Imperial Journal of Interdisciplinary Research (IJIR)
Vol-3, Issue-6, 2017
ISSN: 2454-1362, http://www.onlinejournal.in

Prostitution and the Law: Charting the Indian Course

Shivam Goel
Associate, S.G. & Co.

Part I: Introduction: Four decades back, Charles Winick in his work of acclaim, *The Lively Commerce,* stated that, in a theoretically good society, where sexual fulfilment ought to be possible as other kinds of personal satisfaction, no one would be a prostitute or a client.[i] Prostitution is often thought of as a threat to the marriage-family institution; law-makers are often afraid that, the delicate threads which binds the society together will be broken if people are free to engage in coitus for pleasure; laws, it is stated, are often not enforced adequately because the police have too many other things to do; judges also know that incarceration will not rehabilitate a prostitute, nevertheless, laws exist to emphasise that prostitution is not a socially acceptable form of behaviour.[ii]

Religious Prostitution: According to the *Chamber's Encyclopaedia*[iii], religious prostitution was a feature of many ancient civilisations, including those of Babylonia, Persia, Egypt, Assyria and Phoenicia. Amongst most of these people, the priests and priestesses were a special class of prostitutes. In Babylonia, however, a compulsory single act of prostitution was required of every woman as part of the worship of the Goddess Mylitta. The most plausible explanation of religious prostitution was the belief of the ancients that benefits would be conferred on anyone who shall have coitus with a God or with one of the God's servitors.

Prostitution: "Prostitution" in most general sense may be defined as common lewdness of a woman for gain; whoredom; the act or practice of a woman who permits any man who will pay her price to have sexual intercourse with her.[iv] In the case of ***People* v. *Rice***[v], prostitution was defined as, the act or practice of a female of prostituting or offering her body to an indiscriminate intercourse with men for money or its equivalent. In the case of, ***Carpenter* v. *People***[vi], it was held that, the word "prostitute" in its most general sense means the act of setting one's self to sale, or of devoting to infamous purposes; it also means, what is in one's power that is: the prostitution of talents or abilities; the prostitution of the press. In the case of ***State* v. *Stoyell***[vii], it was held that, a prostitute is a woman who indiscriminately consorts with men for hire; similarly in the case of ***Wilson* v. *State***[viii], a prostitute was defined as a woman who has given herself up to indiscriminate lewdness; also, in the case of ***Trent* v. *Commonwealth***[ix], a prostitute was defined as a woman submitting to indiscriminate sexual intercourse, which she solicits.

According to *Black's Law Dictionary (Fourth Edition)*, "Concubine" was a sort of inferior wife, among the Romans, upon whom the husband did not confer his rank or quality. In the case of, ***State* v. *Dusin***[x], it was held that, a concubine is a woman who cohabits with a man to whom she is not married. "Concubinatus", as per the ancient Roman law meant an informal or natural marriage, as contradistinguished from *justum matrimonium*, the civil marriage. Professor W.W. Buckland in his famous book, *Roman Law from Augustus to Justinian,* held that:

> "*Concubinatus was a recognised connection short of marriage, which seems to owe its legal recognition to the restrictive legislation of the early Empire on marriage… It was encouraged by the immorality of Roman women of high rank; men preferred to contract this union with women of lower class but higher character...*"

It was categorically held in the case of ***People* v. *Cummons***[xi], that the words concubinage and prostitution have no common law meaning, but in their popular sense, cover all cases of lewd intercourse.

According to Section 2 (f) of the Immoral Traffic (Prevention) Act (104 of 1956) read with Section 372 of the Indian Penal Code (45 of 1860), prostitution is the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind. In the case of ***In re: Deva Kumar***[xii], it was held that, prostitution involves indiscriminate employment of a woman's body for hire.

The common law defines "brothel" as a place where people of opposite sexes are allowed to resort for illicit intercourse, whether the women are common prostitutes or not; keeping a bawdy house is a nuisance at common law. As per Section 2(a) of the Immoral Traffic (Prevention) Act, 1956, "brothel" includes any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. It is worthy to note that, in the case of, ***Sushila* v. *State of Tamil Nadu***[xiii] it was held that, a solitary instance of prostitution in a place does not make the place a "brothel"; a similar view was reiterated in the case of, ***In re: John***[xiv], in this case, it was held that, prostitution of a woman should be for the gain of another person, as to the premises to be called as "brothel". Later, in the case of ***Krishnamurthy* v. *Public Prosecutor***[xv], the Supreme Court held that, a place used once for the purposes of prostitution may not be a "brothel". In the case of, ***State of Rajasthan* v. *Mst. Wahida***[xvi], it was held that, any person who keeps or maintains or acts or assists in the keeping and management of a brothel in India, is liable to be punished under the provisions of the Immoral Traffic (Prevention) Act, 1956.

According to *P. Ramanatha Aiyar's Law Dictionary (Fifth Edition)*, prostitution means the sexual exploitation or abuse of individuals for commercial purposes. Also, a public prostitute is a woman who is a prostitute by profession and whose trade is to let-out her body on hire to all visitors or to all visitors of a specified class. When a woman rests content with one lover for years though she may have changed her lovers at intervals of some years, she is not a public prostitute.

