
BETWEEN CRIME AND CONSENT: RETHINKING THE LEGAL BOUNDARIES OF PROSTITUTION

Tanya Singh, Research Fellow, Dr Ram Manohar Lohiya National Law University,
Lucknow¹

INTRODUCTION

“In his student days, he used to argue that if a woman has no other course open to her but starvation, prostitution, or throwing herself from a bridge, then surely the prostitute, who has shown the most tenacious instinct for self-preservation, should be considered stronger and saner than her frailer and no longer living sisters. One couldn't have it both ways, he'd pointed out: if women are seduced and abandoned they're supposed to go mad, but if they survive, and seduce in their turn, then they were mad to begin with.”

— Margaret Atwood, *Alias Grace*

The term *Prostitute* is derived from the Latin *prostituta*. Some sources cite the verb as a composition of "*pro*" meaning "up front" or "forward" and "*stituere*", defined as "to offer up for sale".² In the 18th century BC, ancient Mesopotamia recognized the need to protect women's property rights. In the Code of Hammurabi, provisions were found that addressed inheritance rights of women, including female prostitutes. According to Shia Muslims, Muhammad sanctioned fixed-term marriage—*mutaa* in Iraq and *sigheh* in Iran—which has instead been used as a legitimizing cover for sex workers, in a culture where prostitution is otherwise forbidden. Some Western writers have argued that *mut'ah* approximates prostitution. Julie Parshall writes that *mutah* is legalised prostitution which has been sanctioned by the Twelver Shia authorities. She quotes the Oxford encyclopedia of modern Islamic world to differentiate between marriage (*nikah*) and *mutah*, and states that while *nikah* is for procreation, *mutah* is just for sexual gratification.³

Prostitution is said to be the world's oldest profession, but understanding the size and scope of

¹ Research Fellow, Dr Ram Manohar Lohiya National Law University, Lucknow

² Perkins, Roberta; Lovejoy, Frances (2007). *Call Girls: Private Sex Workers in Australia*. University of Western Australia Press. ISBN 9781920694913.

³ Parshall, Philip L.; Parshall, Julie (1 April 2003). *Lifting the Veil: The World of Muslim Women*. InterVarsity Press. ISBN 9780830856961

this economy, and the methods and actors involved in this trade, is still a murky endeavor. In India, this industry generates a revenue of \$8.4 Billion.⁴

A BRIEF HISTORY OF PROSTITUTION

Biblical Era

Prostitution is considered to be the "oldest profession" and its genesis can be seen in every culture and age. If we see at Biblical culture prostitution can be seen and practiced in Israel in a planned manner which was sanctioned by law. It was more prevalent and practiced by Cannas (also known as Canaanites) and in Syria, Palestine during the 2nd and 1st millennium BC) It was part of the Phoenician culture and was widely spread in Sardinia and the temple prostitutes were male largely and it was to please Goddess 'Ashtart'. Later on, this practice was widely spread to the parts of the Meditarian Sea such as Locri, Epizephiri, Croton, Rossano, Vaglio, and Sicca Veneria.⁵

Roman Era

Prostitution in ancient Rome was legal, public, and widespread. A registered prostitute was called a meretrix while the unregistered one fell under the broad category *prostibulae*. There were some commonalities with the Greek system, and as the Empire grew, prostitutes were often foreign slaves, captured, purchased, or raised for that purpose, sometimes by large-scale "prostitute farmers" who took abandoned children. Indeed, abandoned children were almost always raised as prostitutes. Enslavement into prostitution was sometimes used as a legal punishment against criminal-free women. Buyers were allowed to inspect naked men and women for sale in private and there was no stigma attached to the purchase of males by a male aristocrat.⁶ A harsh reality was that the buyer used to examine them unclothed before buying them, men and women both were included in selling and there was no shame attached to it rather it was considered that for a male aristocrat to buy a male slave as a way of showing off money. This can be still seen in 21st Century that prostitution is encouraged and employed by those who are economically privileged as a way showing off money. Thus, prostitution continues to be a device for exhibitionists.

