

## THE LEGALIZATION OF SEX WORK

Rodrigo Tonel<sup>1</sup>

Thais Biguelini<sup>2</sup>

Aldemir Berwig<sup>3</sup>

Daniel Rubens Cenci<sup>4</sup>

### ABSTRACT

The present research aims to approach and provoke the debate on one of the oldest professions in the world, prostitution. Initially, in a brief introduction, it seeks to clarify and define some necessary concepts to a more objective understanding of the subject, and then starting with its most controversial points, drawing interesting parallels between prostitution and other professions in a try to demystify some unfounded discourses and arguments fully of preconceptions, especially when imposed by the moral, social and religious bias. It also brings some examples of countries where the practice was legalized and the benefits that such legalization brought for them. The methodology applied arises from a bibliography analysis through books written by reputable authors over the subject as well as all sorts of materials and instruments available on the Internet. In addition, we bring up news and alternative ways to cope with the prostitution issue in a try to find better solutions for it. Finally, it concludes by discussing the need for the decriminalization of this practice as well as its legalization in order to

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<sup>1</sup> Law school student by the Regional University of the Northwest of the State of Rio Grande do Sul – UNIJUÍ; Brazil; E-mail: tonelr@yahoo.com

<sup>2</sup> Law school student by the Regional University of the Northwest of the State of Rio Grande do Sul – UNIJUÍ; Brazil; – UNIJUÍ; Brazil; E-mail: t.biguelini@hotmail.com

<sup>3</sup> Doctorate and Master of Science Education (Unijuí); Professor of the Department of Legal and Social Sciences of the UNIJUÍ; Brazil; E-mail: berwig@unijui.edu.br

<sup>4</sup> Doctor degree on Environment by the Federal University of Paraná. Professor of the Master degree in Human Rights by UNIJUÍ, and Professor of law course of UNIJUÍ; Brazil; E-mail: danielr@unijui.edu.br

assure professional rights and guarantees, and also to rescue the human dignity of all those people who work in this kind of profession and who seek some minimum of protection to keep their livelihood without exposing themselves to as many risks.

**Keywords:** Discrimination. Human Rights. Labor. Law. Sex.

## 1 INTRODUCTION

This article analyzes the sex work issue, bringing up the main problem of it which is its non-formalization as a job which, by consequence, creates discrimination and all sorts of violence against the people who do this kind of activity.

The justification for this theme is to bring up some discussions about labor law, human dignity, human rights, and it is a subject that comes along with the history of humanity, coming from a scientifically analyses, evoking the real need to have a discussion about the subject and provoking a stronger reflection from our society and the law. It is also justified by the need to update labor laws as well as rethinking some concepts about sex work.

The contribution of this theme is absolutely evident since it influences our modern society somehow, especially if sex work is legally recognized and regulated as a job. It also brings a significant theoretical contribution in the academic scope of law.

The goal of this research is to approach and provoke the debate on prostitution/sex work. It seeks to clarify and define some necessary concepts to a more objective understanding of the subject, and then starting with its most controversial points, drawing interesting parallels between prostitution and other professions in a try to demystify some unfounded discourses and arguments fully of preconceptions, especially when imposed by the moral, social and religious

bias. It also brings some examples of countries where the practice was legalized and the benefits that such legalization brought for them.

The intention of it will be given by the methodology applied which arises from a bibliography analysis through books written by reputable authors over the subject as well as all sorts of materials and instruments available on the Internet.

## **2 BODY**

Prostitution is nothing more than a sort of practice that engages the sexual activity in exchange especially for money. It is frequently seen as the most ancient profession on the history of the world (Figueiredo, & Peixoto, 2010).

In the contemporary societies prostitution arises as a phenomenon that manifests itself through almost every place around the world. We just need to go for a walk and we will probably find on the sidewalks of cities groups of women trying to get some money by selling sex. In fact, many scholars believe that the influences over the prostitution sphere don't come from public policy but from the economic and cultural transformations (Wagenaar, Altink, & Amesberger, 2013).

Following the next topic, we're going to be talking about conceptions and differences about sexuality, sex and gender.

