

# **LEGALISING PROSTITUTION: A STEP TOWARDS ENDING THE ATROCITIES AGAINST SEX WORKERS**

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## **I. Abstract**

This article elaborates on the advantages of legalising prostitution, and also how legalising prostitution can help in curbing or reducing the atrocities against sex workers, whose plights are unheard to the world. Even though prostitution also known as sex trade is a common practice in many countries, the members of the civilised society are not ready to give it a legal status but at the same time do not deny the existence of the practice. In many instances the Hon'ble Supreme Court has expressed that this profession should be legalised in India.

The Universal Declaration of Human Rights, 1948 states that "All men are born free and are equally entitled to have their basic human rights." Denying legal recognition to this profession means denying the basic human rights of the prostitutes. The debate over whether or not prostitution should be legalised is probably as old as the practice of prostitution itself.

The controversy surrounding the acceptability of such a profession and whether it ought to be tolerated by society within a legal framework, has raised some fundamental issues, particularly in relation to the rights of women. Prostitution, because of its illegal status, is a particularly marginalized subset of the sex industry and presents significant physical, psychological, and legal risks to the women and men involved. Illegal prostitution is also a breeding ground for drug activity, and therefore legalising prostitution can also be a means to curb drug activity. The step of legalising prostitution will protect minors. Around ten million children worldwide are estimated to be in the profession. Legalising and regulating the profession will ensure that only willing, consenting adults are employed, not trafficked children. Legalisation would also translate into better work conditions and better wages for workers. Pimps and middlemen will gradually be eliminated. The job of the police will be to protect rather than extract 'protection

money' from sex workers. The police can also then spend its time and resources tackling more serious issues than people having paid sex.

## II. Introduction

The following is a fragment from the debates in the Constituent Assembly of India in 1949. The Assembly was vested with the task of creating the Constitution of India and this argumentation discussed prostitution at length:

*Shri Brajeshwar Prasad: Mr. President, Sir, I feel that the gravity of the situation has not been realized . . . My Friend Shri Deshmukh spoke in the vein that probably it can be abolished or abrogated altogether. I do not agree with him on that point. Prostitution is a very old institution – as old as the hills and it cannot be abolished. The roots of this institution lie deep in our human nature. The only thing that we can do is to regulate it. . .*

*Shri R.K. Sidhva: Mr. President, I was rather surprised at the attitude of Shri Brajeshwar Prasad. He says this institution is centuries old and it cannot be abolished. Prostitution in India is a disgrace and shame to us and it is regrettable that Shri Brajeshwar Prasad should advocate its continuance. . . It is a disgrace and shame to society that this kind of thing should be allowed to continue. . .*<sup>1</sup>

*Shri Brajeshwar Prasad: If you abolish, the whole thing will go underground.*

Its been sixty-four years since this debate and the similar questions regarding prostitution remain unanswered. Concentrates by the Ministry of Women and Child Development in the government of India evaluate that there are around three million prostitutes (of which 40 percent are evaluated to be kids), also, the expanding number of prostitutes in the nation in the last decade demonstrates a relationship between monetary development and prostitution. Sex workers have been liable to sabotaging laws furthermore, coercive state foundations all through post - free India. Issues identified with sexual orientation, wellbeing, rights, and livelihood are at the core of talks encompassing sex work in India. It is, along these lines, no big surprise that

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<sup>1</sup> See AUSTIN GRANVILLE THE INDIAN CONSTITUTION, CORNERSTONE OF A NATION (1999).

"emotive issues about which much has been composed with more enthusiasm than objectivity since they touch the center of our convictions about morality, equity, sexual orientation and human rights" require a cautious audit.

At the global level, prostitution—labelled “the oldest profession in the world” – is fraught with a tumultuous history<sup>2</sup>. Whether “actively prohibited, tacitly condoned, formally regulated, or a combination of these,” prostitution remains a thriving industry regardless of its legal status. Some estimates suggest that global trade in prostitution earns revenue of \$186 billion annually<sup>3</sup> with prostitution in India comprising more than 8 percent of this figure. Currently, many countries are considering amending their legal approaches toward prostitution, not only for the health and safety of the prostitutes and those who utilize their services, but also to profit from the revenue generated by the profession.

