

SEEKING RIGHT TO LIFE: PROSTITUTION & SEX WORK

HARSHIKA SHAJU NAIR & AADISHRI YADAV

STUDENTS OF DHARMASHASTRA NATIONAL LAW UNIVERSITY, JABALPUR

मदद चाहती है ये हव्वा की बेटी

Help, O Help, this daughter of Eve!

यशोदा की हमजिंस राधा की बेटी

Radha's child, Yashoda's breed,

पर्यंबर की उम्मत ज़ुलेखा की बेटी

The prophet's race, Zuleikha's seed.

सना-ख़वाने-तक्रदीसे-मशरिक कहां हैं | Where are they who praise, the pious eastern ways?

Chakle- Sahir Ludhiyanwi

ABSTRACT

The struggle for rights and recognition of sex workers in India is hampered by deep-rooted societal stigma and lack of legal acknowledgment. This paper explores the daily challenges faced by sex workers in accessing fundamental necessities such as healthcare and education, emphasising the need for recognition and sensitisation. By comparing international models of legalised prostitution from countries like Germany and New Zealand, this paper argues for decriminalisation as a way to regulate the industry, protect sex workers, and grant them access to government benefits and schemes. The paper calls for comprehensive legal and policy reforms, including official registration of sex workers, sensitization of law enforcement bodies, and facilitation of access to healthcare. It highlights the importance of societal acceptance and evolution of laws in tandem with societal progress. Drawing upon international experiences, this paper concludes that legal recognition, education, and rehabilitation opportunities are essential to empower sex workers, enabling them to practise their profession with dignity and become productive members of society. Recognizing the rights of sex workers is a crucial step towards building a more inclusive and just society, where sex workers enjoy the same fundamental rights as other citizens.

Keywords - Prostitution, Decriminalisation, Legal Recognition, Societal Stigma, Empowerment

INTRODUCTION

The World Health Organization (WHO) defines sex workers as “women, men and transgendered people who receive money or goods in exchange for sexual services, and who consciously define those activities as income generating even if they do not consider sex work as their occupation”

Prostitution is considered to be the world's oldest profession, and has managed to exist and flourish throughout different periods in Indian society. However the conundrum lies in the everpresent act and the taboo attached with it. Through centuries kings' courts, elites and entertainment had the concept of a courtesan. Literature names the women in profession differently but the essence of them all lies in the sex work they provide.

India is the most populated nation in the world, but the fascination of the unknown has led to unawareness and criminal acts. The debates for legalising prostitution goes on, but it becomes pertinent to note that the oppressed shall come to light only when they don't fear the authorities in action. 21st century India requires to identify prostitution as a profession for those who willingly opt it and protect those who are forced into it. From time immemorial, the profession has thrived through different timelines in the Indian subcontinent, the courtesans provided services which needed skills, they also acted as spies and helped the king save his kingdom. Today the profession lies in ruins and brothels. Denying the need of this profession is a utopian idea, if it would have been so, the idea would have perished from modern societies. It is about time we take our blinders off and acknowledge existence of sex work, its importance and implications in the society and provide the safety gears it need.

HISTORY AND CONTEXT

Right to life, a jurisprudential principle affirmed and propounded by the Constitution of India, forms the rock of our existence. Article 21 of the Constitution provides that every citizen of this country has a right to a dignified life irrespective of their profession and other biases. Asserting this very basic principle of human ethics and the right to a dignified life extends to even sex workers, who must be treated as any other citizen.

As long as we have known the existence of a civilization, prostitution has been an integral part of society. As much as it has been behind the curtains and hushed upon, the profession is deep rooted in the being of every society that mankind has ever known. Narrowing it down to the Indian scenario, prostitution has been an omnipresent phenomenon. Throughout different periods in the Indian timeline, we have ancient texts of Rigveda showing us proof of a profession that has thrived over centuries. However, the working conditions may not have always been ideal.

