Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

<sup>100</sup> Part II, Section 2, dated the 20<sup>th</sup> December, 1954.

<sup>101</sup> R.P. Kataria, Manzar Saeed, “Law Relating to Prevention of Immoral Traffic In India,” (3<sup>rd</sup> Edition), 2019, pg. no. 33, Orient Publishing Company, New Delhi.

<sup>102</sup> (AIR 1959 All.57).

women and girls for purpose of prostitution as an organised means of living. Various provisions of the Act tend to strengthen such a view.<sup>103</sup>

It does punish acts of third-party facilitation of prostitution, like brothel-keeping, living on the earnings of prostitutes or procuring a person for the sake of prostitution. So long as prostitution itself is not a crime, the individual act of a girl who offers her services on phone cannot be prohibited. If a call-girl does not parade her charms in the public, or indulge in soliciting or in other prohibited acts of like nature, she cannot be held guilty.<sup>104</sup>

Thus, the object of the Act is not only to prevent Immoral Traffic in women and girls but it has wider aims. Though total prohibition of prostitution is not intended, it is intended to be discouraged. Moreover, the purpose is to prevent any open acting in such a way as to influence others and tempt them into falling in the vocation.<sup>105</sup>

#### **V. Provisions of Indian Penal Code, 1860 (IPC).**

Framers of the code have not treated prostitution and immoral trafficking as offences probably because those acts can be tackled as socio-economic problems. However, there are abundant number of provisions in Sections 350 to 376 of the Code that have direct or indirect bearing on immoral trafficking. In this age of criminalization of every field in human sphere, no person indulges in acts like prostitution unless there is a criminal act on part of others either in the form of abetment, kidnapping, abduction, buying and selling of persons including minors for purposes including prostitution and last but not the least rape. Therefore, it becomes necessary to discuss these aspects, some of the most important

provisions under IPC relating to Prostitution are as follows;

#### **A. Procurement of minor girl [s. 366A]-**

Section 366A, IPC is attracted when a person induces a minor under 18 years of age to go to any place, or to do any act, with the intention or knowledge that such minor may be forced or seduced to illicit intercourse with another person. The section has been framed more with the desire of safeguarding the public interest in morality than the chastity of the particular woman.<sup>106</sup>

#### **B. Importation of girl from foreign country [ s. 366B]-**

This section deals with extra-territorial offences, penalising importation into India of a girl below the age of 21 years<sup>107</sup> for illicit intercourse or prostitution.

#### **C. Selling and Buying minors for prostitution [ s. 372 and 373]-**

These sections punish the trade of selling and buying minors for purposes of prostitution. As they are in consonance with Article 23 of the Constitution,<sup>108</sup> which prohibits traffic in human beings and sanctions punishment for practice of such acts.

#### **D. Rape [s. 375]-**

Women and girls who are mostly forced into prostitution start their prostitution after they are raped. Due to unacceptability by family or society. Therefore, the offence of rape is another relevant provision having a bearing on the immoral trafficking.

The Supreme Court of India in *State of Maharashtra v. Madhukar Narain*<sup>109</sup>, has emphatically declared that the women of early virtue leading life of Prostitution also have a

<sup>103</sup> Bai Shanta v. State of Gujarat, AIR 1967 Guj. 211 : 1967 Cr. L.J. 1140 (Guj.)

<sup>104</sup> Shivam Goel, "Prostitution and the Law: Charting the Indian Course," ssrn.com, 2016.

[ProCon.org. "Countries and their prostitution policies." <https://prostitution.procon.org/countries-and-their-prostitution-policies/>]

<sup>105</sup> Begum d/o Hudsain Saheb Kalawat v. State, AIR 1963 Bom. 17 : 1963 (1) Cr. L.J. 148.

<sup>106</sup> Bhagwati Prasad v Emperor, AIR 1929 All 709 (710).

<sup>107</sup> Gazette of India, dated, 10 February 1923, Pt V, p 79; Ramji Lal v State, AIR 1951 Raj 33 (35).

<sup>108</sup> Article 23(1) of the Constitution says: "Traffic in human beings ...are prohibited and any contravention of this provision shall be an offence punishable in accordance with law".

<sup>109</sup> AIR 1991 SC 207 at p. 211.



right to privacy, therefore no one can claim a right to rape them.

### **VI. Provisions under the Constitution of India.**

The specific provisions are incorporated under Art. 23 of the Constitution which forms part of the fundamental right against exploitation. The expression 'traffic in human beings'<sup>110</sup> commonly known as slavery implies the buying and selling of human beings for immoral purposes.<sup>111</sup> The most tangible manifestation of this kind is prostitution.

In the landmark judgement of *Vishal Jeet v UOI*,<sup>112</sup> The Division bench dealt with the problem of prostitution and 'flesh trade' the Constitutional scheme relating to it, the International Covenants relevant to the issue, the IPC and also the earlier judgement of Supreme Court in relation to welfare of children, in detail. Other relevant provisions of the Constitution are, under Art. 35(a)(ii), Parliament alone is competent to make laws for offences declared under Part III of the Constitution. The Immoral Traffic (Prevention) Act, 1956 is an example of exercise of such power by the Parliament.

Article 21, which guarantees and protects the right to life and personal liberty, implicitly contains mandate of protection against immoral trafficking. Article 25(2)(b) specifically provides that measures of social reform are permissible and would not be void on the ground of interfering with freedom of religion. The abolition of 'Devadasi' and 'Jogini' system is based on this provision. As regards the Directive Principles of State Policy, it is significant to refer Article 39 under Part IV of the Constitution which particularly contains certain objectives.<sup>113</sup> These objectives and provisions reflect great anxiety of the Constitution makers to protect and safeguard the interests and welfare of the

<sup>110</sup> Under Article 23(1) of the Constitution of India.

<sup>111</sup> *Raj Bahadur v Legal Remembrancer, Govt. of W.B.* AIR 1953 Cal. 522. Also, *Shama bai v State of U.P.* AIR 1959 All. 57 and, *Gaurav Jain v. UOI.* AIR 1997 SC 3021.

<sup>112</sup> AIR 1990 SC 1412.

<sup>113</sup> One of the objectives under clause (f) is that the State should, in particular, direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment.

children of our country, who often become victims of immoral traffic.

### **Conclusion**

Prostitution and prostitutes have existed in all ages and in all societies including India, to meet the masculine needs of the society. As the Honourable Supreme Court has rightly pointed out in *Vishal Jeet vs. Union of India (AIR 1990 SC 1412)*, that prostitution always remains as a running sore in the body of civilization and destroys all moral values. This malady is not only treated merely as a crime but as a socio-economic problem confronting the society and therefore, the measures to be taken in that regard should be more preventive rather than punitive.

In India, the Immoral Traffic (Prevention) Act, 1956 occupies the legal field dealing with this issue. The main object of the legislation is not only to prevent the immoral traffic but also to rehabilitate the victims of immoral traffic. The idea isn't to render prostitution *per se* a criminal offence, or punish a woman merely because she prostitutes herself rather it aims at the suppression of commercialised vice and not at the penalisation of the individual prostitute or prostitution itself.

Thus, prostitution by itself is not an offence in India, except when it is committed in the vicinity of a public place or somebody seduces or solicits a person for the purpose of prostitution.

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