⁴ <https://havocscope.com/prostitution-revenue-by-country/>

⁵ <https://www.newworldencyclopedia.org/entry/Prostitution>

⁶ https://en.wikipedia.org/wiki/Prostitution_in_ancient_Rome

Indian Culture

In Indian society, the history of prostitution and slavery can be brought out by the manipulation of the Devadasi system. Devadasi was a "female server of god" earlier the Hindu rulers aided them financially and it was an honour to do so. The duties of these devadasis were to look after deities, take care of the temple, perform rituals and they danced and sang in the name of Goddess Yelleamma. All of this was done voluntarily. When the Islamic Rulers invaded the country they began to destroy temples and exploiting people, they targeted these devadasis, and they were tortured, stripped of their titles, and the financial assistance were cut off. After invading the country, because of the differences in religious ideology they abolished and interfered in the rituals which further lead the devadasi system into forced slavery, here they became dependent on alms and consequently, devadasis were forced into prostitution where they were exploited. This exploitation was continued by British Colonisers as they interpreted Hindu Sculptures on women as sexual which didn't fit their standards of modesty which is exactly how devadasis and hindu women in general were objectified. British introduced the Contiguous Disease Act 1868, to provide identity cards to the women who carry out prostitution as a profession, brothels were also made, thus an attempt was made to regulate this profession.

A tawaif was a courtesan who catered to the nobility of India, particularly during the Mughal era. The tawaifs excelled in and contributed to music, dance (mujra), theatre, and the Urdu literary tradition, and were considered an authority on etiquette. Tawaifs were largely a North Indian institution central to Mughal court culture from the 16th century onwards and became even more prominent with the weakening of Mughal rule in the mid-18th century. They contributed significantly to the continuation of traditional dance and music forms and then emergence of modern Indian cinema.

Goa was a colony in Portuguese India set up in the early 16th century, and this Portuguese stronghold contained a community of Portuguese slaves. During the late 16th and 17th centuries the Portuguese trade in Japanese slaves resulted in traders from the Portuguese Empire and their captive *lascar* crew members from South Asia bringing Japanese slaves to Goa. These were usually young Japanese women and girls brought or captured from Japan as sexual slaves.

The culture of the performing art of *nautch*, an alluring style of popular dance, rose to

prominence during the later period of Mughal Empire and the rule of the British East India Company. During the period of Company rule (and after the Indian Rebellion of 1857, the direct administration of the British Crown), British military elements established and maintained brothels across the Indian subcontinent. The prostitutes who worked in such brothels were recruited from rural Indian families and paid directly by the British authorities. The red-light districts of cities such as Mumbai developed at this time. The governments of many Indian princely states had regulated prostitution in India prior to the 1860s. The British Raj enacted the Cantonment Act of 1864 to regulate prostitution in colonial India as a matter of accepting a necessary evil. The Cantonment Acts regulated and structured prostitution in the British military bases which provided for about twelve to fifteen Indian women kept in brothels called *chaklas* for each regiment of thousand British soldiers. They were licensed by military officials and were allowed to consort with soldiers only. In the 19th and early 20th centuries, thousands of women and girls from continental Europe and Japan were trafficked into British India, where they worked as prostitutes servicing British soldiers and local Indian men.

According to Priti Patkar, a Maharashtra-based social activist working with sex workers in the state, many sex workers were forced to take loans from private lenders at high interest rates during the first wave of the Covid pandemic. “We conducted a survey during the first wave which revealed sex workers were taking loans to survive. For their daily meals, they were entirely dependent on donations. We have not conducted any such survey during the second wave, but we have heard the same thing has happened this time, too,” said Patkar, who leads the NGO, Prerana.⁷

Causes of prostitution

There exist number of reasons which compels a woman, a man, a transgender or a child to take up prostitution out of which poverty, unemployment, social castigation and non-acceptance are some of the major contributing factors that causes them to engage or be engaged in commercial sex, which may or may not be a conscious choice. It has been seen that persons of the remote areas fall prey to such unscrupulous intermediaries who gives them promise of decent jobs and then sells them as sex workers. The most fundamental reason which drives the needy and helpless persons towards prostitution is poverty. It is accepted that among all the components

⁷ https://en.wikipedia.org/wiki/Prostitution_in_India#History

answerable for prostitution, poverty is supposed to be the significant explanation that brings individuals into prostitution.