A woman is not a prostitute who indulges in illicit sexual intercourse with only one man; thus, a man cannot be guilty of enticing a female away from her home for the purpose of prostitution, where the proof shows that he enticed her away for the purpose of having coitus with her and not to induce her to have coitus indiscriminately with other men. The most usual motive for indiscriminate sexual intercourse is the money paid there for; hence, prostitution is sometimes defined as "indiscriminate sexual commerce for gain". If, however, a woman submits to indiscriminate sexual intercourse, which she invites/solicits by words or acts or any device, and without profit, she is as much a prostitute as one who does so solely for hire. Her vocation may be known from the manner in which she piles it, and not from the pecuniary charges and compensation gained.[xvii]

So far as the position of law in India is concerned, in order to establish prostitution, evidence of more than one individual (that is, 'customer'/ 'client') is not always necessary. All that is essential to prove is that a girl/lady/woman should be a person offering her body for promiscuous sexual intercourse for hire. Sexual intercourse is not an essential ingredient. The inference of prostitution has to be drawn from diverse circumstances established in a case. Sexual intercourse has to be established but, that does not require the evidence of more than one individual ('customer'/ 'client'); and no evidence of actual coitus for hire should be adduced or proved. It isn't necessary that there should be repeated visits by persons to the place for the purpose of whoredom. A single instance coupled with the surrounding circumstances may be sufficient to establish that the place is being used as a brothel and the person alleged has been indulging in promiscuous sexual activity for hire. The prosecution has to prove/establish that in the premises a female indulges in the act of offering her body for hire, thereafter on proof thereof, the place becomes a 'brothel'.

The word 'prostitution' is not confined to acts of natural sexual intercourse, but includes any act of lewdness. It means surrender of a girl's chastity for money.[xviii] There is no specific law to regulate the so-called immoral practice of prostitution in India; no doubt the Immoral Traffic (Prevention) Act, 1956 read with the Indian Penal Code, 1860 tries to tackle the problem of prostitution, but it does so, indirectly. Although much is known about prostitution and sex-trade in India, but almost all research apropos it, has been confined to the female sex-workers and their clients. Studies albeit men, who sell sex, either to women or to other men in India has hardly been undertaken.[xix] There is a growing need to study this niche area of research in India.

Data Analysing the Indian Experience: Prostitution in India is estimated to be an $8.4 billion industry.[xx] The largest red-light areas across India are: Sonagachi (Kolkata), inhabiting more than 11,000 sex-workers; Kamathipura (Mumbai); Budhwar Peth (Pune), inhabiting around 5,000 commercial sex-workers; Meergunj (Allahabad); G.B. Road (Delhi); Chaturbhujasthan (Muzaffarpur); Itwari (Nagpur); and Shivdaspur (Varanasi). As per the National Crime Records Bureau (NCRB), the number of registered cases albeit human-trafficking in India has increased by 38.3% in last five years, that is, from 2848 in 2009 to 3940 in 2013. The conviction rate for such cases has declined by 45%, from 1279 in 2009 to 702 in 2013.[xxi] A further analysis of the NCBR data reveals that in 2013, maximum crimes (around 65.5%) were registered

under the Immoral Traffic Prevention Act, 1956; whereas procuring of minor girls (Section 366-A of the Indian Penal Code, 1860) accounted for 31.1% of the crimes. The State of West Bengal is the hub of human trafficking in India, with a registered human trafficking cases of 669 in the year 2013, followed by Tamil Nadu (549 cases), Andhra Pradesh (531 cases), Karnataka (412 cases) and Maharashtra (345 cases).

Legalising Prostitution a Solution?: The Immoral Traffic (Prevention) Act, 1956, does not criminalize prostitution or prostitutes *per se*; but it does punish acts of third-party facilitation of prostitution, like brothel-keeping, living on the earnings of prostitutes or procuring a person for the sake of prostitution. The two-fold argument in favour of legalising prostitution is that, firstly, to criminalize prostitution and expect that an $8.4 billion industry will evaporate from India is a far-fetched thought; secondly, legalising prostitution would mean that, brothel-owners would be held accountable/responsible for the treatment of "fallen women", and that, the abused/ill-treated sex-workers will have an option of turning to the law for their protection. Legalising prostitution will result in reduction of sexually transmitted diseases, for sex-workers will be required to maintain health-cards; also, condom enabled sessions will result in safe-coitus. Legalising prostitution vide legislative means would result in elimination of pimps and middle-men, and the task of the police would then be, protection of sex-workers, and not extraction of 'protection of money' from them. Prostitution has been legalised in: Netherlands, New Zealand, Germany, Iceland, Switzerland, Austria, Denmark, Greece, Turkey, Senegal, Venezuela, the State of Nevada in the United States, and among the Australian States- in- Victoria, Queensland, Australian Capital Territory (ACT), and Northern Territory. In Netherland, like ordinary citizens, prostitutes have been brought under the tax net; prostitution in India is an $8.4 billion underground industry, if prostitution in India is legalised then it can result in better economic growth of the country and at the same time it can result in increased protection, health and safety benefits qua the prostitutes. Experience has it all, for with closure of brothels in 1959 in Queensland (Australia), the marked increase in the incidents of rape was by 149%.

Part II: Law Commission of India- Sixty-Fourth Report (The Suppression of Immoral Traffic in Women and Girls Act, 1956): The Law Commission of India in its Sixty-Fourth Report made the following observations of importance:

1. Prostitution is a threat to the institution of marriage and is a means of exploitation of females; prostitution is a social evil which leads to social injustice.
2. The institution of prostitution is the external manifestation of the failure of man to control his animal will within the limits set by the institution of marriage. Because man has not always remained satisfied with the company of his wife and has sometimes sought the pleasures of the flesh by straying beyond the limits of the marital wedlock, the result has been that the institutions like prostitution and concubinage have existed side by side with marriage since times immemorial.
3. Any attempt to stop prostitution by legislation or by any other means of social control has always proved abortive. Prostitution has, therefore, been tolerated as a necessary evil. No country in the world has been able to stop this institution successfully. Even if the law stops it, then, in some other insidious and subtle form, it is bound to re-appear in society, that may have greater potentiality of destroying the peace in family life and also society. The institution of "call girls" seems to be an instance in point. Thus, instead of banning it totally, the law in every country has tried to regulate it so that it may be kept within its legitimate bounds without unduly encroaching upon the institution of marriage and the family.
4. Total prohibition on prostitution is not possible. Various measures have been adopted from time to time to check the evil effects of prostitution and to control its undesirable aspects, but the inarticulate assumption that the law cannot abolish it effectively, has been the basis of legislation in India as well as in many other countries. Down from 1837, when the Penal Code was taken up on the anvil[xxii], to 1956, when the Suppression of Immoral Traffic in Women and Girls Act, 1956 was enacted, it has been observed by the State that, abolishment of prostitution altogether is not possible through the legislative means, as the practice is deeply entrenched/rooted in the Indian social milieu.
5. Adoption of a "wider view" albeit prostitution is undesirable.[xxiii] Conduct of a particular type may be: (a) approved by law; (b) permitted without approval or disapproval by law; (c) disapproved but not prohibited by law; (d) prohibited by law. Prostitution falls partly within

category (c) and partly within category (d). The fact that certain types of prostitution are not totally prohibited by law, does not necessarily imply that they are approved by the law.

