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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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STATUS OF THE SEX WORKERS / PROSTITUTES IN INDIA AND THEIR LEGAL RECOGNITION

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ABSTRACT

Prostitution is the commercialization of a woman's body for self-sufficiency or other social and economic purposes. It is an age-old occurrence in human history. Despite becoming one of the everlasting marks of modern civilization, it remains considered taboo and is frowned upon. Some sex workers have advocated for the legalization and regulation of prostitution, while others have opposed the legalization and regulation of the trade. The paper also exposes a silenced side of those in the sex industry who oppose legalizing prostitution and their ideas for improving the status of women in the sex industry in general. The article takes the form of a protest against the legalisation of prostitution, as revealed by the perspectives of sex workers who participated in the empirical investigation for this paper. This also emphasises the relevance of legal frameworks in India and steps out dictate the importance of such prostitution as a profession for some.

Keywords: *sex workers, prostitution, commercialization, legal frameworks, social and economical purposes.*

Prostitution is the practice or business where people takes part in sexual activity in exchange for money and a person who is engaged in this field is referred as a prostitute. It is one part of the sex business, alongside pornography, or any other sexual entertainment. Brothels are foundations explicitly devoted to prostitution. The situation of prostitution and the law changes generally around the world, reflecting contrasting conclusions. Some view prostitution as a type of abuse of or savagery against women, and kids, that assists to a new crime of human trafficking.

Historia - Who are the Devadasi?

prostitute, also known as a Tawaif, is a woman who sells her own body as merchandise for the enjoyment of others, while prostitution is the practise of providing sexual services in exchange for money. Prostitution represents one of the ancient professions, dating back to the prehistoric Babylonians. Earlier depictions of prostitutes were called as "Devadasi" in Indian history, and they used to devote their entire lives to Lord Krishna's devotion.

According to certain religious beliefs, the Devadasis regard the Gods to be their spouses and hence cannot marry other human men. The same was later dubbed "Nagarvadhu's" or "Brides of the Town" and were summoned to dance and sing by royals and the wealthy¹. Amrapali, the state prostitute and Buddhist pupil, became known as "VaishalikiNagarvadhu" to mention a few.

- The Flaw

According to historians, the Royal families regarded the Devadasi or Nagarvadhu's with respect and honour before to British domination. No one dared to approach them, not even the Kings and Mughals. But, as with all good things, the golden age met its demise at the behest of the British.

These dancers began dancing in front of British officers who became drawn to them, and so the culture of one-night encounters began. The British began calling these performers for sexual pleasures, paving the path for prostitution in India. The transfer of Devadasi was into prostitution during British rule resulted in the collapse of temple dances.

- The Beginning

Prostitution does not merit or imply the terrible connotation bestowed upon it by society. Women started to market their bodies for the sake of money and closeness to the British Empire. Female folk entertainers frequently sell their bodies for a living.² The Kanjar are an old clan of performers who sell their bodies throughout South and Southeast Asia.

Japanese women were seized and sent to India for sex slaves during the latter part of the 16th and

¹ <https://blog.iplayers.in/legal-aspects-related-to-prostitution-in-india>

² <https://www.speakingtree.in/allslides/prostitution-a-brief-history/child-prostitution-in-india>

17th centuries when some regions of India became a Portuguese colony. Another example of the growing employment of women as sex workers can be seen in India during the Company Rule. In several locations in India, the military developed brothels (current red-light districts of Mumbai) for its troops. These brothels hired rural women and girls and paid them straight from the military.

PROSTITUTION IN INDIA- PROPORTION

In accordance with Human Rights Watch, India has over 15 million prostitutes. In Bombay, Asia's largest sex industry centre, about 100,000 women engage in prostitution. Girl prostitutes are largely found in low-income neighbourhoods and business districts, and officials are aware of them. There are at present 1.8 million sex workers in India, with 10% being male (escorts) and the remainder being female (prostitutes).

