

Legal Status of Sex Work in India

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Abstract:

Sex work in India is a complex and a multifaceted perplexity, characterised by ambiguities, inconsistencies and challenges that affect the lives of sex workers. Sex work can be defined as the business or practice of engaging in sexual activity in exchange of payment. Sex work is also described as prostitution, sexual services, commercial sex, whore etc. Sex work is considered as the oldest professions in the world. In India, there are number of women on the streets of India who do these kinds of their livelihood to earn their money. They turn to this profession only because they have no other skills and are not literate to get a job. In India, sex work is legal but there is no express provision stating its legality but trafficking is illegal. Millions of people generate income from sexual transactions around the world, including the United States. It is impossible to count them, given the social stigma and criminal sanctions against sex work. In most countries, the majority of sex workers are female, and the majority of their clients are male. But people of all genders are involved in sex work and are vulnerable to police abuse.

This research paper will discuss the Sex work in India and also through light on various laws prevail in India related to sex work in detail.

Keywords: Sex work, Laws, Human Trafficking, Sex workers.

INTRODUCTION

Sex work can be defined as the exchange of sexual services, for the monetary compensation. It includes the activities of direct physical contact between buyer and sellers as well as indirect sexual stimulation. The phrase "sex worker" was first used in 1978 by Californian sex workers campaigner Carol Leigh.

Prostitution or sex work holds significant historical presence dating back to ancient times till today's period. Devadasi system existed in the past, and its common practice among Hindu's who donate their girl child for the object of worshipping God and dancing at temples. In this way, innocent female lost their guardians and mistreated by the Priests. These practices existed during the British era, when outsiders curtailed various textile industries, armament, forcing these populations to turn prostitution for a living.¹ Most of the people in this profession are from economically disadvantaged background and it has been seen that affluent people take advantage from their condition and profiting from their misery and vulnerability through criminal networks, notably with illusion involving law enforcement. The act is an outcome of sex delinquency and the person involved in such work is considered as sex

¹ HISTORY OF PROSTITUTION AND TRAFFICKING LAWS. Retrieved from https://shodhganga.inflibnet.ac.in/bitstream/10603/124050/8/08_chapter%202.pdf. (2024, September 20).

work. Although, prostitution (exchanging sex for money) is not illegal, but the relating activities such as operating brothels, pimping, soliciting sex etc, are illegal.

OBJECTIVES

- To trace the prostitution status in India and analyse the real scenario.
- To trace the legal framework of prostitution in our country India.

METHODOLOGY

The research adopts a doctrinal approach, analysing case laws and judicial interpretations. Data is collected from legal data base, supreme court judgements, court records and academic publications.

PROSTITUTION: WHETHER LEGAL IN INDIA

As per the legal provisions mentioned under Indian Penal Code,1860 it has been noted that sex work itself is not an illegal act. However, it is very important to consider various activities associated with sex workers such as operation of brothel, trafficking, pimping, are considered as punishable offence in India and as stipulated by Immoral Traffic Act of 1956. The Immoral Traffic (prevention) Act is also known as The Prevention of immoral Trafficking Act.

I. THE IMMORAL TRAFFIC (PREVENTION) ACT OR ITPA.,1956

In 1956, the Indian Government has passed The Immoral Traffic (Suppression) Act (SITA), under this Act prostitution can be legally done but soliciting of people and luring them into sexual activities is illegal. Prostitution as mentioned in the Immoral Traffic (Prevention) Act,1956 means the sexual exploitation or abuse of persons for commercial purposes.² It is also not an offense under the Bharatiya Nyaya Sanhita. Even though it is said that sex work is legal, running a brothel is not legal. It is contradicting to the whole concept of prostitution. As they cannot set up a brothel, they end up meeting their clients in a hotel. The police often conduct raids in such hotels and take them into custody along with their clients. They mostly end up being arrested stating that what they did was illegal. But in fact, is legal. One thing the act expects the prostitutes to do is to stay away from the public eye.

The important sections under THE IMMORAL TRAFFIC(PREVENTION) ACT, 1956 are discussed below.

