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Socio-legal Analysis of Prostitution in India

Reetika Raj Tiwari^a

^aIGNOU, Delhi, India

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Prostitution is an occupation in which individuals participate in sexual activity for business reasons. Prostitution has a long history in India perfect from This paper critically analyses and evaluates the laws related to prostitution and human trafficking along with its latest amendments. The researcher through this also highlights the living condition and hardships faced by the prostitutes, along with the societal boycott and the label of being accused instead of the victim. The main theme of this paper is that its highlights the role of the judiciary in terms of access to justice for the prostitutes with equal emphasis on the policy failure by the government for the prostitutes. Finally, this paper gives different therapeutic measures including lawful to adjustment in mentality and frame of mind through which a change can be acquired in the lives of ladies occupied with prostitution and they additionally get appropriate access to justice and honourable lives.

Keywords: *prostitution in India, constitution, human trafficking, access to justice.*

INTRODUCTION

Prostitution and Human Trafficking, although are different from each other but have got an internal proportion between them. In legal terms, they may differ with the aspect of definition and procedure but in the background, they should be taken into the same consideration.

Prostitution, according to legal definition¹² means “the practice or occupation of engaging in sexual activity with someone for payment.” It is the oldest occupation³. It is seen as a crime, a taboo. The prostitutes are boycotted and live as an outcast. They have practically no legal rights available to them directly in modern times and can often be termed as modern slaves.

Human Trafficking suggests the development or routine concerning improperly transporting people beginning with one country or domain then onto the following, generally for the explanations behind compelled work or business sexual abuse. 'Prostitution' according to the Immoral Traffic (Prevention) Act, 1956, suggests the sexual abuse or abuse of individuals for business purposes, and the explanation "prostitute" will be deciphered in like manner; It can be summarized as; a female offers herself for sexual activity for exchange of money or goods as consideration; It can be summarized as; a female offers herself for sexual activity for exchange of money or goods as consideration⁴.

'Brothel' as indicated by the Immoral Traffic (Prevention) Act 1956, incorporates any house, room, or place, which is utilized for purposes for having sex in exchange. One needs to comprehend that there exists an immediate proportionality between these two inhumane wrongdoings as the two offers ascend to each other⁵. The new Human Trafficking Bill passed in 2018 has various strict provisions of punishment from 10 years imprisonment to life term for the crimes of trafficking of human for commercial activity, for bonded labour, bearing a child, etc. This is regarded as a borderless crime with issues of jurisdiction coming up at the time of the investigation.

CAUSES

1. **Poverty and Unemployment:**
2. **Government policies and Practises**

¹ 'Definition of Prostitution' (*Oxford dictionary*) <<https://en.oxforddictionaries.com/definition/prostitution>> accessed 23 March 2021

² Immoral Traffic (Prevention) Act 1956, s 2(10)

³ *Rescue Foundation v SSP & Others* (2018) SCC 6753

⁴ Traffic Act (n 2)

⁵ Immoral Traffic (Prevention) Act 1956, s 2A

3. Ignorance

FORMS

1. Sexual Exploitation
2. Forced labour
3. Domestic Servitude
4. Organ harvesting
5. Child Soldier

CONSEQUENCES

1. **Physical and Health Problems:**
2. **Legal Consequences**
3. **Psychological Disorder**
4. **Social Stigma and Sociological Problems**
5. **Global Consequences**

LAWS FOR PROSTITUTION: A SOCIO-ECONOMIC-LEGAL ANALYSIS

As there is a large number of Prostitutes in India the Apex Court suggested and also proposed the legalization of prostitution⁶. **Section 372 and 373 of Indian Penal Code**⁷ also deals with the act of prostitution where buying and selling minor is made punishable.

Article 14 in Indian Constitution⁸ - Equality before law - The privilege of the prostitutes are not perceived and they are not treated as equivalent in the general public might be a result of the work or calling they are into, yet shouldn't something be said about those ladies who have gone into this calling because of powerlessness and neediness.

