



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Legalization of Prostitution in India: A Hard-Earned Victory or A Judicial Pretence

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Received 17 August 2022; *Accepted* 03 September 2022; *Published* 09 September 2022

Prostitution is defined as the act of entering into sexual intercourse in return for money. The legal validity of sex work is different in various countries however in India it is still looked down upon as a profession and sex workers are considered as a social outclass. The author of the paper wishes to establish how prostitution still stands as a challenge to the Indian judiciary where about a large number of the population is indulged in sex work and still there are a number of limitations that are put up against it. The analysis by the author is based on the history of prostitution in India, the causes that lead to individuals entering into sex work, the current legal scenario of prostitution in India, and how the legalisation of sex work would impact their community and society in a positive way. The following paper also sheds light upon the social evils such as rape, violence, and sex trafficking that are related to prostitution and how they can be overcome by the government taking control of the situation and improving the scenario.

Keywords: *prostitution, legalisation, sex worker, sex trafficking, rape*

INTRODUCTION

Prostitution is derived from the Latin word called “*prostituere*” which means to expose publicly¹, it is a severely debated topic and has garnered widespread attention over the years. This is a practice in which an individual offers his/her body or engages in any sexual activity in return for money.² Prostitution has been in existence in society for a very long time with its evidence tracing far back to the pre-Vedic ages, and since then it has continued to exist in the modern era too where many countries in the world such as Germany, Switzerland, Austria, Greece, Turkey, the Netherlands, Hungary, and Latvia, prostitution is legal and regulated.³

In India however, prostitution is still considered to be a taboo subject and it is only recently that the Supreme Court of India recognized prostitution as a profession before that it was not only regarded as a crime but also prostitutes were not respected in society and have had a struggling past in regard to their rights.⁴ Prostitution has always been associated with many other crimes against women such as violence, rape, and sex trafficking therefore it is very important to understand that it must be viewed as legal work in the eyes of the government, and also it is the responsibility of the state to take effective care of the rights of the sex workers.

Due to its conflicting history prostitution has always been avoided and was never really viewed as a concerning issue but the reality is different, as we know women have always faced the wrath of the male dominant society and since some uneducated women don't really have any resources and the knowledge to earn a living and also to survive alone in a patriarchal society they resort to entering the profession of prostitution since they have no option left, not only voluntarily but a large number of women are forced to enter into this profession through sex trafficking. In India, 95 percent of the trafficked victims are forced into prostitution, shows data

¹ Yashi Verma, 'Legalization of Prostitution In India' (*Legal Service India*) <<https://www.legalserviceindia.com/legal/article-3392-legalization-of-prostitution-in-india.html>> accessed 16 August 2022

² *Ibid*

³ Harrison Jacobs, 'Prostitution is legal in countries across Europe, but it's nothing like what you think' (*Business Insider*, 13 March 2019) <<https://www.businessinsider.in/thelife/prostitution-is-legal-in-countries-across-europe-but-its-nothing-like-what-you-think/articleshow/68397426.cms>> accessed 16 August 2022

⁴ *Ibid*

from National Crime Records Bureau.⁵ Therefore it becomes extremely important to keep a check on the functioning of the entire system of prostitution.⁶ As viewed under the Indian Penal Code (IPC)⁷ prostitution is not regarded as a criminal offence however, there is a separate act under which it is governed which is known as the Immoral Traffic Prevention Act of 1956⁸ under which several activities such as running a brothel, pimping, etc. are regarded as a crime this act also highlights the definitions brothels and prostitution which we would be further discussing in the paper.

According to reports,⁹ it is estimated that there are about 40-42 million prostitutes across the world and 80 percent of the population of prostitutes are female with the majority of them falling under the age group of 13 to 25¹⁰, with about 7.76 lakhs of sex workers in India¹¹ also between the age group of 13 to 25, it is evident that most of the sex workers are either children or women who are pushed into this trap through sex trafficking which is a major social concern as it puts the lives of women and children at stake. The laws that currently govern the sex workers need changes and newer regulations as the sex workers aren't just any regular workers as their life is met with constant difficulties and problems such that of violence and exploitation and also the wages paid to them are extremely low.¹²

Prostitution is not only hated by many as a profession but also sex workers are treated as social outcasts. We as individuals need to understand that they too are the citizens of our own nation

