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Legalization of Prostitution: A Review of the Sri Lankan Context with Comparative Analysis

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ABSTRACT

There are two dimensions of this study. The first one is to identify the factors regarding prostitution with different perspectives and the second one is to understand how the different jurisdictions have legalized the sex industry. The core objective of this research is to analyse these two dimensions and diagnose how Sri Lankan society recognize prostitution.

To address the first dimension of this study, the researcher analysis legal, social, and medical perspectives regarding the sex industry in Sri Lanka. In accordance to fulfill this objective, data was gathered by interviewing five different stakeholders with a customized analytical approach. For this part of the study, the researcher has collected qualitative data. Regarding the second dimension of the study, the researcher comparatively analyses the legality of prostitution in different jurisdictions. For this analysis, the researcher has selected six regions globally.

The study further analyses the domestic legal framework, and social and medical perspectives regarding prostitution. Therefore, this research can be identified as a comprehensive analysis of prostitution in Sri Lanka.

Keywords: Brothels, Prostitution, Sex Industry, STD.

I. INTRODUCTION

Prostitution means, “A sexual service provided by women, men, and transsexuals in exchange for payment.”² There are interpretations of prostitution from the legal, economic, sociological, psychological, sexological and religious perspectives. Sociologists define that, “Prostitution is a social phenomenon characterized by systematic, extra-marital sexual relationships that can be secret or open and have an emotionally alienated character.”³ From the point of view of sexology, “prostitution is considered to be the provision of sexual services to clients at a pre-

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² Łukasz Dylewski and Pavol Prokop, Prostitution, Encyclopedia of Evolutionary Psychological Science, Springer Nature Switzerland AG (2019).

³Petro Kurmaiev, Prostitution: The Essence and Motives, SSRN Electronic Journal, (2018), p.1.

determined payment.”⁴ The legal interpretation of prostitution differs from jurisdiction to jurisdiction. Some countries are recognizing prostitution as legal and lawful conduct.

(A) History of Prostitution

Prostitution is sometimes called the “world’s oldest profession” and has been practised throughout ancient and modern culture.⁵ In ancient Greece, the first brothels (*lupanarium*) were created in Athens by Solon in the sixth century BC. Prostitution was public and legal in ancient Rome.⁶ Most of the Buddhist *Attakathas* provide evidence about the social structure in ancient India. According to that historical evidence, in ancient India there the prostitution was recognized as a highly reputed profession.

However, societal attitudes began to harden against prostitution in the sixteenth century. This profession became a crime, a transgression against human and divine laws. Scientists have speculated that the spread of sexually transmitted diseases, such as syphilis, may have contributed to the rejection of prostitution in society.⁷ Regarding this new type of crime, new ways of administering the penalty were created. In 1530, King Charles V prohibited prostitution and Those who violated the law were subjected to extremely cruel punishments.⁸

The eighteenth century was “The Golden Age of Prostitution,” and during this period, prostitution was widely popular. There were numerous places in Paris and London where prostitutes could receive training in order to be professional and adaptable.⁹

Many prostitutes sexually served soldiers of both sides during World War I and World War II. During World War II, the Japanese army sexually exploited more than 200,000 women from China and Korea, called ‘comfort women.’¹⁰

II. THE LEGALITY OF PROSTITUTION: A COMPARATIVE ANALYSIS

(A) Europe

Prostitution is illegal in most of the European Union countries, but it is legal in the Netherlands, Germany, Austria, Finland, Denmark, Greece, Hungary and Latvia.¹¹

Sex workers in the Netherlands, like in most European countries, were illegal before 1911 and

⁴ Kapustin, D. *Molodezhnyj seks* [Youth sex]. Minsk: MP, (1997).

⁵ Sanger, W. W. The history of prostitution. Dead Dodo History via Publish Drive, (2015).

⁶ Łukasz Dylewski (n.1), p.1.

⁷ Harper, K. N., Ocampo, P. S., Steiner, B. M., George, R. W., Silverman, M. S., Bolotin, S., Pillay, A., Saunders, N. J., & Armelagos, G. J. (2008). On the origin of the Treponematoses: A phylogenetic approach. *PLoS Neglected Tropical Diseases*, 2, e148.

⁸ Łukasz Dylewski (n.1), p.2.

⁹ Roberts, N. *Whores in history: Prostitution in western society*. HarperCollins Publishers, (1992).

¹⁰ Head, T. (2009). *The history of prostitution*. Updated March 17, 2017.