Article 15 and Prostitution:

⁶ PTI, 'Supreme Court proposes legalising prostitution' (*LiveMint*, 10 Dec 2009)
< <https://www.livemint.com/Politics/1F4DWYUTdopzL2pwV8IhoK/Supreme-Court-proposes-legalising-prostitution.html> > accessed 24 May 2021

⁷ SN Mishra, *Indian Penal Code* (21st edn, Central Law Publications, 1 August 2018)

⁸ DD Basu, *Introduction To The Constitution Of India* (21st edn, Lexis Nexis 2013)

In spite of the fact that prostitutes don't approach open space and are segregated all over the place however by law, they also have appropriate to get to them. Article 15 (3) likewise expresses that the state can make unique arrangement for lady and kids

Article 16(1) and Prostitution:

This privilege is likewise accessible to the lady occupied with substance exchange. Their past dependably frequents them and consequently denied them the equivalent chance. Ladies occupied with prostitution are caught socially and financially. The social shame doesn't let so that they will be unfit to leave this.

Article 19(1) (g) and Prostitution:

A lady can be in substance exchange (which is because of monetary condition), in the same way, others take part in any calling by utilizing their own insight, scholarly limit, and individual physical body through securing moral qualities which have been told in the laws⁹.

Article 21 and Prostitution:

Prostitutes also hold rights to privacy. Any person who will curtail privacy rights and without her permission if does any videographers or photograph of such act which he is not supposed to do then he is punishable under law.

Right to dignity: dignity has always been the dream of every prostitute that is because of the nature of the work they do, the society like India where sex is the word of four walls has never accepted this profession, and will never do. The women who are sex workers also have dignity and they have a right to live with dignity, like any other person of any profession.

Right against exploitation: No person can force a woman to enter this profession against her will. If a woman of such profession is touched or forced to do any act for which she has not agreed or any person who runs the brothel illegally if exploit such women for the purpose of commercial benefit then it is against article 21.

⁹ *Ibid*

Article 23 and Prostitution

Article 23 prohibits all forms of human trafficking and forced labour. But this right is not enjoyed by many vulnerable groups of societies. Every year millions of women are pushed into human trafficking and are later exploited as prostitutes, organ trade, forced bonded labour, and others.

Article 38 states that the state should promote harmony among its people¹⁰.

Article 39 (a) talks about legal aid¹¹. It is to provide creation of free legal aid service at national, state and district and This led to the creation of Legal Service Authorities act 1987.¹²

A consequential approach to access to justice

“Access to justice” is a principle of justice that is seen as universal and it demands preferential treatment for the people coming from the underprivileged sections in order to check the imbalance in the society. The true motive of justice will only be achieved only when people of all the section will have the equal access to the justice and in this regard role of society and judiciary is equally important as the legislature^{13,14}.

ROLE OF JUDICIARY IN HUMAN TRAFFICKING OF WOMAN

The Judiciary has always played a big role in providing justice to the victims of human trafficking. The apex court recommended various measures to eliminate victims of prostitution and the introduction of various welfare programs for proper care, protection, development, and rehabilitation of young girls working in brothels or who have fallen into the trap of prostitution. Also, the apex court issued major directives that the rehabilitation homes

¹⁰ *Ibid*

¹¹ Suchitra Yadav, 'Issues in implementation of free legal aid schemes - Critical Analysis of Article 39A of the Constitution of India' (*Ipleaders Blogs*, 9 August 2018) <<https://blog.ipleaders.in/article-39a/>> accessed 25 May 2021

¹² Legal Service Authorities Act 1987

¹³ Y Srinivasa Rao, 'Law and Social Change In India' (*Legal Service India.com*) <<http://www.legalservicesindia.com/article/1592/Law-and-Social-Change-in-India.html>> accessed 26 May 2021

¹⁴ Arindam Dutta, 'Legal Aid In India' (*Legal Service India.com*) <<http://www.legalserviceindia.com/article/1206-Legal-Aid.html>> accessed 26 May 2021

need to be managed by trained and qualified workers, doctors, and psychiatrists and gave instructions to state these trafficking victims for rehabilitation¹⁵. The Apex Court went on to set up a panel in 2011 and also directed the police authorities that they must not interfere, arrested, penalised, or take up criminal action against adult sex workers voluntarily participating in sexual activities with “Consent”¹⁶¹⁷. The judiciary has also recognised the fundamental rights of sex workers and held that even a prostitute has the fundamental right as well as moral and social rights and she is at her liberty to permit a person for sexual intercourse¹⁸.

