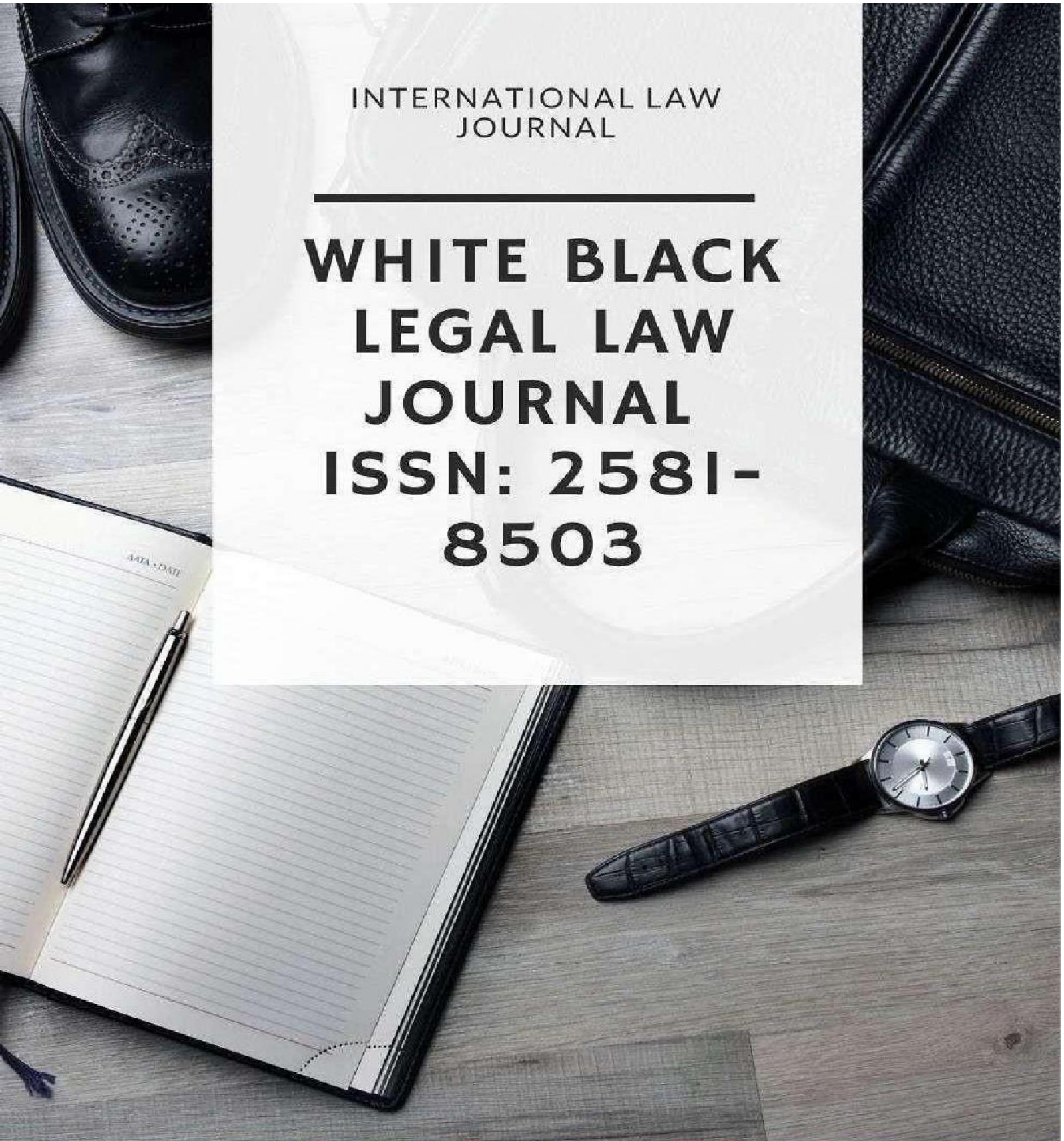




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A CRITICAL STUDY ON THE LAW RELATING TO PROSTITUTION IN INDIA

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ABSTRACT

Prostitution is the practice or occupation of engaging in sexual activity with someone for payment. Prostitution has been in existence in India from time immemorial and the position of the prostitutes has been changing from time to time as well. There have always been issues relating to the social, moral and legal legitimacy of 'prostitution'. Prostitution is always not forceful; it can also be a willful profession sometimes. Immoral Trafficking and forceful Prostitution should be dealt with strictness but willful profession of prostitution should not be criminalized as the persons involved are major. This article focuses on the ancient and present state of laws relating to prostitution including the rights of prostitutes in India along with providing few guideposts for future course of action. The concept of prostitution is regulated mainly by the immoral trafficking prevention act 1956, Indian penal code 1860, etc. This paper endeavours to highlight the concept of prostitution, history of prostitution, rights of prostitutes, law relating to prostitution in India, immoral traffic prevention act 1986, initiatives to combat trafficking of women and children, a proposed amendment in 2006, wheather the prostiution is legal, laws for the protection of sex workers and their rights, what are illegal activities related to prostitution, what is the punishment and penalties for indulging in illegal activities. ligation of prostitution, pros and cons of ligation of prostitution, conclusion etc, on the besis of existing literature, reports, studies, different cases, novels, and other relavent materials, etc.

Key words: Immoral trafficking prevention act 1956, immoral trafficking prevention act 1986, Indian penal code 1860, Constitution of India 1949, prostitution, sexual activity, prostitutes, women, children, sex workers, literature, novels, relavent material.

INTRODUCTION

Prostitution is the business or practice of engaging in sexual activity in exchange for payment. Prostitution is sometimes described as sexual services, commercial sex or, colloquially, hooking. It is sometimes referred to euphemistically as "the worlds oldest profesion " in the speaking world, an A person who works in this field is called a prostitute and is a type of sex worker.