Male involvement or victimisation in prostitution

Teenagers and young men who identify as gender nonconforming in India experience severe human rights violations, social shame, outcasting, and real barriers to entering traditional mainstream employment. This has led to a situation where, in lack of any other options, people endure illegitimate and brutal castration surgeries while putting their lives in danger. According to anecdotal evidence, half of those treated by quacks, Dais, and surgeons with dubious credentials died as a result of castration.

Others migrate to Bihar or Uttar Pradesh as Luanda dancers, the traditional dancing boys, and join various forces³. They are coerced into prostitution under the guise of dancing and subject to brutal violence. As Hijra or folk entertainers, they run the risk of being raped, subjected to rape, sexual assault, sexual harassment, and even murder. The UNDP research on launda dancer in 2007 looked at how young boys who performed as launda dancer in some of Bihar & Uttar Pradesh were plucked from low-income households and recruited to liven up entertainment at weddings in the Hindu heartland.

Male sex workers are vulnerable to physical and sexual victimisation. Traditionally, society and

³ <https://www.britannica.com/topic/prostitution>

religion have created a gender-biased socio-cultural dimension that places males as providers; hence, male sex workers are afraid to report their victimisation to the authorities.

In India, is prostitution permitted?

When it comes to prostitution, there are three different types of nations.

- In places where prostitution is prohibited and against the law, such as Kenya, Morocco, Afghanistan, etc.
- Countries like India, Canada, France, etc., where prostitution is allowed but subject to specific regulations.
- In countries with suitable legal frameworks that permit and regulate prostitution, such as New Zealand, Australia, Austria, the Netherlands, etc.

One of the most important questions is if prostitution is permitted in India, and if so, whether prostitutes have any rights.

The conflict between "Yes" and "No" is the reply to this query. Prostitution is not expressly illegal in India because it is not stated that it is punishable by law, but some prostitution-related activities, like operating brothels, soliciting, trafficking, and pimping, are. In India, prostitution is predominantly legal. Prostitutes can conduct their occupation discreetly, but solicitation and organized prostitution, such as brothel keeping, are outlawed. Prostitution can be done away from public areas. Furthermore, only female prostitution is legal in India. These activities are all punishable offenses in India in THE IMMORAL TRAFFIC (PREVENTION) ACT, (1956). For instance, accepting money in return for sex with permission or without any prior begging may not be criminal in India, even if pimping is a crime that carries legal repercussions.

Why legalisation is a necessity?

1. It would improve the health of sex workers.

Due to a shortage of access to medical and other social services, sex workers in jurisdictions where prostitution is prohibited are, in fact, more likely to get sexually transmitted diseases (STDs). Not to add, sex workers experience harassment, stigma, and discrimination, which

makes them less inclined to engage in safe sex. 4Additionally, sex workers frequently face tense circumstances that cause them to skip taking protection, such as pressures from their pimps and customers and the worry that police enforcement would use their contraceptives as proof against them if they are caught.

The number of STD cases would significantly decline if the government legalised selling and buying of sexual services, but more crucially, it would improve the health of all sex workers. Once legalized, we may mandate condom usage and routine medical checks for Aids and other associated infections for all sex workers in order to safeguard them and prevent the spread of serious health issues. Executing this won't be difficult because sex workers desire money instead than illness.

2. Legal prostitution would lessen violent and sex crimes.

Numerous studies have been conducted and data accumulated to show that legal prostitution lowers the incidence of rape, sex assault, and other sex crimes. In Rhode Island, where prostitution was unintentionally legalised, one research found a link between legalising prostitution and a drop in rape incidents.

Many factors suggest that decriminalisation might lessen sex-related offences. Once it is legalised, sex workers will have the freedom to call the police if they feel threatened or are experiencing issues with their customers or pimps. In addition, sex workers would have the freedom to manage their company without the supervision of a violent pimp, which lowers the likelihood of assault and battery.