### **III. Historical Antecedents of Prostitution in India**

To find the level-headed discussion in contemporary setting before considering chronicled predecessors yields an establishment less account. The quality of examining the noteworthy underlying foundations of an action lies in its energy to deconstruct the common ideas of good discernments with respect to the action installed in the public arena. It disintegrates the solidified method of reasoning around an event, individual, or movement and backs alternative perspectives through a procedure of emotionless contextualization.

Despite the fact that a formal record is hard to lay hands on, there is impressive proof that sex laborers in old India appreciated a high level of organization – as revealed by noteworthy endeavours in the bearings of rediscovering the past from the accounts of colonial and nationalist authors. In fact, S.M. Edward’s writings on crime in India show how surprisingly tolerant Indian society was toward prostitution. In one of the passages, he says, “It is hardly an exaggeration to say that the great majority of India’s inhabitants, representing orthodox and conservative opinion, still regard the profession, and those who follow it, with tolerance, and

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<sup>2</sup> Jessica N. Drexler, *Governments’ Role in Turning Tricks: The World’s Oldest Profession in The Netherlands and the United States*, 15 DICK.J.INT’L L. 201, 201 (1996).

<sup>3</sup> Sex Trade: *Prostitution Facts and Prostitution Statistics*, HAVOCSCOPE DATABASE, available at <http://www.havocscope.com/tag/prostitution/>

sometimes even with respect and approval. . . . It results in social anachronisms, which strangers view with amazement and are unable to understand.”<sup>4</sup>

Social perception of prostitution, morality, and the conditions of the trade shifted during the colonial period, as colonial discourse on subalterns amply demonstrates this. The British amazement regarding the toleration of prostitution in India (which was considered an occupation just like blacksmithing and carpentry) emerged from their own conception of how appallingly prostitute women lived and how degrading their profession was considered to be in Britain. Instead of attempting to understand the structure of prostitution in India, the British exploited prostitute women to satisfy the “natural sexual desires” of the British troops. In order to gain access to women’s bodies, however, they had to push forth the colonial project of superiority of their race, made possible by denigration of Indian prostitutes. This required institutionalization of prostitution through the machinery of the state, and it was achieved by sponsoring and opening several state-run brothels, particularly in the Cantonment areas where they were called chaklas. In the chaklas, prostitute women were treated as though incarcerated; they were physically and sexually abused by soldiers, fined, imprisoned, and starved. Public perception is usually determined by what one experiences or observes. Once the risks (physical and mental) associated with prostitution as a profession increased, society developed an aversion to it.<sup>5</sup>

#### **IV. Indian Legal Landscape on Prostitution**

Inspired by the colonial institutions, it was natural for the Indian state to have a deprecatory view of prostitution as a starting point. However, the debates in the Constituent Assembly invoked at the beginning of the article reflect the understanding of the practical situation of prostitution in India. Nevertheless, the general distaste for the profession resulted in classifying the ancient, legalized institution as criminal activity. Soon after independence, India became a signatory to the UN International Convention for the Suppression of Traffic in Persons and of

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<sup>4</sup> S.M. EDWARDES, CRIME IN INDIA: A BRIEF REVIEW OF THE MORE IMPORTANT OFFENCES INCLUDED IN THE ANNUAL CRIMINAL RETURNS WITH CHAPTERS ON PROSTITUTION & MISCELLANEOUS MATTERS 71 (1924).

<sup>5</sup> ELIZABETH W. ANDREW, THE QUEEN’S DAUGHTERS IN INDIA 15 (1899). *The Working of The Contagious Diseases Acts in Bombay city*, ECONOMIC AND POLITICAL WEEKLY 1470, 1475 (2000)

the Exploitation of Women, New York, 1950. This led to the enactment of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA)<sup>6</sup>. The Act had a tolerant approach toward prostitution yet clearly showed signs of lawmakers grudgingly accepting prostitution as a necessary social evil. The Act underwent an amendment in 1978 and then, due to changing scenarios and debates in the international context, was further amended in 1986, entitled to the Immoral Traffic in Persons Prevention Act, 1986 (“ITPA”).<sup>7</sup>