Prostitution occurs in a variety of forms, and its legal status varies from country to country (sometimes from region to region within a given country), ranging from being an enforced or unenforced crime, to unregulated, to a regulated profession. It is one branch of the sex industry, along with pornography, stripping, and erotic dancing. Brothels are establishments specifically dedicated to prostitution. In escort prostitution, the act may take place at the client's residence or hotel room (referred to as out-call), or at the escort's residence or a hotel room rented for the occasion by the escort (in-call). Another form is street prostitution.

There are about 42 million prostitutes in the world, living all over the world (though most of Central Asia, the Middle East and Africa lacks data, studied countries in that large region rank as top sex tourism destinations). Estimates place the annual revenue generated by prostitution worldwide to be over \$100 billion. The majority of prostitutes are female and have male clients. Prostitution has been in existence in India from time immemorial, the position of the prostitutes has been changing from time to time as well. Existence of prostitution can be seen in ancient Indian texts as well as in the texts of prominent British Indian writers. Indian laws also deal with prostitution. Prostitution has also been recommended to be decriminalized by the Aristotelian natural law doctrines which signify that prostitution is not immoral and prostitutes should not be regarded as morally wrong. But the irony is, in India, the principal Act dealing with prostitution is headed as Immoral Traffic (Prevention) Act, 1956. Modern Indian laws too continued its negative approach in accepting prostitution. But the fact that private prostitution has not been made punishable in India can also not be denied.

CONCEPT OF PROSTITUTION IN INDIA

Prostitution means a situation where both male and femail are doing various types of sexual activity in exchange with money for fullfiling and satisfying the sexual desire and need.

Prostitution is legal in India partially with some specified limitation or condition, but not fully and openly legal in India like other countries where the business of sex workers or prostitution is completely legal. A number of related activities including soliciting in a public place, kerb crawling, owning or managing a brothel, prostitution in a hotel, child prostitution, pimping and pandering are illegal. There are, however, many brothels illegally operating in Indian cities including Mumbai, Delhi, Kolkata and Chennai. UNAIDS estimate there were 657,829 prostitutes in the country in 2016. And the Immoral traffic prevention or suppression act 1956 is replaced by the immoral traffic prevention act 1986 later on for regulating the business of sex or prostitution in India.

