

## Prostitution: A Tug of War between Legality & Illegality

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### Abstract

Historical practices are meant to be preserve without any of the obstruction which goes harmonious with the societal operations. We as the vibrant ideological society divided the natural practices in front or against our own created beliefs and myths in which the beliefs are prioritized over the cultural practices and made them stand between the race of the legality and illegality in the society. Prostitution is one of the such issue which is being practiced since ages in one form or other, but the operation of the prostitution was never been in the question even though the commercialization of sex was done for the monetary benefits and livelihood of the sex worker. The rules and legislation of the 21<sup>st</sup> century has put a lot of bar on the practice of this profession whereby the terms like prostitution and brothels are considered as the sin in the parts of the globe. Prostitution is practiced in all regions of the world according to the ease and suitability of legislation made by the administrator either for the election campaign or for creating lucrative conditions for the stakeholders of this market which even lead to the forced sex work and trafficking of minor, a real reason behind illegalizing the prostitution which is why it is the untouched area for any policy maker because of the fact that the success will always comes out with the scar on the trophy. The research will comprehensively go through the history, pros and cons of the prostitution in any society or region.

**Keywords:** Sex Worker, Prostitution, Brothels, Livelihood, Vulnerability

### Introduction

Right from the 15<sup>th</sup> century since the invaders started penetrating across the boundaries of our civilization the cultural exposure & exchange of the invaders introduced the *purdah system* in Indian civilization which gave gradual rise to put the women behind the veil as it was concept of the Aryans and the Mughals culture for the women's safety in their society. Earlier neither the Indian women's are introduced about the concept of veil nor the safety of the woman was a concern as because society consider both of them equal and independent. It is after the invasion of India that the safety of women in society and the sexual orientation became a taboo and social stigma attached to it which created a prolonged communication gap in generations between the genders resulted in making all aspect related to the sexuality and sexual orientation an unethical and vague discussion in the open society. Prostitution is practiced since several years back from the time of the kings which was very open and acceptable to the society of that time, as we are heading towards the conserved thinking society which is influenced by the mughals ideology where women's are not get exposure of the society the concept of the prostitution taken as immoral and obscene for the Indian society. As prostitution is having long history of being openly practiced but currently in the Indian society and according to law of land the prostitution didn't get any place between being legal and illegal as it totally depends upon the situation and the state laws, enactments, notifications and regulations. The prostitution in India is semi regulatory legal issue which is not

fully banned for being practice but partly it is banned in the aspect of running any prostitution racket, brothels and any kind of prostitution for commercial purposes which can even leads to the trafficking of the human body. Different states in India having different laws and regulations at different period of times regarding the prostitution as it mainly depends on the factor of demography, sex ratio and divorce percentage of the state through which the prostitution policies are drafted and the prostitution is a gender neutral where the sexual pleasure is taken with the opposite gender who is not one's legally married wife or husband and in exchange of any gain which is mainly a monetary term. In Indian aspect the prostitution is mainly practices by the sexual worker who doesn't acquired any skill to work in market and as a last resort for earning livelihood they have to practice prostitution to get their bread and butter each day. Collectively in India the number of sex worker reaches to the number of 8 lakhs females and more than 6000 females becomes the subject to the physical violence per year as register complaint according to the data of national crimes records bureau report 2021-22,<sup>203</sup> this profession is sandwiched between the vulnerability and continuous exploitation of the human body which is basically against the human rights standard set by the international communities. In a country like India where since the independence of the nation the women's aren't getting attention of the society in legal aspects where the some sexual and individual's rights of the women are still un-decisive which made them most vulnerable in the Indian society and the unskilled, financially poor and single parent women is forced to practice prostitution to earn livelihood. The practice of prostitution effects the society through various wrongs but on the other hand the livelihood of some household depends on the same and for this neither any law to stop or ban the prostitution in India is passed by the legislature nor the Indian

judiciary passed any judgment to direct the states to make laws against the prostitution but the time to time prostitution regulation rules are being passed to regulate this sector of the economy.

