

LEGALISING PROSTITUTION IN INDIA: MYTH OR REALITY

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ABSTRACT

India has ratified many international conventions on women rights. The Constitution itself condemns discrimination and exploitation on the basis of gender. Overall the judiciary and the Indian Constitution have shown its soft side towards the issues related to women. But, is that enough? The truth is that it has not been successful in promoting human rights of one such section which is in dire need of realization of its rights. The pity state of women engaged in prostitution is evident from the violence they are subjected to every day, every night. They are for their customers nothing but a piece of meat. They are bound to consume them as they are 'men'. Prostitutes are discriminated at the hands of police, courts and employers. Even if they want to get out of the caucus, they are forced back into there as now she is 'impure' and a hurt to the society. She will not be given any decent job as she is deemed to be capable of only one job, the job of entertainment in the bed. Lately, concerns relating to health, safety and security of the sex workers and their children have come up. Extortion, pimping and coercion force them into the industry. Many a times, poor parents who could not repay a loan send their minor children to the industry. Redefining prostitution as 'sex work' and further on legalizing and decriminalizing sex work in order to protect the human rights and health of sex workers in India is a new idea emerging.

INTRODUCTION

A world of violence and a dilemma of being trapped between the adjectives of 'illegal' and 'immoral' is all what the sex workers get. People are of the view that they ought to refer it to as 'illegal' as it is 'immoral'. It is a declared fact that in India, such profession will never disappear. So, it is better to regulate it. India should learn from societies which have realised that the vice of prostitution is inherent in the society rather than pretend that prostitution doesn't exist here. There are over 2.5 million prostitutes in India and a quarter of them are minors.¹ Globally prostitution is legal in Canada, France, Wales, Denmark, Holland, most of South America, including Mexico, Israel, Australia, and many other countries.² It's either legal or tolerated in most of Asia; Australia has a sex-service company whose stocks are traded on the stock exchange.³ In India, prostitution is generally equated to Female Sex Work.⁴

PROSTITUTION- A REALITY

No government has been able to abolish prostitution. Prostitution is a reality which has to be accepted. When the nation will legalise prostitution, it will also fight against Sexually Transmitted Diseases and the epidemic AIDS. Laws will change the position of prostitutes from second-grade citizens to those who earn their living legally. They will be given dignity to live. A life without reputation is like a house without roof, a fish without water and a plant without roots. The very basic root of a man's life is his goodwill, his reputation in the society. No one wants to be bullied and called names. Reputation is an important part of one's life. The Supreme Court referring to *D.F. Marion v. Minnie Davis*⁵ in *Smt. Kiran Bedi v. Committee of*

¹ See UNICEF Factsheet, https://www.unicef.org/protection/files/child_labour.pdf. See also, *An Essay: Legalising Prostitution in India* (Jun. 2, 2017) IAS EXAM PORTAL <http://iasexamportal.com/civilservices/essay/An-Essay-Legalising-Prostitution-in-India>.

² Raj Kumar Nayak, *Legalising Prostitution in India* (Jun. 2, 2017) <https://www.academia.edu>, See also, *100 Countries and Their Prostitution Policies* (Jun. 3, 2017) <http://prostitution.procon.org/view.resource.php?resourceID=000772&print=true>.

³ Vidya Bharti & Shubham Bharti, *Legalization of Prostitution* 1(2) IJLDAI 98, 98-99 (2015).

⁴ Bindumadhav V. Khire, *Male Sex Work in Prostitution and Beyond: An Analysis of Sex Workers in India* 126 (Rohini Sahni, V. Kalyan Shankar et. al. eds., 2008).

⁵ SS American L.R. 171.

*Inquiry*⁶ held that “good reputation was an element of personal security and was protective by the Constitution, equally with the right to the enjoyment of life, liberty and property. The court affirmed that the right to enjoyment of life, liberty and property. The court affirmed that the right to enjoyment of private reputation was of ancient origin and was necessary to human society.”

In *State of Maharashtra v. Public Concern for Governance Trust*⁷, the Court held that good reputation was an element of personal security and was protected by the constitution, equally with the right to the enjoyment of life, liberty and property and that the right equally covers the reputation of a person during and after his death. In *State of Bihar v. Lal Krishna Advani*⁸ the Apex Court ruled that it was amply clear that one was entitled to have and preserve one’s reputation and one also had the right to protect it. Right to self-preservation has also been recognized under Article 21.⁹ This Article has also been invoked for the upliftment of and dignified life for the prostitutes.¹⁰

HUMAN RIGHTS OF SEX-WORKERS

Every sex-worker should get a mandatory health certificate and be subjected to periodical health check-up. Brothels should also be taxed like any other business house. Out of such tax, a certain amount should be set aside by the government and it should be utilised for providing medical facilities to sex workers. Their children should be taken care of. For those sex-workers who are opting to get out of the business, a rehabilitation centre should be set up. Brothels must be situated away from residential areas and educational institutions. Article 15 establishes that individuals will not be discriminated on the basis sex, caste, class, religion and other such attributes. Human trafficking is prohibited under Article 23 of the constitution. Article 24 bans the practice of employing minors in hazardous occupations.