The increasing rate of poverty has driven numerous individuals especially the young people into the urban areas where they consider prostitution to be a brisk method of addressing their own and their family's need. Urbanization, especially in big cities of India, has prompted the development of other incidental issues which includes an increase in the polarization of classes, further leading to increase in destitution, joblessness, crime and estrangement. This situation has prompted a more noteworthy pervasiveness in prostitution as a way people particularly females attempt to adapt with the grim economic realities. Also some women are led into sex-work due to unemployment. The lack of job opportunities had compelled women to desperately resort to illicit deals as a way of generating income.

Around 6 percent women entered prostitution after the occurrence of rape. And many a times the sexual assault survivors are victimized by the shame and stigma imposed on them by the society who blames these women for being raped. And in certain cases not only the society but their very own family members have denied to accept them. Aside from the deferral or the denial of justice, the casualties have to confront similar situations from time to time. And after the passage of a certain tenure when they find no roof for shelter in our society and when there exists no ray of hope for them, they discover their routes into the darkness of prostitution. Around 8 percent of the young ladies came to prostitution following the episodes of incest. The most well-known incest is among father and little girl, trailed by uncle-niece. And when these youthful casualty of incest being sexually exploited at their very home, do not anticipate safety in anyplace in the general public, gradually winds up in prostitution. Other than the above mentioned factors there are several other reasons that drive women to become a prostitute.⁸

So, is prostitution legalized in India?

The answer to this question is a “Yes” and a “No”. For the Indian context, prostitution is not explicitly categorized as illegal as it is not specifically expressed prostitution to be punishable by law but few activities related to prostitution such as running brothels, soliciting, trafficking and pimping are all punishable offence in India under THE IMMORAL TRAFFIC (PREVENTION) ACT, (1956). Just for example, if a person is engaged in an activity of

⁸ https://blog.ipleaders.in/legal-aspects-related-to-prostitution-in-india/#Causes_of_prostitution

pimping then he/she will be punished under law but if receiving money in exchange of sex with consent and without any prior imploration might not be illegal in India. Thus, it is pertinent to explore the legal framework to prevent exploitation and its associated crimes.

LEGAL FRAMEWORK TO CURB SEXUAL EXPLOITATION AND HUMAN TRAFFICKING

India being one of the largest and diverse democratic- republic country in the world has Constitution of India which on a straight note prohibits human exploitation under Article 14, 19 and 21. One is free and has the right be protected against exploitation and remedy to prevent and penalize any exploitative acts. These rights are guaranteed by our Fundamental rights Part IV, and several other legal statutes. The rights against exploitation are available under Article 23 of Constitution of India. Human trafficking and its other forms is prohibited and punished, such as begar or forced labour (bandhua mazdoori) and in case of violation it is backed by sanction according to the laws of the land such as under Chapter 12 of the Indian Penal Code, 1860- under sections 366A, 366B, 370A deals with punishing for offences of procreation of minor girl, importation of girl from foreign for sex and exploitation of a trafficked person respectively. Thus under IPC laws related to prostitution is quite limited. India adopted the Convention of the Suppression of the Traffic in Person and the Exploitation of the Prostitution of Others of 1949. Our country claims to apply this remarkable treaty with the domestic legal system of our country through the Suppression of Immoral Traffic in Women and Girls Act (SITA) of 1956. This was afterward amended and known as the Immoral Traffic Prevention Act of 1956.

Immoral Traffic Prevention Act 1956

Immoral Traffic Prevention Act 1956 basically explains that it doesn't find Prostitution or prostitutes an illegal act and even our country laws legalize it, but ITPA 1956, but targets the third person who eases brothel-keeping, snatching away the earning of prostitutes or forcefully putting any girl who is not willing to work as a prostitute, if we see the main reason of the Act reflects the idea that a person should not be exploited and the basic human rights of a person should not be taken away. Those who are into this work should be purely put by their own will we cannot force the person to be there and work, the basic rights of a human should always be taken care of. If we look at the broader aspect and according to our Indian laws Prostitution or prostitutes are not considered illegal, but there are a number of activities that are considered as

illegal and these activities are punishable too. These activities are the part of this prostitution only or for better understanding we can say carrying Prostitution is a bigger picture and there are many illegal and immoral work attached to it. Activities like asking to carry out or practice prostitution at public places, pimping, carrying out prostitution business in Hotel, filming it (pornography) forcing a juvenile into it, owing or managing brothel, indulge in prostitution by arranging sex worker and many other.