The profession has always attracted criticism and taboo, but it is interesting to note that in the later Vedic age, this profession contributed to the state's income. The profession required women to acquire seventy-four skills, making them exquisite from other women, who were confined to household chores and often lacked education. It becomes pertinent to note that this profession required immense skills, making itself a luxury for kings and wealthy elites who reigned in Indian society. The concept also extends to the temples of India, where God had their personal lady servants. The profession finds its mentions in numerous ancient texts such as Jatakas, Arthshastra, Atharvaveda, and Kamasutra. Kuttanimata by Damodar Gupta is informative literature on prostitution during the early medieval period. The text throws light on the plight of ancient sex workers and how they had to resort to other means of livelihood due to a lack of state support. The literature running from centuries makes prostitution an ever-present idea that employs thousands of women, yet we fail to protect them against the atrocities of the profession.

By the time the 21st century arrived, the profession lost its skillful aspect and became a mere source of livelihood for women who found themselves at crossroads, where the circumstance demanded financial support but the sources were scarce. The gender biasness that we observe in this profession suffices to trigger the sense of violation of Fundamental rights based on the discrimination that women in these so-called "Red light Areas" face. With vulnerability and no other livelihood to look up to women delve into prostitution, mostly unwilling and circumstantial. Even with safeguards like Protocol to prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nation Convention against Transnational Organized Crime, 2000, Protection of Women from Domestic Violence Act (PWDVA 2005) and Universal Declaration of Human Rights (UDHR) hundreds and thousands of your girls and women are trafficked on a daily basis for this profession. Several accounts of sex workers from the streets of Kamathipura in Mumbai to Sonagachi in Kolkata show how they have been wronged by procurers or their own family members for money to these brothels to a world full of exploitation and harassment.

In today's world, where concepts like human rights and women empowerment are soaring, the idea of basic human rights for sex workers is still kept behind the curtains. Like every citizen of this country, sex workers too are well protected under Article 21 of the constitution. But in reality to what extent have we guaranteed or provided them their right to dignity? These women face distress in the form of unhygienic living conditions, lack of sanitary facilities, non legal identity, poverty to name a few. In the accounts of Perna organisation, which works for the welfare of female sex workers mentions in its accounts that these women are 'Victims of commercial Sexual Exploitation and Trafficking'¹. In the landmark judgement of Geeta Kancha Tamang vs. State of Maharashtra², the Supreme Court emphasised on the fact that trafficking is a heinous crime and prohibited under Article 23 of the Constitution of India. It is, therefore, the fundamental right of every citizen of the country to not be trafficked.

THE CIRCUMSTANTIAL WHIRL TO PROSTITUTION

A sex worker while carrying on her profession might also face emotional, sexual and physical abuse on a daily basis. A Study by Chattopadhyay & Mckraig, 2004 found that women who lack opportunities and are bonded by the shackles of poverty are seen as easy targets for procurers to force them into this environment. Most women are forced by their circumstances into this profession, many are forced into it and some opt for sex work willingly. Real Life stories of high-end sex workers by The Time of India³ captures stories of women who have joined the profession willingly to meet their lifestyle choices.

Many are sold to such brothels by deception from someone known to them. Circumstances are such that they are stuck in this endless maze from which escape becomes almost impossible for them. Sometimes families do not take them back, and lack of education and poverty compel them into such situations. Article 6 of The Convention on the Elimination of All forms of Discrimination against Women, discusses the evils of human trafficking and how it takes away the dignity and right to life of the women. On an international level various protocols such as Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children along with The United Nations Convention against Transnational Organised Crime, 2000 (Trafficking Protocol) recognizes the problem of human trafficking and prostitution.

For traditionalists the idea of divorcing sex from its sacred and religious implications becomes impossible. This has led to women being deprived of living a respectful and dignified life. The sex industry is a state of misery, violence and struggles and embedded within all of it are women whose voices are suppressed and never heard or represented. This system is not kind to women in general, hence one can only imagine the plight of sex workers in the society. They have to fight tooth and nail to emerge from red-light areas. Stories of people like Tumpa Adhikari⁴ who stood against sexual exploitation to complete her education indicates how harsh conditions are for women to even have basic rights like education fulfilled.