6. Prostitution, in so far as it consists of secret acts of consenting individuals without exploitation, and in private, is not appropriate for penal sanctions, and the fact that the pleasure derived from such prostitution is one which is socially disapproved, is not in itself a sufficient ground for the imposition of criminal sanctions.
7. According to the Report of the Street Offences Committee (1928), as quoted in the Report of the Committee on Homo-sexual Offences and Prostitution (1957) –
   Firstly, as a general proposition, it is universally accepted that, the law is not concerned with private morals or with ethical sanctions. The law is plainly concerned with the outward conduct of citizens in so far as that conduct injuriously affects the rights of other citizens. Certain forms of conduct it has always been thought right to bring within the scope of the criminal law on account of the injury which they occasion to the public in general. It is within this category of offences, if anywhere, that public solicitation for immoral purposes finds an appropriate place.
   Secondly, the immorality of an act should never be the decisive factor in making it illegal, since the appropriateness of a moral sanction does not entail the appropriateness of a legal sanction. What is grist to the fine mill of morality, may well escape the clumsy engine of the law, or be mangled by it; but any attempt to exclude the immorality of an act as a relevant factor in deciding whether to make it illegal, is both dangerous and futile. It is dangerous because it leads to the illusion that a legal system can function without the foundation and the frame of reference of a moral system, and it is futile because moral values have a way of infiltrating into even the most anti-septic legal system.
8. Where the law deals with sexual behaviour between consenting parties in private, its enforcement would be difficult. Laws which prohibit sexual acts when committed in private- assuming that the acts are considered appropriate for penal sanctions- can, for reasons obvious, are to be enforced only to a limited extent; however-much the conduct may be the subject of moral condemnation.
9. Call-Girls: So long as prostitution itself is not a crime, the individual act of a girl who offers her services on phone cannot be prohibited. If a call-girl does not parade her charms in the public, or indulge in soliciting or in other prohibited acts of like nature, she cannot be held guilty. What is prohibited is prostitution of another person for profit of oneself, or promoting prostitution by letting out a house, exploiting girls for prostitution in specified places and the like.
   Call- Girl Establishment: Call-girl establishments, that is, houses or flats to which men go and to which prostitutes are summoned by telephone message or some other arrangement, stand in a different category. In most cases, they would satisfy the definition of "brothel", or attract penal provision relating to living on the earnings of prostitution.
10. The legal attitude world-wide towards prostitution can be classified in four broad categories: (a) total prohibition; (b) regulation; (c) repression; and (d) total toleration. Countries in category (a) regard prostitution as illegal in all cases. In these countries prostitution *per se* is a crime, and even clandestine misconduct is punishable. Countries in category (b) regulate prostitution by licensing or other measures, but do not prohibit it totally. Countries in category (c), to which India belongs, repress prostitution by forbidding its blatant manifestations, while those in category (d) impose no prohibitions or restrictions on prostitution.
11. Repressive measures against prostitution are hampered by three (3) main considerations: the persistent demand for exclusive physical satisfaction which the prostitute offers; the existence of a type of women who is drawn to prostitution by virtue of her psycho-neurotic make up; and the social attitude towards sex. The modern view is that the underlying causes of prostitution today are not economic but psychological, though this does not apply to the period of religious prostitution, or to the period when prostitution was generally condoned, or when no other means of livelihood was open to indigent women. Socio-economic factors are still important in borderline cases. Barring few exceptions, prostitutes generally show an anti-masculine attitude so strong as to be psycho-neurotic and, for them, the

performance of the "act of love" against payment constitutes self-assertion, while at the same time they derive satisfaction from the unique 'independence' of their profession.

12. Prostitution like many other evils is a social problem, the eradication of which cannot be achieved by legislation alone, for it requires the co-operation of every individual citizen of the country. When the general moral level of the community will rise to an exalted idealistic level, prostitution shall be brought down and thus will be effectively reduced.

Part III: The Sex Workers' Manifesto[xxiv]**:** The First National Conference of Sex Workers in India (14^{th} to 16^{th} November, 1997) in Calcutta was a major step attempting to put forth generally, the plight and pity of the sex-workers in India. The central theme of the conference was this: Can a sex-worker insist on having safe-sex? Can sex-work be termed as an occupation? Is it justified to see sex-work as morally sinful? Is it possible to rehabilitate prostitutes? Do men and women have equal claims to sexuality? Is prostitution a means to promote 'free-sex'?