HISTORY OF PROSTITUTION IN INDIA

In India, it took the route of devotion. Traditionally, there existed the Devadasi system where it was a prevalent practice among Hindus to contribute their female child for the purpose of dancing in temples and worship of God. However, with diminishing feudalism, these so-called Devadasis lost their protectors and were mishandled by the temple priests. This was the earliest form of prostitution. This practice further flourished in the British era when these outsiders curbed the traditional textile industry, weaponry, etc. and these communities had to turn to prostitution for livelihood. Prostitution is said to be world's oldest profession, and Catherine Salmon referred prostitution to be the oldest profession of the world. Kamasutra is said to be the oldest piece of work on sex, love, desire, pleasure, dated back in 400 BC. And in this Kamasutra, matters concerning prostitution have been discussed. Kamasutra has been written by Maharishi Vatsyayana who is a Hindu philosopher and is an Indian indeed and hence, prostitution has been existing in India. Apart from it, prostitution has been discussed in various other works like "Kuttanimata" by Damodargupta, "Samayamatrka" by Ksemendra and many more. Kamasutra provides for the training of prostitutes for prostitution, which implies that prostitution was a well-established institution and trainings were given to produce well trained prostitutes as producing persons trained in any other respected professions. Also Arthashastra provides law for protection of the prostitutes in as much as it states punishment for enjoying a prostitute, against her will. The above discussion shows that prostitutes were treated with respect and dignity and their administration and protection was done by the throne. Literatures were based on real life incidents. In the novel "Srikanto" by Sarat Chandra Chattopadhyay, it is found that Srikanto, a gentleman from a well to do upper class hindu family falls in love with Rajlakshmi, aka Piyari Baiji, a prostitute. This implies that not all people of society treated

prostitutes with bad intension or hatred manner. Some people are still respected them and also dreams of making a beautiful family with them, some people also dreams of marrying them, because at the end nothing happens as such, but Srikanto accepted Rajlakshmi despite the fact that she had been a prostitute. In another novel of Sarat Chandra Chattopadhyay named “Devdas” which can be seen that Devdas is the son of a Brahmin Zamindar. He involves in a true love affairs with a girl called Parvati Devadas calls her paro from neighbour, whose father was also a kind of Zamindar and her mother belong from such a family where the daughter of the family was married off on acceptance of money or valuable goods or commodities from the family of bride groom, which is a type of selling of the daughter to the family of the bridegroom for getting huge amount of money and the ultimatum of every marriage was (is) sex almost. Hence, it can be said that Parvati belonged from such a family where the daughter of the family were sold in veil of marriage. Though Devdas and Parvati didn’t marrying each other, but Parvati, who belongs from such type of family ended up being a Thakurain, wife of Thakur, i.e. wife of Zamindar. This implies that she was accepted in the society. In the same novel also, it can be seen that, Chandramukhi, a prostitute, falling in love for Devdas and he also, somewhere in mind keeps on comparing Chandramukhi with the love of his life ‘Parvati’. At the end, it can be seen that Devdas didn’t ignore Chandramukhi for being prostitute. He impliedly accepted the fact that he also somewhere had a soft corner for Chandramukhi. Both the above discussed novels reflect the then status of the prostitutes in Bengal, India.

RIGHTS OF PROSTITUTES:

The prostitutes just an ordinary citizen of India is also entitled to the Fundamental rights enshrined in India such as, Art. 14 (Right to equality before law and equal protection of the law); Art.19 (1)(g) (i.e., right to carry on any profession, occupation, trade or business subject to limitations prescribed); Art. 21 (Right to life and personal liberty including right to live with dignity); Art. 23 (1) (which prohibits traffic in human beings and beggars along with other similar forms of forced labor). Further, the Immoral Traffic (Prevention) Act, 1956 also provides some rights to the prostitutes such as Section 16 of the Act talks about rescue the prostitutes, Section 21 mandates to protect her home.