- **Section-3** of the act prescribes a punishment for keeping a brothel or allowing premises to be used as a brothel. 'Brothel' has been defined in section 2(a) of the act which states that it can be any house, room or place which is used for prostitution.
- **Section-4** of the act penalises any person who is living on the earnings of prostitution. This section does not even exclude the family members.
- **Section-5** of the act penalises the procuring, inducing or taking person for the sake of prostitution. This section targets the pimps, brothel owners and traffickers.

² Immoral Traffic Prevention Act,1956.

- **Section-6** of the act penalises the people who detains a sex worker in the brothel or any premises where prostitution is carried on. This section specifically targets the middle men and the brothel owners.
- **Section-7** of the act penalises the prostitution when it is carried out in or in the vicinity of public places. Public places include any densely populated area, hostel, public religious worship, educational institution, hospital, nursing home or any other place which is notified by Commissioner of police, Magistrate and the state government. Vicinity refers to as two hundred meters.
- **Section-8** of the act penalises the sex worker for seducing or soliciting a person for purpose of prostitution. According to this section a sex worker cannot do any gestures to invite someone for the purpose of prostitution. This section is discriminatory as it prescribes different punishment for the same offence to the man, as the punishment is half of what is prescribed for the female.³

ii. The Constitution of India

- It prohibits trafficking in human beings, beggars and other similar forms of forced labour under **Article 23(1)** and any contravention of this provision shall be an offense punishable in accordance with the law under **Article 23(2)**.
- Prostitution or sex workers are not banned or punishable by this Act but surrounding activities are made punishable in this act. All the third parties involved in this profession are made punishable, making it difficult for the sex workers to carry out prostitution. In my opinion it is in direct violation of **Article 19 and Article 14 of the Constitution of India** as this Act.
- purposefully makes it difficult for the sex workers to carry out their profession without the fear of being caught.⁴
- The ITPA instead of checking on immoral trafficking of humans seems to be more focussed on eliminating prostitution. Putting such laws has only made the life of sex workers difficult, vulnerable and dangerous. This is absolutely a wrong way of tackling this profession, instead of making their life easy, the government has done exactly the opposite. No country has been able to stop prostitution with legislations.
- For a moment just imagine a situation where a sex worker is looking for a client without such restricting laws. She can talk with the client in open without any fear of being caught by police. Here, the woman is safe and free to approach the police if something goes wrong, be it forceful act by the client or not paying the professional fees to her.
- But now come to the reality where laws are restricting. Here, the system has instilled the fear of punishments in the clients by making such laws. The clients instead of meeting the sex-worker in an open or public place prefer to meet at a dark and alone place to avoid the police. It is very easy for the client to commit a crime in such circumstances.

³ Immoral Traffic Prevention Act, 1956, sec.8, p.no.6.

⁴ Constitution of India, section (A.19,14, and 23)

iii Bharatiya Nyaya Sanhita,2023

a. Section-98 (Selling child for purposes of prostitution, etc.) - Whoever sells, lets to hire, or otherwise disposes of any child with intent that such child shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such child will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.⁵

Explanation 1- When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a **brothel**, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation 2- For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

b. **Section 99 (Buying child for purposes of prostitution, etc.)-** Whoever buys, hires or otherwise obtains possession of any child with intent that such child shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such child will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to fourteen years, and shall also be liable to fine.

Explanation 1-Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation 2- “Illicit intercourse” has the same meaning as in section 98.⁶

RELEVANT JUDICIAL INTERPRETATION

Landmark Cases

i. BUDHADEV KARMASKAR VS STATE OF WEST BENGAL

On the night of 17th September 1999, Budhadev Karmaskar entered a brothel on Jogen Dutta Lane in Calcutta. He then proceeded to violently attack and kill a sex worker. A **trial Court** convicted him under Section 302 of IPC to life imprisonment and the High Court of Calcutta upheld this conviction. The Supreme Court not only dismissed Karmaskar’s appeal against the conviction, but invoked Article 21 of the Constitution to assert that sex workers too had a right to a life of dignity. In furtherance of

⁵ The Bharatiya Nyaya Sanhita,2023(S.98 and 99).