The Immoral Traffic (Prevention) Act, 1956 defines 'prostitution' under Sec 2(f) as "the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind" The definition of 'prostitute' is also construed accordingly under Section 2(e).

The Act also laid out differentiation between a 'Girl' and 'Woman' for the purpose of definition. According to Sec 2 (b), a "girl" means a female who has not completed the age of twenty-one years, while a "woman" means a female who has completed the age of twenty-one years as per Sec 2(j).

This law basically states that prostitutes are allowed to carry out their trade but they cannot practice it publicly, in accordance with the Act if any of the clients are found to carry out any activity in public he is guilty of the offense and be penalized. The Act also states a woman cannot carry out any such business within 200 yards of a residential, public place. Sex workers cannot be put in the line of laborers and they cannot be governed under that, or as working professionals but they have equal rights to enjoy and they can also take assistance in case they want some rehabilitation or rescued as they are part of very own country which guarantee them all the equal rights. The Immoral Traffic Prevention Act 1986 is the amendment of the original Act. It also states that if any of the sex workers found out for seeking out money or seducing and also not allow to publically share their contact details, in that case, they can be punished for 6 months and other penalties can also be put over them.

LEGALIZATION OF PROSTITUTION

There are two different opinions regarding prostitution. There are many countries which have legalised prostitution, some countries have legalised it with some restrictions and others have criminalised it. Legalizing Prostitution can bring both positive and negative changes in India. The positive changes that can be brought about are increasing access to justice to the victims. Middle men exploit the prostitutes, prevent help from the police because of the lack of

documentation. Licensing of brothels would allow id cards registered with their documentation with the government. Health clearance and checking the spread of HIV– The spread of HIV would decrease with the help of proper monthly health inspections of the sex workers and making the use of protection (condoms or pills) mandatory, to prevent the spread of Sexually Transmitted Diseases (STDs). Regularization of wages and working conditions– Providing a certain fixed wage per customer as well as providing the sex workers with good and hygienic working conditions would be beneficial for their health and well-being.

People in favour of legalisation of prostitution believe that, in calling for legalization or decriminalization of prostitution, they dignify and professionalize the women in prostitution. But dignifying prostitution as work doesn't dignify the women, it simply dignifies the sex industry.

People who favour legalization/decriminalization of prostitution argue that decriminalization does not control the sex industry. It expands it. The rebuttal to this argument is that as prostitution has become a massive industry in itself, which has been transformed into "sex work," and people who engage into entrepreneurs, further trafficking is now being coined as "voluntary migration for sex work." Looking to the future, we see targeting poor women for the international sex trade to remedy the inadequacies of the free market of "sexual services." Prostitution is thus normalized as an "option for the poor." Legalization of prostitution in the State of Victoria, Australia, resulted in massive expansion of the sex industry. Along with legalization of prostitution, other forms of sexual exploitation, such as tabletop dancing, bondage and discipline centers, peep shows, phone sex, and pornography, have all developed in much more profitable ways than before legalization (Sullivan & Jeffreys, 2001). Prostitution has become an integral part of the tourism and casino boom in Victoria with government-sponsored casinos authorizing the redeeming of casino chips at local brothels (Sullivan & Jeffreys, 2001). A range of state-sponsored prostitution systems exist in Austria, Denmark, Germany, the Netherlands and Switzerland. It seems likely that European statesponsored prostitution countries serve as magnets and, ultimately, as conduits through which significant numbers of women are trafficked to other European nations. Europe has a high density of women trafficked per square mile compared to North America, for example. Given the porousness of national borders facilitated by the Schengen agreement (2), it is not surprising that high numbers of trafficked women are also present in other European countries that do not have legalized or decriminalized systems of prostitution. Although accurate numbers of women

trafficked are difficult to obtain, the International Organization of Migration (IOM) has estimated that 500,000 women and children are trafficked in Europe annually (IOM, 1998). In contrast, it has been estimated that 45,000- 50,000 women and children are trafficked annually into the United States.⁹