The ITPA is only a cosmetic surgery over SITA. The change in the title and scope signifies two important aspects, namely (a) the drive to ‘suppress’ traffic has been replaced by the need to “prevent” it and (b) the words “Women and Girls” have been replaced by the term “Persons,” recognizing that individuals of both sexes, including eunuchs, are trafficked in for prostitution.<sup>8</sup> Although, the enormous factor of the Act, the criminalized view of prostitution, stays, at the same time as the act of prostitution per se is not criminal, every other act related with prostitution is criminal. particularly, it prohibits absolutely everyone from keeping a brothel and dwelling off the income of a prostitute, buying or inducing and detaining a female for prostitution are criminal works, as well. There is a geographical limit, as the practice cannot take place in a public area or a notified area, in addition a ban on soliciting or seduction for prostitution. In fact, section 8, which deals with soliciting, is extremely criticized by means of activists. Like its previous avatar, SITA, there is no punishment for the customer of the prostitute. A contentious clause, which violates the essential right to privacy, vests strength in the magistrate to order removal of a prostitute from any location within his jurisdiction if s/he deems it essential.

A near reading of the ITPA allows us to look at how the regulation has effectively rendered prostitution a criminal activity. The ITPA defines prostitution as “the sexual exploitation or

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<sup>6</sup> See the Law Commission of India’s Sixty-Fourth Report on the Suppression of Immoral Traffic in Women and Girls, 1856, 1975, available at <http://lawcommissionofindia.nic.in/51-100/Report64.pdf>. The Report maps a historical background and describes the scope of the Act in detail.

<sup>7</sup> Ministry of Women and Child Development, Government of India and UN Office on Drugs and Crime, *India Country Report, 4*, (2007), available at <http://www.unodc.org/pdf/india/publications/India%20Country%20Report.pdf>.

<sup>8</sup> JEAN D’CUNHA, LEGALIZATION OF PROSTITUTION: ASOCIOLOGICAL INQUIRY INTO THE LAWS RELATING TO PROSTITUTION IN INDIA AND THE WEST (Workmakers 1991).

abuse of humans for business purposes . . .” for this reason, via its very definition, because any kind of exploitation or abuse is unlawful, prostitution will become illegal. More importantly, proscribing prostitution to sexual exploitation and abuse maintains “prostitution by using desire” and “pressured prostitution” out of doors the crook space. Considering that anti-trafficking legal guidelines deal with “forced prostitution,” the regulation remains silent on “prostitution with the aid of desire.” Public notion and popular imagination fill the vacuum of indeterminacy in this regard, which most effectively reinforces the unfavorable mental constructs of prostitution in India.

## **V. Violence Against Sex Workers in India**

This segment shows that the ill-conceived criminal framework defined above has given an upward push to (a) the middlemen and brothel proprietors in this profession, known as pimps (we will use the word “pimp” to denote brothel proprietors as well) and (b) corrupt police officials. Each of these players impose heavy violence on sex workers, and we contend that, by way of decriminalizing prostitution, we would basically remove those two players from the marketplace. At more than one stage, this is precisely what is needed.

The above section demonstrates that, even though prostitution is not unlawful per se, evidence suggests that sex employees are enormously susceptible due to the existing legal framework and that they face insufferable degrees of harassment via state (police) and personal individuals (customers and pimps). There is little doubt that clients of intercourse workers time and again abuse them at some stage in, and even outside of, their sexual engagements. Lane-level prostitution mainly attracts excessive hazard of violence. Police extortion is an identical chance and occasionally a worse one. The number of prostitute women arrested is disproportionately greater than the variety of pimps, procurers, and brothel keepers arrested beneath the equal legal guidelines, at the same time as the consequences imposed on prostitutes had been a long way more than the ones imposed on brothel keepers or pimps. This discriminatory remedy of the ones whom the regulation seeks to “rehabilitate” stems from collusion between police and pimps who use the regulation’s layout to brutally take advantage of sex employees.

Some studies have attempted to map the exploitation of sex workers by police in India empirically. Puja Yadav, based on her research fieldwork with sex workers in Pune, notes that police visit the red-light area of the town three times each day and take ten to twelve sex

workers to the police station every day,<sup>9</sup> misusing the powers vested in them (whether a girl is soliciting or not could hardly be ascertained by an objective eye, and police use their naked discretion in this regard).<sup>10</sup> The brothel manager begins negotiations when police can agree to free the girls if paid, where “the sum could begin at Rs. 300 and go up to Rs. 2000.”<sup>11</sup> In real, terms, adjusted for inflation, this range is approximately equivalent to nine to sixty-two U.S. dollars. If freed, this amount is recovered from sex workers’ earnings. If negotiations fail, the girls are taken by the police and produced in court the next day, where they are fined Rs. 50-100 per person and released, having an additional lawyer’s fee of Rs. 100. All this is usually paid by the sex workers themselves. In addition, every brothel pays a monthly fee to the police station under the jurisdiction of which the brothel falls. In Pune, this ranges from Rs. 2000 to Rs. 5000, and the amount is again extracted from the sex workers as monthly payment.