In the case of *Budhadev Karmaskar v State of West Bengal*^[iv], the Supreme Court of India observed that sex workers are human beings and no one has a right to assault or murder them as they also have the right to live. The judgment also highlighted the plight of sex workers and empathizes that these women are compelled to indulge in prostitution not for pleasure but because of abject poverty and directed the Central Government and State Governments to open

rehabilitation centers and impart technical and vocational skills like sewing so that they attain other means of livelihood. Following the direction, the Immoral Traffic (Prevention) Act has incorporated Section 21 as a rule for the State Governments to establish and maintain protection homes and these should be regulated by licenses issued by them. An appropriate authority should be appointed for making an investigation for the application of the license for the protection homes. These licenses are not transferable and they are valid only for the specified period. The Government is empowered to make ancillary rules in respect of license, management, and maintenance of protection homes, or ancillary matters by virtue of Section 23 of the Act.

LAW RELATING TO PROSTITUTION IN INDIA

ITPA defines “prostitution” as sexual exploitation or abuse of a female for monetary purposes and a “prostitute” is the person who gains that commercial benefit. The Indian Penal Code of 1860 also deals with prostitution but it is limited to child prostitution. However, it attempts to combat activities such as kidnapping in general, kidnapping for the purpose of seduction and luring a person into sex, importing a girl of a foreign country for sex, etc. In addition, Article 23(1) of the Constitution prohibits traffic in human beings and beggars and other similar forms of forced labor. Article 23(2) declares that any contravention of this provision shall be an offense punishable in accordance with the law. It was stated in *Raj Bahadur v. Legal Remembrancer*, that “Clause (2) however permits the State to impose compulsory services for public purposes provided that in making so it shall not make any discrimination on grounds only of religion, race, caste or class or any of them. 'Traffic in human beings' means selling and buying men and women like goods and includes immoral traffic in women and children for immoral or other purposes.” The Immoral Traffic (prevention) Act, 1956 defines prostitution. It says, prostitution means the sexual exploitation or abuse of persons for commercial purposes and the expression prostitute shall be constructed accordingly. But prostitute should include persons who are not only abused or exploited sexually for commercial purpose, but also persons who wilfully engage in this profession of prostitution for commercial gain, irrespective of their sex, whether male, female or a part of LGBTQ. Immoral Traffic (Prevention) Act, 1956 specifically declares certain acts to be illegal including solicitation for prostitution, managing a brothel or allowing the usage of certain places as brothels (Sec. 3), living on the earnings of a prostitute’s money (Sec. 4), inducing or kidnapping a girl for prostitution, detaining girls in brothels (Sec. 6), seducing a person under custody for prostitution (Sec. 8) and carrying out

prostitution within two hundred metres of any public place like schools, colleges, temples, hospitals (Sec. 7) etc. Indian Penal Code, 1860 penalizes child prostitution, namely selling and buying of minors for the purpose of prostitution. Section 370 trafficking of person. Section 370A punishes any person who knowingly or having reason to believe that any minor or any person has been trafficked engages that minor for sexual exploitation and he/she shall be awarded rigorous imprisonment of not less than five years in case of minors and three years in case of any other person. Section 371 habitual doing slaves. Section 372 of the Code awards imprisonment of minimum ten years for a person selling a minor for the purpose of prostitution. Section 373 of the same Code awards imprisonment of ten years for buying a minor person for the purpose of prostitution. The explanations to these sections indicate only the trade of minor girls and not boys. Section 374 unlawful compulsory labour.

IMMORAL TRAFFIC PREVENTION ACT 1986

In 1950 the Government of India ratified the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others. In 1956 India passed the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). The act was further amended and changed in 1986, resulting in the Immoral Traffic Prevention Act also known as PITA. Immoral Traffic Prevention Act, 1986 PITA only discusses trafficking in relation to prostitution and not in relation to other purposes of trafficking such as domestic work, child labour, organ harvesting, etc. The following is an outline of the provisions in this law that pertains to children below the age of 18. The act defines child as any person who has completed eighteen years of age. The first section of the act has provisions that outline the illegality of prostitution and the punishment for owning a brothel or a similar establishment, or for living of earnings of prostitution as is in the case of a pimp. Section five of the act states that if a person procures, induces or takes a child for the purpose of prostitution then the prison sentence is a minimum of seven years but can be extended to life. To ensure that the people in the chain of trafficking are also held responsible the act has a provision that states that any person involved in the recruiting, transporting, transferring, harbouring, or receiving of persons for the purpose of prostitution if guilty of trafficking. In addition any person attempting to commit trafficking or found in the brothel or visiting the brothel is punishable under this law. If a person is found with a child it is assumed that he has detained that child there for the purpose of sexual intercourse and hence shall be punishable to seven year in prison up to life imprisonment, or a term which may extend to ten year and also a maximum fine of one lakh

