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The dilemma of the sex workers: Fundamental Right to work or get exploited?

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Sex Workers have been marginalised since the onset. Sex work has been equated to sexual exploitation and trafficking leaving them more vulnerable and depriving them of agency. This research paper underscores and analyses some hard-hitting facts that how there is no internationally accepted definition of sexual exploitation or prostitution, how our domestic legislation, the ITP Act has failed these marginalised women on the same line, the persisting lacunae in it, and the reasons for precarious condition of sex workers, lastly giving away a few recommendations on how we can uplift them and reinstate their human and labour rights that they have always been entitled to.

Keywords: *sex workers, fundamental right to work, exploitation, prostitution, labour rights.*

INTRODUCTION

COVID-19 pandemic turned out to be a tough time for everyone involved, more for some than for others. At the time when we were privileged to be safe in our homes, there were various marginalised groups for whom the hazards only increased. The plight of sex workers was central to this. Society stigmatises them. Additionally, they are harassed by the brothel owners and live their life in which their existence is ignored by the legislators. Since they lack education and awareness to stand up for their basic rights, they live in treacherous conditions with a

greater risk of contracting STDs. With the stigma associated with them, comes the deprivation of access to proper health care resources and facilities.

The final nail in the coffin is accorded by the law enforcement agencies who are supposed to don the hat of being protectors and reinstate sought rights. However, they harass these sex workers, accept bribes to let the brothels, and even engage in barbarous crimes like rape themselves. This is supported by the account of experiences of a resident of Sonagachi when she recalled taking the help of a policeman on running away from a brothel who raped her with his friends instead. Raid at brothels was settled with bribes, and children as young as 7 were being brought into those areas¹. The life of children in the red-light areas is inhuman equally as they are seen as victims of the stigma that surrounds their mothers. Sex workers are stereotyped and side-lined, however, they need this protection the most. They deserve to be treated at par with other citizens and before the law. They must have an unhindered right to a dignified life as any other person.

The Immoral Traffic (Prevention) Act, 1956 or ITPA, is the centric legislation encompassing provisions related to sex work in India. It is directed to prevent human trafficking for the purpose of sexual exploitation. Even though it hasn't criminalised prostitution but makes various activities related to it illegal, such as ownership and management of a brothel, pimping, or curb-crawling. However, the law makes the Red Light Areas vulnerable to police actions who often are found to cross their limits while enforcing the provisions by taking arbitrary action against sex workers along with their clients who are engaged in private sex work even when it is consensual. Apart from ITPA, there are some other codes such as the juvenile justice Act, 2015, the Constitution of India, 1950, and the Indian Penal Code, 1860 that capitulate provisions that deal with prostitution as well as trafficking in India.

While there have been several reasons as to why women have been forced into this profession, some of which include being trafficked, coming from backgrounds of absolute poverty or lack

¹ 'India: My Life in the 'Red Lights' of Sonagachi' (UNODC)
<<https://www.unodc.org/southasia/en/frontpage/2010/March/red-lights-of-sonagachi.html>> accessed 17 July 2022

of opportunities, what must not be conveniently neglected is the existence of a group of women who are choosing to engage in this profession voluntarily. However, Indian laws look at it from the tinted and one-sided perspective of exploitation while conveniently ignoring the other half that should be recognised and should be entitled to basic human rights. The focus is on the eradication of prostitution rather than ensuring a basic minimum for the voluntarily engaging sex workers. The enormous existence of red-light areas as well as the spine-chilling stories from those corners adduces the failure of our domestic legislation. Therefore, it is high time to be able to analyse the persisting lacunae and work towards uplifting this marginalised section.

SEX WORKERS: PRECARIOUS LIFE & LIVING CONDITIONS

Sexual Exploitation & Prostitution: Still Indefinable

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)² and The Trafficking in Persons Protocol³ are explicit examples of international instruments which refer to “sexual exploitation,” however, have failed to frame it into words. However, both the documents go on to use the locution “exploitation of prostitution”. In the protocol, the phrase has been defined as, “...exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁴ Sexual Exploitation as a term has not been used in CEDAW itself. The ambiguity in the given definition and absence of a proper one has had a problematic impact on the vulnerability of sex workers along with undermining the protection accorded to them by human and labour law rights.

