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## THE LEGAL STATUS OF PROSTITUTION IN INDIA

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### ABSTRACT

India is a country that is one of the ancient civilizations of the world. With thousands of years of history and culture, some activities are prevalent even in the 21<sup>st</sup> century. One such practice is 'Prostitution'. Female prostitution marks the inception of the sex industry. According to the constitution of India, every person is at liberty to practice any trade and has a right to live with dignity. But people of the polish section of societies do not consider 'prostitution' as trade and people who are involved in this trade as 'human' with some 'rights and freedom'. As a country, we have come a long way from abolishing Sati Pratha, Dowry, Triple Talaq to the recent decriminalization of section 377 of the Indian Penal Code, 1860. However, facing away from the fact that prostitution and prostitutes exist as part of the society that we live in, is not going to change anything. This denial has already increased the number of assaults, abuse, and other forms of exploitation of women, young girls, and children. Supreme Court in various pronouncements has hinted towards giving legal status to this trade and protecting the rights of women and children involved in it. This paper is focused on analyzing the origin of prostitution in Indian culture, criticism towards the practice, and judicial intervention regarding the legal status and way of living of those involved in the same.

As Victoria Hugo said, “Slavery still exists but now it only applies to women and it is called Prostitution.”

**Keywords:** India, Prostitution, sex workers, legalization, supreme court, exploitation

## A. Introduction

Prostitution is one of the oldest professions not just in India but in many countries around the globe. In one form or the other prostitution has existed and still exists all over the world. Despite being the oldest profession, it is regarded as immoral, degrading, and hateworthy. It is the need of the hour to acknowledge prostitution as any other economic activity and treat people involved in this industry like other citizens of the country. Legalizing and regulating prostitution will have a life-changing impact on the lives of the sex workers and decrease the risk of sexually transmitted diseases among the rest of the population. The word prostitution has originated from the Latin word 'prostibula'<sup>1</sup>. According to the American dictionary, prostitution is defined as "the act or practice of indulging in promiscuous sexual relations especially for payment"<sup>2</sup>. Prostitution is the practice or business where one participates in a sexual act in exchange for money. It involves the utilization of one's body for purpose of sexual intercourse or oral sex, all for money. Such a person is called a prostitute. Men and the transgender community have also become an active part of the industry. However, women still constitute most of the percentage working as prostitutes. According to a report from Foundation Scales, there are a total of 40-42 million prostitutes in the world and 80% of them are females<sup>3</sup>. The growth rate of people employed in this industry is concerning and alarming. The risk factor associated with prostitution as a profession is multi-fold affecting health, high rates of assault and rape, and social distress. As a result, after the adoption of the Universal Declaration of Human Rights (1948), the first convention regarding sex workers was born known as the 1949 UN Convention for Suppression of the Traffic in Persons and the Exploitation of Prostitution of others<sup>4</sup>. The preamble of the convention reads as "prostitution and traffic in persons are "incompatible with the dignity and worth of the human person"<sup>5</sup> thereby aiming at ending abolishing prostitution in all forms. The ratified nations are bound by this treaty and shall punish any person who regulates, encourages, or gains from prostitution of another person even

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<sup>1</sup> Arkaprabho Roy, 'Prostitution and Its Legalization in India: A Plea Against The Sinful Agenda', ISSN-2393-8250 (2018)

<sup>2</sup> Encyclopedia Americana 675 (1st ed. 1965)

<sup>3</sup> Gus Lubin, 'There Are 42 Million Prostitutes in The World, And Here's Where They Live' Business Insider (18<sup>th</sup> January 2018, 10:15 PM) <https://www.businessinsider.com/there-are-42-million-prostitutes-in-the-world-and-heres-where-they-live-2012-1?IR=T>

<sup>4</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1951

<sup>5</sup> Grégoire Théry, Prostitution under International Human Rights Law: An Analysis of States' Obligations and the Best Ways to Implement Them', 1, (2016) <http://www.cap-international.org/wp-content/uploads/2016/11/ProstitutionUnderIntlHumanRightsLawEN.pdf>

with the consent of such person. The convention clearly states the difference between "prohibition" and "abolishment" of prostitution. The former treats the persons involved in prostitution the same as the institution of prostitution whereas the latter deals with eradication of prostitution and rehabilitation of persons involved in that institution by giving them the status of "victim of prostitution."<sup>6</sup> States were encouraged and advised on the ways through which they can prevent exploitation from prostitution through this convention. However, the impact of the international convention was not as expected but many countries accepted prostitution like any other commercial activity and started regulating it.