LEGAL STATUS OF PROSTITUTION IN INDIA

Prostitution in India stands on a very dicey pedestal in today's scenario. In the Indian context, Prostitution is neither fully legal nor entirely illegal, which means that it lacks regulations. Recently through bollywood movies like Gangubai Kathiawadi the topic of prostitution have been at least kept as topic of discussion on the table and recognised as a genuine problem. It has raised the question in the minds of individuals as to why is prostitution not recognised like any other work? The illegal status of prostitution creates a dilemma regarding their rights as individuals. The bare necessities of clothing, shelter, medical care, and

¹ Soyanika Gogoi & Sakshi, "PLIGHT OF THE FEMALE SEX WORKERS IN INDIA-NEED FOR RECOGNITION AND REGULARISATION OF THE PROFESSION" (November, 2019), <http://www.penacclaims.com/wp-content/uploads/2019/12/Soyanika-Gogoi.pdf> (Accessed: Aug 20, 2023).

² Geeta Kancha Tamang vs. State of Maharashtra, Criminal Appeal No. 858 of 2009

³ Real life stories of high-end prostitutes - Times of India <https://timesofindia.indiatimes.com/life-style/relationships/love-sex/real-life-stories-of-high-end-prostitutes/articleshow/60017313.cms> (Accessed: 19 August 2023).

⁴ BORN IN BROTHEL, THIS GIRL DIDN'T WAIT FOR A MESSIAH TO END HER PLIGHT: KOLKATA NEWS - TIMES OF INDIA <https://timesofindia.indiatimes.com/city/kolkata/born-in-brothel-this-girl-didnt-wait-for-a-messiah-to-end-her-plight/articleshow/68999993.cms> (Accessed: Aug 20, 2023).

food are often a challenge to women in this profession. If the profession is openly legalised it could help in challenging the institutional barriers that prevent sex workers from accessing basic rights and equality. The societal perspective and taboo attached to the profession with time have deteriorated the living conditions of sex workers. Amidst perceptions and beliefs stand the objective approach of the Indian Constitution. The constitution is analogous to a holy book, all-inclusive and based on natural principles, this characteristic ensures that no taboo violates fundamental rights. The Supreme Court in *The Kajal Mukesh Singh & Ors v. State of Maharashtra*¹ held 'Prostitution is not an offence and a woman has the right to choose her vocation'. This significant judgement sets an important precedent; a woman's choice of her vocation. It also illustrates that though the profession of sex workers may raise eyebrows, the profession is not an offence in India, as long as public decency and morality is maintained.

In 2022, a three-judge bench of the Supreme Court issued a historic order that recognised sex work as a profession and said that sex workers are entitled to dignity and equal protection under the law. The apex court elaborated that 'voluntary' sex work was not illegal. It issued commendable guidelines along the lines that when a sex worker makes a complaint of an offence, the police must take it seriously and act in accordance with law; that when a brothel is raided, the sex workers concerned should not be arrested; that no child of a sex worker should be separated from the mother merely on the ground that she is in the sex trade; that the police should treat all sex workers with dignity and should not abuse them; and more other positive directions. However, it is not legal as well irrespective of the fundamental rights that protect the sex workers as well.

Part III of the Indian Constitution provides for fundamental rights, which preserve and protect the rights of all individuals in the country irrespective of any biases. The right to follow a profession is a part of "personal liberty" within the meaning of as used in Article 21 of the constitution and no one can be deprived of this except according to the procedure prescribed by law. Articles 14, 15, and 21 ensure equal, non-discriminatory life with dignity. As much as prostitution as a profession is despised by society, over 8 lakh women in India are sex workers, which makes it a duty of the state to protect and provide for women involved in prostitution. Article 19 (g) provides to carry any profession, trade, and business to all Indian citizens. There is a distinction between women who are trafficked for sex work and women who willingly opt for the profession. The distinction has been acknowledged by the Justice Verma Commission (2012-2013). The acknowledgment further makes it a duty of the state to protect those who are trafficked and to provide safety nets to those who opt for it willingly.

