

The Legality of Prostitution in India: An Extensive Analysis

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Abstract

The oldest profession in India is Prostitution. Generally, people hold a misconception that it is illegal. Prostitution is not illegal as long as such centres are licensed. Owning and managing a brothel and pimping are illegal activities. Major cities where such brothels operate illegally in large numbers are Kolkata, Delhi and Mumbai.

In this paper, we will be focusing primarily on the relationship between prostitution and Indian culture, along with the mentality of the person buying or selling sex, the difficulties faced by sex workers, and how prostitution legalisation can help strengthen the scenario, not forgetting that prostitution is not just about female prostitutes, but also the male counterpart, albeit less in number and not the male counterpart. We do not remove male sex workers when enacting legislation for female sex workers.

Introduction

Prostitution is a severe social issue common in India and its solution has been made difficult, but problems are still present. Prostitution is a gender-specific practise, like other types of abuse committed by men against women; girls and women are the vast majority of victims, while men are constantly the perpetrators.

¹The word itself, prostitution, speaks of a woman's condition. The term prostitution comes from the Latin word 'prostituere' which means 'publicly revealing'. Prostitution involves giving or receiving a body for hire for sexual activity, but excludes spousal sexual activity. Performing for hire or proposing or consenting to perform for hire while there is an exchange of value, either of the actions such as sexual intercourse or other penetration to any person's genitals through physical contact in order to fulfil the offender's sexual desires. It is a woman's ordinary lewdness for money.

²Moreover, it becomes an arduous job to find an accurate and detailed picture because of such a large amount of stealthy prostitution at every level. It is an enterprise that takes full advantage of the vulnerability of human beings, especially children and women, in violation of their human rights and makes them subject to financial transactions through the use of power and pressure, whether for the purposes of sex, labor, servitude or slavery.

The world has taken a consistent stance in today's globalised human resources world condemning this gross abuse of human resources and has urged the government to take effective action against it. Basically, this work aims to focus on the best approach to testing the problem of prostitution

¹ Rupam L., *Uniform Civil Code Towards Gender Justice*, Legal Services India, <http://www.legalservicesindia.com/article/1832/Uniform-Civil-Code-Towards-Gender-Justice.html>.

² Anuj Kumar, *Legalization of Prostitution in India: Need of the hour*, [legaldesire.com](https://legaldesire.com/legalization-of-prostitution-in-india-need-of-the-hour/) (May 23, 2016), <https://legaldesire.com/legalization-of-prostitution-in-india-need-of-the-hour/>.

legalisation in India. Giving it a legal mandate would prompt women to have a healthier and safer society. From a particular angle, the argument is to be understood.

Prostitutes should be sensitized about their rights and interests, education, health, ability to choose or reject routine medical check-ups, financial support, accident coverage and other advantages. They should also be given a voice that, in the event of any gross misconduct, will give them justice.³

Background

Prostitution is an old occupation in India. In fact, in various Hindu mythological inferences referred to as apsaras, there are mentions of sex workers. The Devadasi system existed during the pre-colonial era, where it was a popular practise among Hindus to give their female child as a sign of their devotion to God. In the literal sense, Devadasi means devoted to the god, that is, they were married to the god and did not have to marry any mortal being.

They were women who were sexually liberated and excelled in diverse fields of art, including classical dance and music. Colonialism, however, brought an exploitation and repression system. The British began to reflect their own social constraints on these women, where the fundamentals of sexual freedom, femininity, art and culture were converted into devotion, Bhakti, etc., and furthermore, with the declining feudalism and the end of colonialism, the temple priests began to mistreat these women. Leaving them exposed to sexual abuse and hunger, therefore. This is one of India's oldest ways of prostitution.

³ Sathya N., *Prostitution: A Brief History*, Speakingtree.in (Feb.12, 2018), <https://www.speakingtree.in/allslides/prostitution-a-brief-history/child-prostitution-in-india>.

Are men also working as sex workers

In the past, only women were used as prostitutes and men were their customers, but now male, female and transgender people are all employed in this field in the 21st century. Males are growing at a great pace as prostitutes in India, according to the BBC report. It also notes that they offer sex to male clients while there are no female clients. Gigolo is the word for male prostitutes.⁴

Causes of Prostitution

The situation began to deteriorate after the fall of the Mughal empire, particularly for the lowest strata of society, the women who worked in harems, palaces and brothels. The main cause of prostitution is poverty. It is difficult for a woman to be financially independent in India's patriarchal society, especially when she has been deprived of education, independence and skills. Prostitution is therefore the only occupation in which to receive cash.