rupees. If a child is found in a brothel and after medical examination has been found to have been sexually abused, it is assumed that the child has been detained for the purpose of prostitution. Any person committing prostitution in public with a child shall be punishable to seven year in prison up to life imprisonment, or a term which may extend to ten year and also a maximum fine of one lakh rupees. If prostitution of a child is being committed with knowledge of an establishment owner such as a hotel the license of the hotel is likely to be cancelled along with the given prison sentence and/or fines. Any child found in a brothel or being abused for the purpose of prostitution can be placed in an institution for their safety by a magistrate. Landlords, leasers, owner, agent of the owner who unknowingly previously rented their property to a person found guilty of prostituting a child, must get approval from a magistrate before re-leasing their property for three years after the order is passed. In 2006, the Ministry of Women and Child Development proposed an amendment bill that has yet to be passed. The amendment does not really concern any of the provisions related to the child but has many important consequences for the right of women sex workers.

A PROPOSED AMENDMENT IN 2006- HIGHLIGHTS

A proposal was made in 2006 to amend the Immoral Traffic (Prevention) Act and has not been enforced yet. The amendment bill deletes the provisions that penalize prostitution by soliciting clients. This proposal recommends enhanced punishment and an increased fine amount. It intends to criminalize the act of visiting a brothel for the purpose of sexual exploitation of trafficked victims with imprisonment of at least three months or a fine of Rs. 20,000 which has not been criminalized in the Act. The bill constitutes authorities at the center and state level to combat trafficking. The term “trafficking in persons” has been defined with a provision for punishing any person who is guilty of the offence of trafficking in persons for the purpose of prostitution.

LAWS FOR THE PROTECTION OF SEX WORKERS AND THEIR RIGHTS

The right to life enshrined under Article 21 is also applicable to a prostitute. This was explained in the case of *Budhadev Karmaskar v State of West Bengal*. It stated that sex workers are human beings and no one has a right to assault or murder them as they also have the right to live. The judgment also highlighted the plight of sex workers and empathizes that these women are compelled to indulge in prostitution not for pleasure but because of abject poverty and directed

the Central Government and State Governments to open rehabilitation centers and impart technical and vocational skills like sewing so that they attain other means of livelihood. Following the direction, the Immoral Traffic (Prevention) Act has incorporated Section 21 as a rule for the State Governments to establish and maintain protection homes and these should be regulated by licenses issued by them. An appropriate authority should be appointed for making an investigation for the application of the license for the protection homes. These licenses are not transferable and they are valid only for the specified period. The Government is empowered to make ancillary rules in respect of license, management, and maintenance of protection homes, or ancillary matters by virtue of Section 23 of the Act.

WHEATHER THE PROSTITUTION IS LEGAL IN INDIA

In the Indian context, prostitution is not explicitly illegal though pronounced to be unethical by the Court, certain acts that facilitate prostitution are regarded as illegal and acts like managing a brothel, living off the money procured by means of prostitution, soliciting or luring a person into prostitution, traffic of children and women for the purpose of prostitution, etc. are made explicitly illegal by the Immoral Traffic (Prevention) Act, 1956 (ITPA). For example, running a sex racket is illegal but private prostitution or receiving remuneration in exchange for sex with consent without prior solicitation might not be illegal.

