

# LEGALFOXES LAW TIMES

## Devadasi System and the Regulating Laws: An Evaluation

### ABSTRACT

They are looked down upon by the society, treated like mere objects by many and considered the dirt of every society. Illegal by night, ostracised by day these people lead a difficult life. A life where to cook meals in the day light and to sell their bodies at night. Sex workers are treated like sex worker and not humans. Gratifying the hushed desire of millions, these sex workers with needs and desires as mainstreamed as always been an outcast. Though not illegal but caught in a web of laws making them vulnerable.

### INTRODUCTION

**“Slavery still exists but now it applies only to women and its name is prostitution.”**

Victor Hugo

**“The only thing the government has done for us is to label us as prohibited”**

Sex worker

Why do sex workers alone face the criticism and not those who feast on them? Because they are poor and helpless and this is their source to sustain themselves in a society where it is a ‘vice’ that is most pronounced in the night and silenced out of existence in the day light. Though lawful but no real protection, respect or acceptance in the society, mockery on the face of desire. Prostitution is simultaneously asexual and economic institution and it is highly gendered while

male prostitute is widely tolerated, female prostitution is viewed as a form of social and sexual deviance.

Sex work in India is governed by **The Immoral Traffic (Prevention) Act, 1956**. Sex work is not illegal in India, it is lawful only if soliciting is conducted in private spaces. A number of supporting activities such as supporting brothels, pimping and pandering are punishable offences. To look into the requirements of the act and before we jump into evaluating the evils and qualities of this Act, it is important to understand the nature of the controversial sex industry, trace its roots and illuminate the reasons why people choose to end-up being sex workers.

A prostitute is a person who offers sexual services in return for payment. However in India where people are fond of modifications have called prostitutes as heinous sinners. In the land of Kama sutra, the world's oldest occupation is frowned upon.

Once near a red light area I randomly asked a man if he knows who a prostitute is, he then looked at me as if I am some alien creature, his eyes full of repulsion and gawkily replied "we do not talk of such people or places".

## DEFINITION

The encyclopaedia of social science defines prostitution "**as the practice in which a female offers her body for promiscuous sexual intercourse for hire etc.**"

Judiciary through its remarkable judgments has also defined prostitution and prostitute in the following cases.

In **People v. Rice**<sup>1</sup>- prostitution was defined as, the act or practice of a female of prostituting or offering her body to an indiscriminate intercourse with men for money or its equivalent.

In the case of, **Carpenter v. People**<sup>2</sup>- it was held that, the word "prostitute" in its most general sense means the act of setting one's self to sale, or of devoting to infamous purposes; it also

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<sup>1</sup> 277 111.521, 115 N.E.631, 632.

<sup>2</sup> 8 Barb., 610.

means, what is in one's power that is: the prostitution of talents or abilities; the prostitution of the press.

## **HISTORY**

Surprisingly, prostitution is often deemed to be the oldest profession and can be traced back to the ancient literatures and civilisation.

Prostitution was considered as a sacred practice in the ancient era of Greek Historian Herodotus. The Sumerian records of 2400 BC also considered prostitution as a profession. These records depicted a temple-brothel that was managed by the Sumerian Ministers. These sanctuaries classified women into three categories. While the first category of women performed sexual ceremonies, the women belonging to the second category were responsible for approaching the guests and discovering clients, and the third category of women lived on the sanctuary grounds and was the most frowned upon.

In subsequent decades, female prostitution was regulated in Greece, India, Japan, and other countries. In these Asian countries, tawaif was a commonly used word. This term was used for courtesans who entertained people through dancing, singing, and poetry. Sex was not a common practice during this era. Only the highly classifies tawaifs would engage with prostitutes who would play music and work for them.

Another category of women, known as the 'devadasis' was forced into prostitution in India. Devadasis were holy women who were married to a Devi or deity and enjoyed a high social status in the society. They took care of the temples and performed Bharatnatyam. They lost their status in Islamic times when India was invaded and temples were destroyed. Devadasis became poor and were forced into prostitution

This clearly suggests that prostitution has its roots in ancient India and is not a manifestation of decadence. Further, it is important to emphasise that the fact that this practice found a place in sacrosanct literature, including the Vedas and the Artha-shastra, implies that prostitution was not an underground practice. Rather, it was a well-acknowledged, mainstream activity. This should

raise some eyebrows the next time ‘culture’ is put forth as a reason to look down upon sex workers.

## **REASONS FOR PROSTITUTION IN INDIA**

Often, millions of sex workers are coerced into prostitution and continue to be victims of human trafficking and forced sex. However, there are millions of other women who turn to sex work to escape abject poverty. The law thus has to be designed to protect both the victims of sex slavery as well as people who voluntarily choose to take up prostitution as their profession.