UNAIDS has described sex work as “consensual sex between adults which takes many forms and varies between and within countries and communities.”⁵ Amidst this prevailing obscurity, an internationally available definition of sexual exploitation seeming comprehensive was in

² Convention on the Elimination of all Forms of Discrimination against Women, 1979

³ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

⁵ UNAIDS Guidance Note on HIV and Sex Work, 2012

response to an investigation into the sexual exploitation of refugees by some aid workers in 2003 in West Africa in. The said definition was rendered by the UN Secretary-General:

“...any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”⁶

When we look closer home at our domestic legislation which is, The Immoral Traffic (Prevention) Act, 1956, it does not define who a sex worker is. Further, according to the ITPA, “prostitution means the sexual exploitation or abuse of persons for commercial purposes.”⁷ What must be paid attention to here, is the fact that the scope of the expression ‘prostitution’ has been widened by not just including promiscuous sexual intercourse for hire but also taking unlawful as well as the unjust advantage of entrapped women to benefit oneself sexually.

The act of prostitution has been assumed to be an act of sexual exploitation. Also, ‘abuse’ can have wide meanings. It usually implies that being a sex worker of their own volition is not an offence intrinsically to the point that she reports being exploited or abused or the same is known during the investigation. Therefore, an amendment must be made in order to clarify the multiple interpretations by clearly defining sexual exploitation as well as abuse to prevent any misuse by the enforcement agencies. Also, when a person readily offers their body with free consent in exchange for consideration, it should not be a criminal concern.

THE CONFLATION BETWEEN SEXUAL EXPLOITATION & SEX WORK

Equating sex work to sexual exploitation has led to inflammation of vulnerabilities of sex workers, thereby resulting in abuse of their human rights. Conflating sex work to trafficking or sexual exploitation stands to be a significant factor in perpetuating coercive and perilous working conditions. It has led to existing harmful legislation which limits the right to access

⁶ Secretary-General’s Bulletin: Special measures for protection from sexual exploitation and sexual abuse, United Nations, 2003

⁷ Immoral Traffic (Prevention) Act, 1956, s 2(f)

justice and services of sex workers. Additionally, it is also preventing them to have organised and safe working conditions while being empowered to assert their human and labour rights.

Progression in law reforms and the struggle to recognise sex work as work go hand in hand. One of the arguments often stated in the favour of decriminalisation of sex work is that it would give the sex workers a right to social protection, under the blanket of which they would be protected and respected regardless of their occupation. The consequence of the absence of an accepted definition is this conflation of sex work with sexual exploitation. Effectively investigating as well as prosecuting trafficking wherever it persists has also been hindered by a visible lack of willingness to define sexual exploitation. It is not astonishing to see increased attention on human trafficking for sexual exploitation which has led to the total neglect of noticing exploitation in relation to forced labour which includes in itself servitude in the domestic sphere. As much strict vigilance on trafficking for sexual exploitation is maintained, it would be appreciable to have a victim-centric approach applied to the victims of contemporary forms of slavery too. It would warrant their right to equal treatment regardless of the sector they belong to.”

This conflation has deprived the sex workers of their agency while they are merely looked at as victims. What is to be further underscored is the fact that the laws and policies in place which have been aimed to protect them are only claimed as “gender sensitive,” however having a protectionist nature. These accelerate the reinforcement of harmful stereotypes about women as victims while overlooking the causes which are specifically pertaining to gender, thereby leading to the persistence of slavery in contemporary forms. It doesn’t take much to realise that this commingling often leads to increased arrest and prosecution of the clients of sex workers in an endeavour to curtail exploitation. It is shown to increase violence against sex workers along with decreasing their earnings and living in precarious conditions to avoid detection by law enforcement agencies. They’re less likely to report abusive, coercive, or violent practices thus, being forced to jeopardise their own safety. This leads to isolation from support networks along with health and social services. There has been no conclusive evidence proving that criminalising leads to the elimination or reduction of sex work. There are various papers

advocating against the said conflation. Therefore, even though sexual exploitation and sex work are not mutually exclusive, it would be wrong to say that sexual exploitation encompassed all sex work in generality. Therefore, leading to the conclusion that the general use of this term isn't meant to be imposed on prostitution.⁸

Voluntary Engagement

Sex workers get into this work for different reasons. Many workers feel engaging in this profession is their only option as they don't have any other means, however, some stay in it simply voluntarily. There exist dozens of reasons which form the basis for remaining in the industry. Therefore, if we are strictly against violence, it is high time to respect the autonomy of sex workers. We need to believe that they possess the capability to decide and make self-suited choices.

Since brothels are illegal⁹, they are often raided. In the process of raid and rescue, women who have affirmed business arrangements of own volition with a client are also detained or forcefully sent to shelter homes. This is done in the truancy of consent and simply asking if they desire to leave the said trade. The premise of this is a postulation by the authorities that whosoever is involved in sex work does not engage in it voluntarily and is being forced to do so. In this regard, the Justice Verma Commission in 2012-13, had acknowledged that there exists a difference between women who are trafficked for commercial sexual exploitation and women who are consenting adults engaging in sex work of their own volition.