Due to multiple layers of law enforcement agencies with confusingly overlapping roles, the story does not end here. The raids in Pune by the Commissioner’s Office, Social Security Section, and Crime Branch appropriate around Rs. 30,000 to Rs. 50,000 to dilute the seriousness of the crime, which is usually keeping minors. Although these minors are rescued and sent to remand homes, they return to brothels eventually, but that is a separate inquiry. In Surat’s red light area, over a period of three months in 2003, police arrested women and extorted Rs. 1000 to Rs. 1500 per sex worker by threatening imprisonment, without informing them of the relevant laws under which they were being convicted. The court also showed disturbing signs of insensitivity when it upheld the corrupt actions of police.<sup>12</sup>

A participant studied less frequently is the pimp, whose violent method of subduing a intercourse worker have only lately began to entice the attention of students in the area. Therefore, to recognize another layer of the pervasive terrible impact of criminalizing prostitution on sex employees, it is important to have a look at the institution of procurers (as they are formally called ) or pimps (as they may be informally referred to as, usually adult

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<sup>9</sup> S.N.SINHA &N.K.BASU,THE HISTORY OF MARRIAGE AND PROSTITUTION22 (Rita D. Sil ed., 1992).

<sup>10</sup> *Id*

<sup>11</sup> *Id*

<sup>12</sup> Sahyog Mahila Mandal & Another v. State of Gujarat & Others, Special Civil Application No. 15195 and No. 4594 (Gujarat H.C.) (2003).

males –females are referred to as madams). Pimps are the marketers for street prostitutes or brothel keepers/owners. Even though there is an upward thrust in independent prostitution round the globe in the age of telecommunication, studies suggest that pimps' services are regularly utilized by prostitutes, normally out of necessity. It has been estimated that 90 percent of world prostitution is pimp managed. Pimps are the villainous entrepreneurs of the intercourse exchange, who are involved in trafficking as nicely. they're the link among the client and the sex worker. They solicit clients, and they make certain price. They are vital middlemen who run the affairs of the intercourse employee, who (a) is disenfranchised both economically and socially, (b) runs the chance of getting customers who're violent or may not pay after the services, and (c) is politically susceptible in instances of prosecution and abuse.

A study by Eileen McLeod reveals that a complex relationship exists between a prostitute and her pimp. While literature does mention the ability of pimps to satisfy the emotional and psychological “wants” of sex workers, pimps are able to maintain their supremacy largely through physical violence and financial control.<sup>13</sup> For young and juvenile prostitutes, pimps have been known to extort most of their earnings with the constant threat of violence against their prostitutes. They create a system whereby prostitutes' sustenance relies entirely on obeying the pimp who provides them with everything and abuses them for disobeying.

Pimps, consequently, emerge within the marketplace because the regulation allows a disproportionately disenfranchising reputation for prostitutes. In the absence of nation safety, and, in reality, in the presence of state coercion, the market offers alternative mechanisms for protection of its players. Pimps emerge in the market for sex.

## **VI. Why Decriminalize Prostitution?**

### *i. Stereotypes as Bodies of Social Norms?*

Prostitution as a transaction involves at least two people. In the most basic sense, one is the service provider, the female, who charges a fee to the other, who is male. However, unlike most other transactions in the service industry, prostitution is characterized by the manner in which

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<sup>13</sup> Prostitutes often relate to their pimps as boyfriends, cohabitants, or husbands, ‘simply sharing the proceeds of prostitution on egalitarian basis.’ EILEEN MCLEOD, WOMEN WORKING: PROSTITUTION NOW 177 (Croom & Helm 1982).



the two parties are differentiated not only by society but also by the parties themselves.<sup>14</sup> Society has many names for women who engage in prostitution—whores, sluts, disposable trash – and these names invite us to single out these individuals for ridicule and scorn. These norms have been crystallized in rules that declare prostitution illegal. Such rules outlaw such transactions, and, while the transactions occur out of doors the purview of the law, the difference among the players' bargaining electricity is exacerbated.