### **2.1 What is the difference between sexuality, sex and gender?**

When we're going to talk about sex many thoughts may irrupt from our minds. First, sex can be seen as something that in some cases represents pleasure, happiness, health, other times

submission, taboo, perversity, sin, violence and sometimes even work. So, sex can be seen by a variety of forms including the biological, psychological, cultural, religious and historical aspects (Silva, 2008).

The sexual life implies many dimensions of the human life. Mostly, sex is marked by three main conceptions: the law, the medical practice and the religious perspective. First, the jurists and legislators had condemned and punished in different periods of the history sexual activities as being crimes. Second, the medical community sees it as a health issue demonstrating great concern about the spread of sexual diseases such as Aids. And finally, a bunch of religions and churches consider sex activities as a sin and therefore whosoever does it, deserves the eternal condemnation, in other words, the one who does these kinds of activities will be send to hell after the earthly life (Focault, 1988).

Now, in an attempt to find a definition about what is sex and what makes it different from gender, we could adopt a quite simple but very effective definition that is given by the World Health Organization (WHO, 2017), which says that:

"**Sex**" refers to the biological and physiological characteristics that define men and women.

"**Gender**" refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women. To put it another way: "**Male**" and "**female**" are sex categories, while "**masculine**" and "**feminine**" are gender categories. (n. p., emphasis added by the author)

On the other hand, the term sexuality appears as a category that refers to the human characteristics and not only about the sexual organs (Silva, 2013). In other words, "it includes all the dimensions of a person such as biological, psychological, emotional, cultural and spiritual." (Trindade, & Ferreira, 2008, p. 418, our translation). So, the sexuality basically transcends the biological factor permeating others structures.

In accordance with Diamond (2014),

Sexuality is part of what makes us human. Naturally, its fundamental function is to propagate the species. But clearly, sex goes far beyond the powerful evolutionary instinct to procreate. Sex is also about sensual pleasure. Enjoyment. Excitement. Even ecstasy. In addition to the earthly and earthy delights of the flesh--the thrill of physically touching and being touched by another warm body, the mounting excitement toward sexual release, the climactic ecstasy of orgasm, and the pulsating, peaceful afterglow of relaxation following orgasm--human sexuality also serves both a psychological and spiritual purpose. Sex is a way of lessening our alienation, isolation and aloneness by physically connecting with, penetrating or being penetrated by another person at the most primal level of existence. . . . Sex substantiates, humanizes and incarnates existence. It produces joy, love, comfort, affection, and sometimes, ecstasy.

So, for now, we may have some idea through the definitions previously presented here of what sex, gender and sexuality really mean. The comprehension of those three elements is very important when we're going to discuss the sex work. Therefore, at this moment, we're able to start the following topic.

## **2.2 Sex as a work and sex work**

When we ask a young person if sex is pleasure or work, the most probable answer is going to be that sex is all about desire and pleasure. But, if we ask for an elder person the same question, the answer may be a little different, in other words, sex is almost pure work (Agustín, 2017).

According to Unaid (2014),

sex work, therefore, refers to consensual acts between adults and do not involve coercion. Sex work cannot and should not be conflated with human trafficking or sexual exploitation which constitute human rights violations and are prohibited under international and national laws. States have a responsibility to prevent and address human trafficking and sexual exploitation. However, these efforts should not justify

criminal prosecution or other coercive measures against adults who voluntarily engage in sex work, either as sex workers or clients. (p. 1)

At the other hand, however, sex workers are usually every individual who perform sexual services or activities relating to it through some kind of payment. Thus,

sex workers are female, male and transgender adults (18 years and older) who receive money or goods in exchange for sexual services, either regularly or occasionally. It is important to note that sex work is consensual sex between adults, which takes many forms, and varies between and within countries and communities. Sex work may vary in the degree to which it is more or less “formal” or organized. (Unaid, 2014, p. 1).

Prostitution is illegal in many countries of the world, but if we go on-line we are going to find countless websites that sell sex. The main argument is that selling your time for money is not illegal inasmuch as doctors and lawyers do it every single day. What is illegal, however, is prostitution which is selling sex for money. So, they say that they are selling their time instead of selling sex, and that sex comes up as being just a part or a consequence of it.