¹¹ Danna, D. Report on prostitution laws in the European Union, Università Degli Studi di Milano, (2014). p.12.

considered criminals. New Dutch laws, however, legalized brothels, and sex workers began to be seen as any other business. Sex workers in the Netherlands have gained full social, legal, and employment rights.¹² In Germany, The Prostitution Act (*Prostitutionsgesetz*) of 2002 was an attempt by the federal government of the time to improve the conditions of life and work for sex workers in the country.¹³ Prostitution, the provision of sexual services by adults, is generally legal in Austria. In Austria, contracts for sexual services between sex service providers on the one hand and customers on the other are generally permissible.¹⁴ Sex work is technically legal in Greece. The authorities issue professional certificates and medical certificates for the sex workers and they should be an employee in a licensed brothel.¹⁵ Also, Danish law is still grounded on a liberal view. Prostitution as such shall not be considered to be a criminal activity.¹⁶

(B) USA and Canada

Nevada is the only state in the US which is legalized prostitution. Still, the state has not passed legislation prohibiting prostitution. However, in Nevada, prostitution is limited to authorized brothels, and the prostitutes must be above the age of 21.¹⁷

Prostitution is penalized in Canada. Under the provisions of the ‘Protection of Communities and Exploited Persons Act’ in 2014, purchasing sexual services and communicating in any place for that purpose is a criminal offence according to Canadian criminal law.¹⁸

a. Central and South America

Prostitution has not been criminalized by most Latin American countries. In Mexico, prostitution is decriminalized and regulated at the level of the federal states.¹⁹ The Criminal Code of the Republic of Argentina does not forbid prostitution at all but punishes the pandering and trafficking of women for sexual exploitation.²⁰ Columbia accepts and regulates the practice

¹² Kilvington, J., Day, S., & Ward, H. Prostitution policy in Europe: A time of change. *Feminist Review*, 67, (2001), p. 78–93.

¹³ Dorothea Czarnecki, Henny Engels, Barbara Kavemann, Wiltrud Schenk, Elfriede Steffan, Dorothee Törnau, *Prostitution in Germany – A Comprehensive Analysis of Complex Challenges*, Berlin, April 2014, p.4.

¹⁴ Federal Chancellery Republic of Austria, Prostitution, <https://www.bundeskanzleramt.gv.at/en/agenda/women-and-equality/prostitution.html> (Accessed 14 Nov. 2021)

¹⁵ Globle Network of Sex Work Project, Greece, <https://www.nswp.org/country/greece> (Accessed 14 Nov. 2021).

¹⁶ Per Ole Träskman, *Purchase of a Sexual Service – A Lawful Private Delight or an Offence? A Study of Criminal Legislation in the Nordic Countries*, *Scandinavian Studies in Law* © 1999-2012, p.296.

¹⁷ Nomi Levenkron, *The Legalization of Prostitution: Myth and Reality - A Comparative Study of Four Countries*, p.31.

¹⁸ Prostitution Criminal Law Reform: Bill C-36, the Protection of Communities and Exploited Persons Act, In force as of December 6, 2014.

¹⁹ Claudiu Andreescu, Cristian Giuseppe Zaharie, *Legal status of prostitution in Latin America*, *Romanian Economic and Business Review* – Vol. 9, No. 3, p. 40.

²⁰ *ibid*, p.43.

of prostitution, similarly to most of the neighbourhood countries.²¹ Also, Brazil, Chile, Venezuela, Cuba and most of the Caribbean islands recognize prostitution as a lawful profession. However, El Salvador and Guyana can be identified as two nations in the Latin American region that have been illegalized prostitution.²²

(C) Australia and New Zealand

Prostitution is legal in almost every state in Australia except to some extent in South Australia. However, the legality of prostitution and maintaining brothels are regulated under state laws.²³ Prostitution was decriminalized in New Zealand by the Prostitution Reform Act 2003. There are three main aims of the legislation. Firstly, to protect the workers from exploitation. Secondly, to promote the health and safety of the workers. Finally, to eliminate the prostitution of people under the age of 18.²⁴

(D) Africa

Prostitution is illegal and criminalized in most African countries. However, in some countries, prostitution is not criminalized, but the procurement and solicitation of sex in public places are illegal.²⁵ In Burkina Faso, Cape Verde, the Central African Republic, Côte d'Ivoire, Ethiopia, Lesotho, Madagascar, Malawi, Sierra Leone, Swaziland and Zimbabwe prostitution is not illegal but related activities that are considered illegal. Senegal is the only African country in which prostitution is both legal and regulated.²⁶

(E) Asia

Many countries in Asia have not legalized prostitution and related activities. Prostitution is illegal in the Peoples Republic of China. However, unlike in Mainland China, the country's special administrative regions such as Hong Kong and Macau has legalized prostitution.²⁷ Prostitution itself is illegal in Japan but buying sex is not. However, it is important to note that Japan has a long tradition of prostitution.²⁸ Although prostitution is technically illegal in Thailand, it is largely tolerated and regulated as a part of the important economic industry of

²¹ *ibid*, p.44.