⁶ *ibid*

this argument, the Court issued a string of directions to the State and Central governments that sought to rehabilitate sex workers across the country.⁷

ii. Gaurav Jain v. Union of India

In the above cited case, the Court emphasised on the rights of the children of the prostitutes as those children face a lot of criticism and are often judged by the profession of their parents. Therefore, in this case the Supreme Court of India held that the children of the prostitutes must have proper and equal rights of care, protection and educational opportunities. The court mentioned Article 14, 15, 16, 21, 23, 24, 45, 46 and came to the conclusion that social and economic welfare should be ensured for every child and every child should be accepted with both hands open.⁸

iii. Kajal Mukesh Singh and Others v. State of Maharashtra

In this landmark judgement, it was held that there is no provision in the Immoral Traffic Prevention Act, 1956 that penalises or criminalises prostitution or the person indulging in that. The Court put forth that allowing prostitution from a place is completely illegal but consensual prostitution is not an offence and a woman has the full and proper right to choose her occupation in order to earn a livelihood.⁹

iv. Manoj Kumar & Manoj Kumar Shah V. State of WEST Bengal

In this case the Calcutta High court ordered the investigation officer to issue notice against the owner of health spa under Section 41 of Code of criminal procedure. The owner of health spa employed minor girls in the business of prostitution under his spa. According to the Judicial officer reports, it was stated that the investigation officer was present during the proceedings but on the other hand, it was contended that he was not present at the proceedings. The court considered that offence is punishable more than 7 years punishment, the investigating officer should consider all the necessary to issue the notice under this section in the interest of the justice. The court held such grave offences which comes under section 5 of this act is carry out this spa business in lawful business act. On other hand, only notice was issued to the owner and victims were put in Jail who were already exploited. The victims were minor and forcing minor in prostitution business is punishable offence and the criminal should be punished for more than 7 years under Immoral Traffic Prevention Act, 1956.¹⁰

v. State of Uttar Pradesh vs Kaushalyaon

In this particular case, The Supreme court has made a ruling that establishes the permissibility of imposing limitation on the freedom of movement of individuals engaged in sex work. Such restrictions are justifiable on the basis of safeguarding public health and upholding public morals, as outlined under Article 15 of the constitution.¹¹

⁷ Varsha Nair, retrieved from official website of <https://clpr.org.in/blog/implications-of-the-recent-supreme-court-order-on-sex-work/>. (2022, June 25)

⁸ *Gaurav Jain v Union of India*, AIR [1997]8SCC114.

⁹ *Kajal Mukesh Singh and others v. state of Maharashtra*, AIR [2020], writ petition no. 6065 of 2019.

¹⁰ *Manoj Kumar and Manoj Kumar Shah vs state of West Bengal* AIR[2020].

¹¹ *State of Uttar Pradesh vs Kaushalyaon* AIR[1964] SC416.

vi. State of Karnataka vs M.R Hiremath

The Karnataka High Court observed that Sex work is not illegal in India and the has the right to engage in consensual sexual activities for commercial purposes. Also, the court highlighted the importance to regulate sex trade to avoid exploitation and to ensure health and safety of sex workers.¹²

CONCLUSION

It can be tentatively concluded that the provisions of Immoral Traffic Prevention Act,1956 and Bharatiya Nyaya Sanhita,2023 are the basic lines which throws light on the various laws and sections deal with this concept. India needs to regulate the system of sex work. The Government needs to secure the rights of sex workers so their children and future generations also get their rights. Students of sex workers can take education so that they can choose other professions as they like. Government needs to decriminalize the brothels as it would also have impact on our society. If sex work gets recognized it would be easier for the law enforcement agencies to catch the criminals who are involved in the human trafficking. The Purpose of this present research is to suggest improvements in the present working system related to sex work or Prostitution.

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¹² State of Karnataka vs M.R Hiremath AIR[2019][7] SCC5