### **A Sandwiched between Legality & Illegality**

Practicing prostitution is considered as a sin in the culturally rich society like Indian society where marriage is considered religious pious and any men or women having sexual intercourse outside the course of marriage with any men or women who is not legally a married husband or wife is considered as the sin and was earlier punishable as adultery in Indian penal code. Such habitual practice of taking sexual pleasures from sex workers promotes the commercialization of the prostitution in India which is not the prohibited practice in India but it leads to promotion of brothels, sex rackets and red light districts in any area., eventually which is a prohibited and banned to practice for commercial purposes because that causes collateral trouble whether it is the customer or the sex worker moreover it is one of the key reason behind not giving proper legal status to prostitution in India. As prostitution in India can be practiced individually to earn livelihood but the full fledged running of brothels leads to multi offences for the sake of profit making and eventually affects the morality of the society.

Foremost, issue in any of the society regarding the prostitution is about the health and sanitation issue in which precisely the reproductive health of the women affects significantly, where due to the daily sexual intercourse with the different body of men can nurture and transfer the human immunodeficiency virus (HIV) which attacks the immune system of the body and leads to the non curable disease like AIDS that mostly transfer through engaging in any kind of the sexual activities. Although the prostitution is of no gain to the civil society and government administration as it is loss in every scenario but still for the sake of human pleasure and right to pursue any profession which is not barred by

<sup>203</sup> Centre for Public Policy Research, <https://www.cppr.in/archives/women-prostitution-in-india> (last visited 27 Mar, 2023)

law it is only prohibited with some conditions that needs to be followed as it usually affects the morality of the society. The conditions are usually differs from region to region which is regulated through any special act or order passed by the government of any state in harmonious to the Immoral Traffic (Prevention) Act where all the punishment of any act in violation of prostitution practices is enshrined. But as we are heading towards the vibrant, open and liberal societies we as a society need to accept prostitution as a profession and way of earning livelihood regardless of the fact that how adverse it is for the society as according to the constitution of India the life with liberty and dignity is ensured<sup>204</sup> and which can be achieved by any individual through the way of living prosper in economic and social terms for which easiest way is to earn through any sort of means. The visionary constitution framers put an article 19 in the Indian constitution in which provisions regarding the basic freedom to survive in the society is mentioned which ensures the freedom to pursue any profession, or to carry on any occupation, trade or business<sup>205</sup> which is having one basic exception that the profession should not be barred by the law to be practice or pursue within the territory of India. As the constitutionally the prostitution has a free hand to practice in India as it is not barred by the law to practice it individually but commercializing the prostitution is barred by law and not harmonious with the provision of the constitution because of the factors like it is against the morality and decency of the society. The provision of the article 19 of the Indian constitution is partly supported by the article 21 of the Indian constitution with the provision that personal liberty is enshrined under this article which immunizes the individual practicing the prostitution in a scenario if the prostitution is prohibited or banned. The minorities, children and women's are the subject of vulnerability and frequently exploited for sexual desires, in the scenario of commercialization or the fully

legalization of the prostitution will fade away the deterrence of law and law enforcement agencies which eventually creates such a massive demand in this sector that can only be fulfilled with the increasing supply of the sexual workers which are limited in the market but for the sake of profits the broker and business regulators commits the offence of trafficking which is sometimes even the cross border women and minor trafficking through ways of abduction and kidnapping. Keeping any kidnapped or abducted minor or women at a place where every hour he/she have to lose her virginity every hour for just to get lowest standard of living or life like a sex slave even in 21<sup>st</sup> century will not only affect the life expectancy of that person but also badly affects the psyche for the lifetime. This offence attracts multi provisions of different Indian laws to penalize the offender that are punishment under Indian Penal code, Immoral Traffic (Prevention) Act and article 23 of Indian constitution which prohibits the human trafficking. The prostitution mostly act as the tormentor for the society values which is the reason behind the prohibiting the prostitution in India and this sector is only functioning in individual capacity because of the personal liberty enshrined under the article 21 of Indian constitution.

In the alarming situation of the pandemic the most impacted profession was prostitution globally, as the countries were under strict lockdown and coming in contact with someone's body was not advisable during pandemic as there was apprehension of spread of virus but as in this profession in exchange of sexual pleasure money is being paid, whereas to enjoy the sexual pleasure bodily contact need to be developed but people in the apprehension of not to come in the contact of the deadly virus restricted themselves from going for such activities. Globally this sector was abruptly ignored by the administrators & the government and during the complete nationwide lockdown the sex workers doesn't have any social security and source of income