²² Sexuality, Poverty and Law Programme, <http://spl.ids.ac.uk/sexworklaw/countries>, (Accessed 14 Nov. 2021).

²³ What are the prostitution laws in Australia? <https://www.catwa.org.au/prostitution-laws-in-each-state/> (Accessed 14 Nov. 2021).

²⁴ Jan Jordan, *The Sex Industry in New Zealand: A Literature Review*, Ministry of Justice, New Zealand, (2005).

²⁵ E.N. Ngugi, E. Roth, Theresa Mastin, M.G. Nderitu, and Seema Yasmin, Female sex workers in Africa: Epidemiology overview, data gaps, ways forward, *SAHARA J.* 2012; 9(3): 148–153.

²⁶ *ibid*.

²⁷ World Health Organization, Regional Office for the Western Pacific, *SEX WORK IN ASIA*, 2001.

²⁸ *ibid*. p.11.

tourism.²⁹ Prostitution is illegal in Vietnam, Laos, Burma, Cambodia and Malaysia.³⁰ However, in the South-East Asian region, there is a vast illegal sex industry based on tourism. Prostitution is legal in Singapore, but operating a brothel and soliciting in public is technically illegal but in practice, they are tolerated in designated areas.³¹ Prostitution is illegal in the Philippines but the government regulates that women working as entertainers.³² Prostitution is not explicitly illegal in India, but certain acts that facilitate prostitution are regarded as illegal.³³ In Sri Lanka, though prostitution does not consider a criminal offence, maintaining a brothel and other related activities are penalized.³⁴ In 2002 all the South Asian countries have agreed to the ‘Convention on Preventing and Combating Trafficking in Women and Children for Prostitution,’ for the purpose of preventing prostitution and human trafficking in the region.

III. THE LEGAL FRAMEWORK IN SRI LANKA REGARDING PROSTITUTION

According to Sri Lankan Law, sexual relationships between adults with natural consent is not an offence. Adultery is also not a criminal offence whereas it is a marital offence. However, Sri Lankan law provides provisions to deal with offences of sex workers where money or consideration is exchanged.³⁵

(A) Vagrants Ordinance

Vagrants Ordinance is one of the outdated laws remaining in Sri Lanka which was enacted by British rulers in 1841. The long title of the ordinance states “an Ordinance to amend and consolidate the law relating to vagrancy”.³⁶

Under Section 3(1)(b) of the ordinance every common prostitute wandering in the public street or highway, or any place of public resort, and behaving indecently consider a Vagrant Person.³⁷ Also, any person who knowingly lives wholly or in part on the earnings of prostitution; shall be guilty under the ordinance.³⁸

According to Section 7(1)(a) of the ordinance, any person in or about any public place soliciting any person for the commission of any act of illicit sexual intercourse or indecency, whether with the person soliciting or with any other person, whether specified or not shall be guilty of an

²⁹ *ibid.* p.15.

³⁰ *ibid.* pp. 17-21.

³¹ *ibid.* p.23.

³² *ibid.* p.26.

³³ Immoral Traffic (Prevention) Act, 1956.

³⁴ Penal Code, No: 2 of 1883 (Later Amended) and Brothels Ordinance, No: 5 of 1889.

³⁵ Ajith Rohana, Darshana Gallage, Palitha Halangoda & Prabath Karunaratne, *Laws concerning Commercial Sex and HIV AIDS Prevention*, p.3.

³⁶ No 04 of 1841

³⁷ Sec: 3 (1) b.

³⁸ Sec: 9 (1) a.

offence under this Ordinance.³⁹

Accordingly, if a person invites somebody to have sex at a public place expressly or impliedly, it can be considered a criminal offence. In *Leembragan vs Silva*⁴⁰ case, the supreme court held that illicit sexual intercourse is subjected to indecency.

Vagrants Ordinance is the key legal instrument that is used by Police to arrest street prostitutes. Especially Section 3(b) states that every common prostitute wandering in public streets or highways could be arrested. However, the ordinance does not define who is a ‘common prostitute’.⁴¹

(B) Brothels Ordinance

Brothels Ordinance⁴² was also enacted in the British colonial period. This ordinance laid down the legal foundation for penalizing conducting and maintaining brothels in Sri Lanka.