3. It Would Safeguard Minors.

Child prostitutes is a major global issue in both developed and developing nations. According to study, at least ten million youngsters are victims of prostitution.

Sexual assault is beneficial because its illegality exposes pimps to legal dangers, encouraging

them to charge larger fees. The median earnings per compelled worker in most industrialised nations, especially the United States, is approximately \$70,000 per year.

Aside from economics, another significant reason for the existence of a market for young slaves is the illegality of adult prostitution. When a guy cannot locate a grown-up sex worker, she would most likely turn to prostitutes who usually utilize teenage sex attendants to fulfill his sexual desires. Many pro-decriminalization of prostitution advocates believe that allowing individuals to purchase illicit sex from women 18 years or older will greatly reduce child exploitation. Because no one wants to be punished and fined, people in the business of sex will only legally hire eager adults rather than fight to function in secrecy. We can eliminate child sex slavery by legalising prostitution and enforcing stricter laws against it.

4. It May Aid in the Fight Against Human Trafficking.

Another significant reason that prostitution should be legalized is that it might be used to combat human trafficking.

The primary advantage of legalizing the sale and purchase of sex is that it can foster a productive connection between law enforcement officers and sex workers. If they have a solid relationship, law enforcement agents can employ sex workers as important information sources to detect human trafficking. Contrary to popular belief, prostitution legislation primarily serves to offer cover for human traffickers by giving them the ability to use the laws to threaten women sufferers, particularly young ones.

5. Prostitution is a crime with no victims.

Sure, some prostitute victims are victims, especially when they are kidnapped and imprisoned against their will, but prostitution is a crime that has no victims. As others have stated, some women in the company opted to sell their services freely and without being compelled to do so. Prostitution, like betting and drug usage, is a practise that people engage in willingly. According to Rutgers Law School's Sherry F. Colb, "what makes prostitution a 'victimless crime' in the meaning that nobody is absolutely injured by it is the fact that there are actually consenting adults involved."

6. It Would Allow Sex Workers to Work.

Everyone who is lawfully employed has certain legal rights and entitlements, including safety rights, a minimum salary, medical insurance, paid leave, and protection from unlawful discrimination. And because sex workers do not work legally, particularly in countries where prostitution is not considered a respectable occupation, they do not have any of these privileges.

LEGAL CONTOURS PROTECTING SEX WORKERS IN INDIA

Activities like soliciting or any other type of organised prostitution are prohibited in India. However, because it is a profession that acts covertly, it is challenging to estimate its rate. Even though running a brothel is against the law in India, the government hasn't done anything to find them and shut them down. But there are laws in place that keep them in check.

The Indian Penal Code of 1860, the Immoral Traffic (Prevention) Act of 1956, and other legal frameworks have a number of provisions regarding prostitution. The prohibition of human trafficking and forced labour, as well as the denial of individual trafficking and confined employment, are all protected by the Constitution, in addition to equality safeguards and other liberties like the right to life and personal liberty articles.

THE CONSTITUTION

➤ Right to profession Inherent of the Prostitution.

Article 19(1)(g) guarantees the fundamental freedom of all citizens to exercise a trade, profession, or work of his choice, but also imposes constraints on the selection of such trade, profession, or of this company. ⁵Because India is a socialist nation, every law ought to be passed by parliament with the welfare of humanity in mind. The restriction must be linked to its aim, which may be in the public's interest. The ban of a basic right of participating in professional, commercial, or commercial activity is deemed unreasonable if exerted not in the public's interest but in consideration of the sensitivities and sentiments of a segment of the population. Sex work is a profession that is not drawn by Art. 19(1)(g). Obscenity is defined

⁵ <https://www.legalservicesindia.com/article/2460/Legalization-of-Prostitution-in-India>

in India by the Hicklin test, which was established in the matter of *Rv. Hicklin*⁶. It depends on whether the obscene matter has the potential to corrupt and defile people whose minds are susceptible to such immoral effects and into the control of such a publication may fall. Sex labour is often performed within four walls, and it doesn't deprave or corrupt people's minds.