Rendering answers to the questions posed above, it was observed as follows:

a. Sex-workers, usually, are not in a position to negotiate with their clients. If a sex-worker is starving, either because she does not have enough customer or because most of her income is spent towards maintaining a room, or meeting the demands of madams, local power-brokers, or the police, how can she be in a position to refuse a client, who is not persuaded to use condoms or views it as an unnecessary impediment in his way to 'absolute' pleasure.
b. Historically speaking, "sex-work" is regarded as one of the oldest profession in the world, much because of the fact that it meets an important social demand. However, today, the term 'prostitute' is rarely used to refer to an occupational group who earn their livelihood by means of providing sexual services, rather it is deployed as a descriptive term denoting a homogenised category, usually of women, who pose threat to public health, sexual morality, social stability and civic order.
c. Like other human propensities and desires, sexuality and sexual need are fundamental and necessary to the human condition. Pleasure, happiness, comfort and intimacy find expression through sexuality. However, the State and social structures acknowledge a very limited and narrow aspect of sexuality. Sex is seen primarily, and almost exclusively, as an instrument for reproduction, negating all aspects of pleasure, comfort and the desire intrinsic to it. Privileging heterosexuality and homosexuality is not only denied legitimacy, but is considered as undesirable, unnatural and deviant. Thus, 'sex' and 'sexuality' which finds liberating expression in our art and literature is given no societal sanction beyond its reproductive purpose. Therefore, sex-work is considered not only morally sinful but also, unethical.
d. People who are interested in the welfare of prostitutes, and many others who are genuinely concerned, often fail to think beyond rehabilitating sex-workers or abolishing prostitution altogether. It is high time to realise that, it is perhaps, if not impossible then very difficult to rehabilitate a sex-worker because the society never permits erasure of their identity as prostitutes or the 'fallen' ones.
e. Societal norms qua sex and sexuality do not apply similarly to men and women. If sexual needs are at all acknowledged, in our society, beyond procreation, it is only for men. Polyandry and polygamy, although both are blotted with social prohibitions; but India's scriptural past is a testimony to the fact that polyandry was seen with more caveats than polygamy.
f. Free-sex implies irresponsibility and lack of concern for well-being of others. Often the so-called clients of sex-workers compel them to have protection-free coitus which is the root cause of sexually transmitted diseases. Prostitutes are to educate themselves of the ills of condom-free sex, and likewise the 'clients' should acknowledge that freedom of sexuality has to come with responsibility and genuine respect for the needs and desires of others.

Part IV: Right to Self- Determination of Prostitutes in India: The Preamble of the Constitution of India, 1950, pledges to secure socio-economic justice to all its citizens with stated liberties, equality of status and opportunity, assuring fraternity and dignity to individuals in a united and integrated nation, the Republic of India. Prostitutes (the "*fallen women*", as they are often called) too are a part of Indian citizenry, and thus are an integral part of "*We the people*". Whoredom in society has not been an unknown phenomenon; it

is of ancient origin and has its manifestations in various forms with varied degrees, unfounded on so-called social sanctions. The victims of prostitution are usually the poor, the illiterate and the ignorant sections of the society. Prostitutes have always been seen as the objects/ instruments of sexual gratification; and never as complete human beings with dignity of person and self-determination. Their problems multiply due to the coercion laid around them and due to the tortuous treatment meted out to them. Rape of a prostitute is often considered as an 'offence non-existential'.

The Hon'ble Supreme Court of India in a catena of judgments has categorically laid down that, the un-chastity of a woman does not make her open to any and every person to violate her person as and when he desires. The mere fact that, the prosecutrix was of lose moral character and was habitual to sexual intercourse and might have gone to the accused herself, is no ground to disbelieve her statement. In the case of ***Mohan* v. *State of M.P.***[xxv], it was held that, it is no defence as against the crime of rape, that the girl so raped was of easy virtue and was habitual to sex.

Lately, the Allahabad High Court through Aditya Nath Mittal, J., in the matter of ***Shushil* v. *State of U.P.***[xxvi], observed that, even if a prostitute lodges a report of rape and her evidence inspires confidence, then there is no rule of law that the statement of the prostitute cannot be believed. The Court observed that, even a prostitute has the fundamental right as well as moral and social rights and she is at liberty to permit, or not permit, a person for sexual intercourse. Nobody can commit sexual intercourse even with a prostitute under threat or compulsion.

Moreover the above dicta of the Allahabad High Court, seems to have garnered the colour and substance from the following ratio of the Supreme Court, ***State of Maharashtra* v. *Madhukar Narayan Mardikar***[xxvii], here, Apex Court stated as follows:

> "*...even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also, it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.*"

Right to self-determination albeit prostitutes, is firmly grounded in India, much vide the rulings of the apex court, but none the less, a caveat to this premise of law remained on the statute books, much in the form of Section 155 (4) of the Indian Evidence Act, 1872; while generally, Section 155 speaks of 'impeaching credit of witness'; Section 155 (4) stated that, when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. However, Clause (4) of Section 155 was omitted, to meet the ends of justice, by Act 4 of 2003, vide Section 3 (with effect from: 31-12-2002).

Part V: Section 372 and Section 373 of the Indian Penal Code, 1860 & Section 81 of the Juvenile Justice (Care and Protection of Children) Act, 2015: Sale and/or purchase of minors for immoral purposes, is a penal offence in India. Section 372 of the Indian Penal Code, 1860, makes selling of minor for purposes of prostitution an offence punishable with imprisonment of 10 years and fine. Similarly, Section 373 of the Indian Penal Code, 1860, makes buying of minors for purposes of prostitution an offence punishable with imprisonment for 10 years and fine.

Section 372 of the Indian Penal Code, 1860, states that, when a female under the age of 18 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.

Section 373 of the Indian Penal Code, 1860, states that, any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of 18 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. In so far as Section 373 is concerned, a precedent of reverent importance is that of, ***Dowlat Bee* v. *Saikh Ali***[xxviii], in this case the question before the court of law was that, if a person were to contract with a minor girl, aged 17 years for prostitution; would it be 'buying' or 'hiring' within the meaning of Section 373 of the Indian Penal Code, 1860? Scotland, CJ was of the opinion that the terms of Section 373 are wide enough to penalise such suffering; however, Holloway, J dissented, holding that Section 373 could not be interpreted to include a hiring by minor herself, all such cases will be covered by provisions relating to kidnapping and abduction.[xxix]

In the case of, ***Emperor* v. *Vithabai Sukha***[xxx] it was held that, where a brothel keeper allowed a girl under 18 years of age to visit the brothel for two or

three hours in the night, and allowed her to prostitute herself to customers for money, it was held that the brothel-keeper was guilty of an offence under Section 373 of the Indian Penal Code, 1860.