The vulnerability of women to sexual abuse is a result of a restrictive, orthodox Indian culture that sees them merely as an item or a commodity. The prevalent caste system in India, where oppressed females are often sexually abused and left to rot in the impoverished system, is another major cause of prostitution. Other explanations for prostitution are the lack of sex education, kidnapping and abduction.⁵

⁴ Diva R., *Legal aspects related to prostitution in India*, ipleaders intelligent legal solutions (May 22, 2020), <https://blog.ipleaders.in/legal-aspects-related-to-prostitution-in-india/>.

⁵ Manoj W., *The Legal Framework of Prostitution in India*, SAGE Publishers, (2008).<https://sk.sagepub.com/books/prostitution-and-beyond/n12.xml>.

The Practice of sex trade

Before contending with the legalization of prostitution, the nature of it and the need for it must be understood in society and, in particular, the Indian one where sex is still a big taboo. Various individuals also argue against the legalization of prostitution and seek the criminalization of the act, and its immoral existence is mostly the reason behind their point of contention.

Nevertheless, we do not know that, while most individuals regard prostitution as something unethical, the sex work industry is constantly thriving just as every other industry operates on demand. If demand rises, then the company prospers in terms of marketing.

The market for sex transactions is so strong that its origins have spread from the red light areas to private massage parlours and online platforms. Fully criminalising the act would be like putting a blind eye on the real victims of sexual abuse and offering the sex workers a free passage to more persecution and brutality.

Laws Related to Prostitution in India

The Constitution of India, under Article 23⁶, prohibits trafficking in every form including commercial sexual exploitation of women and girls. We have special legislations like the Immoral Traffic Prevention Act (ITPA) and local legislation like Goa Children's Act etc. in addition to the provisions in the IPC (Indian Penal Code).

Immoral Traffic (Prevention) Act-1956

⁶The Consti. Of India, 1949, Art. 23.

The Immoral Trafficking Prevention Act, 1956 ('ITPA'), India's main sex work law, does not criminalise prostitution or prostitutes per se, but primarily punishes third-party activities that encourage prostitution, such as brothel keeping, living off earnings and procurement, even if sex work is not forced

Section 3. Punishment for keeping a Brothel or allowing premises to be used as a Brothel.

(1) Any person maintaining or running, acting or assisting in the maintenance or management of a brothel shall, on first conviction, be punishable by a strict term of imprisonment of not less than one year and not more than three years, and also by a fine of not less than two thousand rupees and, in the event of a second or subsequent conviction, by a strict term of imprisonment of not less than one year and not less than one year.

(b) Being the owner, lessor or landlord of any premises or agent of such owner, lessor or landlord, causes the same or any part thereof to be used as a brothel, knowing that the same or any part thereof is intended to be used as a brothel, or is knowingly a party to the use of such premises or any part thereof as a brothel, shall be punishable by imprisonment on first conviction for a period of time which may be punishable by first conviction.⁷

(2-A) For the purposes of subsection (2), unless proven otherwise, it is assumed that any person referred to in subparagraph (a) or subparagraph (b) of that subsection knowingly allows the premises or any part thereof to be used as a brothel or, where applicable, knows that the premises or any part thereof are to be used as a brothel, if, -

⁷ Dharmendra C., *Legalization of Prostitution in India*, Academia.edu (Jan.2009), https://www.academia.edu/613653/Legalization_of_Prostitution_in_India.

- (a) A report is published in a newspaper circulated in the region in which that person resides in order to discover that the premises or some part of them were used for prostitution as a result of a search carried out under this Act.; or
- (b) Such a person shall be provided with a copy of the list of all items found during the search referred to in clause (a).⁸

Section 5. Procuring, inducing or taking person for the sake of prostitution.

(1) Any person who-

- (a) Procures or attempts to procure a person for the purpose of prostitution, whether with or without his/her consent; or
- (b) Induces a person to leave somewhere in order to become the prisoner of, or visit, a brothel for the purpose of prostitution; or
- (c) Takes or threatens to take a person or allows a person to be taken from one place to another in order to carry on or to be brought up for prostitution; or⁹
- (d) Causes or induces a person to engage in prostitution; is punishable on conviction with a strict term of imprisonment of not less than three years and not more than seven years and also with a fine of up to two thousand rupees; and if any crime under this sub-section is committed against the will of any person, the term of imprisonment shall be extended by seven years.:

⁸ The Immortal Traffic (Prevention) Act, 1956.

⁹ Dr. P.K. Pandey, *Prostitution in India Legal and Social Ramifications*, Scribd, <https://www.scribd.com/document/62739533>.

Provided that if the person in respect of whom an offence committed under this sub-section :

- (i) Is a child, the punishment postulated under this sub-section can be extended to rigorous imprisonment for a term of not less than 7 years but may extend to life; and
- (ii) Is a minor; the punishment postulated under this sub-section could be extended to rigorous imprisonment for a period of not less than 7 years and not more than 14 years.

It can also be seen that only the actions of the 3rd party are punished by both parts, namely section 3 and section 5, and the other sections of the Act are punished, and new laws are enacted to prosecute the client who visits the prostitutes.