Before we begin to develop opinions about people who willingly work as prostitutes, it is important to remember Atticus Finch’s advice:

**“You never really understand a person until you consider things from his point of view until you climb into his skin and walk around”.**

The reasons why sex workers enter the profession in India are numerous and varied. It can be voluntary or willingly when given a choice between being destitute on the streets and lulling hungry children to sleep every night or working as a sex worker and expanding the opportunities for their children, these women choose the latter. There can be other causes as mere ill treatment by parents or selling them or to bad company and as major as even family prostitution, the social customers, inability to arrange marriage, lack of sex education, prior incest, rape, early marriage and desertion. It can range from Lack of recreational facilities, ignorance, and acceptance of prostitution to Economic causes including poverty and economic distress and also psychological causes include desire for physical pleasure, greed and dejection.

On the other end of the spectrum, there are women and girls who were duped into sex work — victims of sex trafficking who continue to face sexual exploitation every day. Sex trafficking is partly a manifestation of misogyny and partly a manifestation of socio-economic vulnerabilities of the disadvantaged sections of the Indian society, who are tricked into prostitution under the masquerade of promises of a good job or better life.

**1. Abduction:** This is often the foremost common cause. Lassies are abducted from their villages/negative places on some or other pretext, exploiting their innocence. A number of these

are visiting movies, cities ,temples /pilgrims , making them film-stars offering job opportunities and marriage .Contrary to common beliefs , most kidnappers are females or couples.

**2. DevadasiSystem:** The inhuman system of prostitution with religious sanction ‘Devadasi System’ still continues to flourish within the so called progressive and democratic country. Thousands of women are dedicated to goddess ‘Yellamma’ and ‘Renuka’ (mostly within the state of Karnataka and Maharashtra ) and after a short period of concubinage, they become accessible to urban prostitute .Within these mechanism we find, that three socialized instruments perpetuate deity of those women , namely economic organization, brute force and also the religious rituals .

**3. Rape:** About 6 per cent of the ladies entered prostitute after the incidence of rape. Rape on the ladies could be a great social stigma and in some circumstances, the victims of rape aren’t even accepted reception .Aside from the delay or perhaps absence of justice, the victims have to face similar incidents every now so. Once they don’t find any safe place in society and don’t foresee and better future perspective, they find their ways within the brothels .The foremost common incest in between father and daughter, followed by uncle- niece .When the youngvictim of incest exploited reception, she doesn’t foresee safety anywhere within the society and slowly finishes up in prostitution. In certain circumstances, we’ve stumble upon the cases where the ladies were sold by their own fathers, uncles or the brothers-in-law after subjecting them to incest.

**4. Marriage:** Though the matter of prostitutiondirectly through marriage isn’t very common on Bombay, some cases were noticed this areas.

**5. Children of girls in prostitution:** Female children of the ladies in prostitution invariably find yourself in prostitution, as there’s no safe place for the kids and there’s no programme for them till date, to urge them out of those areas and to produce them alternation livelihood.<sup>3</sup>

## LAWS IN INDIA

The Immoral Traffic (Prevention) Act, 1956 governs the

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<sup>3</sup><https://www.ugc.ac.in>.

The highlights of Immoral Traffic (Prevention) Act, 1956 can be summarised in the following points:

**(A) Sex-workers:** Carrying on prostitution in or within 200 meters of a public place or within a notified area, and soliciting or seduction in public, or in sight or sound of a public place for the purpose of prostitution are offences under sections 7 and 8. Public place is defined as any place intended for use by, or accessible to, the public and includes any public conveyance. Working privately and independently as prostitute is not an offence. However, a sexworker can be removed from any place at the request of a magistrate and a brothel containing two or more sex-workers can be closed down.

**(B) Clients:** The client commits an offence if he carries on prostitution with a sex-worker in or within 200 meters of a public place or in a notified area (under the Indian Penal Code, if the sex-worker is below 16, the client can be charged with rape).

**(C) Babus:** Live-in-babus or lovers are committing an offence by living off the earnings of prostitution. If anybody who is proved to be living with a sex-worker is arrested under these charges, he is assumed to be living off her earnings unless he can prove otherwise.

**(D) Brothel keepers:** A brothel is defined as any place used for sexual exploitation or abuse, for the gain of another person or for the mutual gain of two or more prostitutes. Landlords, brothel-keepers and those who abet brothel-keeping can be punished under section 5 of the Act. Detaining a person for prostitution is also an offence. A magistrate can order the closure of a brothel that is within 200 meters of a public place. Hotels that are being used as brothels can have their licenses suspended or cancelled if any of the sex-workers are minors.