Article 21-dubbed the right to life- states: No person shall be deprived of his life or personal liberty except according to the procedure established by law. The ambit of this article also includes 'Right to life with dignity'. Thus, a mindful approach towards such workers is the need of the hour as they have a right to live a dignified life as any other citizen of this country. Thus, absence of a relief mechanism and support to sex workers is a violation of their fundamental rights under Section 21.

Article 32, the heart and soul of the constitution, provides implementation machinery through the writs. Every Indian citizen has fundamental rights and they also have the right to seek their rights via Article 32. It provides the citizens to move to court in order to implement their fundamental rights if the states fail to do so. Sex workers have these rights too. Their profession or societal prejudices do not hold any ground to bar them from their fundamental rights. Although the machinery can come to function only when prejudices are lifted. The wheel of change shall only churn when a new perspective of acceptance is brought to life via judicial activism. The remedies provided can only be used when the state reinforces the fundamental rights of sex workers. Article 38 makes it a legal duty of the state to secure a just social order, where the welfare of people is promoted and they get to exercise their rights.

The concept of age and consent, like any other women, applies to sex workers as well. A woman can deny services to any person, and any act done between two persons must be of two adult consenting individuals. In today's society, there is a dire need to sensitise law enforcement authorities regarding the rights of sex workers and they must not be harassed with humiliating questions. A research study by the World Health Organisation (WHO) reported that 70% of sex workers in India were beaten up by Police officials and more than 80% were arrested without any evidence. Section 375 of the Criminal Law (Amendment) 2013 is violated if the modesty of a sex worker has been threatened or is forced into any sexual performance without her consent. There are often cases of physical and verbal abuse on such women, by police officials when they raid brothels. Harsh acts of police violence complaints are belittled by authorities and the entire system is apathetic towards the victim. Such an act is really concerning as only running a brothel is illegal and workers should not be arrested or harassed.

Their right to life and livelihood is violated and consistently neglected by authorities. These violations take place in the form of human trafficking, employing children below the age of 18 years as their lack of education and poverty make them fertile targets to be forced into the profession. It is also impossible for sex workers to provide normal schooling to their children. In the case of *Mohini Jain and Unnikrishnan vs State of Andhra Pradesh*,² It was held by the Supreme Court that most of the children of these sex workers are encroaching on their right to education because of the profession followed by their parents. They do not have any access to basic and primary education which creates a spiral in which such children are stuck. It is the right of every citizen in the country to have access to education. This also stands in violation of Article 26 of the Universal Declaration of Human Rights. The International Convention against Discrimination in Education states that every human has a fundamental right to education and no person shall be denied the right to education. Denying sex workers these rights not only devoids them of their individualistic rights, but also defeats the purpose of education.

In India, judicial safeguards are in the form of landmark judgments which have upheld the rights of sex workers. In the case of *Budhadev Karmaskar vs. State of West bengal*³ The court has extensively discussed the rights of sex workers. The court observed that "prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also

¹ *Kajal Mukesh Singh & Ors v. State of Maharashtra*, Criminal Writ Petition no. 6065 of 2019

² *Mohini Jain and Unnikrishnan vs State of Andhra Pradesh* 1992 AIR 1858

³ *Budhadev Karmaskar vs. State of West bengal* Criminal Appeal No. 135 of 2010

human beings and their problems also need to be addressed". SC also held that "a woman is compelled to indulge in prostitution not for pleasure but because of abject poverty. If such a woman is granted the opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body." Further, the Supreme Court directed "the Central Government and all the State Governments to prepare schemes for giving technical/vocational training to sex workers in all cities in India."