- **Article 21** of the constitution is provided to every one which states that no one should be deprived of right to life and personal liberty except for the procedure established by the law.
- **The Directive Principles of State Policy**, which are also mentioned in Part IV of the Constitution, require the State to do things like make sure that everyone, regardless of sex, has an equal right to a sufficient means of subsistence,⁷ that workers' health and strength are not exploited, that no residents are forced to work jobs that are inappropriate for their age and strength, and that it advances the educational and economic interests of the less fortunate members of society. The State has these common obligations, and citizens, including sex workers, have a similar entitlement, according to the High Court of Andhra Pradesh.

Indian Penal Code

Sections 372 and 373 of the Indian Penal Code 1860 also address prostitution, but exclusively for underage prostitution.

Though sections 366A, 366B, and 370A of the IPC deal with penalising offences of minor female reproduction, importation of a girl from abroad for intercourse, and exploiting a trafficked person, respectively. Thus, the scope of IPC rules governing prostitution is extremely narrow.

The IPC's Section 366 Clause (A)⁸ addresses both the crime of procuring a minor girl for unlawful sexual activity and its penalty. The same law's clause (B) addresses bringing a girl from another country into ours for any type of sex business. In *Fateh Chand v. State of Haryana*⁹, a man was accused of violating Section 366 by obtaining a young girl for prostitution. The Indian Penal Code's Sections

⁶ *R v. Hicklin*, [1868] 3 QB 360, 371;

⁷ <https://www.indialegallive.com/laws-research-indepth/prostitution-should-it-be-legalized-in-india/>

⁸ The Indian Penal Code, 1860. 366, No. 45, Acts of Parliament, 1860 (India).

⁹ *Fateh Chand v. State of Haryana*, (1977) 2 SCC 670

372 and 373 make it unlawful to buy or employ a minor female for sex labour and to sell or otherwise dispose of a juvenile girl with the intent to coerce her into prostitution.

Immoral Traffic Prevention Act & problems with its implementation

The fundamental issue with this regulation is that it never addressed the situation of a sex worker operating alone. Prostitution is not entirely legal in India, but it is permitted to practise in secret. These women face a number of difficult obstacles, including:

- They are more vulnerable to exploitation at the hands of clients and police than other sex workers who are cooperating on a premises;
- They are subjected to the most heinous forms of torture by clients, as evidenced by numerous interviews researchers and social workers conducted with Indian prostitutes; and
- The provision has no means to rehabilitate these women with their consent nor are they given any legal protections.
- There are no rules to oversee the trafficking investigation, not even the ability for the rescued to connect with medical care.
- They receive ineffective legal assistance services.

The flesh trade and the sin of woman trafficking are forbidden rather than prostitution itself. Section 7 of the ITPA ¹⁰defined prostitution to be prohibited in public settings, and Section 8 of the ITPA ¹¹declared any acts necessary for prostitution, such as enticing or soliciting, to be illegal and penalised. A sex worker is also prohibited from doing her duties 200 metres or less from a public space. It is forbidden to engage in the flesh trade or the sin of trafficking women. Unlike other occupations, sex workers are not legally protected in any way.

The primary problem with the ITPA is that, despite being designed to protect sex workers from exploitation, it actually works in the exact opposite manner by shielding the ultimate exploiter—the client—from legal prosecution, leaving the prostitutes to bear the brunt of any legal repercussions.

¹⁰ Immoral Traffic (Prevention) Act, 1986, Section 7

¹¹ Immoral Traffic (Prevention) Act, 1986, Section 8

The reason the legislation has had such a small effect and reach is because neither the actions of the Executive nor the Judiciary has altered. There are various elements grouped under three categories that contribute to the ITPA's inconsistent enforcement against prostituted women:-

1. Corruption

The primary problem that eventually prevents the requirements of the Act from being applied is the connection between elected politicians, law enforcement organisations, and brothel proprietors. Additionally, the commanding officers are notoriously dishonest.

