



Prostitution in India and its Legalization

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Abstract

"We want legislation to be refocused on making sex worker's life safer and enhancing the interaction they have with the police while tackling the very real issue of exploitation. We want governments to ensure that no one is forced to sell sex or is prevented from leaving sex work if they so desire." -**Mutasah Tawanda**, *Senior Director for Law and Policy (Amnesty International Secretariat.)*

Prostitution is the second oldest occupation after agriculture, with ancient roots in India. Its existence is documented in historical writings. The unsolved question is whether sex workers have any human rights at all or are just viewed as a sexual object. Although India is a party to a number of international agreements on human rights, including women's rights, and the Indian Constitution safeguards people's rights against discrimination, it has failed to sufficiently defend the human rights of sex workers. Prostitution has recently become associated with violence, prejudice, and exploitation. Prostitution is frequently seen as a taboo in Indian society, and the necessary attention has not been devoted to its regulation. This article investigates the relationship between prostitution and exploitation and violence, as well as the potential impacts of legalising and regulating prostitution on exploitation and attack on sex workers. Prostitution has been legalised through numerous legislation passed by post- and pre-independence administrations, as well as through publications and books.

This article tries to uncover some hidden facts concerning the human rights of sex workers in India, as well as whether the Indian legal system recognises sex workers' rights. It also seeks to disclose their current state in modern Indian society. The study report concludes with notable findings and suggestions that may help to re-establish sex workers' fundamental human rights in India.



1. Introduction

Prostitution is non-selective sex labour performed for money or other material assets. Females are not the only ones who work in this field in the twenty-first century. Men and transgender people are also involved in prostitution in smaller numbers than women. Prostitution is mentioned in the Rig Veda¹ in the setting of India. Tawaifs served the elite in dancing, music, and other arts in mediaeval India. This was the beginning of prostitution, which subsequently evolved into sexual favours for ordinary people. This is known as prostitution in the modern period. The most important question about prostitution is whether its legalisation is for the better or for the worse.

Prostitution is now allowed in Austria, various states in Australia, New Zealand, Canada, Belgium, and Brazil. Prostitution is not expressly outlawed nor regulated in India. The Immoral Traffic (Prevention) Act, 1956 (ITPA)², commonly known as the ITA act, rendered associated employment such as owning or operating in a brothel, pimping, and organised sex work illegal (hereafter referred to as the same). Prostitution is referred to as sexual abuse' in this statute. The statute, however, does not recognise males who have entered the prostitute business.

Because of the shame associated with prostitution, prostitutes frequently seek medical attention. This includes undesired pregnancies, HIV/AIDS, and other sexually transmitted infections (STIs) among prostitutes. Thus, regulating prostitution and brothels will aid in the reduction of this scourge.

2. Historical Background

Prostitution is typically defined as intercourse between two people in return for money or goods. It is not a new notion, but dates back to ancient times. Even mythology from India because of their attractiveness and exquisite beauty, characters like Menaka, Rambha, and Urvashi were thought to be sex workers. Prostitution is present even in Vedic literature. Kings used to offer slaves to rishis for females who didn't have any brothers. Prostitution was not recognised as a profession until the Brahamana period, when it was referred to as "Vishya" at first and subsequently "Beshya," which meaning one who may be approached by anybody.

¹SukumariBhattacharji, Prostitution in Ancient India, 15 SOCIAL SCIENTIST 32, 32-34 (1987).

²The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India).



The profession got stronger and larger throughout the Early Medieval Age, and they were notorious for their passion and propensity of abusing others. They were given names such as Panapanyangana, Ganika, and Bhujishya. Similarly, throughout the Mughal period, the nababs maintained ladies in their own apartments, most of whom were foreigners or slaves from Persia. Prostitutes were also categorised into several sorts, such as Swarini (a married girl who is a prostitute), Paricharika (mistress of the masters), Ganikas (professional prostitutes who resided in brothels), and Muhuttika (mistress of the masters) (girl for pleasure appointed for short duration).³

3. International Stage and Prostitution

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, established the idea of human rights as fundamental, unalienable rights. The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women were subsequently drafted to defend fundamental human rights (CEDAW)⁴. The concept of immoral trafficking is found in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, particularly Women and Children, 2000.

The General Recommendation of the UN Committee on the Elimination of Discrimination Against Women is that the States should acknowledge the fact that due to the unlawful or illegal status attached to the sex workers in the respective countries, making them vulnerable to violation of their fundamental human rights and equal protection of the law. This recommendation is pertinent to the discussion of Article 6 of CEDAW. The CEDAW Committee has also suggested that safe working conditions for sex workers be established⁵.

The UNDP and the International Labour Organization (ILO) have emphasised the importance of passing the necessary legislation to give sex workers rights that are enforceable by law, such as

³ <https://www.ijlmh.com/wp-content/uploads/Prostitution-in-India-Protection-of-human-rights-of-Sex-Workers-in-India.pdf>

⁴ Gitanjali Misra et al., Protecting the rights of sex workers: Indian experience, JSTOR 88, 89 (2000).