### **B. Countries where Prostitution is legalized**

In the early 2000s, many countries started legalizing and regulating prostitution as an established industry. The rationale behind this is to prevent the exploitation of prostitutes, reduction in crime rates associated with sexual violence, and rehabilitation those who want a safe exit out of this profession. Here are mentioned few countries that have legalized prostitution in some form or the other:

1. **NETHERLANDS:** the Netherlands was the first country in the world to legalize and regulate prostitution. It was the first major European country to set up prostitution like any other profession. Prostitution is legal in the country if it is between two consenting adults<sup>7</sup>. For the last 21 years, prostitution has been legalized in the Netherlands giving the sex workers a status of independent workers who have to register themselves to the Chamber of commerce and pay taxes. The objective behind legalizing prostitution was to reduce force prostitution, underage prostitution, eliminating abuse and exploitation of sex workers, and improving labor conditions<sup>8</sup>. The country is now considering some policy reforms to improve the current state of prostitution. For instance, with new reform sex workers will now have to register at the national level, prostitutes will be briefed about social security, dangers involved in prostitution, and exit alternatives to

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<sup>6</sup> Supra note 5

<sup>7</sup> Government of the Netherlands, <https://www.government.nl/topics/prostitution> (Last visited June 10<sup>th</sup>, 2021)

<sup>8</sup> Joshua Cruz, 'The Audacity of Tolerance: A Critical Analysis of Legalized Prostitution in Amsterdam's Red Light District', Humanity in Action, (June 12<sup>th</sup>, 2021) [https://www.humanityinaction.org/knowledge\\_detail/the-audacity-of-tolerance-a-critical-analysis-of-legalized-prostitution-in-amsterdams-red-light-district/](https://www.humanityinaction.org/knowledge_detail/the-audacity-of-tolerance-a-critical-analysis-of-legalized-prostitution-in-amsterdams-red-light-district/)

sex workers who wish to leave the industry. Amsterdam, the capital of the country is famous for being the world's largest red-light district<sup>9</sup>.

2. **DENMARK:** The Dutch government legalized prostitution in the year 1999. The act of prostitution in itself is not criminalized among adults however, creating any kind of profit through other's prostitution (pimping) is illegal. Prostitution by a minor is illegal. Even though the government has legalized prostitution to reduce the illegal sex trafficking, abuse, and exploitation of women and other sorts of criminal activities the country has a bigger problem of sex trafficking. The import of women from eastern Europe into the country for sex work has increased many folds. According to the report of the Ministry of Justice, the Government plans to crack down on the growing problem of criminals bringing women from poor countries to Denmark and forcing them to work as effective sex slaves.
3. **BELGIUM:** Before 1946 prostitution was controlled and regulated by municipalities in their areas<sup>10</sup>. However, soon after local laws were replaced by federal regulation. Prostitution and purchase of such services are not prohibited but third-party involvement (pimping) and running a brothel is illegal. Belgium follows a mix of Model 3 and Model 4 that is no regulation at the national level in form of official direction and regulatory approach in Belgian Law respectively<sup>11</sup>. At the federal level prostitution is not prohibited and at the local level municipalities can regulate prostitution as they seem fit for public safety and morality.

These three countries above are a few of the many countries that have accepted prostitution in some way or the other to improve the conditions of those involved in it and reducing criminal activities in this regard.