Under Section 2 of the Ordinance, any person who, (a) keeps or manages or acts or assists in the management of a brothel; or (b) being the tenant, lessee, occupier or owner of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for habitual prostitution; or (c) being the lessor or landlord of any premises or the agent of such lessor or landlord, lets the same, or any part thereof, with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, shall be guilty of an offence under this ordinance.⁴³

Although the Ordinance does not provide an interpretation for ‘Brothel House’, the Supreme Court broadly defined that term in *Dhorati Silva vs OIC Vice Branch Pettah*⁴⁴ case. Under Section 2(a) of the Ordinance, managing a brothel is a criminal offence. The term “management” involves the idea of administration or control.⁴⁵ In *Deny vs. Sirimal*⁴⁶ case, the Supreme Court held that a ‘Guest House’ or a ‘Rest House’ cannot be included as a Brothels House.⁴⁷ Also, in *Abeykoon vs Kulatunga*⁴⁸ case, Supreme Court held that having sexual intercourse by a man and a woman in a place is not sufficient to prove an offence under the Brothels Ordinance.

³⁹ Sec: 7 (1) a.

⁴⁰ 34 NLR 56

⁴¹ Laws concerning Commercial Sex and HIV AIDS Prevention, n(34), p.10.

⁴² No 05 of 1889.

⁴³ Sec. 02 (a), (b) & (c).

⁴⁴ 78 NLR 433.

⁴⁵ S. C. 413— 414 (1950).

⁴⁶ SC App. No. 488/98.

⁴⁷ Laws concerning Commercial Sex and HIV AIDS Prevention, n(34), p.12.

⁴⁸ S. C. 413— 414 (1950).

(C) Penal Code

Although the Penal Code of Sri Lanka does not identify Prostitution as a criminal offence, new laws in respect of providing persons for sex were introduced by the amendments of the Penal Code that were brought in **1995, 1998** and **2006**.⁴⁹ Section 360(A) of the Penal Code as amended in 1995 interprets that procuring a person to become a prostitute within or outside of Sri Lanka, is an offence.⁵⁰

(D) Prostitution Related Crimes

As discussed above, prostitution itself is considered a crime in Sri Lanka and immoral activity which against social values. Human trafficking, Child Pornography, Child Prostitution and many other crimes are also related to the sex industry. These are creating huge social downgrades. Human trafficking is criminalized in Sri Lanka by Section 360 (C) of the Penal Code.⁵¹ Also, the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act No. 30 of 2005 makes provision for the prevention, rehabilitation and extradition of women and children trafficked.⁵² Obscene publication, exhibitions, relating to children have also been criminalized under Section 286 (A) of the Penal Code.⁵³

IV. THE SOCIOLOGICAL ASPECT OF PROSTITUTION

Sexual needs are one of the most prominent needs of every adult human being. People adopt various methods to fulfil sexual needs and there are certain limitations to having moral control over that. However, an individual has a biological motivation to satisfy his/her sexual needs. In most countries, the family is considered to be the primary unit that satisfies these needs.⁵⁴ Extramarital sexual relations are restricted under morality in most Asian countries, including Sri Lanka. However, the sex industry is beyond moral and legal limits.

(A) Factors promoting demand for the sex industry

According to many sociological studies, the demand for the sex industry is mainly based on the following factors.⁵⁵

- To have sexual satisfaction when it is not adequately provided by the married partners.

⁴⁹ Laws concerning Commercial Sex and HIV AIDS Prevention, n(34), p.3.

⁵⁰ Penal Code (Amendment) Act No 22 of 1995, Sec 360(A).

⁵¹ Sec: 360 (C) of the penal code as amended under Penal Code Amendment Act No 16 of 2006.

⁵² Act No. 30 of 2005/ NCPA, Training Manual on Child Trafficking, Chap. 05 Domestic Legal Framework, p.86.

⁵³ Sec: 286(A) of the penal code as amended under Penal Code Amendment Act No 22 of 1995.

⁵⁴ B.G.I.M. Samarasinghe, Sex Industry as a social issue in Sri Lankan context: beyond a social problem, E-journal of Social Work 2018 - 2 (1): 40-46, p.43.

⁵⁵ *ibid.*

- To have sexual satisfaction since they are unmarried.
- As a habit/addiction to sex workers & Strong relationships with sex workers.
- Having high sexual drives.
- To satisfy unusual sexual needs.
- The easier access to sex workers and their service.

(B) Factors influencing prostitution

There are several social and economic factors that cause especially women to enter this illegal and socially rejected profession. These factors can be listed down as follows.⁵⁶

- Economic difficulties in the family.
- Illiteracy, unemployment and difficulty in finding jobs.
- Pressure in other jobs and the dislike to engage in other jobs.
- Personal interest and other social and economic motivations to engage in this profession (ex: an easy way for earning)
- Environment and the socialization process.