The Supreme Court has issued directions to the state government for the establishment of rehabilitation homes for children found begging in the streets, as well as for the minor girls forced into 'flesh trade' into protective homes. Quick examination and extreme discipline for every one of those profiting by the prostitution of others should be the top needs of the state, and particularly of the legal executive, for accomplishing the long haul objective of the destruction of prostitution¹⁹. This judgment is only one of numerous that strengthen the reality of the Supreme Court's inability to address the brutality intrinsic in prostitution in India, in opposition to its notoriety for being an extremist legal executive. The Supreme Court has to a great extent overlooked the violations submitted against the casualties of dealing, in this manner remains an observer of the administration's accentuation on rebuffing exploited people, sex labourers, for their work, without researching the conditions under which they have been compelled to embrace that calling. The profound preference and oppressive frame of mind of the judges against casualties of prostitution have incited them to assume an aloof job.²⁰ SC Cancels Bail Granted To Woman Accused Of Forcing Girls Into Prostitution²¹.

¹⁵ *Vishal Jeet v Union Of India* (1990) SCR (2) 861

¹⁶ *Sushil v State of UP* WP No 25292 of 1997

¹⁷ A Mandhani, 'Adult sex workers "participating with consent" should not be arrested: SC panel' (*Livelaw*, 16 February 2016) <<https://www.livelaw.in/adult-sex-workers-participating-with-consent-should-not-be-arrested-sc-panel/>> accessed 27 May 2021

¹⁸ *Ram prakash v State of UP* Criminal Miscellaneous Application No 3725 Of 2003

¹⁹ Mandhani (n 17)

²⁰ *Gaurav Jain v Union* (1997) SCC 745

POLICY FAILURE

1. Government inaction and absence of thought to the issue may encourage trafficking; few dishonest government authorities may enjoy trafficking which is extremely dishonourable for their benefit by the means of corruption. Existing guidelines are obsolete and henceforth are incapable of taking care of the issue, battling this wrongdoing needs a guideline, checking, examination, and indictment with steady participation with partners in different nations. Numerous administrations have not executed national arrangements that facilitate crafted by different branches that manage to deal, including law authorization offices.
2. Nonetheless, human trafficking keeps on infesting the world because of the continuous capacity of exploiters to produce significant benefits at no genuine risk through the misuse of a worldwide sub-class of devastated and helpless individuals. To start with, the issue stays buried in definitional disarray regarding whether human dealing is bondage or the way toward entering a person into a state of servitude. The term indicates development and was arranged in a trans-national composed wrongdoing instrument. Nonetheless, strategy pioneers place that the development of the injured individual isn't applicable to the offense, simply the slave-like abuse. Obviously, on the off chance that one can't be sure about what the offense is, it tends to challenge address it.
3. One can find this in the latest bill regarding human trafficking²². It utilizes obscure language, leaving space for abuse and misuse. Another worry is that while the Bill gives insusceptibility or immunity to exploited people to wrongdoings perpetrated under pressure or risk of death by the hands of the trafficker, but this invulnerability reaches out to just those violations that are culpable with imprisonment of 10 years or more, or death sentence. Hence, immunity can't be asserted for insignificant offenses despite the fact that submitted under compulsion by the dealer. Further, the burden of proof that the offense was submitted under pressure or any sort of risk is on the victim rather than the accused.