⁵ Jaffer Latief Najar, 'Human Trafficking in India: How the Colonial Legacy of the Anti-Human Trafficking Regime Undermines Migrant and Worker Agency' (*LSE Human Rights*, 11 February 2021) <[https://blogs.lse.ac.uk/humanrights/2021/02/11/human-trafficking-in-india-how-the-colonial-legacy-of-the-anti-human-trafficking-regime-undermines-migrant-and-worker-agency/#:~:text=According%20to%20data%2C%2095%25%20of,prostitution%20\(Divya%2C%202020\)>](https://blogs.lse.ac.uk/humanrights/2021/02/11/human-trafficking-in-india-how-the-colonial-legacy-of-the-anti-human-trafficking-regime-undermines-migrant-and-worker-agency/#:~:text=According%20to%20data%2C%2095%25%20of,prostitution%20(Divya%2C%202020)>) accessed 16 August 2022

⁶ *Ibid*

⁷ Indian Penal Code 1860

⁸ Immoral Traffic Prevention Act 1956

⁹ Gus Lubin, 'There Are 42 Million Prostitutes In The World, And Here's Where They Live' (*Business Insider*, 18 January 2012) <<https://www.businessinsider.com/there-are-42-million-prostitutes-in-the-world-and-heres-where-they-live-2012-1?IR=T>> accessed 16 August 2022

¹⁰ *Ibid*

¹¹ Divya A, 'Sex workers in India on the verge of debt bondage and slavery, says a study' (*The Indian Express*, 24 December 2020) <<https://indianexpress.com/article/lifestyle/life-style/sex-workers-in-india-on-the-verge-of-debt-bondage-and-slavery-says-a-study-7117938/>> accessed 16 August 2022

¹² *Ibid*

and that they are vested with the same fundamental rights as ours thus, it becomes highly important to legalize the field of sex work since it would benefit their community as a whole and uplift them from their current conditions where both law and people view them with no respect. Prostitution, as a problem must be encountered as not only women but even men, are trapped under its clutches therefore a reformed system must be established in order to provide a livelihood to the individuals involved in this business and take stricter actions to make sure children are not exposed to it.

PROSTITUTION AND ITS HISTORY

Prostitution has had a long and debated history where it is believed that it has existed since about the Vedic ages with references being made to it in the Rig Veda. The Puranas have mentioned *5 categories of women* based on the number of men they had their relations with such as a Kulata was a woman having a relationship with two men, a darshini was a woman having relations with three men, and a woman in relation with 5 men was called a vaishya and if a woman offered herself to more than 5 men then she was known as a mahaveshya.¹³

These terms were also used in Hindu mythology where in an epic like Mahabharata Draupadi was referred to as a vaishya due to her marriage with the 5 Pandavas,¹⁴ along with this there have been several mentions of Apsaras in the Indian mythology who were known for their extremely charming and unrivaled beauty, they were immensely trained in the dance and art forms and were believed to live in the Dev Lok the abode of gods. The Rig Veda has clear mentions of a practice where salve was given as gifts to the Brahmans by the kings. The Aryans too had a tradition in which women were presented to the other kings as a symbol of friendship these women were exceptionally beautiful and were trained dancers and singers. Prostitution was prevalent in several parts of ancient India where sex workers were referred to as 'devadasis' which means servant of the god. In the following practice the girl at a very young age was

¹³ Itimes, 'History Of Prostitution' (*India Times*, 12 September 2014)

<<https://www.indiatimes.com/lifestyle/self/history-of-prostitution-277526.html?picid=1460674>> accessed 16 August 2022

¹⁴ *Ibid*

married off to the gods and was destined to serve at the temple for the rest of her life they were trained in dance forms and were supposed to dance in order to entertain the deity.

Devadasis were married to the god but were sexually exploited by the upper caste men and the Zamindars, and they were also not given any rights and were supposed to live a life of seclusion. The devadasi system has been part of southern Indian life for many centuries. A veneer of religion covers the supply of concubines to wealthy men.¹⁵ In age-old texts and epics, there have been references made that women made money out of their beauty, Chanakya in his acclaimed work *The Arthshastra* has talked about the various occupations practised by women out of which one occupation was known as *Rupjiva* in which women made money using her beauty which is almost identical to modern-day prostitution.¹⁶ In the Mughal era, there was the concept of 'Tawaif' who were trained singers and dancers in the court of the Mughal ruler. However later on these tawaifs were reduced from the royal status and performed at 'kothas' where they were sexually exploited.