It was also held that any form of physical or verbal abuse, torture or use of force is in violation of constitutional principles. The judgement also led to addition of Section 21 and 23, to the Immoral Traffic Prevention Act, 1956. These sections empower the state government to enable its discretion for constructing protective homes and other facilities to rehabilitate and facilitate such workers. After this judgement a committee was set up in 2011, to look into the status of sex workers in India and make further recommendations. The committee discovered that the criminalisation of prostitution ostracises them and prevents them from having a dignified and legally recognized life of their own. Thus, the committee recommended to provide rehabilitation to such workers to reiterate the integrity of workers. Furthermore, in the case of *Gaurav Jain vs Union of India*¹, the court provided direction to protect and safeguard the children of sex workers and provide adequate facilities for their well-being and rehabilitation.

LEARNING FROM THE INTERNATIONAL COMMUNITY

The acknowledgment of difference is the way forward to betterment. The international community, specifically some countries, were quick to acknowledge the right to life of sex workers in the progressive realm. Countries like Germany, New Zealand, Mexico, and Singapore have legalised prostitution. The step has helped in the codification of laws like the Prostitutes Protection Act of Germany. Once the profession is legally acknowledged, it allows the state to implement provisions that prevent illegal acts. The countries now actively aid sex workers to practise their right to work in a dignified manner. They are free to say no to their clients, and they are legally aided in case of non-payment of their fees. The registration allows them to work in a professional environment and are protected from any harassment from authorities. The codification of law has allowed the state to regulate the admission of persons in the profession. Individuals under 18 years of age are prohibited from practising the profession. Ensuring the well-being, health, and safety of the citizens. India can draw inspiration to regulate sex work and usher an equal, non-discriminatory society for the sex workers, where they enjoy their fundamental rights alike, because they too have a right to live.

MEDICAL CARE

The working conditions and life in general is full of woes, and striving for something as simple as medical services and emergency situations is a difficult task. The stigma attached to the sex workers acts as a constant barrier for them against availing healthcare facilities, these women are most prone to HIV+ and tuberculosis. Lack of medical facilities, ruthlessly violates their right to life. Poudel (1994) studies suggest that the prostitution industries are growing in countries like India, Nepal, Thailand and the Philippines, these countries report the highest number of HIV+ population. The recent statistics of National AIDS Control Organisation in 2021 estimated around 24 lakhs individuals living with HIV with numbers increasing each day. In such a situation the psyche of the woman who is already overburdened and probably uneducated has to go through a very rigid and humiliating process to avail basic healthcare benefits.

From several accounts of survivors of abuse and assault, the entire legal recourse has been a nightmarish experience for them. The already complicated process can create a bigger toll on the victim as they may be subjected to embarrassing questions, the authorities are hostile towards the victim and even phase physical and emotional abuse, and intrusive processes are run on an already traumatised person without a semblance of compassion from authorities involved. This makes even a simple process like termination of pregnancy under such an institution almost impossible for the person.

In an already stigmatised society, the process of sexual practices prior to marriage, or with any other man except for the husband, is considered deviant which is why our understanding of the very concept of sexual education is so taboo and misinformation is spread rampantly. We have women who run their whole household through this profession, and the entire medical and legal process makes their already difficult life even more painstaking. Hence, there is a need for further study and appropriate action to move forward from the problematization stage of the issue. The society that we live in is not the "utopia" that Thomas More had described in texts. Traditionalists are staunch in their understanding of what a "couple" means. Organisations like the *Bajrang Dal*, Anti-Romeo squad and other fringe elements that harass two consenting adults to indulge in any act under the garb of religious morality are currently at the forefront of newsroom discussions and public understanding of what "morality" means. The struggles faced by sex workers, with this context in mind, becomes figuratively impossible, specially in a society where even consensual relationships are viewed as objectionable and vile behaviour. All of this, as a consequence, leads to an increase in the number of victims of abuse and harassment, and a higher number of unwanted pregnancies in a country where the population explosion is already a detriment to standards of living for all citizens. It is hence suggested that actionable efforts must be made in a direction to reduce the burgeoning stress on judicial machinery which, according to the census data of 2011, has almost 50,000 cases per judge and it is assumed that in the last 12 years, this number has only gone up instead of down.