### *ii. Diluting Stereotypes Through Law*

The question that emerges is, if the social norm of treating sex workers as “fallen” women is deeply ingrained in society, how can decriminalizing prostitution change people's attitudes towards sex workers. This needs detailed analysis, which mainly hinges on an expressive theory of law. Many theorists have claimed that law has an expressive function in addition to a sanctioning function. The expressive theory argues that courts play an important role in expression of social values. The expressive theory argues that courts play an important role in expression of social values.<sup>15</sup>

### *iii. Bridging the Gap Between New Law and Old Norms*

A challenging view comes from social response theories, which contend that new law may meet with resistance if it departs too visibly from established social values. Such reactions have the potential to weaken the effect of legal intervention to the extent that it is inconsistent with society's moral, ethical, or cultural values. Legal innovation may thus result in backlash if “sticky” social norms are eroded. Gradual movement of legal institutions and piecemeal legal intervention, however, could be the key (hence our recommendation for decriminalizing and not legalizing prostitution at this juncture).<sup>16</sup>

### *iv. Public Health Concerns*

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<sup>14</sup> Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11 (1999).

<sup>15</sup> H. L. A. Hart, in *Punishment and Responsibility* (Oxford University Press 1968)

<sup>16</sup> See Emanuela Carbonara, Parisi Francesco & Georg Von Wangenheim, *Lawmakers as Norm Entrepreneurs*, REV.OF LAW &ECON. 779 (2008)

Perhaps one of the strongest arguments in favour of the legalization, let alone decriminalization, of prostitution comes from public health concerns, because combating AIDS/HIV is easier if prevention and treatment programs target female sex workers. Statistics show that female sex workers in developing nations are fourteen times more likely to be infected with HIV than other women of reproductive age. As a result, prostitution in Asia in general, and in India in particular, has contributed significantly to the spread of sexually transmitted diseases, including HIV/AIDS. Indeed, India's success in curbing the outbreak of AIDS (which appeared in 1986 and, in 2002, was expected to rise to 25 million cases by 2010 but only reached about 1.5 million) is credited to awareness campaigns strategically focused near red light districts in major cities. In fact, sex worker collectives have been instrumental in raising awareness regarding the use of condoms, with positive result.<sup>17</sup> This is another sign to heed the collectives' demands which include, inter alia, the decriminalization of prostitution.

### **VII. Conclusion**

Even though prostitution also known as sex trade is a common practice in many countries, the members of the civilised society are not ready to give it a legal status but at the same time do not deny the existence of the practice. In many instances the Hon'ble Supreme Court has expressed that this profession should be legalised in India. The Universal Declaration of Human Rights, 1948 states that "All men are born free and are equally entitled to have their basic human rights." Denying legal recognition to this profession means denying the basic human rights of the prostitutes. The debate over whether or not prostitution should be legalised is probably as old as the practice of prostitution itself. The controversy surrounding the acceptability of such a profession and whether it ought to be tolerated by society within a legal framework, has raised some fundamental issues, particularly in relation to the rights of women. Prostitution, because of its illegal status, is a particularly marginalized subset of the sex industry and presents significant physical, psychological, and legal risks to the women and men involved. Illegal prostitution is also a breeding ground for drug activity, and therefore legalising

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<sup>17</sup> S. Jana, L. Khodakevich, C. Larivee, L. Bey & N. Sardar, *Changes in Sexual Behavior of Prostitutes in Calcutta*, in PROCEEDINGS OF THE 10<sup>TH</sup> INTERNATIONAL CONFERENCE ON AIDS, YOKOHAMA, Abstract No. 364D (1994) presented in *Global Challenge of AIDS: Ten years of HIV/AIDS Research: Proceedings of the Tenth International Conference on AIDS/International Conference on STD*, Yokohama, Aug. 7-12, 1994.

prostitution can also be a means to curb drug activity. The step of legalising prostitution will protect minors. Around ten million children worldwide are estimated to be in the profession. Legalising and regulating the profession will ensure that only willing, consenting adults are employed, not trafficked children. Legalisation would also translate into better work conditions and better wages for workers. Pimps and middlemen will gradually be eliminated. The job of the police will be to protect rather than extract 'protection money' from sex workers. The police can also then spend its time and resources tackling more serious issues than people having paid sex.