**(E) Landlords:** Knowingly renting out property which is being used for prostitution is an offence under section 7.

**(F) Traffickers:** Procuring, inducing, taking or detaining a person for prostitution are offences under section 5. If the person is a minor or a child or if a person is procured against her will, the sentence is more severe.

**(G) Pimps:** Pimping and touting is an offence under section 4. It is assumed, unless proved otherwise, that a pimp is living wholly or partially on the earnings of a sex-worker.

**(H) Rescued Girls:** The government is bound to provide rehabilitation in a protective institution, or under the supervision of a person appointed by the Magistrate, for women and girls received from prostitution. Under the Juvenile Justice Act, 2000 children of sex-workers and minors, classified as vulnerable because they associate with sex-workers, can be removed to a registered juvenile home (government or Non-Governmental Organisation) until they come of age.

The fact that the Act criminalises brothels, which includes two or more women working together as prostitutes, implies that if women want to work as sex workers legally, they should do so alone. Further, the compulsion that sex work shouldn't be within a 200m radius of any public place again implies that to engage in prostitution legally, an isolated location should be chosen. These aspects of the Act make sex workers more vulnerable to abuse and exploitation. Moreover, sex workers who are often exploited by pimps or brothel owners can't take the resort of the legal system because, under the law, they will be prosecuted for working in a brothel and hence, they silently continue to suffer at the hands of brothel owners. Section 8 of the Act notably criminalises the act of seducing or soliciting customers. Though the Act may not prohibit prostitution, it certainly makes it very difficult for sex workers to legitimately exercise their right to work.

The Indian penal code includes separate offences that covers sex workers trafficker's and clients who engage with minors.

Section 372 and Section 373 of the Indian Penal Code, 1860 -Sale and/or purchase of minors for immoral purposes, is a penal offence in India. Section 372 of the Indian Penal Code, 1860, makes selling of minor for purposes of prostitution an offence punishable with Imprisonment of 10 years and fine. Similarly, Section 373 of the Indian Penal Code, 1860, makes buying of minors for purposes of prostitution an offence punishable with Imprisonment for 10 years and fine.

Section 372 of the Indian Penal Code, 1860, states that, when a female under the age of 18Years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps manages a brothel, the person so disposing of such female shall, until the contrary is Proved, bepresumed to have disposed of her with the intent that she shall be used for the Purpose of prostitution.

Section 373 of the Indian Penal Code, 1860, states that, any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of 18 years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution. In so far as

Section 373 is concerned, a precedent of reverent importance is that of, **Dowlat Bee v. Saikh Ali**<sup>4</sup>, in this case the question before the court of law was that, if a person were to contract with a minor girl, aged 17 years for prostitution; would it be 'buying' or 'hiring' within the meaning of Section 373 of the Indian Penal Code, 1860? Scotland, CJ was of the opinion that the terms of Section 373 are wide enough to penalise such suffering; however, Holloway, J dissented, holding that Section 373 could not be interpreted to include a hiring by minor herself, all such cases will be covered by provisions relating to kidnapping and abduction<sup>5</sup>

Rehabilitation of Prostitutes and their Children: Section 16 of the Immoral Traffic (Prevention) Act, 1956, provides for the rescue of persons living or carrying on, or made to carry on prostitution, in a brothel. Section 16 provides that, a Magistrate (that is, Metropolitan Magistrate, Judicial Magistrate of First Class, District Magistrate or Sub-Divisional Magistrate) may direct a police officer not below the rank of a sub-inspector to enter any brothel and remove any person there from; after removing the person, the police officer must forthwith produce him before the Magistrate. Rehabilitation of sex-workers has been an issue of considerable importance qua which substantial amount of time and efforts have been invested by the Apex Court since the very commencement of the Immoral Traffic (Prevention) Act, 1956. Not very long ago, in the case of **BudhadevKarmaskar v. State of West Bengal** observations, as made vide order dated 02.08.2011, held as follows

**“We are fully conscious of the fact that simply by our orders the sex workers in our country will not be rehabilitated immediately. It will take a long time, but we have to work patiently in this direction. What we have done in this case is to present the situation of sex workers in the country in the correct light, so as to educate the public. It is ultimately the people of the country, particularly the young people, who by their idealism and patriotism can solve the massive problems of sex workers. We, therefore, particularly appeal to the**

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<sup>4</sup> 5 MHCR 473.

<sup>5</sup> See:PSA Pillai,criminal law , Chapter 40:kidnapping and Abduction, lexis Nexis, 9<sup>th</sup> Edition ,2006 ,p.714-715.