2. Complexity in the collection of sufficient proof

the challenge of accumulating enough proof to prove a case beyond a reasonable doubt. Some police officers claim that there is a 60 percent or greater difference between the reported and real numbers of crimes committed.¹²

3. Inadequate corrective homes

The shortcomings of the reformatory (corrective and rehabilitative) housing constructed in accordance with the Act. The large number of individuals condemned to prostitution under ITPA cases overloads and renders these facilities unable to handle them. The establishment of subsidised hostels and care homes for women leaving corrective homes, as well as the requirement of vocational training programmes and educational courses in protective homes, are all necessary steps in redefining inmates as surviving human beings. Decriminalisation seeks to hold brothel owners responsible rather than sex workers.

Furthermore, compared to male prostitutes, the act appears to be more biased against female prostitutes. The law imposes harsher penalties on women who solicit than it does on men. Although there is no logical justification for this, laws like these tend to get biased. It is believed that the Act's explicit treatment of prostitution-related women as a perpetrator rather than a victim runs counter to its own stated goals.¹³

¹² NHRC-UNIFEM-ISS Project, A Report on Trafficking in Women and Children in India 2002-2003, Volume 1, 248.

¹³ Mellisa Farely, „BAD FOR THE BODY, BAD FOR THE HEART“; Prostitution Harms Women even if legalized or discriminalized, 10(10) VOILENECE AGAINST WOMEN 1087, 1090(2004).

Poor condition of corrective homes

Correctional facilities have been constructed in India to save women from prostitution, however these facilities first need to undergo a number of corrections. Corrective houses are described in Section 21 of the Immoral Traffic (Prevention) Act, which gives the government the authority to force a woman to perform sex labour against her choice for a predetermined amount of time.

It should be highlighted that many of these women are pregnant and are forced to live apart from their children. When the Constitution grants its individuals the right to personal liberty, all of this occurs.¹⁴

The Bombay High Court ruled in a case where a lady was held against her will that, notwithstanding the fact that the fundamental rights are subject to some reasonable limitations, the rights upheld by Part III must be maintained on a higher pedestal than other rights under general law. The woman was then freed by the court, which ruled that as a major, she had a fundamental right to freedom of movement and could not be imprisoned against her will¹⁵.

Additionally, a public interest lawsuit involving Upendra Baxi and Lotika Sarkar v. State of Uttar Pradesh revealed the substandard conditions of corrective homes. The Indian Express published a letter by Upendra Baxi and Lotika Sarkar regarding the appalling state of Agra's Protective home, and the Supreme Court used the letter as the basis for a writ petition. According to the letter:

“the average strength of the Home varies between 100- 125 women. The building, a rented one, has two underground cellars about twelve feet by twelve feet. The rooms lack ventilation and drainage facilities. There is only one latrine with a flush. There is no bathroom and the kitchen is without wire gauze. The girls live like animals.....

The conditions of the protective homes in others places are similar or worst. It is reported that many inmates in Liluah protective home sleep under beds and floors because of lack of space and furniture. The Nepali girls who have been rescued from Bombay brothels have reported that the conditions in

¹⁴ Article 21, The Constitution of India, 1950.

¹⁵ Nurjamman Lokman Lashkar vs The State of Maharashtra, CRIMINAL WRIT PETITION NO.4781 OF 2018.

the protected homes are worst than that of the brothel."¹⁶

Another stunning instance included the release of 19 prisoners after the Supreme Court began to investigate a case similar to this one. It was revealed that all 19 of these prisoners had become mad. Their quick discharge by the corrective home's administrator was thought to be an attempt to hide the wrongs committed against these ladies there.

These are the conditions in correction homes for women in India, where instead of feeling safe and achieving mental peace, these women are exposed to more forms of torture and are also denied access to basic necessities like food, latrines, and medical checkups. They receive scant or less food and water while being held in cages like animals.