WHAT ARE ILLEGAL ACTIVITIES RELATED TO PROSTITUTION

Immoral Traffic (Prevention) Act, 1956 declares certain acts to be illegal. These acts include a solicitation for prostitution, managing a brothel or allowing the usage of certain places as brothels, living on the earnings of a prostitute's money, inducing or kidnapping a girl for prostitution, detaining girls in brothels, seducing a person under custody for prostitution and carrying out prostitution within 200 meters of any public place like schools, colleges, temples, hospitals, etc.

LEGALIZATION OF PROSTITUTION IN INDIA

Prostitution is considered a taboo in India from the very beginning and it is not discussed openly, which is a topic frequently frowned upon. However, it poses a big threat to the fabric of Indian society for its role or activities in weakening the marriage, sexually transmitted diseases, abduction of girl children, isolation of prostitutes from society, physical and mental trauma. It is reported that there are about 38000 sex workers in the state of Delhi. The situation of Mumbai

is more depressing. That's why there arises an urgent need to control prostitution. The abolition of prostitution is a very big and tough task because it is an ancient practice and it has existed too long. Though it is described as an illegal in nature, but it is still continued. It could be due to the lack of enforcement or implementation of laws or due to an inability to restrict or confine this illegal practice. To stop this issue, the legalization of prostitution could be adopted since abolition appears to be a daydream.

PROS AND CONS OF LEGALIZATION OF PROSTITUTION

If the practice of prostitution is legalized, the State will automatically acquire various type of responsibility to manage or control the brothels and it can fulfill this duty by issuing a license to authorized persons or prostitutes or brothels owner. It will also formulate various rules, regulations or guidelines regarding the age of prostitutes, database relating to client, sufficient remuneration, other medical facilities to the prostitutes should be provided. By this method or policy, the prostitutes can acquire some legal rights for example: right to medical care, right to education of their children, right against exploitation and rape. This method may directly facilitate the eradication of various sex racket operations in India, various type of hidden and street prostitution, and specially the abuse of prostitute. There should be various protection houses, which will be established for those prostitutes who have lost their livelihood, or those who were forced into that prostitution. The central government and every state government including the union territories can impart various forms of training and the basic education to these prostitutes so that they can find various other means or ways to earn money and also sustain their livelihood.

On the other side, we can say that the legalization of the practice of prostitution could be misinterpreted because the promulgation of prostitution. It could pave the way for easy money for all prostitutes and also could encourage or instigate directly or indirectly more women or girls to practice the profession of prostitution. There is a huge possibility that this could be a revenue-generating way for the Central government and every state government. In this connection, the rules, regulations or guidelines should have to more stringent to regulate and control this industry so that it is not fully legitimized and that is the least the central government and our every state government including union territory can do to address such type of issue.

CONCLUSION & SUGGESTION

In my conclusion part, I would like to state that India has penalized sexual exploitation of persons for trade or commercial purpose but it does not penalize voluntary sexual activity for commercial purpose, yet it has also not set it free to be legal like that of Aruba, Australia, Austria, Belgium, Colombia, Hungary and many more. Also India has not come up with any constructive answer as to why is it wrong to practice voluntary sex work, despite of the fact that it was completely legal in ancient India. Also India lacks in any constructive laws for governing Indian prostitution and distinguished peoples immorally trafficked and dragged to this profession and peoples who join this very profession willingly. India should come up with a constructive law governing the act of prostitution which should deal with forced prostitution and willful prostitution differently. Immoral trafficking of people in this very profession should be stopped and handled strictly and also a systematic way should be brought in to existence for allowing the persons who willfully joins the profession with free consent and obviously are major, to carry out their business peacefully and with dignity.

Thus, it can be said that Prostitution is a gender neutral profession and as far as it relates to voluntary and willful sex it is neither an offence as punished by the Immoral Trafficking (Prevention) Act, 1956 (as amended till date) nor it is a nuisance as per Section 268 of I.P.C., 1860 provided practiced without compromising the rights of any person in any manner, and so with proper precautions and guidelines it should be allowed to be practiced in India freely as it is better to work than to beg in streets to earn one's livelihood[vii]. Right to profession is a fundamental right under Article 19 of the Constitution of India and prostitution should also be seen in this very light. Every adult in India should be allowed to choose the profession freely, assisted by proper effective Law.

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