<sup>204</sup> The Constitution of India, art. 21

<sup>205</sup> The Constitution of India, art. 19

as this sector is unorganized or informal and partly legalized sector. The worker were not able to meet the expenses and there was high food insecurity among them as there was not any association to help them, these workers with empty pockets travelled to thousands of kilometers to reach their village in hope of food. Unlike the other profession this sector is not enough privileged to form any association or organization legally which can takes care of them during these kinds of hardships, this is why the sex worker evaporated overnight from cities and the schemes through which food grains will be distributed amongst the marginalized community of people including sex workers and transgender wasn't able to get benefitted as most of them doesn't have the basic identity card like aadhar card as because being recognized as the partly legal sector in India any document doesn't required for the verification of individual till now. During pandemic this community faced a lot of harassment in working and existing in the society as this profession is considered to be filthy and lot of stigma is attached to it meanwhile they were also most exploited because of the involuntarily sexual assault with them in the society because local authorities was unable to provide any kind of support to anyone the minor trafficking and sex slaving also raised gradually.

### **Penal Laws in India Countering Prostitute Traffickers**

In Indian social structured society where the women treated as the property of father and husband before and after the marriage respectively. The legalization of prostitution will drag this vulnerable group into more vulnerability as the commercialization will lead to the kidnapping, abduction and trafficking of the women which will wrest the freedoms of the women's in the social strata. The time will repeat just like in 17-19<sup>th</sup> century where females were kept as the object in the society and family too but now several provisions of laws and in constitution of India itself protects the rights of

the sex workers and moreover bars the activities pertaining to the trafficking. Commercialization of prostitution is barred in both Immoral traffic (prevention) Act<sup>206</sup> and Indian Penal Code<sup>207</sup> where several provisions penalizes the promotion and carrying on such activities like in section 3 of the act punishes the rigorous imprisonment of not less than one year on first conviction and not less than two years on second conviction if found or keeping the brothel or allowing the premises to be used for the purpose of brothel where the accused or landlord need to prove the contrary for the acquittal, moreover lease or any agreement related to that land in case of a tenant gets void.<sup>208</sup> Often the landlords have the knowledge of the brothel on their land but for the sake of the monetary benefits they indirectly become the part of this nexus and treated and tried as the partner in the offence. And if any person who is above the age of the 18 years and wholly or partly lives on the earning of the prostitute where the prostitute is in direct influence and control of the person acting as tout or pimp will be punishable for two years and not less than seven years in case of the minor, according to the section 4 of the Immoral Traffic (Prevention) Act.<sup>209</sup> As the most of the missing and abducted children are taken far away from the home and mostly influenced and forced to practice prostitution against their will just to get survival, the touts treat them as the money making machine and creates tough job for the rehabilitating agencies therefore the punishment of offences against the minors are justified and may be need to more deterrent for the offenders. Even the procuring or inducing any person to work or become inmate in the brothel will attract the punishment of not less than three years to seven years whereby the consent and will of the prostitute will not be relevant during the trial, further in this section 5

<sup>206</sup> The Immoral Traffic (Prevention) Act, No. 104, Acts of Parliament, 1956 (India).

<sup>207</sup> Indian Penal code, 1860, No. 45, Acts of Parliament, 1860(India)

<sup>208</sup> The Immoral Traffic (Prevention) Act, §3, No. 104, Acts of Parliament, 1956 (India).

<sup>209</sup> The Immoral Traffic (Prevention) Act, §4, No. 104, Acts of Parliament, 1956 (India).

of the act if this is done to the child the punishment varies from seven years to extend of life and in case of the minor, the punishment will be seven years to fourteen years.<sup>210</sup> Similarly, if any person is detained by other in the brothel or place where for the purpose of sexual intercourse a person is kept with or without his will or consent shall be punishable with the term of seven years and above.<sup>211</sup> The immoral traffic (prevention) act was introduced as a special law to put a bar against the commercializing activities of prostitution in the market so it can't be having any adverse socio-legal consequences on any community.