During the British era the condition of women declined even more as they believed that prostitution was a highly demeaning profession and that prostitutes had no life of their own, they suppressed the prostitutes and used them to fulfill their sexual desires. They opened up several brothels that were regulated by the state and were known as *chaklas*, a number of women who were prostitutes resided in these *chaklas* and were exploited sexually by the soldiers who often ill-treated them, and they were also tormented both physically and mentally. Prostitution as an occupation has been prevalent for a very long time including Vedic as well as the epic ages. It is important to understand that it has been an occupied for ages and at a particular time sex workers were considered as equals in society however the current scenario is different where sex workers are looked down upon and their work is not regarded as any occupation, it is time that we understand and consider them as equals show respect to them.

¹⁵ Nash Colundalur, 'Devadasis are a cursed community' (*The Guardian*, 21 January 2011)
<<https://www.theguardian.com/lifeandstyle/2011/jan/21/devadasi-india-sex-work-religion>> accessed 16 August 2022

¹⁶ *Ibid*

LAWS PERTAINING TO PROSTITUTION IN INDIA

There are no concrete laws that administer prostitution as of yet in India however prostitution is also not illegal in the eyes of Indian law however, owning acts associated with prostitution are deemed as illegal. Prostitution is majorly governed by the Immoral Traffic Prevention act of 1956, under which certain activities carried out in association with prostitution are referred to as illegal. The following act defines both a brothel and prostitution where a brothel is defined under section 2(a) of the act which states that any place that is used for the purpose of sexual exploitation is referred to as a brothel¹⁷ whereas the word prostitution is defined in section 2(f) of the act which states that the sexual exploitation of one's body for commercial purpose¹⁸. Under the following act, sex workers can practice their profession but any person who makes an earning from prostitution is to be punished this involves procuring abducting, or inducing a person for prostitution; a move significant enough to ensure trafficking for the sex trade was under check.¹⁹ Furthermore, it is mentioned that sex workers are required to maintain a minimum of 200 meters of distance from any place that has a public presence, to simply put it forward prostitution can only be practised away from the public eye.²⁰

Under this act the following acts can be considered illegal:

- Any individual who manages or helps in the functioning of a brothel is to be imprisoned for a period of 1 year.
- Any individual who abducts a girl to engage her in prostitution is to be imprisoned for a period of 7 years.
- Any individual who engages in prostitution under the two hundred meter range of any public place would face an imprisonment of up to three months.

¹⁷ Immoral Traffic Prevention act 1956, s 2(a)

¹⁸ Immoral Traffic Prevention act 1956, s 2(f)

¹⁹ Bijayani Mishra & Sabiha Mazid, 'Why Supreme Court's acknowledgement of sex work as a profession is welcome' (*The Indian Express*, 30 May 2022) <<https://indianexpress.com/article/opinion/columns/supreme-court-acknowledgement-sex-work-profession-7944151/>> accessed 16 August 2022

²⁰ *Ibid*

In the case of *Smt. Afjal v State of UP*²¹ where the person detained young girls for the purpose of prostitution was found to be in violation of the act and proven guilty by the court.²² Apart from this the Indian Penal Code, 1860 (IPC) also administers prostitution however, particularly it deals with abduction and sex trafficking of minors under sections 372²³ and 373²⁴ of the IPC. The Supreme Court of India ruled that both sex workers and their children are covered by the protections of Article 21 of the Constitution²⁵ of India like every other profession and person.²⁶ Therefore all the fundamental rights included in the Indian Constitution are available to them and in any case whatsoever they cannot be infringed. In the case of *Budhadev Karmaskar v State of West Bengal*,²⁷ the court ruled out that sex workers are part of the society and that prostitution is a profession just like the others therefore the body has the right or the authority of causing them any harm and assaulting them since they have a right to live and anyone doing so will be in the violation Article 21.²⁸

We have seen that various laws and acts administer prostitution however, our country lacks in establishing proper legislation to regulate prostitution, sex workers are as equal as the other people engaged in various professions but they do not get that treatment from society and are treated as outcasts. As a country where about 3 million people earn their livelihood by prostitution, it becomes extremely important to introduce laws for the betterment of sex workers, and doing so would ensure them a better lifestyle and security from other social evils than come in through prostitution such as violence, murders, and rapes.