The state and judiciary actively works towards rehabilitation measures for sex workers, it must be noted that along with rehabilitation measures, it is pertinent for both bodies to realise that sex workers might not completely be able to give up the profession. Therefore it is important to strengthen the fundamental rights in the context of sex workers. Sex workers have inalienable rights like any other Indian citizen.

¹ 1990 Supp. SCC 709

Mere animal existence is a violation of Article 21 of the Indian constitution, right to life with human dignity was propounded by Judiciary in *Maneka Gandhi vs Union of India*¹,

However, a few constitutional safeguards are available for women in this context such as the Immoral Traffic (Prevention) Act of 1956 primarily deals with the laws governing such work; moreover provisions are available in Indian Penal Code (IPC) and Juvenile Justice Act dealing with prostitution and trafficking of women. This piece of legislation gives us a comprehensive definition of what prostitution is and lays down a framework under which circumstances prostitution is allowed and acts that can make the act illegal. Considering that prostitution is a very sensitive issue, this legislation becomes essential for the protection of sex workers. The act has forbidden running brothels and procuring women for sexual activities is illegal but does not restrict prostitution outrightly.

The drawback of having such legislation comes at a point where workers are neither restricted nor provided with legal status.

Sexual intercourse is a consensual process and a sex worker has the right to refuse services, and is entitled to bring charges of sexual assault and seek redressal if her consent is not obliged to. It is an often occurrence that when police officers raid illegal brothels, they often cross their limits and harass sex workers and their clients too. When two individuals are involved in consensual sexual intercourse it can be seen as a violation of the individual's liberty and must be treated with dignity and respect.

SUGGESTIONS

Here it becomes essential to understand that these women are fighting a battle for their human rights every day. Empowering them not only improves the structural defects in the mechanism but also helps them to be productive members of the society. Sex workers need protection and mechanisms must be implemented in order to protect their rights such as:

- All law enforcement bodies must follow a sensitized process to deal with such workers and workshops must be organized for all bodies such as police officials and other authorities to make the process more liquid and empathetic towards women. Women officers must be accompanied whenever such brothels are raided and a woman officer must deal with the worker.
- The blanket ban recognition and ignorance towards the issues of sex workers is a major impediment hindering their rights. Decriminalisation of prostitution would help in the process of normalisation of sex workers in the society. This would not only enforce freedom to practise the profession with dignity but will also implement the provisions more effectively and these workers would be covered under labour laws and shall reap the benefits.
- Recognition in the society is such an essential ingredient of one's being, this recognition comes in various forms the first priority is official registration of workers through Aadhar card, Pan Card, Ration Card etc. this is an essential step in order to provide benefits of governmental benefits and yojna that are launched by the state. To avail any kind of benefits today, such documents are a necessity hence it needs to be provided to all the workers.
- Laws evolve with society. No law can single handedly be implemented without the changes in the mentality of the people of our society. There is a need for acceptance and facilitation to such workers for the society to prosper.

CONCLUSION

The stigma attached in the minds of the people in our society, has deprived sex workers of their basic fundamental rights. It seems that we are constantly testing which straw ends up being the last straw that breaks the camel's back. It is our responsibility that sex workers enjoy all the rights like any other citizen of this country. The biggest question that needs to be answered here is that if prostitution is not criminalised then why do these women still need to fight for a legal identity?

Prostitution is not a cakewalk. Everyday challenges for basic necessities like healthcare, education, and a life with dignity add on to the burden. India needs to take inspiration from countries like Germany, New Zealand, and China where the profession is legalised and the women of these countries practice their profession in a dignified manner. If prostitution is legalized it would be easier to regularise it, laws would be implemented in a better manner, women can be educated and rehabilitated and recognized for their work.

This is a never ending topic of discussion, traditionalist views restrict our ideas, and the women of the society are grabbed back into captivity. To accept this profession the women shall demand their pay for their work and schemes for skill development can also be implemented in a better manner and can also seek for alternate employment to make a living for themselves.

¹ *Maneka Gandhi vs Union of India*, 1978 SCR (2) 621