A lot of people position themselves in favor to the legalization of prostitution in order to protect women from violent costumers and abuses such rape, exploitation, human trafficking would decrease considerably, sex crimes would diminish, it would proportionate better access to health services as well and, finally, there’s no way of stopping people from engaging in this business because it is already impossible to stop, so the legalization wouldn’t be the righter idea but the smarter (Lewis, & Larson, 2015).

However, on the other side of the fence, are those people who don’t agree with this idea, and they think that prostitution should remain illegal. Most of the reasons are based in morale aspects. They believe that legalization of this kind of business would encourage sex outside of the marriage which something considered very wrong judging by the moral aspect. Another

argument is that it would put the women in a detrimental position becoming simple objects for sale (Lewis, & Larson, 2015).

Nevertheless, by other logic, if you get sex from somebody through seduction instead of money, it is not considered sex work and consequently not criminalized, perhaps just because it is an act morally accepted by the society.

Furthermore, while groups of people, religions and cultures feel offended just because they see individuals selling sex in exchange of money, on the other hand, they seem not to realize the different sorts of arranged marriages which they believe it is absolutely pure love and affection where people marry because, in most of the cases, they have financial interests and it has happened throughout the history of the mankind and continue happening on the present (Agustín, 2017). So, we have to rethink our morale conceptions.

Yet, many religions and churches criticize the sex work, and they often argue that sex is something that the married couples do to procreate. So, sex basically has the finality to procreate. But now, how about those couples that are infertile? They can't have children but they do have sex just for pleasure; or how about those individuals who get married in a old age and do not have the capacity to procreate anymore and so they make hands of medications such as Viagra to return their libido for sex in a perspective for pleasure or entertainment instead of procreation? It seems to be very controversial inasmuch as by one side the religions and churches condemn it but at the other side they allow it.

But now, if we start looking by the human diversity bias, considering as an example, a young man who has sexual problems and he goes and hires a woman to help him with those problems and then after it he goes on and have a successful marriage. This is just a mere example of the diversity of the human condition. But at the other side, what are neglected are the diversity of individuals, the diversity of situations, and the diversity of cultures.

The history of the world shows us how this subject is seen in many parts of the world, and what we may find is a wide variety of outcomes. We find a lot of cases where things go fine, and we find a lot of cases where things do not go fine. So, what we have to deal when discussing this subject is a human activity which very frequently is badly regulated and as a consequence what happens is that massive amounts of abuse, rape, unfairness, exploitation etc, occur frequently in many parts of the world.

However, all of these abuses we can also find in another institution which is marriage, especially, if we go around the world and meet with poor cultures; we're probably going to come across situations where all those cited abuses happen daily inside the marriage. But to go back to our resolution the correct answer is not to condemn marriage to say that marriage is wrong. By this way, we can think analogically about prostitution as a bit of it.

If we take the point of view submitted by the opposition, the more we try to condemn the activity that we all know that has existed in every society, it always pops up, there is always a black market, and there are many different ways of treating sex. If there is one thing that we all should realize is that the buying of sex is not going away, so what we want is that it happens in a better way rather than a worse way. We need to have a constructed attitude.

According to the Open Society Foundations (2017),

**There are many reasons why adults enter into sex work, including as their main livelihood or temporarily for survival or short-term revenue.** Regardless of their reasons for engaging in sex work and the nature of their work, all people should be treated with respect and dignity. Sex work should be acknowledged as work and sex workers must be entitled to the fundamental right to work to support themselves and their families. Sex workers in many parts of the world have organized to fight for their human rights. These rights cannot be fully realized while criminal laws threaten sex workers' access to justice and to health and social services, undermine their right to workplace and labor protections, and expose them to arbitrary arrest. (p. 2, emphasis added by the author)



Another factor is that the incident of rape among sex workers is higher and as a consequence what happens is that when a situation like this occurs, they fear to go to the police to report the violence against them because they may be arrested due to the criminalization of sex work. So, in this sense the decriminalization of sex work would have a very positive aspect in order to remove those kinds of barriers that frequently humper the full access to justice (Open Society Foundations, 2017).