**youth of the country to contact the members of the panel and to offer their services in a manner which the panel may require so that the sex-workers can be uplifted from their present degraded condition. They may contact the panel at the email address: panelonsexworkers@gmail.com.”**

In the case of **Gaurav Jain v. Union of India**<sup>6</sup>, the issue that came up before the Supreme Court was the rehabilitation of the children of the prostitutes. The Apex Court observed that, segregating children of prostitutes by locating separate schools, and providing separate hostels, would not be in the best interest of the children and the society at large. The Honourable Court directed that, these children should be segregated from their mothers and should be allowed to mingle with others and become a part of the society. The Court further contemplated that, the children of prostitutes should, however, not be permitted to live in the inferno and other undesirable surroundings of prostitute homes. This was observed particularly so in context of the young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. Whilst the court did not accept the plea for separate hostels for children of the prostitutes, it felt that, accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their respective mothers living in prostitute homes as soon as they are identified.

### **Other laws**

The Apex Court reconnoitred that, so far as the Constitution of India is concerned, Article 14 of the Constitution of India, 1950 provides for equality in general; Article 21 guarantees right to life and personal liberty; Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth, or any of them; Article 15 (3) provides that nothing shall prevent the State from making special provisions for women and children; Article 16(1) provides for equality of opportunity in matters of public employment; Article 23 prohibits human-trafficking and forced labour, making it punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (which was renamed in 1990 as the Immoral Traffic (Prevention) Act); Article

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<sup>6</sup> 1990Supp SCC 709: 1991 SCC (Cri) 140.

39(f) provides that children should be given opportunities and facilities to develop in a healthy manner and in conditions which do not put to compromise their dignity and freedom, also childhood and youth should be protected against exploitation, moral and material abandonment; Article 46 directs the State to promote the educational and economic interests of women and people of weaker sections of society, to protect them from social injustice and all other forms of exploitation; Article 51-A enjoins duty on every citizen to develop scientific temper, humanism and the spirit of enquiry and reform and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. Thus, the court stated that, social justice and economic empowerment is firmly rooted in the constitutional firmament of India, holding it 'fundamental' to the life and liberty of every citizen (prostitutes and their children included).

The Court further pointed out that, Article 1 of the Universal Declaration of Human Rights (UDHR) provides that, all human beings are born free; equal in dignity and rights. Article 2 states that, everyone i.e. prostitutes with their children included are entitled to all rights and freedoms set-forth in the Universal Declaration of Human Rights without any distinction of any kind such as that of: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 provides that everyone has the right to life, liberty and security of person. Article 4 enjoins that no one shall be held in servitude; slave trade and sex-trade are prohibited in all forms. The victims of flesh trade are no less than destitute of slave trade. Article 6 provides that everyone has the right to recognition everywhere as a person before the law, and thus identity of the victims of flesh trade cannot evaporate in thin air; their presence need to be acknowledged and consolidated efforts need to be made, both on executive/administrative side and judicial side to rehabilitate them and to provide for their welfare. India being a signatory to the UDHR is obligated to Work towards the aspirations that the declaration contemplates.

The Court further stated that, the Declaration of Right of the Child, to which India is a signatory, encapsulates by virtue of Article 3(1) that, all actions concerning children whether undertaken by public or private social welfare institutions, legislative bodies, court of law or administrative authorities must yield to the best interest of the child. Further, the Court elucidated that, the Convention on the Elimination of All Forms of Discrimination against Women, 1979 by virtue

of Article 1, prohibits discrimination against women; Article 5 enjoins to modify social patterns of conduct of men and women with a view to achieve elimination of prejudices and all other customary practices which are based on the idea of the inferiority/superiority of the sexes or on stereotyped roles of men and women; Article 12 prescribes that discrimination against women should end in the field of health-care in order to ensure better health services, including those related to family planning. Article 13 directs the State Parties should work towards elimination of discrimination against women in all areas of socio-economic life, entitling them to all benefits apropos family life, marital status and right to foster their children in best possible manner.

## **CONCLUSION**

The act is not comprehensive enough to regulate the Indian sex industry, prevent trafficking and supporting sex workers and victims. Criminalising brothels, soliciting and the practice of prostitution in proximity to public places in an attempt to curtail prostitution has clearly failed, which is clearly evident from the fact that metropolitan cities like Mumbai and Kolkata with red light areas of Kamathipura and Sonagachi respectively rank as some of the largest red light areas in Asia. The Act has made sex workers rather more vulnerable by forcing them to work in the darker, more invisible corners of the cities, silently suffering exploitation. This seclusion of sex workers also implies that they are left in oblivion about access to information about and treatments for sexually transmitted diseases, which they are most at risk of contracting. Further, it also means that they can't access public facilities like public hospitals, colleges and schools, the access to which are essential for them to expand their opportunities and improve the quality of their lives.

Mainstreaming sex work, easing access to birth control methods and medical aid together with educational opportunities will not only enable sex workers to live a more normal life but will also work to a great extent to prevent their exploitation because they will no longer be vulnerable to their perpetrators.