Section 2(14) (viii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 states that, child in need of care and protection means a child, who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts. Section 81 of the Juvenile Justice (Care and Protection of Children) Act, 2015 states that, any person who sells/buys a child for any purpose shall be punishable with rigorous imprisonment for a term which may extend to 5 years and shall also be liable to fine of Rs. 100,000/-. However, where such an offence is committed by a person having actual charge of the child, including employees of a hospital or nursing home or maternity home, the term of imprisonment shall not be less than 3 years and may extend up to 7 years. Also, Rule 32 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 provides for the rehabilitation and social reintegration of the juveniles. Rule 32 states that, the primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise through alternate care programmes and long-term institutional care shall be of last resort.

Part VI: Rehabilitation of Prostitutes and their Children: Section 16 of the Immoral Traffic (Prevention) Act, 1956, provides for the rescue of persons living or carrying on, or made to carry on prostitution, in a brothel. Section 16 provides that, a Magistrate (that is, Metropolitan Magistrate, Judicial Magistrate of First Class, District Magistrate or Sub-Divisional Magistrate) may direct a police officer not below the rank of a sub-inspector to enter any brothel and remove any person there from; after removing the person, the police officer must forthwith produce him before the Magistrate.

Rehabilitation of sex-workers has been an issue of considerable importance qua which substantial amount of time and efforts have been invested by the Apex Court since the very commencement of the Immoral Traffic (Prevention) Act, 1956. Not very long ago, in the case of ***Budhadev Karmaskar* v. *State of West Bengal***[xxxi], the Apex Court reiterating its observations, as made vide order dated 02.08.2011, held as follows:

> "*We are fully conscious of the fact that simply by our orders the sex workers in our country will not be rehabilitated immediately. It will take a long time, but we have to work patiently in this direction. What we have done in this case is to present the situation of sex workers in the country in the correct light, so as to educate the public. It is ultimately the people of the country, particularly the young people, who by their idealism and patriotism can solve the massive problems of sex workers. We, therefore, particularly appeal to the youth of the country to contact the members of the panel and to offer their services in a manner which the panel may require so that the sex-workers can be uplifted from their present degraded condition. They may contact the panel at the email address: panelonsexworkers@gmail.com.*"

How far this effort of the Supreme Court has been successful, is still unaccounted.

Women found in flesh trade should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. The commercial exploitation of sex is to be regarded as crime, but those trapped in custom-oriented prostitution and gender-oriented prostitution should be viewed as victims of gender oriented vulnerability. That could be done by not only the law enforcing agencies but by constant counselling and interaction by the NGOs impressing upon sex-workers the need to shed off the path and to start with new lease of life. It is pertinent to mention that, the customary initiation of women in the practice of *Devadasi, Jogins* and *Venkatasins* is still prevalent in not just Andhra Pradesh, but also Karnataka and Maharashtra. This in fact is affront to human dignity and self-respect but pursuit of customary beliefs traps the fair sex into this glorified unworthy self-sacrifice, which ultimately leads to prostitution in temples and other charitable institutions, this in turn is a crime against humanity and violation of human rights conferred under the Universal Declaration of Human Rights and the Constitution of India, 1950. Only economic rehabilitation can prevent the practice of dedication of young girls to prostitution as *Devadasi, Jogins* and *Venkatasins.* In catena of judgments it has been held that, dedication of minors to the service of a temple as *dasis* (servants) amounts to a disposal of such minors, knowing it to be likely that they will be used for purpose of prostitution.[xxxii]

According to the Declaration and Agenda for Action from the World Congress against the Commercial Exploitation of Children (Stockholm), the commercial sexual exploitation of children is a

fundamental violation of rights of children. It consists of sexual-abuse by the adult and remuneration in cash/kind to the child or a third person(s). The infant/juvenile is treated as a sexual object and as a commercial object. The commercial sexual exploitation of infants/juveniles constitutes a form of coercion and violence against children, and it amounts to forced labour and a current-day form of slavery. There are three pioneer and interrelated forms of commercial sexual exploitation of children: prostitution; pornography; and trafficking for sexual purposes.[xxxiii] Around 10 million children worldwide are estimated to be in the profession of sex-trade.[xxxiv]

In the case of ***Gaurav Jain* v. *Union of India***[xxxv], the issue that came up before the Supreme Court was the rehabilitation of the children of the prostitutes. The Apex Court observed that, segregating children of prostitutes by locating separate schools, and providing separate hostels, would not be in the best interest of the children and the society at large. The Honourable Court directed that, these children should be segregated from their mothers and should be allowed to mingle with others and become a part of the society. The Court further contemplated that, the children of prostitutes should, however, not be permitted to live in the inferno and other undesirable surroundings of prostitute homes. This was observed particularly so in context of the young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. Whilst the court did not accept the plea for separate hostels for children of the prostitutes, it felt that, accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their respective mothers living in prostitute homes as soon as they are identified.

In another case, ***Gaurav Jain* v. *Union of India***[xxxvi], the moot question that came up before the Supreme Court for adjudication was this: What are the rights of the children of fallen women, the modules to segregate them from their respective mothers and others, so as to give them protection, care and rehabilitation to bring them back to the mainstream of national life? And as a facet of it, what should be the scheme to be evolved to eradicate prostitution at the source itself? And, lastly, what succour and sustenance can be provided to the fallen victims of flesh trade?