Moreover keeping the rule and provisions aside the source of Indian laws which is Constitution of India itself guarantees the several human rights for living the dignified and equal life within the society which will make this profession equally respected as others. The articles of the constitution of India supports in legalizing and moreover defend the prostitution as the no wrong and legal implications in commercialization of the same as the article 21 of the constitution which in itself is the whole sum-up of the human right ensures the personal liberty and dignified life to every person in which it can be advocated or argued that the for ensuring well being of the person it is the personal liberty of the person to pursue any of the profession for the monetary benefits and livelihood driving the way of the profession in any legal direction will be ensured by the article 19 of the constitution of India where the freedom to pursue any of the profession is ensured with some exception keeping in mind relating to the decency and morality of the profession in mind. Simultaneously the constitution of India prohibits the trafficking of the human body for any of the purpose which also includes and bars at the activities relating to the commercialization of the prostitution. The Indian penal code, which is the basis of this penal laws in India also have enough provisions

to create a deterrence before the introduction of the special laws by the parliament like immoral traffic (prevention) act. The Indian penal code equally pays punishment to the trafficking, selling and even buying of the prostitute strictly and as the penal code was drafted way back in 19<sup>th</sup> century so the main spotlight is on the minor girl child who was most vulnerable for this offence, the focus of all the provisions of this act is on the safeguard of the minor girl which is the reason behind the implementation of the special law for the prostitution. In the case of the buying and selling of the minor person with intent to establish illicit relationship with the prostitute who is not the legally married then both the seller and the buyer will be punished for extend of ten years and shall be liable for the fine.<sup>212</sup> Similarly under section 370 of the Indian Penal Code the trafficking of person for any purpose is also punished in the Indian penal code as it deprives the personal liberty of the person. The other provisions like section 366A bars the inducement and procurement of any minor girl child with the intent to force or seduce her to establish illicit relationship will similarly be punished with the imprisonment of ten years.<sup>213</sup>

From both the side the arguments can be presented for the legalizing and illegalizing the prostitution in any society but the implication and affects of socio, legal and economical factors should be kept in mind as the legalization of the prostitution will give monetary benefits, social security and standard of living to the sex worker in the society but on the other hand these practices will impact the society largely if this sector is not tapped, identified and regulated & monitored frequently. The argument regarding the decency and morality will be presented from the opposite end but it is the question before the court and policy maker whether the livelihood, personal liberty and life with dignity enshrined in the constitution of India of more than a million sex

<sup>210</sup> The Immoral Traffic (Prevention) Act, §5, No. 104, Acts of Parliament, 1956 (India).

<sup>211</sup> The Immoral Traffic (Prevention) Act, §6, No. 104, Acts of Parliament, 1956 (India).

<sup>212</sup> Indian Penal code, 1860, §372 & 373, No. 45, Acts of Parliament, 1860 (India).

<sup>213</sup> Indian Penal code, 1860, §366A, No. 45, Acts of Parliament, 1860(India)



worker is above the morality and decency of the society.

### **An Outlook of World on Prostitution**

As the civilization and origin of the different countries the historical and present perspective of the government and stakeholders of the region differs, whereby in some regions it is seen as the necessity of the manhood but on other side of world it is treated as the sin against the pious relation of marriage. The world is having the dividing opinion and practices when it comes to the prostitution because of the different cultures and practices, while taking a look on the globe starting from the India where the prostitution is both seen as the sin and necessity of the manhood as because of its diverse culture, therefore policy makers didn't concluded the laws on prostitution inclined towards the one side instead of that a blended law is introduced where the practice at individual level is permitted to have livelihood from it but commercialization of the sex is prohibited under several laws as it is having several socio-legal implications on the society which somehow impacts the morality and decency of Indian society to some of its extent.

As the United States of America follows the federal form of governance where the states also have power to implement their laws and acts which may be different from the federal laws. Similarly, prostitution is one of such issues where the states and federal government have lack of consensus on same policy though according to the federal laws of US any kind of prostitution is prohibited in the country but through the regional and state acts the prostitution has some relaxation in some parts of the country according to the need and situation. In United States of America prostitution is classified into categories that are street prostitution, brothel prostitution, escort prostitution and child prostitution whereby all kinds of the prostitution are prohibited and punished under the law in all states except the state of Nevada where some relaxation is given to the brothel prostitution and