Role Of Judiciary

A major ruling from a three-judge Supreme Court bench in 2022 established sex work as a legitimate profession and affirmed that sex workers are entitled to integrity and equal protection under the law. The Supreme Court also determined that "voluntary" sex work is neither unlawful nor forbidden, and it set praiseworthy rules for police to take decisive action whenever sex workers report an offence and to follow the law. Additionally, it was said that sex workers shouldn't be detained during brothel raids or separated from their kids only because their mother works in the industry. The Supreme Court also ruled that police should respect and not mistreat sex workers. In addition, the Supreme Court has made other notable rulings (Rajagopal, 2022).¹⁷

In the subsequent case of Gaurav Jain & SC Bar Association v. Union of India, the judgement was reversed. The Supreme Court instructed "Secretaries, Social Welfare Departments of the Union as well as¹⁸ the State Government to satisfy the bench comprised by whenever the Chairman of the Panel so desires to discuss how appropriate schemes in the spirit of the Constitution can be developed" in the recent case of Budhadev Karmaskar v. State of West Bengal¹⁸.

¹⁶ "Home for the girls or Jail?" from Dr. R.S. Sodi to the Editor of the INDIAN EXPRESS, Apr. 6, 1981.

¹⁷ Rajagopal, K. (2022, May 26). Supreme Court recognises sex work as a 'profession.' The Hindu. Retrieved September 7, 2023, from <https://www.thehindu.com/news/national/supreme-court-recognises-sex-work-as-a-profession/article65461331.ece>

¹⁸ Sahyog Mahila Mandal v. State of Gujarat, (2004) 2 GLR 1764 (India)

In *Budhadev Karmaskar v. State of West Bengal*, the highest court ruled that sex workers are entitled to a life of dignity because they are also people. The meaning of the word "life" in Article 21 of the Constitution is well established thanks to a number of court decisions, and it does not merely refer to an animal life.

Conclusion

Morality, Societal Stigma, and Inaction – Challenges for Sex Workers in India

The profession of sex work is fraught with ambiguities. Considered the oldest profession in the world, it has been historically driven by women and transgender communities and, is perhaps the most laden with prejudice. Most of Indian society continues to be driven by the patriarchal discourse on sexuality, wherein, an individual becomes socially devalued if sex becomes a part of their identity. An unnerving dichotomy prevails because on one hand sex workers are “othered” and on the other, they have massive clienteles across economic strata.

and psychological violence as well as financial discrimination against sex workers is rampant. The growing visibility of transgender and male sex workers in the industry has also made them extremely vulnerable to violence and harassment due to dominant ideas of masculinity and heterosexuality.¹⁹

The acknowledgement of sex workers facing sexual violence within policy-making was further highlighted in 2013, in the aftermath of the horrifying rape case in Delhi, popularly known as the Nirbhaya case. Justice JS Verma Commission’s recommendations for the protection of women and the LGBTQ+ community from sexual and other kinds of violence did not address the multiple forms of violence routinely faced by sex workers. The Verma Commission further recommended amendments for Section 370 of the Indian Penal Code which deals with the offence of “buying and disposing of any person as a slave”

Thus, the main concern is to give equal identification to all individuals as human and to grant them equal protection. Legalising prostitutes might not be the greatest solution to prostitutes' difficulties. However, certain changes in present legislation and policy would have a considerable impact on their lives. The names of women residing in areas with red-light districts ought to be included to the voter

¹⁹ <https://www.legalservicesindia.com/article/2460/Legalization-of-Prostitution-in-India>

rolls since they are also residents of this nation and have the same right as any other citizen to vote.²⁰ The government should implement a collective insurance system for women who reside in red-light districts.²¹



²⁰ National Commission for Women has suggested that sex workers in red-light areas should be included in the voter's list as a proposal to amend the Immoral Traffic (Prevention) Act, 1956

²¹ India Sex Workers get life cover, BBC News, May 1, 2008