The Court in this case, through K. Ramaswamy, J., observed that, prostitutes are victims of circumstances and hence, should be treated as human beings like others, so as to bring them back into the mainstream of the social order without any stigma attached to them. The prostitutes and their children need to be treated with humanity and compassion so that their integration into the social mainstream is plain-sailing. Victims of flesh trade need care and consideration of the society. The Convention on the Right of the Child; the Fundamental Rights, contained in Part III of the Constitution of India; the Universal Declaration of Human Rights; the Directive Principles of State Policy, apply with equal vigour and force to ameliorate the socio-economic, educational and cultural conditions of the fallen women and their children.

The Apex Court reconnoitred that, so far as the Constitution of India is concerned, **Article 14** of the Constitution of India, 1950 provides for equality in general; **Article 21** guarantees right to life and personal liberty; **Article 15** prohibits discrimination on the grounds of religion, race, caste, sex or place of birth, or any of them; **Article 15 (3)** provides that nothing shall prevent the State from making special provisions for women and children; **Article 16(1)** provides for equality of opportunity in matters of public employment; **Article 23** prohibits human-trafficking and forced labour, making it punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (which was renamed in 1990 as the Immoral Traffic (Prevention) Act); **Article 39(f)** provides that children should be given opportunities and facilities to develop in a healthy manner and in conditions which do not put to compromise their dignity and freedom, also childhood and youth should be protected against exploitation, moral and material abandonment; **Article 46** directs the State to promote the educational and economic interests of women and people of weaker sections of society, to protect them from social injustice and all other forms of exploitation; **Article 51-A** enjoins duty on every citizen to develop scientific temper, humanism and the spirit of enquiry and reform and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. Thus, the court stated that, social justice and economic empowerment is firmly rooted in the constitutional firmament of India, holding it 'fundamental' to the life and liberty of every citizen (prostitutes and their children included).

The Court further pointed out that, **Article 1** of the Universal Declaration of Human Rights (UDHR) provides that, all human beings are born free; equal in dignity and rights. **Article 2** states that, everyone i.e. prostitutes with their children included are entitled to all rights and freedoms set-forth in the Universal Declaration of Human Rights without

any distinction of any kind such as that of: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. **Article 3** provides that everyone has the right to life, liberty and security of person. **Article 4** enjoins that no one shall be held in servitude; slave trade and sex-trade are prohibited in all forms. The victims of flesh trade are no less than destitute of slave trade. **Article 6** provides that everyone has the right to recognition everywhere as a person before the law, and thus identity of the victims of flesh trade cannot evaporate in thin air; their presence need to be acknowledged and consolidated efforts need to be made, both on executive/administrative side and judicial side to rehabilitate them and to provide for their welfare. India being a signatory to the UDHR is obligated to work towards the aspirations that the declaration contemplates.

The Court further stated that, the Declaration of Right of the Child, to which India is a signatory, encapsulates by virtue of **Article 3(1)** that, all actions concerning children whether undertaken by public or private social welfare institutions, legislative bodies, court of law or administrative authorities must yield to the best interest of the child. Further, the Court elucidated that, the Convention on the Elimination of All Forms of Discrimination against Women, 1979 by virtue of **Article 1**, prohibits discrimination against women; **Article 5** enjoins to modify social patterns of conduct of men and women with a view to achieve elimination of prejudices and all other customary practices which are based on the idea of the inferiority/superiority of the sexes or on stereotyped roles of men and women; **Article 12** prescribes that discrimination against women should end in the field of health-care in order to ensure better health services, including those related to family planning. **Article 13** directs the State Parties should work towards elimination of discrimination against women in all areas of socio-economic life, entitling them to all benefits apropos family life, marital status and right to foster their children in best possible manner.

Thus, in nutshell, the Court was of the opinion that, prostitutes have universal moral and social rights which entitle them and their children to live a life of dignity, devoid of social ostracism and discrimination. However, this case filliped on a rather curious-note, when D.P. Wadhwa, J. of the bench comprising of, K. Ramaswamy and D.P. Wadhwa, JJ., expressed his dissent albeit the directions issued by K. Ramaswamy, J. on the question of prostitution and its eradication, and on the nature and scope of Articles 142 and 145 (5) of the Constitution of India, 1950. Whilst D.P. Wadhwa, J. consented with K. Ramaswamy, J. on directions issued albeit social rehabilitation of the children of the prostitutes and establishment of juvenile homes.

Later, in the case of ***Gaurav Jain and Anr* v. *Union of India & Ors***[xxxvii], the Supreme Court of India (the Three Judges Bench comprising of: Sujata V. Manohar, S.P. Kurdukar, and D.P. Wadhwa, JJ.) elucidating on the scope of its power under Article 142 held that, Article 142 cannot override Article 145(5). The Apex Court observed as follows:

a. Even in non-adversarial public interest litigation if the two-judges comprising the Division Bench differ, matter has to be referred to the Chief Justice of India for constituting a larger bench for decision, and it would not be competent for one of them to issue directions for compliance by invoking Article 142 on the plea that the same has been done to avoid delay involved in reference to a larger bench.
b. The directions issued under Article 142 by K. Ramaswamy, J. in ***Gaurav Jain* v. *Union of India***, (1997) 8 SCC 114, regarding prostitution, its amelioration and eradication to which D.P. Wadhwa, J., the other member of the Division Bench dissented, cannot stand in law.

Thus, this case overruled, ***Gaurav Jain* v. *Union of India***, (1997) 8 SCC 114; however, directions issued in ***Gaurav Jain* v. *Union of India***, (1997) 8 SCC 114, with respect to social-reintegration of the children of the prostitutes and establishment of juvenile homes were upheld.