So, we basically see two different worlds. In one of these worlds, prostitutes are workers and have free choice; on the other world prostitutes are captives and have no choice whatsoever. The decriminalization of sex work could enable people to organize and/or associate. This would bring enormous outcomes in terms of promoting better and safer conditions for sex workers. The mobilization of efforts from sex workers can increase their access to health services and prevention materials.

Another thing that we to take into consideration when we are debating the decriminalization is that it really challenges the state's control over the individuals and their sexuality. So, the decriminalization is also an issue of sexual rights including the rights to sexual expression, privacy and freedom (Open Society Foundations, 2017).

By this bias,

Criminal laws contribute to social marginalization not only through the imposition of legal penalties on sex workers prosecuted for specific acts, but also through the assignment of criminal status to all sex workers, regardless of any particular arrest, charge, or prosecution.<sup>27</sup> This sweeping condemnation leads to widespread discrimination, stigma, and ill treatment in social institutions and services, by health providers, police, and the general public. Decriminalization removes one source of stigma, the criminal label that serves to validate mistreatment or social exclusion (Open Society Foundations, 2017, p. 7).

Criminal laws, in this context, are not going to solve the problem. Even where there are criminal laws to those kinds of actions, people are certainly going to continue doing what they.

The criminal law can't rule behavior, it may be discourage some behaviors but it can't stop everything. Prostitution is not going to stop.

### 2.3 The scenario around the world

The claim for the recognition, legitimation and formalization of sex work comes from all over the world. According to the *Red de Trabajadoras Sexuales de Latinoamerica y el Caribe* (2017, p.1, our translation): “We are women sex workers who struggle daily for our rights, to give us equal treatment and allow us to participate with voice and vote on the areas where the political decisions that affect us are taken.”

In 2003, New Zealand recognized the harm done to prostitutions by criminalizing them, so they decided decriminalize this activity making a new legislation. “The new legislation represented a shift in policy position from a moralistic to a public health and human rights approach [...]” (Abel, Fitzgerald, & Bruton, 2007, p. 23).

The decriminalization in New Zealand brought a series of benefits in terms of health and increase of safety to the sex workers. Most of the women said that they perform sex always using condoms, and also they do check ups periodically. They reported that they feel safer after the legislation inasmuch as the abuses decreased considerably (Abel, Fitzgerald, & Bruton 2007).

According a classification given by Barnett and Casavant (2011, p. 2, emphasis added by the authors): “**Criminalization** indicates that it is legally impossible, or almost impossible, to engage in prostitution. This approach seeks to reduce or eliminate prostitution”

Notwithstanding, this term can still be divided in three more sub-categories which follow bellow:

*Prohibitiosism* seeks to eliminate prostitution by criminalizing all aspects of prostitution. Under this approach, prostitution is seen as a violation of human dignity. Criminal law and effective law enforcement are viewed as critical tools in reducing the number of individuals involved in prostitution; *Abolitionism* . . . maintain (s) that even though prostitutes may choose to enter the trade, it is nevertheless a social problem. They believe that governments must take the necessary steps to allow prostitution to occur only as long as it does not infringe on public safety and order . . . *Neo-abolitionism* . . . call (s) for the decriminalization of the activity of prostitutes themselves, but for the criminalization of all other aspects of prostitution, including the activity of pimps and the participation of clients. (Barnett, & Casavant, 2011, p. 2, emphasis added by the authors).

Now, at the other hand, decriminalization simple means the repelling of prostitution from the criminal law. In other words, the aim of decriminalizing prostitution is to treat it as any other job (Barnett, & Casavant, 2011).

And finally, the legalization which encompasses prostitution through the others legislations such as labor law, criminal law, and others. This approach tries to controls prostitution by a set of rules that regulate in under what circumstances the activity can be done. So, for example, in these cases, the law regulates it through licensing, stablishing a minimum age to start it, and determining where it should be done (Barnett, & Casavant, 2011).