### C. Indian Perspective of Prostitution

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<sup>9</sup> Rohit Bhattacharya, '15 Countries Around The World That Have Legalized Prostitution', Scoopwhoop, (June 12<sup>th</sup>, 2021) <https://www.scoopwhoop.com/inothernews/countries-with-legal-prostitution/>

<sup>10</sup> Lena Reinschmidt, 'Prostitution in Belgium: federal legislation and regulation at the local level', Observatory for Sociopolitical Developments in Europe, (2016) <http://www.beobachtungsstelle-gesellschaftspolitik.de/f/18c81917c6.pdf>

<sup>11</sup> Supra note 10

## Historical Background and Origin of Prostitution in India

Prostitution has its roots deep within the land of India. It is there since the inception of them mentioned in our ancient literary texts Vedas. Even during the period when India was ruled by the Mughals and then the Britisher's prostitution was prevalent in Indian society. The presence of prostitution as an organized and established institution was found in Rig-veda. For instance, Rig-veda 10.95 has an illustration referring to the love affair of Urvashi and Pururava<sup>12</sup>. Others included Rambha and Menka these were called *Apsaras* who were the perfect embodiments of beauty and were highly accomplished in dance and music. Their job was to entertain the divine *devtas* and were also sent to test the penance of the great saints<sup>13</sup>. We have a vast literature that covers the period of eight to fifth-century showing pieces of evidence of women of easy virtue and illicit love affairs like *Jara* and *jatini* – male and female lovers of a married spouse<sup>14</sup>. There are references of courtesans who offered sexual services for livelihood in Vatsyayana's *Kamasutra*<sup>15</sup>. During the era of Aryan rulers' prostitution was exercised in the form of giving beautiful, accomplished maidens as gifts and as a token of friendships to guest emperors to please them. They also developed the concept of celestial courts. In one of the epic Sanskrit texts Mahabharata, there is mention of prostitutes by the name of Vaishyas. They were an important part of the court and were invited by people of high social status<sup>16</sup>. The *Devdasi* system is borne out of the concept of treating women as a commodity. Young and beautiful women were given as gifts in return for some favor or showing respect. Women were considered part of *Dakshina* given to priests of the temples. This was the rise of religious prostitution<sup>17</sup>. Different periods in the history of India before the Mughals and Britishers give an account of the practice of prostitution by people of grand stature. During the Mughal rule, the practice of prostitution gain a status symbol and became more organized as it grew under the royal kingdom. Akbar gave a separate quarter called 'Shaintanpur' for prostitutes<sup>18</sup>. King Jahangir's harem had 6000 mistresses. For Mughal emperors having multiple partners and

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<sup>12</sup> Itimes, 'History of Prostitution', India Times (Sep 12th, 2014, 12:27 IST)

<https://www.indiatimes.com/lifestyle/self/history-of-prostitution-277526.html?picid=1460678>

<sup>13</sup> Dr. Tulsing sonwani, 'Prostitution in Indian Society: Issues, Trends, and Rehabilitation' (2013)

<https://www.ugc.ac.in/mrp/paper/MRP-MAJOR-SOCI-2013-25158-PAPER.pdf>

<sup>14</sup> Sukumari Bhattacharji, 'Prostitution in Ancient India' (1987) 15 (2) Social Scientists, 32

<sup>15</sup> Supra note 1

<sup>16</sup> DR. Smt. S. R. SARODE, 'Historical Study Of Prostitution Trade In India: Past And Present' (2015)

<http://vcckarad.com/Minor%20Research%20Project%20on%20HISTORICAL%20STUDY%20OF%20PROSTITUTION%20TRADE%20IN%20INDIA%20%20%20PAST%20AND%20PRESENT.pdf> (Last visited Jun 15<sup>th</sup>, 2021)

<sup>17</sup> Supra 14

<sup>18</sup> Supra 16

mistresses were a symbol of authority, power, and wealth<sup>19</sup>. A large number of girls were part of the king's court for dancing and singing. Prostitution saw a change from monetary benefits and pleasure to performing arts which formed a great part of Mughal existence. Famous dancing girls included Anarkali, Nur bai, and Lal Kunwar who later became the lover of prominent Mughal kings. In the British era, nothing changed as prostitution continued through Nawabs, Zamindars, and Rajas<sup>20</sup>. Many East India Company officers kept concubines and mistresses<sup>21</sup>.