⁶ A.I.R. 1989 S.C. 714.

⁷ A.I.R. 2007 S.C. 777.

⁸ A.I.R. 2003 S.C. 3357.

⁹ Surjit Singh v. State of Punjab, A.I.R. 1996 S.C. 1388.

¹⁰ Gaurav Jain v. Union of India, A.I.R. 1997 S.C. 3021.

Though India is signatory to several international agreements, it has failed to protect the human rights of sex-workers. There is a general lack of accountability in national and state commissions and the police force. Plus, the Indian legal system has enormous backlog of pending cases. It has been estimated that it may take more than 350 years for the Judiciary to get rid of this backlog.¹¹ Indian women are particularly seen to be experiencing the effects of discrimination and violation of their human rights in areas of education, health and work. This is marked by the poor literacy and earning rates that women have, compared to men.¹²

As women are already vulnerable, amongst this vulnerable group, sex-workers emerge as even more vulnerable. Most of the sex-workers are made to forcibly join the industry and most of them join without consent. Minor prostitution is growing. Because of the tender age, the minors become more susceptible to exploitation and physical and economic exploitation. As per studies conducted in the Sangli district of Maharashtra and in villages of Nepal, it has been discovered that more than half of the sex workers were roped in when they were less than 14 years old¹³. Child sex work, though illegal, is a thriving industry in India and more than 40% of sex workers in India are children.¹⁴

Even in the hospitals they are marginalised. For instance, "in a hospital, an HIV test is prescribed for a general person, only if he is suffering from TB, STD or diarrhoea, but in the case of a sex worker, HIV tests are mandatory even if they want to get themselves for common cold. Such happenings are not only entirely discriminatory in nature, but also result in the further stigmatization and marginalization of the sex workers."¹⁵ In another instance in a hospital in Kolkata, it is a part of the process for the health workers and medical practitioners

¹¹ Geetanjali Misra, Ajay Mahal *et. al.*, *Protecting The Rights Of Sex Workers: The Indian Experience* 5(1) HEALTH AND HUMAN RIGHTS 88, 91 (2000). *See also*, B. Debroy, Some Issues in Law Reform in India, presented at the Conference on Governance and Development, Bonn, Germany, May 1999.

¹² S. Gruskin and D. Tarantola, *HIV/AIDS, Health, and Human Rights in HIV/AIDS Prevention and Care Programs in Resource- Constrained Settings* (P. Lamptey, H. Gayle *et. al.*, eds.).

¹³ Sankar Sen, *A Report on Trafficking in Women and Children in India* Vol. I 68 (2002-03) *See also*, K. Mukherjee, *Flesh Trade: A Report* (Ghaziabad, India: Gram Niyojan Kendra, 1989), and Darbar Mahila Samanwaya Committee, *The "Fallen" Learn to Rise: The Social Impact of STD-HIV Intervention Programme* (Calcutta: DMSC, 1998)

¹⁴ *Ibid.*

¹⁵ S. BHARAT, HIV/AIDS RELATED DISCRIMINATION, STIGMATISATION AND DENIAL IN INDIA 89 (1999).

to take a blood sample of every woman visiting the hospital for treatment, if she happens to be a sex worker.¹⁶

Not only this, when they turn to the police for justice and protection, the police in turn harass and detain sex workers. The Immoral Trafficking Prevention Act, 1986 states that sex work in itself cannot be termed as an illegal activity if it is practiced independently and privately. The police disregard this legislation and arbitrarily arrest sex workers and extort them, releasing them only after they are paid money by the sex workers.¹⁷ Even in the brothels, they have no respite. When the customers are gone, the managers take turn to 'use' them. Child sex-workers have nothing for their use as all their earnings are taken away by their managers. What is left with them is not even sufficient for a meal a day. Due to lack of proper documentation, they could not access banks. Local money lenders are the only options left. These moneylenders also exploit them. They place heavy interest rates and exploit them sexually on the pretext of loan repayment. They do not have any access to education. Even if they want to study, their dream is crushed by the teachers who exploit them as they are aware of their profession. They refuse to give them marks until they meet them in the bed.

LEGALISATION AND DECRIMINALIZATION OF PROSTITUTION

It is necessary for the state to take steps to protect the human rights of the sex-workers. Rescue and rehabilitation of the sex-workers is the first step towards preservation of their human rights. They should be provided with means of livelihood and should be rehabilitated. The State would have to employ several methods to rehabilitate them out of which the pivotal one should be the restriction of entry in the profession. The above methods would do good only when India become a utopian nation. However, realising that prostitution would never be driven away from the society, one should not let it thrive secretly rather the sex-workers should be restored with their rights and saved from further exploitation. Legalizing sex work and the sex industry in itself would be the only way out. This move would ensure the civil and political rights of sex-workers. Trafficking and exploitation of sex workers can also be dealt with.