⁵ UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendations Nos. 19, Article 6. Adopted at the Eleventh Session, 1992, (Aug. 1, 2020, 9:12 PM)



the right to safety and occupational health as well as the right to take part in the process of establishing workplace health and safety standards⁶.

The international community responded to prostitution and the trafficking of people for prostitution by signing a number of conventions, including the International Convention for the Suppression of Traffic in Women and Children, the International Agreement for the Suppression of White Slave Traffic⁷, and the International Convention for the Suppression of Traffic in Persons and the Exploitation of Prostitution.

4. Legal Aspect of Prostitution in India

Prostitution is largely allowed in India. Although private prostitution is permitted, solicitation and organised prostitution, such as running a brothel, are not. Outside of open areas, prostitution is possible. In India, only female prostitution is permitted.

Because prostitution is a secretive industry with racket-like organizations like brothels, it is difficult to estimate how common it is. Even though it is technically unlawful to operate a brothel, the government makes little effort to find them and dismantle the sex industry. There are, however, a few prostitution-related laws.

The first piece of law created with regard to prostitution in India is *The Immoral Traffic Prevention Act, 1956*. According to Section 3⁸ of the Statute maintaining a brothel or allowing a location to be used as one is punishable by two to three years in jail and a fine. According to Section-5⁹, soliciting a person for prostitution without their agreement carries a sentence of three to seven years in jail and a fine. Prostitution is not allowed in or close to public spaces, according to Section-7¹⁰ of the law. The statute, however, says nothing about the trafficking of minors or the abuse and brutality customers inflict on women. *Smt. Afjal v. State of U.P.*¹¹.had an accuser who operated a brothel and held young girls for prostitution. According to the act's terms, the accused was found guilty, and the young girls were saved.

⁶ ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No 200), Geneva: ILO, (Aug. 1, 2020, 9:28 PM) https://www.ilo.org/global/topics/hiv-aids/WCMS_194088/lang--en/index.htm

⁷ Dt. 18-05-1904, as amended by the UN General Assembly on 3-12-1948

⁸Section 3, The Immoral Traffic Prevention Act, 1956.

⁹ Section 5, The immoral Traffic Prevention Act, 1956.

¹⁰ Section 7, The Immoral Traffic Prevention Act, 1956.

¹¹*Smt. Afjalvs State Of U.P.*, 2012 (77) ACC 7 (HC).



The Indian Penal Code, 1860 also contains prostitution-related laws. The IPC's Section¹² 366 Clause (A) discusses and specifies penalties for procuring a juvenile girl for illegitimate sexual activity. The same clause's clause (B) discusses the importation of a female from a foreign nation for prostitution. A man was charged under section 366 in the case of *Fateh Chand v. State of Haryana* for soliciting a young girl for prostitution. The IPC's Sections¹³ 372 and 373 forbid buying or employing a juvenile girl to compel her into prostitution and selling or disposing of a minor girl knowing that the girl will be forced into prostitution, respectively.

The moral, physiological, and legal ramifications of legalising prostitution have all been taken into account. As previously indicated, prostitution that takes place in secret and on an individual basis is lawful in India. Prostitution has to be regulated, and brothels and associated businesses need to be under government supervision. Despite the fact that there are laws prohibiting the development of brothels and pimping, these businesses nevertheless operate and take advantage of women. Police raids aren't always useful since the proprietors of the brothels bribe the officers. It is clear that supply and demand are to blame for this. Supply and demand will be satisfied if the government takes control of these brothels, and intermediaries won't be needed either. Apart from that, prostitutes must be permitted to do their trade discreetly, allowing them to earn a living while remaining hidden from the public view.

Once more, there is no mention of legal sanctions for customers or brothel owners who violently abuse a prostitute. Additionally, it does not mandate the use of condoms or include measures for the healthcare of sex workers, leading to the spread of HIV/AIDS and an increase in birth rates that contribute to population growth.

But in 2011, the Supreme Court ruled in *Budhadev Karmaskar v. State of West Bengal*¹⁴ that sex workers had a right to dignity under Article 21 of the Constitution, which protects the right to life and a means of subsistence. "We are of the view that sex workers have a right to live with dignity under Article 21 [right to life] of the Constitution since they are also human beings and their concerns need to be addressed," Justices **Markandey Katju** and **Gyan Sudha Misra** wrote in their decision on February 14, 2011.

¹²Section 366, IPC -1860.

¹³ Section 373, 374 , IPC -1860.

¹⁴<https://indiankanoon.org/doc/1302025/>



Conclusion

The profession of prostitution has long been seen as shameful by society, and those who engage in it are seen as unclean and shameless. India's prostitution regulations are ineffective and lack a defined strategy. Due to this, control of such operations is very necessary. It is preferable to have restrictions than to outright forbid the conduct of sex work since it will still exist even after tight laws are put in place. In certain instances, the profession of prostitution also involves violence and exploitation. However, it could support certain people in managing a family. The main worry continues to be that people need to be made aware of issues with women so that they do not perpetrate such horrible atrocities against them. In light of these factors, the researcher believes that prostitution should be made legal with a regulatory agency in charge of monitoring the activity. The researcher comes to the conclusion that legalising and regulating prostitution provides the rights and protection of sex workers and children.