### **Prostitution in Present India**

The practice of prostitution is still prevalent in India whether it is accepted by the elite respected society or not. India has its own famous 'Red Light Areas' some of them are Sonagachi (Kolkata), Kamathipura (Mumbai), Budhwar Peth (Pune), G.B Road (New Delhi), and Chaturbhujsthan (Muzaffarpur). These areas have thousands of sex workers working as part of the thriving sex industry in India which is not legal or regulated by the state. Although the Indian Constitution gives the right to every individual to live a life with dignity and sustainable living conditions the same is not true for the sex workers working in the prostitution business. In many cases, Apex Court while interpreting Article 21 has stated that the right to live is more than something mere animal existence it should be meaningful and worth living<sup>22</sup>. Further, according to Article 41, "the State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want"<sup>23</sup>. Part IV of the Constitution deals with Directive Principles of State Policy (DPSP) which work as guidelines for the state to achieve its highest potential in running the nation. It can be noted that Articles 38- 43 focus on employment opportunities, minimum wage, and human work conditions. Therefore, it is the duty of the state to look after the welfare of its citizens but unfortunately, prostitution and prostitutes are ignored in the application of these provisions. India is a signatory to United Nations Convention against Transnational Organized Crime (UNTOC) which includes Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children as one of its protocols<sup>24</sup>. However, even before the ratification

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<sup>19</sup> Supra 13

<sup>20</sup> Supra 16

<sup>21</sup> Supra 14

<sup>22</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597

<sup>23</sup> INDIA CONST. art. 41

<sup>24</sup> Interview with Mr. G K Pillai, Union Home Secretary, Government of India (India, 2011) <https://www.unodc.org/southasia/en/frontpage/2011/june/significance-of-the-untoc-to-address-human-trafficking-interview-with-mr-g-k-pillai.html> (Last visited 20th Jun, 2021)

of UNTOC Indian Constitution has various provisions to prevent human trafficking and any kind of forced labor as given in the provision of Article 23<sup>25</sup>. To give make Article 23 more effective Indian Parliament passed legislation for reducing cases of human trafficking in India. The Immoral Traffic (Prevention) Act, 1993<sup>26</sup> does not make prostitution illegal in itself but makes certain acts criminal. Main highlights of the Act are as follows:

- a. Any kind of activity to manage, assist and keep a brothel is a punishable act and leads to imprisonment for not less than two years. This can be increased if such an act is repeated by the offender<sup>27</sup>.
- b. No person is allowed to live off the earnings of prostitution it is punishable with imprisonment which may extend to two years or fine or both. In case prostitution relates to a minor then punishment is for not less than seven years. Further, the act makes pimping and touting criminal offense<sup>28</sup>.
- c. Trafficking a person for prostitution is also prohibited under the act in every form<sup>29</sup>.
- d. Any acts of soliciting, seducing, and carrying prostitution in any public place or within 200 m of any public place are prohibited<sup>30</sup>.
- e. The Act also provides for rehabilitation measures of women involved in prostitution by keeping them in corrective institutions<sup>31</sup>.

The Act does not prohibit and criminalize prostitutes and prostitution. Therefore, the act of private prostitution is not illegal. There were amendments done in the Act that further give evidence of established practice in the eyes of legislature although not legalized. In 2006 Amendment Bill omitted section 8 and section 20 that talked about soliciting and seducing for prostitution and removal of prostitutes from a certain place<sup>32</sup>. However, the Act is not as effective as the intentions of the Parliament expected. There were various loopholes and many women groups, NGOs and others suggested many changes that can be done in the Act to make it beneficial for those involved in this industry, especially women and young girls. The Act

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<sup>25</sup> INDIA CONST. art. 23

<sup>26</sup> Immoral Traffic (Prevention) Act, 1993, No. 104, Acts of Parliament, 1993 (India)

<sup>27</sup> Immoral Traffic (Prevention) Act, 1993, § 3, No. 104, Acts of Parliament, 1993 (India)