¹⁶Bindman, Stephen, 1996. Prostitute murders hard to solve, and no one cares. Ottawa Citizen [Canada], July 29 1996.

¹⁷ JEAN D'CUNHA, THE LEGALIZATION OF PROSTITUTION: A SOCIOLOGICAL INQUIRY INTO THE LAWS RELATING TO PROSTITUTION IN INDIA AND THE WEST 43 (1991).

There is a need to redefine 'Prostitution' as 'Sex Work'. The occupation originated in the West and the female who worked as prostitutes were looked down upon and they alienated from the society. The issue of dealing of prostitution as a human rights issue itself is evident of the fact that the sex-workers are not given that position which other working women are given. This situation also throws light upon the vulnerability of sex-workers. 'Sex Work' should simply be seen as just another income generating activity for women and men.¹⁸ When commercial sex will be looked upon as work, there would be an end to the exclusion the sex-workers face. What problems a sex-worker faces is not different from the problems which are faced by any other worker engaged in menial work. What is needed is a shift of focus from the decency of the work to hardships of the work. The International Labour Organization has taken a step ahead in this regard. In 1996, the Global Alliance Against Traffic in Women launched an international investigation of "Trafficking in Women".¹⁹ The report stressed upon the extreme violence and abuse women in sex industry are subjected to. It also stressed upon lack of recourse to the authorities. On legalization of sex work, the sex industry would become a regulated industry and there would be provisions of minimum standards for work as well as minimum wages. The brothel owners, masters and money lenders would be accountable to the law and would be governed by statutory principles. On legalisation of sex-works, sex workers would be entitled to labour rights as they would be engaged in a legal industry. Also, there would be a reduction in the discriminatory treatment that is meted out to the sex workers in areas of healthcare and education.²⁰ Legalising sex- work would result in reduced violence and the sex-industry would no longer need to remain underground. There may be stricter laws to regulate the practice of commercial sex but since it will be an organized sector, the conflict between brother owners and sex workers would not go unnoticed and the sex workers would no longer be at the vulnerable edge.²¹

¹⁸ Victoris Flavia Namuggala, *Gambling, Dancing, Sex Work: Notions of Youth Employment in Uganda* 48(3) IDS BULLETIN (2017).

¹⁹ GAATW, *Handbook for Human Rights Action in the Context of Traffic in Women* (1997).

²⁰ Jo Bindman, *Redefining as Sex Work on the International Agenda* (Jun. 1, 2017) <http://www.walnet.org/csis/papers/redefining.html>.

²¹ *Ibid.*

CONCLUSION

It is an evident fact that India being a socialist state and above all a welfare state, must take strong steps for protection of the rights of sex-workers. These vulnerable groups are ever-exploited. They have minimal facilities and are subjected to health issues and lack of basic requirements like education. They are subjected to violence, not only in the hands of their customers who think them of as a sex toy, but also in the hands of the brothel owners who take away a big share of their earnings. If the brothel owner is a woman, she will always subject her to violence of several kinds from beating to verbal abuse. If the brothel owner is a man, then it is the worst case for the sex-worker. When she is exhausted after a session, she needs rest but she is again dragged to the room of the owner or several other friends of his who take turn to rape her. They call it fun as a prostitute cannot shout rape because she herself has chosen it. But this is where they are wrong. Even a sex-worker has the right to say “no”. If she is succumbing to the multiple rapes, she is just doing so because she would not get any money for her sessions until her owner consumes her. It is upon the owner, whether such consumption would be individual or group work. She is dragged and laid on the bed. All that she is supposed to do is enjoy the session so that the customer enjoys even more. But, does she really enjoy that? A regular feature of having sex in any one’s life would be exhausting and harassing. She is traumatised both physically and mentally. She has not overcome the pain in her private parts when she has to serve one more customer. And above all; this, her hard-earned money is called names and she is looked down. Every day she undergoes a new trauma and all this is doubled when she is treated as a second-grade citizen. To avoid this trauma, she cannot leave the job, as it is her only means of earning. She never saw school and does not know what education is. So, she cannot even get herself a decent job. What is left with her is her body and she has to use it. What we can do is lessen her pain. The State can lessen her pain by legalising what she does. Then, at least she could live her life with dignity, like any other woman who earns money by doing a job. While prostitution is a truth of the society; such truth which will never fade away by any law, its realisation and acceptance is even bigger a truth. What society cannot get rid of should be accepted. The imagery of a woman engaged in sex-work should be restructured in such a way the society begins to see it as a work, an occupation, although one where women are not engaged with their own choice, but such image would at least lessen the pain of those women who are already into the profession.