A dismal picture is provided by the law enforcement situation, viewed from the conventional point of view. The National Human Rights Commission Action Report conducted during 2002-2004 indicates that the key problems in the present law enforcement scenario are as follows:

- ¹⁰• Lack of priority: For different purposes, law enforcement authorities and justice delivery agencies offer HT problems the lowest or zero priority.
- Insensitivity: Lack of sensitivity is a major challenge in response to human trafficking. It is more of an attitudinal issue.
- Victimization of the victim: The NHRC study shows that about 85 to 90 percent of those arrested are women and most of them are victims of trafficking. The NHRC study shows that about 85 to 90 percent of those arrested are women.

¹⁰ *Gaurav Jain v. Union of India*, (1997) (AIR 1997 SC 3021).

- Improper investigation: Whereas a trafficking crime extends across a large canvas as the scene of crime, starting from the source point and extending to the transit places as well as the destination areas, the investigation is more often unheard and unrepresented.
- Database: One of the major drawbacks in law enforcement is the fact that there is no database of traffickers and other exploiters. There is no sharing of intelligence among the stake holders and therefore, the offenders indeed act with impunity. (Bedi ,Kiran ;Nair.P.M 2008)

Magnitude and Trend of the Problem in India

The data collected by the National Crime Record Bureau (NCRB) shows the magnitude of the problem of prostitution in India. The Bureau is collecting data under the following heads of crime which are related to Prostitution and Human Trafficking.¹¹

- Procurement of Minor girls (section 366-A IPC).
- Importation of Girls (Section-366-B IPC).
- Selling of Girls for prostitution (Section-372 IPC).
- Buying of Girls for Prostitution (Section-373 IPC).
- Immoral Trafficking (Prevention) Act 1956.
- Child Marriage Retrain Act, 1929.

¹¹ Madison R., *Red Light City: Sex Workers' Experiences of the City of Joy Madison*, Leigh Rose, <https://madisonleighrose.wordpress.com/2012/08/27/red-light-city-sex-workers-experiences-of-the-city-of-joy>.

Procurement of Minor Girls (Sec. 366A of IPC) (Incidence...253)

253 cases were reported in the year 2007 as compared to 231 such cases in 2006, accounting for 9.5% increase over 2006. West Bengal has reported 54 such cases indicating a share of 21.3% at National level followed by Andhra Pradesh (37) and Bihar (36). An increasing trend was observed in these cases during the last three years.¹²

Selling of Girls for Prostitution (Sec.372 of IPC) (Incidence...69)

“69 cases of 'Selling of Girls for Prostitution' were reported in the country during 2007 against 123 such cases in 2006, thereby indicating a decline of 43.9% over 2006. West Bengal has accounted for 79.7% (55cases out of 69 cases) of the total cases of 'Selling of Girls for Prostitution' reported in the country.

Buying of Girls for Prostitution (Sec. 373 of IPC) (Incidence...40)

40 cases of 'Buying of Girls for Prostitution' were reported in the country during the year 2007. This indicates a 14.3% increase in the incidence over 2006 when 35 cases were reported in the country. Maharashtra has accounted for 77.5% (31 out of 40) cases reported in the country in 2007.¹³

Immoral Trafficking (Prevention) Act 1956 (Incidence...3,568 Rate ...0.3)

Cases under this Act have registered a decline of 21.4% (3,568) during the year as compared to the previous year (4,541). 33.6% (1,199) of the total cases reported in the country were reported from Tamil Nadu whereas Daman & Diu reported the highest crime rate of 2.7 under this head as compared to the National average of 0.3.

¹² Diva Rai, *Legal aspects related to prostitution in India*, ipleaders intelligent legal solutions (May.22, 2020), <https://blog.ipleaders.in/legal-aspects-related-to-prostitution-in-india>.

¹³ V Sithannan, *Immoral traffic: Prostitution in India*, Jeywin Publications, (2006).

Child Marriage Restraint Act 1929 (Incidence...96 Rate ...Negligible)

The cases reported under this Act during 2007 have marginally declined by 3.0% over the previous year (99). Andhra Pradesh (21) Gujarat (14) and West Bengal (9) have reported bulk cases together accounting for 45.8% of the total cases.¹⁴

Shall India Legalize Prostitution?