<sup>28</sup> Immoral Traffic (Prevention) Act, 1993, § 4, No. 104, Acts of Parliament, 1993 (India)

<sup>29</sup> Immoral Traffic (Prevention) Act, 1993, § 5 & 6, No. 104, Acts of the Parliament, 1993 (India)

<sup>30</sup> Supra note 27

<sup>31</sup> Legalization of Prostitution in India, (2009) From Selected Works of Dharmendra Chatur <http://dcac.du.ac.in/documents/E-Resource/2020/Metrial/408RobinsonHembrom2.pdf> (Last Visited Jun 25<sup>th</sup>, 2021)

<sup>32</sup> The Immoral Traffic (Prevention) Amendment Bill, 2006, No. 47, Bills of the Parliament, 2006 (India)

does not provide alternative work options for women who want to exit the industry. Neither does the Act makes any concrete system for regulation or keeping a check on such activities.

### **Legal Intervention of Indian Judiciary**

Indian Judiciary as well as the legislature has time and again looked at prostitution and those involved in the practice as immoral, derogatory, and liable to punishment. In case of *Kaushailiya v. State* (1963)<sup>33</sup> Allahabad High Court denied accepting prostitution as part of profession or trade as mentioned in the Indian Constitution. The court observed that if any profession or trade is based on immorality then the state has all the right to ban the same and it will not lead to violation of any fundamental right. In another case of *Olga Tellis v. Bombay Municipal Corporation*<sup>34</sup> the Supreme Court said, "Under the constitution, no person has claimed the right to livelihood by the pursuit of an opprobrious occupation of a nefarious trade or business, like gambling or living on the gains of prostitution."<sup>35</sup> The time has come when the Indian Judiciary and the legislature together move away from treating prostitutes as criminals and look at them with the victim mentality. Many of the women and young girls that constitute more than 70% of this industry took up the profession because of economic conditions, lack of alternative employment, coercion, and abuse. The state must make sure when they abolish an act to provide for rehabilitation both socially and legally of those involved in such acts. But in recent times our Indian Judiciary has shifted from the conventional ways of looking at the societal problems be it LGBTQ+ rights or unfair religious practices like Triple Talaq. In cases like *Begum v. State*<sup>36</sup> the shift of mindset of the judiciary was visible by taking into account the problems of prostitutes. Bombay High Court observed that if contentions are being raised as to the reasonableness of prostitution, then it should be kept in mind that women do not choose this occupation as per their wish. They have been indulged in this walk of life as a result of exploitation, force, coercion, or helplessness<sup>37</sup>. Although later the Apex Court overturned the decision of the High Court showing the need for a change in the mindset for the betterment of those involved in prostitution. In the case of *Gaurav Jain v. Union of India*<sup>38</sup> petitioner asked the court for a system of separated education institutions and hostel

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<sup>33</sup> Kumar Regm, 'Trafficking into Prostitution In India And The Indian Judiciary' (2006) IHRLR 23 [https://www.stu.edu/portals/law/docs/human-rights/ihr/r/volumes/1/373-406-kumarregmi\\_traffickingintoprostitutioninindiaandtheindianjudiciary.pdf](https://www.stu.edu/portals/law/docs/human-rights/ihr/r/volumes/1/373-406-kumarregmi_traffickingintoprostitutioninindiaandtheindianjudiciary.pdf) (Last visited Jun 25<sup>th</sup>, 2021)

<sup>34</sup> *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SSC 545

<sup>35</sup> *Supra* note 1

<sup>36</sup> *Begum v. State*, AIR 1963 Bom. 17

<sup>37</sup> *Supra* 34

<sup>38</sup> *Gaurav Jain v. Union of India*, AIR 1997 SC 3021



arrangements so that the children of the prostitutes can have required education and place to live away from such areas of occupation which could harm the lives of such children. It can be said that even though prostitution is not legalized or even illegal per se in India the debate on the occupation, rights of prostitutes, and concern of the society on the matter is going on since its inception.