²¹ Ashoke KM, 'SC Cancels Bail Granted to Woman Accused of Forcing Girls into Prostitution' (*Livelaw*, 18 December 2017) <<https://www.livelaw.in/sc-cancels-bail-granted-woman-accused-forcing-girls-prostitution-read-order/>> accessed 28 May 2021

²² PTI (n 6)

These two things defeat the basic purpose of the bill. Moreover, although the Bill has the provision of strict laws and punishment it does have few legal terms such as 'aggravated' which invites ambiguity. If the woman is trafficked for the purpose of bonded labour, forced marriage, begging, bearing a child, then it is categorised under this said term, but at the same time, its literal meaning also suggests that this term includes other forms of offences related to trafficking, but here it leaves out trafficking for sexual slavery, exploitation, and others outside its ambit. The last types of dealing are similarly indefensible, and this partition may prompt increasingly remiss arraignment with regards to these offenses. Thus this loophole gives rise to further protection of the accused due to ambiguity of the law²³²⁴.

4. National Human Rights Commission, a constitutional body just has a recommendatory role while dealing with such matters. Its independence in the working is not properly utilised and their investigation is not taken into proper cognizance due to various reasons such as corruption, improper administration, clashes of ego between NHRC with other investigation agencies.
5. Absence of authentic data - In the past, the anti-trafficking movements have suffered a loss due to the absence of proper authentic and reliable data. This has prompted to lost believability and credibility and trustworthiness with policy makers and people making a donation in terms of authorisation required resources and funds.
6. Lacks of assets, resources spend on these issues - This is also another big reason why these activities do not come down. In February 2018, the Union Cabinet, led by the head administrator, affirmed the Trafficking in Persons (Prevention, Protection, and Rehabilitation) Bill for presentation in the Parliament. The bill will make a national enemy of dealing department conform to a December 2015 Supreme Court order to set up an investigative agency for the crimes related to human trafficking. The production of such an office was pending the entry of the counter dealing bill, in spite of the fact that the Ministry

²³ Admin, 'The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018' (*PRS Legislative Research*) <<https://www.prsindia.org/billtrack/trafficking-persons-prevention-protection-and-rehabilitation-bill-2018>> accessed 29 May 2021

²⁴Siddharth Kara, '3 Ways Our Anti-Trafficking Efforts Fail' (*Impacting Our Future*) <<http://www.impactingourfuture.com/advocacy/3-ways-our-anti-trafficking-efforts-fail>> accessed 29 May 2021

of Women and Child Development (MWCD) had distributed 832 million Indian rupees (INR) (\$13.1 million) to the Ministry of Home Affairs (MHA) for the organization, however, did allot Rs 4, 04,365 crores (US \$62.8 billion) for the Ministry of Defence (MoD). This reflects the attention of the States and the government in dealing with serious matters²⁵. Undoubtedly, no wrongdoing is more disagreeable than depriving of human respect for benefit. This is the quintessence of human dealing, and its destruction is long late.

7. Lack of legal protection to the victims, low conviction and high acquittal rates is also a reason why the polices of government fail to achieve its truest purpose. The 2016 report likewise included IPC section 367 in its amassed trafficking information in spite of this section covering wrongdoings more extensive than dealing; the government did not report on the off chance that it had dis-aggregated non-trafficking violations from the information. In 2016, police researched 5,217 dealing cases and the legislature finished the prosecution of 587 cases. Courts convicted traffickers in 163 cases and absolved people in 424 cases. The vindication rate for trafficking cases expanded from 65 percent in 2015 to 72 percent in 2016. The NCRB too excluded the bonded labour work from overall trafficking cases. In spite of the general increment in trafficking cases announced by the NCRB, NGOs kept on remarking the figures did not mirror the huge size of human trafficking violations in India, the same number of cases were not enlisted by police or were settled outside the court.

RECOMMENDATION

1. Rehabilitation, compensation, and Means of Survival

- Once “rescued”, the victims are to be produced before the magistrate and thereafter sent to Protection Homes or Rehabilitation Homes. If the victim cannot be repatriated, the rehabilitation process provided for in the Bill comes to an end at this point. However, unless there is targeted economic empowerment and skill building of rescued

²⁵ Laxman K Behera, ‘Defence Budget 2018-19: The Imperative of Controlling Manpower Cost’ (*IDSA Network*, 2 February 2018) <<https://idsa.in/issuebrief/defence-budget-2018-19-controlling-manpower-cost-lkbehera-020218>> accessed 30 May 2021

victims, victims will be forced to go back into their previous profession. In India, under their anti-trafficking laws, various NGOs have taken initiative to rehabilitate the victims of human trafficking.

