

REFORMING SEX WORK IN INDIA THROUGH HUMAN RIGHTS APPROACH AND JUDICIAL INTERVENTION

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It sounds so odious to call woman a prostitute, as it is a term used only with the intent of judging the character and adding insult on the other hand. A sex worker is a provider of commercial sexual services. Although, the term 'prostitution' and sex work are synonym, it is the hair-line difference that matters the most. According to Merriam Webster, the term 'prostitution' is the actor practice of engaging in promiscuous sexual intercourse with strangers for money but sex worker is a wide term encircling glamour models, web-cam workers, tele-sex operators, pornstars, strippers, sensual masseuse and burlesque dancers etc.

With this, one can effortlessly understand that sex work refers to those people who have voluntarily given assent to join the sex industry without any force where as prostitution is a term used to highlight the evil of trafficking and it is mostly the outcome of forced sexual exploitation.

INDIAN CONTEXT-HISTORY AND RELIGION

Sex work or commercial sex work is one of the oldest and unorganized professions in the world. Talking about Indian context, '*Women and Society in Ancient India*' written by Ms. Sukumari Bhattacharji, who tried to emphasize the fact that Rig Vedic society was functioning around female slavery and has explained the genesis of sex work in Rig Vedic period. Considering the Indian mythology, celestial demigods i.e., Rambha, Menaka and Urvashi were the firsts to mention. They were considered as pleasure givers for divinities in the court of Lord Indra. Further during the rule of Aryas, as a symbol of friendship, maidens were presented to the victors by Kings. It is also relevant to mention that Kautilya's book 'Arthashastra', contains rules for sex workers and their actions.

The medieval period gave great importance to women and wine. The Muslim rulers, except Aurangzeb, recognized sex work as a profession, which was flourished in imperial benefaction. After the decline of Mughal rule, the condition worsened and the women were forced to leave the royal palace in quest of jobs, regrettably, society did not have any job to offer them. During the British regime, these conditions were still in persistence and because of the absence of any concrete laws and regulations, sex work boomed as a commercial work on a larger scale.

Further, with the dawn of religious sex workers/prostitutes in the late 18th century, Devadasies came into being, who were the women married to the local temples. This devadasi system is still being practiced in many places of India. They are known by different names viz., Basvi in Bijapur district of Karnataka, Bhavin in Goa, Jogin in Andhra Pradesh, Thevardiyar in Tamil Nadu, Aradhini, Jogatin and Murali in Maharashtra, Ganika in Orissa, Nati in Assam, etc. Bhanchara and Bedia caste peoples of Madhya Pradesh continue to practice this tradition of giving girls to the Gods and goddesses at the temples.

Currently, poverty, together with culture has greatly influenced sex-work and drives this industry. Primarily, underprivileged and uneducated people are being targeted in this trade. Under the Indian laws for the time being in place, activities such as soliciting in public, running brothels are prohibited, the red-light areas in the most important areas are fostering brothels and over a period of time, those places have established to be one of the most happening cities in India. Asia's largest red light areas are situated in India, they are: a) Kamathipura in Mumbai; b) Bowbazar, Sonagachi in Kolkata; c) Garstin Bastion Road in New Delhi; d) Meerganj in Allahabad; e) Budhwar Peth in Pune; f) Chaturbhujsthan in Muzaffarpur and g) Tilawalain Jaipur.

Approximately 75% of the sex workers are uneducated and around 90% of them do not have any special skills that would help them in securing alternate employment. Inadequacy of income is a noteworthy reason for women to enter into this trade. Daughters become the sole breadwinners of such families since the allure of quick money drives the economically backward families to opt the trade. No western philosopher understands as to why Indian families and women pick sex work as their chief profession in the face of cultural ethics and values.

The proliferation of technology in the recent past has also been another reason for impacting upon the lifestyle and attitude of sex workers. Mobile phones aided with high speed internet have become a key source for many young people who wish to take pleasure in lavishness of the World Wide Web. They have also been instrumental in setting the *modus operandi* of the current flesh trade which is extremely diverse from what we perceive.

INTERNATIONAL BILL OF HUMAN RIGHTS (UNIVERSAL DECLARATION OF HUMAN RIGHTS)

Article 23 – (1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

Article 24 – Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

LAW CURRENTLY IN FORCE

The laws in relation to sex work are entailed in Constitution of India, The Indian Penal Code, 1860 and the Immoral Traffic (Prevention) Act, 1956. At the national level our Supreme Lexi.e.the Constitution of India has recognized the right to freedom from forced labour and trafficking as a fundamental right. Under Article 23(1) "Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." Besides Article 23 there are other important provisions of the Constitution of India which are relevant for the purpose of this research on human trafficking. These include:

- a. Article 14 provides for equality in general.
- b. Article 15(1) prohibits discrimination on the grounds of religion, race, caste, sex or place of birth, or of any of them.
- c. Article 15 (3) provides for special protective discrimination in favor of women and child relieving them from the moribund of formal equality. It states that, nothing in this article shall prevent the state from making any law for the protection of women and children.
- d. Article 16 (1) covers equality of opportunity in matters of public employment.
- e. Article 21 provides right to life and personal liberty to all citizens.
- f. Article 24 prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age.
- g. Article 38 (1) enjoins the State to secure and protect as effectively as it may a social order in which justice - social, economic and political shall inform all the institutions of national life. It emphasizes on the necessity of providing opportunities to enhance equality.
- h. Article 39 (d) the State should direct its policy towards securing, among other things, a right to adequate means of livelihood for men and women equally and equal pay for equal work their age or strength.
- i. Article 39(f) provides that the children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity of existence.
- j. Article 42 protects against inhuman working conditions.
- k. Article 45 makes provision for free and compulsory education for children, which is now well settled as a fundamental right to the children.
- l. Article 46 directs the State to promote the educational and economic interest of women and weaker sections of the society and direct the state to protect them from social injustice and all forms of exploitation.