#### **D. Is India going to Legalize Prostitution?**

Prostitution is not an occupation of choice but of helplessness and hopelessness. It is an easy way out for those who have no alternative means to live their lives and therefore, it becomes the duty of the state to take into consideration the state of those involved in this industry. Prostitution is not illegal per se in India and it is within the reach of the judiciary pieces of evidence of which are the cases filed in this regard in the different courts. The question is if the government as a provider ignores the lives of thousands of its people only because of the occupation they have chosen? Legalizing prostitution is a hot topic for debate between modern-day critics and conventional conservatives. Like every coin has two sides legalizing prostitution has its drawbacks. Pro-prostitution supporters say that decriminalizing and legalizing prostitution will make it easier for the state to keep a check on criminal activities that happen under the cover of prostitution. It will give a voice to the sex workers and prevent their exploitation. Legalizing prostitution is giving rights to sex workers which they have been deprived of for so long and it goes against the spirit of the constitution of India. Furthermore, legal backing to prostitution will help the state to hold people accountable for their acts done against the law in any form. Decriminalizing will help to form a system of rehabilitation for those who want an exit out of the industry as it will make the sex workers less fearful of punishment. System of licensing and registration as followed in countries where prostitution is legal can help to keep in check the numbers of persons involved and also a regular health check-up will lead to a reduction in cases of HIV/AIDS. On the other hand, critics who are against legalizing prostitution claim that legalizing prostitution is not going to change the condition of the sex workers as the stigma attached to the occupation will persist. Also, legalization will lead to a difference between registered and unregistered sex workers and create a distinction between the treatment of both categories of workers. By legal status given to prostitutes and prostitution, it will hamper the workings of these workers as they will be under the watch of the state. Most of the women workers who work in the industry do not love to be seen or labeled as prostitutes in the eyes of the world at large. Many critics and feminists also believe that

legalizing prostitution as an occupation is not enough as it will not solve issues that will bring them to par with any other ordinary citizen of the country. Legalizing prostitution will become a free pass for women and especially men who are in this business and will increase the criminal activity of human trafficking.

Legalizing and decriminalizing prostitution as a profession is a complicated issue that needs serious thought by the legislature, judiciary and society together to make the lives of those involved worth living.

### **E. Conclusion**

Sex workers in India have and still are suffering in the dark secluded places with abuse, exploitation, illness, and whatnots. India has a diverse culture and outlook which accepts every person with a warm heart. However, even though prostitution and prostitutes have served the desires of society since times immemorial they are looked down upon. Even if we consider legalizing prostitution in the nation this will only be the first step of the thousand steps for the betterment of this section of the society. Stigmatization and mentality are what need to be changed only then any law enforced will prove to be effective. There could be a lot done to change the status of prostitutes and other sex workers in India. Legislature, Judiciary and we as a society together can bring some change into their dark worlds. Legislature can make enforce new laws, policies, schemes for rehabilitation, development and protection of sex workers and others being forced into the industry. Judiciary can take easy approach towards those involved in such a profession and look at them as needy for justice. Whereas we as a society can stop treating them as criminals and have a broader mindset. NGOs, lawyers, social workers can come together to educate and give opportunities for vulnerable sections especially the children and women so that they can live of their hard work. Prostitution is not a choice and way of life it is a result of helplessness. Recently, Bombay High Court in a case of detention of three young sex workers stated that prostitution is not a criminal offence and a woman has a right to choose her own vocation<sup>39</sup>. This statement by the court has to some extent made it clear that prostitution is not an offence in India and the legislation made are only to protect women or any person from exploitation. Therefore, even if any person chooses prostitution as desirable vocation, they should have a freedom to do and not be discriminated on the same basis.

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<sup>39</sup> Khushi Gupta, 'Prostitution Not A Criminal Offence, Women Have The Right To Choose Their Vocation: Bombay HC', shethepeople, (Jul 15<sup>th</sup>, 2021, 7:45PM) <https://www.shethepeople.tv/news/prostitution-not-criminal-offence-bombay-high-court-women-sex-workers/>