Part VII: Remarks: Legal regime in India albeit sex-work is laid down under the Immoral Traffic (Prevention) Act, 1956. Sex-work *per se* is not prohibited under the mandate of the 1956 Act; however, the enactment penalises and prohibits specific activities relating to commercial sex. The 1956 Act provides for the rescue and rehabilitation of individuals engaged in sex-work. The 1956 Act makes punishable: brothel-keeping vide Section 3; living on earnings of prostitution vide Section 4; procuring, inducing or detaining individuals for prostitution vide Sections 5 and 6-- penalties are higher where offences involve children (individuals less than 16 years of age) and minors (individuals less than 18 years of age). Prostitution in areas notified by Police and areas near public places is prohibited vide Section 7; and soliciting prostitution is prohibited and is punishable vide Section 8 of the 1956 Act.

The 1956 Act contemplates implementation of the mandate of the Act through Police and Magistracy. The 1956 Act contemplates implementation of the mandate of the Act through police personnel, both, Special Police Officers and Trafficking Police Officers; these officers are accorded special powers vide Section 13, to raid, rescue and search premises suspected of serving as brothels (See also: Section 15). The 1956 Act vide Sections 16, 17, 18 and 20, empowers the Magistrates to order arrests and removal, directing taking into custody of the rescued persons, closing down of brothels and eviction of sex-workers. The 1956 Act vide Sections 19, 21, 23 and the Immoral Traffic (Prevention) Act- State Rules, further provide for institutional rehabilitation for 'rescued' sex-workers.

Major defects albeit the 1956 Act:

i. Section 2(a) of the 1956 Act defines "brothel" as "*any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes*." (Underlining is mine).
Section 3 of the 1956 act provides for punishment for keeping, running and managing a "brothel". The term "*for the mutual gain of two or more prostitutes*" renders premises shared by prostitutes as illegal, even if it is for residential purposes only. There have been a plethora of instances, where by prostitutes have lost their homes and earnings under the guise of "closing down of brothels".

ii. Section 4 of the 1956 Act states that, any person above the age of 18 years, who knowingly lives on the earnings of a prostitute, shall be liable for punishment. Thus, what can be contemplated from the language of Section 4 is that, aged parents, siblings, and partners of prostitutes, who either due to old age or by reason of a disability are dependent on them are liable for punishment, which shall run in the following terms: imprisonment up to 2 years, or fine up to Rs. 1000/-, or imprisonment up to 2 years and fine up to Rs. 1000/-. This provision, thus, is not very well drafted; its implications are atrocious.

iii. Section 8 of the 1956 Act states that, any woman who tempts, or attracts, or endeavours to tempt or attract the attention of any person for the purpose of prostitution; or, solicits or, molests any person or, loiters or, acts to cause obstruction or, annoyance to persons or, offends public decency, for the purpose of prostitution, shall be punishable with: imprisonment up to 6 months or fine up to Rs. 500/- or both, on first conviction; and imprisonment up to 1 year and fine up to Rs. 500/-, in the event of a second or subsequent conviction.
However, a man who commits any offence under this section (that is, Section 8), shall be punishable with imprisonment for not less than 7 days but up to 3 months.
Section 8 is one of the most misused-provision of the 1956 Act. Sex-workers are often arrested even when they are not soliciting. This provision although does nothing to prevent (or abate) human trafficking, but still it is often used, particularly to criminalize and prosecute prostitutes even when they are not soliciting.

iv. Section 15(5A) of the 1956 Act mandates medical examination of individuals removed from brothels inter-alia for detection of sexually transmitted diseases. Prostitutes often are forcibly tested for sexually transmitted diseases and results of their tests are disclosed in the open court. This is contrary to the national policy which mandates obtaining of consent and necessitates confidentiality and counselling for HIV testing.

The Immoral Traffic (Prevention) Act, 1956, no doubt is an improvisation over the Suppression of Immoral Traffic in Women and Girls Act, 1956 but still a lot is to be achieved, particularly with reference to the abuse and social ostracism that sex-workers face despite the fact that prostitution *per se* is not illegal in India. Prostitutes cannot be seen as individuals with half-rights or no-rights; the Constitution of India guarantees them all rights as are available to all other citizens of the country, the crowning glory of them all being the "right to self-determination". Because prostitution *per se* is not illegal in India, the contention or the moot point of argument should not be, whether or not to legalise activities of sex-workers, but as to how to regulate prostitution in India?

Necessary fetters are required to be imposed on the exercise of police powers of the State, particularly in respect of raids that are carried out in the abode of the sex-workers, in the bid of terming them as 'brothels'. Rehabilitation of sex-workers is too academic a proposition much because of the social hypocrisy we are surrounded with, and due to the attitude of social denial, we live in. Despite the fact that flesh trade is an $8.4 billion industry in India, hardly any affirmative steps have been taken to regulate prostitution and to improvise the living conditions of sex-workers in India. Prostitutes in India face "identity crises", their existence is acknowledged only when brothels are raided and surveys are conducted by the Government and other agencies/authorities.

The only good that can be done to uplift the prostitutes from their situation of crises is to acknowledge them as human beings not only of 'flesh' but also of emotions; rights; privileges and liberties; and to make them realise that the Constitution of India shields them, protects them and embraces them, as it does to all other citizens of the country.

Bibliography:

Primary Sources:

1. The Constitution of India, 1950
2. The Suppression of Immoral Traffic in Women and Girls Act, 1956
3. The Immoral Traffic (Prevention) Act, 1956
4. The Indian Penal Code, 1860
5. The Indian Evidence Act, 1872
6. The Juvenile Justice (Care and Protection of Children) Rules, 2007
7. The Juvenile Justice (Care and Protection of Children) Act, 2015
8. The Universal Declaration of Human Rights
9. The Convention on the Right of the Child
10. The Convention on the Elimination of All Forms of Discrimination against Women, 1979
11. The Law Commission of India: Sixty Fourth Report, The Suppression of Immoral Traffic in Women and Girls Act, 1956, Chapter I: Introduction, March 1975
12. The Report of the Street Offences Committee, 1928
13. The Report of the Committee on Homo-sexual Offences and Prostitution, 1957

Secondary Sources:

1. Black's Law Dictionary (Fourth Edition)
2. *P. Ramanatha Aiyar's Law Dictionary (Fifth Edition)*
3. Professor W.W. Buckland, *Roman Law from Augustus to Justinian*
4. Charles Winick, *The Lively Commerce,* Quardrangle (1971)
5. Chamber's Encyclopaedia (1961), Volume II, p.257
6. Ratanlal & Dhirajlal, *The Indian Penal Code,* Chapter XVI: Criminal Force & Assault, Wadhwa & Company (Nagpur), 30th Edition (2006), p. 675
7. Gagandeep Kaur, *Law and Changing Private Morality in India,* Journal of Law Teachers of India, Volume II, Issue 1-2, 2011, p. 126
8. Palash Krishna Mehrotra, *Legalisation of prostitution will help protect vulnerable women in India,* Daily Mail, 19 October 2014
9. Devanik Saha, *The number story: A human trafficking cases rise, convictions come down,* The Indian Express, 30 January 2015
10. PSA Pillai, *Criminal Law,* Chapter 40: Kidnapping and Abduction, Lexis Nexis, 9th Edition, 2006, p.714-715
11. Sridevi Panikkar, *Child Sex Tourism: An Overview of the Domestic and International Response,* Delhi Law Review, Volume II (2005-2006), p.157
12. Sex Workers' Manifesto, http://www.nswp.org/sites/nswp.org/files/Sex%20Workers%20Manifesto%20-%20Meeting%20in%20India.pdf, Last viewed on: 05.06.2016

*Shivam Goel; B.Com (H), LL.B. (Delhi University), LL.M. (NUJS, Kolkata); Author of: Corporate Manslaughter and Corporate Homicide: Scope for a New Legislation in India, Partridge India, 2015; Associate, S.G. & Co. (New Delhi); advocate.shivamgoel@gmail.com

[i] See: Charles Winick, *The Lively Commerce,* Quardrangle (1971)

[ii] See: Law Commission of India: Sixty Fourth Report, The Suppression of Immoral Traffic in Women and Girls Act, 1956, Chapter I: Introduction, March 1975

[iii] See: Chamber's Encyclopaedia (1961), Volume II, p.257

[iv] See: ***Com.* v. *Cook***, 12 Metc., Mass., 97; ***State* v. *Anderson***, 284 Mo. 657, 225 S.W. 896, 897; ***U.S.***

ex rel. Mitter* v. *Curran, C.C.A.N.Y., 18 F. 2d 355, 356
[v] 277 Ill. 521, 115 N.E. 631, 632
[vi] 8 Barb., N.Y., 610
[vii] 54 Me. 24, 89 Am. Dec. 716
[viii] 17 Ala. App. 307: 84 So. 783
[ix] 181 Va. 338, 25 S.E. 2d 350, 352
[x] 125 Kan. 400, 264 P. 1043, 1044
[xi] 56 Mich. 544, 23 N.W. 215
[xii] 1972 MLJ (Cr.) 150
[xiii] 1982 Cr LJ 702 (Mad)
[xiv] AIR 1966 Mad 167
[xv] 1967 Cri LJ 544 (SC)
[xvi] 1981 RCC 42
[xvii] See: *P. Ramanatha Aiyar's Law Dictionary,* Fifth Edition, p. 1029
[xviii] See: Ratanlal & Dhirajlal, *The Indian Penal Code,* Chapter XVI: Criminal Force & Assault, Wadhwa & Company (Nagpur), 30th Edition (2006), p. 675
[xix] See: Gagandeep Kaur, *Law and Changing Private Morality in India,* Journal of Law Teachers of India, Volume II, Issue 1-2, 2011, p. 126
[xx] See: Palash Krishna Mehrotra, *Legalisation of prostitution will help protect vulnerable women in India,* Daily Mail, 19 October 2014
[xxi] See: Devanik Saha, *The number story: A human trafficking cases rise, convictions come down,* The Indian Express, 30 January 2015
[xxii] The Penal Code was actually passed in 1860
[xxiii] According to the narrow view, the law should reach only acts causing positive harm. According to the wider view, the law should also punish behaviour which, though not causing positive harm to the individual, may damage the cherished moral fabric of the society, and destroy values which are considered worth preserving at all costs.
[xxiv] See: Sex Workers' Manifesto, http://www.nswp.org/sites/nswp.org/files/Sex%20Workers%20Manifesto%20-%20Meeting%20in%20India.pdf, Last viewed on: 05.06.2016
[xxv] 2001 Cr LJ 3046 (M.P.)
[xxvi] See: Criminal Appeal No. 422 and 425 of 1994, the Allahabad High Court, Order dated 13.05.2016
[xxvii] AIR 1991 SC 207
[xxviii] 5 MHCR 473
[xxix] See: PSA Pillai, *Criminal Law,* Chapter 40: Kidnapping and Abduction, Lexis Nexis, 9th Edition, 2006, p.714-715
[xxx] (1928) 30 Bom LR 613, 52 Bom 403
[xxxi] (2011) 10 SCR 577
[xxxii] See: (1881) 1 Weir 359 (FB); ***Queen-Empress* v. *Basava***, (1891) 15 Mad 75; ***Reg.* v. *Jaili Bhavin***, (1869) 6 BHC (Cr C) 60; ***Queen-Empress* v. *Tippa***, (1892) 16 Bom 737
[xxxiii] See: Sridevi Panikkar, *Child Sex Tourism: An Overview of the Domestic and International Response,* Delhi Law Review, Volume II (2005-2006), p.157
[xxxiv] See: Palash Krishna Mehrotra, *Legalisation of prostitution will help protect vulnerable women in India,* Daily Mail, 19 October 2014
[xxxv] 1990 Supp SCC 709: 1991 SCC (Cri) 140
[xxxvi] (1997) 8 SCC 114
[xxxvii] (1998) 4 SCC 270