²¹ *Smt Afjal v State of UP* [2009] 2009 (77) ACC 7 (HC)

²² *Ibid*

²³ Indian Penal Code 1860, s 372

²⁴ Indian Penal Code 1860, s 373

²⁵ Constitution of India, art 21

²⁶ Krishnadas Rajgopal, 'Supreme Court recognises sex work as a profession' (*The Hindu*, 26 May 2022)

<<https://www.thehindu.com/news/national/supreme-court-recognises-sex-work-as-a-profession/article65461331.ece>> accessed 16 August 2022

²⁷ *Budhadev Karmaskar v State of West Bengal* [2011] SC 704

²⁸ *Ibid*

CAUSES THAT LEAD TO PROSTITUTION

There are a number of reasons why one enters into prostitution with poverty and unemployment being the major reasons why women choose to enter into this occupation. There have been several instances where women have been lured into the trap of prostitution where they are promised decent paying jobs by a certain individual and in order to move out of the clutches of poverty and to provide a better future for their children, they fall prey to such lies where the person sells them off as sex workers and they end up in this business. Poverty is basically the most obvious reason why the vulnerable sect of women is driven towards business. There is an increasing rate of poverty in India with women living in slum areas or the urban locality either unemployed or poor which plays a huge role in them being attracted to prostitution. There are no facilities provided to the children of sex workers they are always regarded as outcasts this leads to them not being able to attain education thus ending up with the same fate and entering into sex work.

It is important to understand that the children of sex workers must be educated and this has to be made sure by the state that they are provided with equal opportunities so that they along with their mothers can come out of the clutches of sex work. Another social reason for women to enter into prostitution is a prior rape or sexual assault incident, we live in a society where if a woman loses her dignity she is abandoned and is considered to be characterless with no one even wanting to marry her this leads to her being termed as an outcaste leaving her no option but to turn to the profession of sex work.²⁹ Along with all of these causes human sex trafficking is another major cause why a large number of women enter into prostitution, there need to be stricter measures taken by the government to stop this social evil which would lead to a decrease in the number of sex workers and put a stop to the illegal trafficking of small children primarily girls.

²⁹ *Ibid*

EFFECTS OF LEGALISING PROSTITUTION

As we have further mentioned that Supreme Court of India has very recently accepted prostitution as a profession however prostitution as a profession has not yet been completely legalised. Like many other countries that have legalised sex work India should also take the initiative as prostitution if legalised has its own benefits and would change society as a whole. Legalising prostitution would directly better the conditions of sex workers as violence against sex workers is very common since they are considered objects by men who have no dignity of their own also there have been many cases of rape and murder of sex workers. The legalisation of the work would surely impact the conditions of sex workers in a positive as they would be treated better the police would also be alert in case of any crime reported to them by the brothel.

Recognition and regulation of sex workers in the country will facilitate planned interventions for improving their living conditions such as providing health facilities, educational opportunities, and vocational training. Empowering and providing exit routes to those sex workers who do not wish to continue will be a more effective way of addressing the issue of this segment in the country.³⁰ The most significant change that the legalisation of prostitution would bring is the decrease in sex trafficking which is a major problem that the country needs to deal with once the profession would be under government control records will be kept of each sex worker and also the entire process will be regulated by the state creating a safer and secure environment also, all the individuals involved in illegal activities and in the trafficking of small girls would be under the radar of the government thus putting a halt on the trafficking of women and children.³¹

It will also lead to the children of sex workers getting better opportunities at availing education, therefore, putting a stop to them entering into the business in the future. The health conditions of the sex workers will also be improved as they would get better medical attention and also

³⁰ Suneita Ojha, 'Rights of sex workers: Should prostitution be legalised?' (*The Economic Times*, 7 December 2014) <<https://economictimes.indiatimes.com/magazines/panache/rights-of-sex-workers-should-prostitution-be-legalised/articleshow/45397117.cms>> accessed 16 August 2022

³¹ *Ibid*

legalisation would promote safe sex among individuals thus, reducing the risk of Sexually Transmitted Diseases (STDs).

CONCLUSION

Prostitution is regarded as a taboo subject in society for an extremely long time however, it is time that we change our perspective towards the issue and accept it as equal to every other occupation that exists in society and not view it as demeaning anymore. A lot of social evils are associated with prostitution but we need to understand that all of the issues faced by women indulged in this business such as violence, rape, and sex trafficking can only be put to an end if sex work is legalised. Sex work employs about 3 million of the national population thus it makes it important for the government to realise the significance of legalising prostitution.