commercialization of the prostitution is legalize but on the regulation basis where the brothel needs to licensed and follow the precautions like sanitation of the premises, required vaccination against sexual diseases, use of condoms by the sex worker to prevent the STDs and many more to have a safe sexual enjoyment of the services rendered. Except in Nevada, whole United States of America punishes both prostitute and the customer equally according to their different state laws as due to the pervasive socio-legal implications where in the US the matter of rape, sexual assault and harassment is reported by the sex worker and still the all kinds of the prostitution is ongoing in the country due the loophole in laws and nexus between the traffickers and law enforcement agencies where in the red light area openly operates and practice prostitution in the name of the massage centre, adult filming shop and parlors which fulfills the need of the brothels for the customers. The escort prostitution operates in more openly manner where through the publishing of the advertisement agencies send their prostitutes at their clients place at their request in the name of the home massage services which is similar to the practicing the individual prostitution in India for which the law enforcement doesn't have any power to restrict as it is the personal liberty and human right too of any individual to do anything within his owned premise. But the child prostitution laws are discriminatory in the United States of America where if any foreigner minor is held while practicing the prostitution it is treated as the trafficking of the minor child from the other state and proper rehabilitation and visa facility will be provided to her to establish her in the country but on the other hand any US minor resident is found practicing prostitution then the minor girl will end up being in the juvenile custody, no rehabilitation support will be provided to her regarding the same.

The indo-pacific island nation Japan, which has recent infamous history of the sex slavery during the world wars and in other military



aggressions has banned the prostitution on laws and paper in a very loose handedly to discourage the foreign trafficker and others from doing any offence regarding sexual orientation at first instance. Japan which is one of the largest market of the prostitute in Asian continent contribute around \$24 billion per year in country's GDP where the vast chunk of the share comes from the international tourist expenditure on the prostitution. Since this sector of the country contributes the major chunk in the country's GDP which is the reason behind the substandard prostitution laws in Japan and doesn't have the enforceability in the laws, according to the article 3 of the prevention of prostitution law the sexual intercourse with the unspecified person in exchange of money is prohibited and punishable but no explicit judicial punishment is mentioned in the laws moreover in the legislation all types of sex are permissible except the vaginal sex for the unspecified person. Further, for the specified person all kinds of sex and commercialization of prostitution is legal in the country. The country has prior vast experience of the prostitution being openly practiced in the society as during the war times and sex slave for the Asians are generally taken from the Japan which used to be the sex traffickers hub in the Asia in earlier period, as religious also the culture of Japan doesn't prohibits the any practice regarding the commercialization of the prostitution in the society.

**Conclusion: A Sum-up of Comparative View**

Prostitution is such a natural humanly act that has become a legal issue for the generation of 21<sup>st</sup> century whereas anciently this practice goes on harmoniously with the society operations. As societies was became nuclear and divided on the basics of the culture and practices, the indivisible ideology regarding the prostitution is also perceiving its shape where due to lack of resources and financial assistance the humans are trafficked for the forced sex workers and pushed towards this vulnerable conditions. Prostitution which can be both voluntarily and

involuntarily is strictly punished in most of the region on globe but the administrators can't neither be solve or tap the problem of prostitution through the laws and legislation nor it can bar it from practicing as it the nature of the humans to go for such pleasures. Instead of dominating this sector through arbitrary legislation it can be sharply monitored and regulated for the well being of the class of workers working for monetary benefits or livelihood as it can be as lucrative sector for the economy of the country as the prostitution sector of country of Japan which gives it a crowd of international tourism through this sector. It can also be argued that it is the failure of the administrators and policy makers that the people have choose practicing prostitution for the livelihood against their social insecurity to earn bread and butter for them which clearly signifies and the prove of government lacking on implementation of the on ground policy and schemes regarding the poverty eradication that the people where especially the vulnerable community of women aren't getting enough livelihood support from the government that she has to desparately sell her body for daily meal. As this favorable condition of exploitation of women gives rise to the traffickers in the society and plough fair field conditions for the violation of the human rights. Government's around the globe need to ensure the proper sex education and literacy nationwide so that any class or community shouldn't be dragged towards such vulnerability, moreover the pressing force be given towards the rehabilitation and re-establishment of the extracted sex worker trough the schemes in the main stream society.

Prostitution can never be suppressed or banned as voluntarily or involuntarily it is for the earning of livelihood where instead of suppression the other alternative can be provided to such workers to have harassment free lifestyle. In a try to tap the potential of this sector the awareness policy regarding the prostitution can be implemented and sex education could be imparted to prevent the STDs. Further the



respect of this profession should be given in the legislation and the administrators as it is till now observed a taboo between the police and the sex worker which shouldn't be widened as it is in regular pace just due to the lack of understanding between the nexus of policy makers, law enforcement agents (police) and workers. People need to make more vibrant society regarding the acceptability of this profession sex worker as the human being in the society in which the law enforcement agencies and policy will plays the key roles.