Most of the women who are working as prostitutes in Sri Lanka, do so because they are compelled by economic and social inequality and by terribly restricted life chances. Some moreover are physically coerced and a large proportion of women staffing the brothel sector have been trafficked into the business. Those women who are held in debt bondage may receive only a fraction of the money paid by clients. On the other hand, in patriarchal societies in which women have inferior access to economic resources, sex work gives many uneducated and unskilled women an income that far exceeds that which they can obtain in any other occupation.⁵⁷

V. PUBLIC HEALTH AND PROSTITUTION

The prevalence of sexually transmitted diseases (STDs) is a major health problem associated with sex work global. More than 30 different bacteria, viruses and parasites are known to be transmitted through sexual contact. STDs are spread predominantly by sexual contact, including vaginal, anal and oral sex. Some STDs can also be transmitted from mother to child during pregnancy, childbirth and breastfeeding.⁵⁸ The rates of STDs are 60 times higher among sex

⁵⁶ *ibid*, p.44.

⁵⁷ World Health Organization n(26), p.6.

⁵⁸ World Health Organization, Sexually transmitted infections (STIs), <https://www.who.int/news-room/fact->

workers than in general populations. In addition to higher rates of STDs, sex workers are often unaware of their infection status, further endangering their health risks and increasing the risk of infecting others with HIV and other STDs.⁵⁹

Since sexual intercourse is the prominent way of transmitting HIV and other sexually transmitted diseases (STDs), sex workers, and clients are often labelled as a "high-risk group" in the context of HIV and STDs.⁶⁰

(A) Prostitution and STDs in Sri Lanka

In Sri Lanka, most of the STDs related health issues are reported among sex workers and their clients. Most of the medical studies provide evidence that Human Immunodeficiency Virus (HIV) and other STDs are commonly reported from female sex workers. The common STDs in Sri Lanka are Genital herpes, Gonorrhoea, Non-gonococcal urethritis (NGU), Syphilis, and Genital warts.⁶¹ However, Sri Lanka has a low-level HIV epidemic, with HIV prevalence estimates below 0.1%, which is lower than in most South Asian countries.⁶² Lack of awareness about STDs and especially lack of safety precautions such as using condoms can be considered as the main reasons for the spread of STDs among sex workers.

VI. CONCLUSION

Prostitution is itself an ambiguous concept. It always contradicts social, cultural and legal norms and standards. The arguments build-up regarding prostitution by western authors such as Roger Mathews⁶³ could be more suited to western culture but not to non-western cultures. Prostitution is kind of a universal practice but it does not have a universal value. Especially in the countries like Sri Lanka, prostitution has no recognition in the societal and cultural framework.

As discussed previously in this paper there are many disagreements in legal, social and public health aspects to recognizing prostitution as a good practice. Therefore, though there are some

sheets/detail/sexually-transmitted-infections-(stis) (Accessed 20 Nov. 2021).

⁵⁹ ALEXIS HALL, M.P.H., Public Health Research Analyst, Sex Workers and STIs: The Ignored Epidemic, <https://www.iqsolutions.com/section/ideas/sex-workers-and-stis-ignored-epidemic>, (Accessed 20 Nov. 2021).

⁶⁰ Gaspari V, D'Antuono A, Bellavista S, Trimarco R, Patrizi A. Prostitution, sexual behavior and STDs. *G Ital Dermatol Venereol*. 2012 Aug;147(4):349-55. PMID: 23007210.

⁶¹ What are the common sexually transmitted infections in Sri Lanka? <http://www.fpasrilanka.org/content/stis-hiv> (Accessed 20 Nov. 2021).

⁶² Manathunge A, Barbaric J, Mestrovic T, Beneragama S, Bozicevic I (2020) HIV prevalence, sexual risk behaviours and HIV testing among female sex workers in three cities in Sri Lanka: Findings from respondent-driven sampling surveys. *PLoS ONE* 15(10): e0239951. <https://doi.org/10.1371/journal.pone.0239951>.

⁶³ "The legalisation of prostitution is, superficially, an attractive option. It appears to solve some of the problems that have become associated with regulationism and seems to offer a solution to the dilemma of not criminalising prostitution per se but at the same time controlling the activities of those involved in prostitution. Legalisation offers the promise of reducing the street trade while providing a more secure environment in which women can work." Roger Mathews, *Prostitution, Politics and Policy* (Routledge, 2008) p. 105.

arguments for the legalization of prostitution, society is still not ready to accept it.

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