- Rehabilitating doesn't mean providing them protection home to the victim but also providing them livelihood, compensation, and free service to health care facilities through which they can cure their sexually transmitted diseases. In India, most of the state's government has started compensation policies but lack of proper administration has led to failure. A proper political will is required as India is the home of one of the biggest populations of total Human trafficking victims.²⁶

2. Change in the mindset of the people.

- As stated by many jurists that no law can ever succeed if it doesn't enjoy the popular support of the people. To provide actual justice to the victim the society needs to change its mindset first.
- Due to social stigma and non-acceptance, most of the victims tend to return back to prostitution so not only the government but the society too need to broaden their horizon and accept them as vulnerable victims rather than criminals²⁷.

3. Legalization of prostitution: legal and Economic Benefits

- This step will reduce human trafficking by a big margin and will also control the sex industry. The biggest change will be that the entire regulatory machinery will come under the control of the government and the woman engaged will receive the direct benefits of the entire government scheme related to healthcare, Labour laws, working condition, monetary compensation.

²⁶ Teresa Cantero, 'India has a Trafficking problem and it is worse than you think' (*All That Interesting*, 17 September 2015) <<https://allthatsinteresting.com/human-trafficking-india>> accessed 01 June 2021

²⁷ Shraddha Chaudhary, 'Band-Aid On A Septic Wound: The Anti-Trafficking Bill' (*Law School Policy Review*, February 2018) <<https://lawschoolpolicyreview.com/2018/08/10/band-aid-on-a-septic-wound-a-comment-on-the-anti-trafficking-bill-2018/>> accessed 01 June 2021

- Health care is a big issue and due to social stigma, the prostitutes do not have access to better healthcare facilities, which at present is absent due to lack of political will, policy failure of the legislature, and unacceptability of society.
- Recognizing prostitution as a financial action, therefore empowering ladies in India to acquire working licenses as "sex laborers". This will go under the arrangement of the lowest pay permitted by law and will have better access to protection and laws.
- Our nation will be enormously profited by authorizing the act of prostitution in India. Above all else, it will help in diminishing human dealing. Thousands of Nepalese young ladies are being dealt with in India and sold into the states of implied bondage²⁸. So as to comprehend that how human dealing could be decreased by sanctioning prostitution, we should take the case of Germany. In Germany, the instances of human dealing fundamentally decreased by 10% amid the time of 2001 to 2011, after they have authorized prostitution.
- Legitimization of prostitution will likewise help in bringing the sex business leveled out. It will help in offering poise to the ladies occupied with this calling and will spare them from living as second-grade natives with illness and no entrance to open areas. It will likewise guarantee security conditions for their kin since sex specialists will be required to experience therapeutic tests and get sufficient medicinal consideration.²⁹³⁰

CONCLUSION

Law is a tool of social change. Law will never be successful until it is accepted by the public at large. Not only the legislature but the people also need welcome acceptance. Without creating financially backed policy for the social upliftment of the castes and communities vulnerable to trafficking, without generating economic opportunities to address large-scale poverty that

²⁸ 'Rape for Profit: Trafficking of Nepali Girls and Women to India's brothels' (1995) 12(5A) Human Rights Watch Report

²⁹ Abdullah, 'Should we legalise Prostitution' (*Livelaw*, 21 December 2016) <<https://www.livelaw.in/sex-workers-legalise/>> accessed 03 June 2021

³⁰ Kristie Trifiolis, 'Legalizing Prostitution: An Introduction' [2014] Seaton Hall Review

drives the supply for trafficking, and without a comprehensive approach to the connected issues of pornography, prostitution, bonded labour, and trafficking, this “law to prevent the trafficking of persons” can be little more than a band-aid on a septic wound.