In two studies in which 186 victims of commercial sexual exploitation were interviewed, women consistently indicated that prostitution establishments did little to protect them, regardless of whether the establishments were legal or illegal. One woman said, “The only time they protect anyone is to protect the customers”¹⁰

One of these studies interviewed 146 victims of trafficking in 5 countries. Eighty percent of the women interviewed had suffered physical violence from pimps and buyers and endured similar and multiple health effects from the violence and sexual exploitation, regardless of whether the women were trafficked internationally or were in local prostitution. A second study of women trafficked for prostitution in the United States yielded the following statements. Women who reported that sex businesses gave them some protection qualified it by pointing out that no “protector” was ever in the room with them. One woman who was in out-call prostitution stated: “The driver functioned as a bodyguard. You’re supposed to call when you get in, to ascertain that everything was OK. But they are not standing outside the door while you’re in there, so anything could happen. In brothels that have surveillance cameras, the function of cameras was to protect the buyer and the brothel rather than the women, with one brothel putting in cameras after a buyer died. Protection of the women from abuse was of secondary or no importance.”¹¹

Another argument presented by those in favour of legalisation is that Legalization/decriminalization of prostitution will decrease the demand for prostitution. Whereas, it has been seen that it encourages men to buy women for sex in a wider and more permissible range of socially acceptable settings. With the advent of legalization in countries that have decriminalized the sex industry, many men who previously would not have risked buying women for sex now see prostitution as acceptable. When legal barriers disappear, so do the social and ethical barriers on treating women as sexual merchandise. Legalization of

⁹ <https://catwinternational.org/wp-content/uploads/2019/09/Ten-Reasons-for-NOT-Legalizing-Prostitution.pdf>

¹⁰ Raymond, Hughes & Gomez, 2001; Raymond, d’Cunha, Ruhaini Dzuhayatin, Hynes & Santos, 2002).

¹¹ (Raymond Hughes & Gomez, 2001; Raymond, d’Cunha, Ruhaini Dzuhayatin, Hynes & Santos, 2002)., 2001, p. 74).

prostitution sends the message to new generations of men and boys that women and children are sexual commodities and that prostitution is harmless fun.

The widespread availability of prostitution (and pedophilia) tourism creates a buyers' market, ultimately permits exploiters to use their socioeconomic advantages to purchase sexual services in states where women and children are the least protected and are more vulnerable, This further leads to depreciation in bargaining power of women in systems of prostitution.

It is worth noting that globally we see that advanced economies have criminalized consensual prostitution which directs economically privileged persons of such countries to exploit woman and children belonging to less developed countries and often such exploitative acts are relatively less-consensual.

Thus, leading to growth of prostitution tourism.

Strictly speaking from point of view of one's right to opt for this as a profession in a developing country like India, where women and children are yet to have complete access to economic, political and social justice and also it has been observed that prostitution as an Industry is essentially a big part of globalized capitalist economy, guaranteeing one's right to sell and one's right to buy seems to be a far-fetched idea as the buyer is generally privileged and the seller is in the profession either out of necessity or because of making an easier choice as other avenues were closed or not accessible. Thus, adding to unequal bargaining power between the two, which recognizes that prostitution is less a consensual economic transaction and more the abuse of a person's vulnerabilities

PRESENT SITUATION

We cannot deny the fact that prostitution also has its nexus with trafficking in modern-day situations. It is observed that sexual exploitation and trafficking is done within the country and internationally too. The main destination are the countries that are underdeveloped like Bangladesh, Nepal, including India. It is also estimated that each year 2 lakhs Nepali girls under the age of 16 are put into prostitution. The Ministry of Women and Child development conducted a survey and found out that about 3 million prostitutes 40% amongst them are young girls and even the customers demand young girls have sex this survey was conducted in the year 2015 and the situation got worsened after that. Day by day such cases are increasing of

buying and selling of girls and putting them into prostitution. In recent times according to survey conduction in the year 2020 number of human trafficking cases has increased and Maharashtra being at number one, over 900 and thousands of victims of human trafficking.¹²

WHAT CAN BE DONE?