IMMORAL TRAFFIC (PREVENTION) ACT, 1956

The main Act that deals with the subject matter is the Immoral Traffic (Prevention) Act, 1956. According to the provisions of this Act, pimping and other activities are prohibited but it does not prohibit prostitution *per se*. Under this Act, offences are discussed under Section 3 to 9, which are as under:

- a. Section 3 – Punishment for keeping a brothel and allowing to use premises for this purpose
- b. Section 4 – Punishment for living on the earnings of the prostitution
- c. Section 5 – Offences in procuring, inducing or taking persons for the sake of prostitution
- d. Section 6 – Detaining a person where prostitution is carried on

- e. Section 7—Offences pertaining to prostitution in the environment on public places
- f. Section 8—Seducing or soliciting for the purpose of prostitution
- g. Section 9—Seduction of a person in custody

JUDICIAL INTERPRETATION

In an important ruling of Gujarat High Court, it was held by Justice J B Pardiwalain in the matter of Vinod Vijay that : “A customer at a brothel could be said to receive the victim. I see no good reason why the customer should be kept out of Section 370 of Indian Penal Code, 1860”.

In *Gaurav Jain v Union of India (1997)* it was held by Justice K. Ramaswamy “that there are constitutional provisions like article 23 and also statutes like the immoral traffic prevention Act 1956 in order to prevent prostitution. The state governments have to take proper action to eradicate prostitution and also to [rehabilitate the women](#) and children who fall into such traps. This judgment would do justice to these children as they would not be deprived of their basic rights like the right to education, health, and most importantly, their right to life with dignity”.

On December 2009, bench of Hon’ble Justice Shri Dalveer Bhandari and Shri

A.K. Patnaik said to Solicitor General of India Gopal Subramaniam “When you say it is the world’s oldest profession and when you are not able to curb it by laws, why don’t you legalize it? You can then monitor the trade, rehabilitate and provide medical aid to those involved in the trade”.

The Hon’ble Supreme Court in the second quarter of 2011 sought suggestions on formulating conditions to facilitate sex workers to practice the trade with dignity. A bench presided over by Justice Markandey Katju, which spoke about rehabilitation of sex workers and that right to live with dignity is a constitutional right. The bench constituted a panel headed by Senior Counsel Pradip Ghosh, Jayant Bhushan etc. and NGOs like Usha Multi-purpose Co-operative Society, Durbar Mahila Samanwaya Committee etc. to look into the problems faced by sex workers in order to protect their fundamental right.

Justice Katju observed that “Society must have sympathy towards sex workers and must not look down upon them. They are also entitled to a life of dignity in view of Article 21 of the Constitution” Justice Katju also referred to Sahir Ludhianvi’s poem “*Jinhe naaz hai Hind par woh kahan*” where are those who are proud of India which depicts the plight of sex workers.

The bench of Allahabad High Court consisting of Justice Aditya Nath Mittal, in the matter of **Shushil v/s. State of Uttar Pradesh**, Criminal Appeal no.422 and 425 of 1994 dated 13.05.2016, observed that, even if a prostitute lodges a report of rape and here evidence inspires confidence, then there is no rule of law that the statement of the prostitute cannot be believed. “The Court held that, even a prostitute has fundamental as well as moral and social rights and is at liberty to permit, or not permit, a person for sexual intercourse; nobody can commit sexual intercourse even with a prostitute under threat or compulsion.”

Moreover, the above dicta of the Allahabad High Court, seems to have garnered the colour and substance from the following ratio of the Supreme Court, **State of Maharashtra v/s. Madhukar Narayan Mardikar**, AIR 1991 SC 207, Apex Court stated as follows:

“...even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also, it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.”

From this, one can easily understand the benefit of legalizing sex work:

- a. It will curb sex trafficking
- b. It will control the sex industry
- c. It will decrease clandestine and illegal trade
- d. It will protect the women as they will have exclusive rights
- e. It will promote women’s health since they will have access to medical facilities, etc

In *Kajal Mukesh Singh And Ors vs The State Of Maharashtra (2020)* Justice P.K Chavan that while interpreting the Act held that sex-work was a fundamental right under Article 19(1)(g) of the Constitution. The High Court observed that the ITPA did not

criminalize 'prostitution' per se. It made a categorical distinction between sexual exploitation and voluntary sex-work and held that the three women had a right to vocation under Article 19(1)(g) of the Constitution. It also held that women have the right to travel and reside anywhere under Article 19(1)(d) of the Constitution and the Sessions judge was incorrect in remanding them against their will. This part of the judgement is progressive, but the HC then double-backed on its own interpretation when it held that the criminal provisions under sections 3-9 of the ITPA are reasonable restrictions under Article 19(6) of the Constitution.

By considering such dimensions and analyzing the socio-economic factors, it may be concluded that decriminalization of prostitution is necessary. A rights-based advancement is preferable, which guarantees citizenship, voting rights, safe working conditions, access to medical facilities and right not to be harassed, humiliated and exploited. Sex work should be regarded as legitimate work and sex workers must be allowed to enjoy the human rights and labour rights just like their compatriots. The only good that can be done to support the prostitutes from their situation of catastrophe is to recognize them as human beings not only of 'flesh' but also in terms of emotions; rights; privileges and liberties; and to make them realize that the Constitution of India shields, protects and embraces them, as it does to all other citizens of the country.

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