Some people claim that prostitution in India will be made legal and accepted as part of society because the prostitution issue is unavoidable. The advantage of legalising prostitution in India would be that we will at least have a track record of sex workers, such as when most of the bar dancers migrated to Gujarat and Karnataka and other neighbouring states and started their business underground when dance bars in Bombay were closed. These women, who live on the edge of life everywhere, can gain access to medical facilities that can monitor the spread of AIDS by legalizing prostitution. The sex industry has a very strong need to be regulated like every other industry and empowered with legal protection. For sex workers and society as a whole, the practical consequences of the occupation being legal will offer nothing but benefits. Holding prostitution illegal also leads to violence, since prostitutes and their clients are seen by many criminals as enticing targets for stealing, fraud, abuse, or other criminal acts¹⁵. The perpetrators know that it is unlikely that certain people would report the crimes to the police and before the attacks take place, the victims will have to accept that they were involved in the illegal practise of prostitution, now if it is legal then they will probably go and report this to the police. Benefits of prostitution legalization include:

- Legalizing prostitution and stopping human trafficking in the sex industry.

¹⁴ *Budhadev Karmaskar v. State of West Bengal* (2011) 10 SCC 283.

¹⁵ Moni N., *Anthropological Perspectives on Prostitution and AIDS in India*, 36 Economic and Political Weekly no. 42 (2001).

- Prostitution legalization would govern the sex industry.
- Prostitution legalization would eliminate clandestine, covert, illicit and street prostitution.
- Legalization of prostitution, since they will have freedom, will protect women in prostitution.
- Women in prostitution systems want to legalize the sex industry as they are the one who struggles most because they have no rights.
- Prostitution legalization would promote the welfare of women as they will have convenient access to medical services that they do not have when it is illegal.
- Recognizing prostitution as an economic practise and thereby allowing women to receive work permits as sex workers in India.¹⁶
- Nevertheless, those who demand that prostitution be "legalised" and regarded and equal to all other occupations and professions with "respect and dignity" need to address a few fundamental questions:
- In fact, what does the word "legalize" imply? Does it mean that wherever she wants and advertises her services, a prostitute can open a brothel or sex parlour? Does it mean that men or women who supply call girls should be able to set up an office in any neighborhood they want, just as doctors set up their clinics and put up a hoarding outside the house announcing that during such and such hours, call girls are available?
- It is ultimately mixed with criminal mafias even in those countries where it is legalised, because sex trade necessarily comes with sex slavery and violent forms of pornography and sex trafficking. Does it not risk my life if a brothel owner is free to set up shop in my neighbourhood? How many are willing to accept a brothel right next to their own home, even among those who are empathetic towards the plight of prostitutes? How many of us are willing to let our young children grow up in an atmosphere where it is considered a fully acceptable practise to rent a woman's body for sex?¹⁷

¹⁶ Ibid.

¹⁷The Journal of Sex Research, Vol. 38, no. 2, (2001).

- If the vast majority of citizens in India do not want to have brothels operating freely and lawfully in their communities, if sex workers agreed to operate in specially designated areas historically known as red-light districts, the only way to provide for "legal" sex work is. Specific licenses or licenses for licensed brothels may then be obtained by sex workers. But in publicly defined sex zones, every sex worker does not want to leave.
- Most women, particularly those who operate as girls call high society, tend to operate unexpectedly, particularly those who want to wear the mask of respectability. Also, most men who run sex rackets, including female prostitution, would not want to be identified publicly as pimps and procurers. How does the law regulate those individuals?
- Do they have the right to request its relocation or demand that the call-girl center be moved to a red-light district after the trade is legalized if people come to know that a person in their neighborhood is using its premises to operate a call-girl racket? Or does it mean that other men, in the name of 'respecting' the rights of sex workers to an occupation of their choosing, must suffer from the existence of such practices and thereby risk their own lives?
- Those who request that sex work be given the same "respect" as any other occupation need to clarify whose responsibility it is to give or ensure "respect" to prostitutes and pimps who are their "helpmates." Is the government required to pass a law compelling people not to avoid prostitutes, as it did to prohibit the practise of untouchability, for example? Through openly intermixing and dining with castes condemned as untouchable, one may show that one does not practise untouchability. How can one prove a prostitute's "respect"? Do we have to send our children to brothels to intermix with the children of sex workers or do we hold special functions to socially honour the most successful among them?

Conclusion

It would be ignorant to place a blind eye on it and believe that the system and its shortcomings do not exist in a culture where prostitution has been an age-old occupation and continues to thrive as a business field. It would mean a better life for sex workers with better pay, health care and safety by decriminalising sex work with proper rules and regulations and making it legal.¹⁸

It will be a revolutionary step, not just as a society, that will remove many social evils from society, such as child trafficking, rape, etc. Sex trade is a very simple fact of our country and assured benefits can be achieved by accepting it as a legal occupation with certain laws and protections for all interested parties. Only the improvement of society will be solved by a better and equitable regulatory system and the introduction of all safeguarding approaches¹⁹.



¹⁸ *Budhadev Karmaskar v. State of West Bengal*, (2011) 10 SCC 283.

¹⁹ SukumariBhattacharji, *Prostitution in Ancient India*, 15 (2), SOCIALSCIENTIST 32 (1987).