In the present scenario ensuring safety of women and children from getting sexually exploited and trafficked is a benediction for legislative, administrative and public policy reforms. Honourable Orissa High Court opined that "Girl trafficking is more heinous than drug trafficking" lawmakers have missed the opportunity or we can say didn't pay much attention that trafficking can be as serious as drugs trafficking, as human trafficking attracts a maximum punishment of 3 years while on the other side drug trafficking attracts punishment which is up to 10 years of imprisonment, the court while continuing also delivers that all the one who is involved in the trafficking of women and children are equally punishable as the one who is running this racket. Their involvement in assisting them is as heinous as if they are running a racket of their own. So no mercy or leniency should be shown to them as well, they are actually forcing girls, women into prostitution by making their fraud, coercion and by putting them into this they are receiving the hefty amount from the one who is running the racket at a large level.¹³

Geeta Kancha Tamang v. State of Maharashtra¹⁴ The case is related to the release of a woman who used to run a brothel. In this case, mercy petition of a woman was denied because the crime which she has committed of trafficking is heinous and dangerous in itself and the second reason as per the Honourable Court the brothel was still operational. Trafficking is itself prohibited under Article 23 of the Indian Constitution. As she is running a brothel as her business also involves detaining children incapable of understanding the consequences of the profession involved.

In a landmark judgement, the Calcutta High Court recently ordered that a sex worker, who is exploited for commercial sex practices, should not be charged as accused for the offences under The Immoral Traffic (Prevention) Act, 1956 until and unless cogent evidences are found against her as a co-conspirator. The court held that sex workers are victims of crime and should be provided with all remedial measures available under the law including witness protection

¹² <https://www.statista.com/statistics/633086/reported-human-trafficking-cases-by-state-india/>

¹³ <https://lawsisto.com/legalnewsread/NjMxMA==/GIRL-TRAFFICKING-MORE-HEINOUS-OFFENCE-THAN-DRUG-TRAFFICKING-ORISSA-HC>

¹⁴ <https://indiankanoon.org/doc/1909783/>

programme, grant of interim compensation and/or rehabilitative measures and protective custody.¹⁵

To counter such exploitations, a dynamic policy with effective framework and reformation of laws are required. This can start by forming two different laws for the trafficking of children and adult persons. This might ensure that consenting adults are not criminalised necessarily as it adds to their misery apart from the social stigma and poor treatment at the behest of society and children are given justice. Further, sex work-related activities should be dealt in a strict manner simultaneously ensuring empathy towards those who are dragged into this profession. Policies made for the welfare of sex workers and to prevent their exploitation should include strengthening of National Human Rights Instrument (NHRI) and increasing its accountability and transparency. NHRI should be provided with the power to initiate suo motu actions against the guilty for violating the rights of sex workers. Free trained legal aid should be provided to sex workers. Another major policy reform which must be taken is to implement the Supreme Court's recommendations to issue identity documents and ration cards to sex workers at national, state, district and sub-district levels. Implementing these recommendations will provide sex workers with identity and will work as their accounting factor by the government in its policymaking. It is high time the sex worker's exploitation is brought to the forefront so as to reform laws and policies on it. As it is, only through laws and policies that substantive measures can be taken because, after all, law is a medium to control and regulate the behaviour of the people in a society.

It is crucially important that how cases related to prostitution are dealt depending upon facts and circumstances and thus, criminalizing or decriminalizing prostitution is not really a solution to the problem as a straight jacket formula based law reforms would lead to either allowing an industry to flourish upon exploitation of those involved or forced into or leading to criminalizing those who are innocent and are forced into this industry and are now trapped with no way back home with law agencies being given a device to further harass them. Balancing of interests of those who are victims, who consensually opt and the society as a whole is needed.

¹⁵ <https://www.deccanherald.com/opinion/in-perspective/enforce-court-orders-on-sex-workers-763278.html>