Now, if we go to Australia we will probably find different treatments given by the criminal legislation, this because in Australia the approaches are taken different and individually by each state (Barnett, & Casavant, 2011).

In 1992, the Australian Capital Territory decriminalized prostitution, designing rules with the aim to protect sex workers in terms of health care and safety. The results were outstanding because there are very few illegal brothels and it diminished the percentage of individuals selling sex on the streets. On the state of Victoria (also in Australia), the situation is a little bit different. In this scenario the individuals are required to be licensed (Barnett, & Casavant, 2011).

In Brazil, the situation manifests itself by a different form. First of all, to comprehend how the professional sexual activities happen in Brazilian's territory it's necessary to frame a very interesting aspect which is called by the Portuguese language *programa*, and it means "the elementary unity of the prostitute's activity. Its execution requires previous agreements about three points: the practices, or the content of the service that will be provided, the price, and the available time given by the prostitute." (Freitas, 1985, p. 30, our translation).

So, it's easy to note that the informal expression *programa* sounds like slang on the Portuguese language and it doesn't only refer to the sexual act itself but also even to the hypothesis where the client just want to talk with the sex worker for a determined period of time (Oltramari, & Camargo, 2004).

In 2013, Canada's Supreme Court has struck down prostitution's laws and therefore it is not considered to be a crime to sell sex in exchange for money (CBC News, 2013).

So, it's clear for those countries where the prostitution was decriminalized or legalized the benefits were for both sides, the sex worker and the State.

### **3 FINAL CONSIDERATIONS**

So now, what it's possible to conclude from this succinct approach is that a fairer and egalitarian society cannot be considered in the near future as long as rights and guarantees are denied to some categories on detriment of others, especially when such denial is exclusively based on moral and/or religious aspects . It is already time for the international society mobilizes itself together with the governments to seek for a greater legislative commitment to safeguard and protect such professionals as if they were from any other category of work. It should be emphasized that what is sought here is not to get greater prominence or importance to the sex

professionals in specific, but only to seek for equal treatment as well as facilitated access to such equality.

Decriminalization and effective professional legalization of prostitution are urgent, there are rights and guarantees to be granted, there is human dignity to be rescued, there are lives to be protected and more importantly: there are lives depending on these kind of life to stay alive. It is not forgotten that morality and religion have an effective and relevant role regarding social control, but such deference cannot be invoked in order to segregate certain individuals simply because what they do to earn a living and guarantee their livelihood, especially when it is not something illegal. Therefore, whenever morality, good customs and religion are used as justifications for sowing inequality between individuals, it is a clear and unequivocal sign that what is completely prostituted is the character of those egoist people who stand by against equality and dignity.

## **A LEGALIZAÇÃO DO TRABALHO SEXUAL**

### **RESUMO**

A presente pesquisa visa abordar e provocar o debate sobre uma das profissões mais antigas do mundo, a prostituição. Inicialmente, em uma breve introdução, se procura esclarecer e definir alguns conceitos necessários para uma compreensão mais objetiva do assunto e, em seguida, começando com seus pontos mais controversos, trazendo paralelos interessantes entre a prostituição e outras profissões na tentativa de desmistificar alguns discursos infundados e argumentos totalmente preconceituosos, especialmente quando impostos pelo viés moral, social e religioso. Também traz alguns exemplos de países onde a prática foi legalizada e relatar-se-á os

benefícios que essa legalização trouxe. A metodologia aplicada decorre de uma análise bibliográfica através de livros escritos por autores respeitáveis sobre o assunto, bem como todos os tipos de materiais e instrumentos disponíveis na Internet. Além disso, trazemos notícias e formas alternativas de lidar com a questão da prostituição na tentativa de encontrar melhores soluções para isso. Finalmente, discute-se a necessidade de descriminalização desta prática, bem como sua legalização, a fim de garantir direitos e garantias profissionais, e também para resgatar a dignidade humana de todas as pessoas que trabalham nesse tipo de profissão e que procuram o mínimo de proteção para manter seus meios de subsistência sem se expor a tantos riscos.

**Palavras-chave:** Discriminação. Direitos Humanos. Trabalho. Lei. Sexo.

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