No Designation as Workers Until NHRC Intervention

A direction was issued by the Apex Court in September 2022, to furnish dry rations to sex workers who had been identified with the help of Legal Service authorities and the National AIDS Control Organization. This was to be done regardless of identity proof. However, even then it was noticed that certain governments insisted on identity proofs such as Aadhar and bank account details, clearly flouting the order of the Apex Court. The justification accorded to

⁸ *Ibid*

⁹ Immoral Traffic (Prevention) Act, 1956, s 3

this was the surety of no duplication. This is just one example of deprivation owing to the lack of government-approved identities.

Another prevailing dilemma pertaining to Sex Workers is the sensitivity to their identity revelation. They often hide it in order to escape being identified by family members, or relatives or to procure earning opportunities. The stigma attached to their identity is well known. The protective instinct makes it tough for them to access relief work through government channels. This is why they are left out of the safety nets.

NHRC'S RECOGNITION AS INFORMAL WORKERS

Sex Workers were recognised as informal workers by the National Human Rights Commission (NHRC) in an advisory that was issued in October 2020. It was to secure their rights during the times of pandemic and directed the concerned Ministries in all states along with Union Territories to recognise them as informal workers. This was to be followed by registering them in order to be eligible for basic benefits which are accorded to other workers. NHRC had recommended issuing temporary documents to sex workers like other informal workers so they could access health services and welfare measures.

POLICE ABUSE& INSENSITIVE MEDIA

Police Abuse

A 2014 paper incorporated a pan-India survey of around 3000 sex workers who came forward to share their experiences of police violence. Half of them accepted being verbally abused by the police. 35% of them were subjected to beatings or were hit with belts or pulled by their hair. In more recent work, it was found that under the Immoral Traffic (Prevention) Act, 1956, sex workers were being labelled as not only immoral but also smugglers. It further pronounced how police brutality against sex workers was only letting society follow the same path and treat them worse. It is not surprising to note the misuse of the law by the police to justify their fines, raids, misdemeanour, and violence. It was also alleged that bonded labour and harassment were common at the hands of the authorities. What could be more despicable than to see the supposed protectors of law violate it blatantly?

Insensitive media

NGOs that work with sex workers have also alleged media personnel accompanying police who then act as an accomplice in humiliating these sex workers. Not only do they engage in such an abhorrent act, but they also convert it into sensational news items.¹⁰ This defeats the purpose of Article 21. How come it is selectively available, more to some than others? This group of women workers has only been deprived and disempowered by violating their rights so gravely. It is so disheartening to see the agency which is supposed to present a correct and wholesome perspective of issues to its own citizens discriminate against some of those to fulfill their own agendas. Biased reporting, sensationalism, and moral policing jeopardise the future of these workers as much as the Police. Reports published by UNESCO as well as other journals¹¹ show how the media of India does not shy away from stereotyped reporting of sex workers, while not making any effort to correct such preconceived notions. Media, even after being the fourth pillar of democracy, has let down this section of its citizenry.

Other Anomalies in ITPA

- Since practising prostitution in a brothel and around the public place is illegal, a massive chunk of their work is criminalised as they are supposed to be guarding themselves against oppressive authorities.
- Visiting these red-light areas by the clients has been penalised under the said act.¹² There exists a presumption of these clients have criminal ties, and some of them could and must be prosecuted under the IPC, but that cannot be true for each and every one of them. This sector could go covert by penalising all clients and hence block legitimate channels to send help.
- The act only focuses on trafficking for sexual exploitation yet leaves other possibilities out of its scopes such as forced marriages, bonded labour, or even domestic work.

¹⁰ *Ibid*

¹¹ Geetanjali Misra, Ajay Mahal & Rima Shah, 'Protecting the Rights of Sex Workers: The Indian Experience' (2000) 5 (1) The President and Fellows of Harvard College, 88-115

¹² Immoral Traffic (Prevention) Act, 1956, s 5C

- The officer to enforce the provisions of the act is the rank of Sub-Inspector. The power delegation to junior officers could lead to harassment. Also, women officers must be a part of the team of police officers so as to understand their concerns with more sensitivity.
- In the act, there is no mention of where are sex workers supposed to be rehabilitated after rescue with no measures for victim compensation and an absence of comprehensive information on their access to NGOs and health services.
- The ITPA gives no surety of safety or protection to sex workers when read from a legal perspective.

PARTIAL DECRIMINALISATION: SC ORDER, 2022

In May 2022, the Supreme Court partially fulfilled an indelible and highly contested demand long-standing demand of sex workers to decriminalise their profession while entailing that they are entitled to live a dignified life and equal protection. It further went on to direct the police to respect the rights of sex workers who are consenting while recapitulating the spirit of Article 21¹³. The SC reiterated the Court's ruling in *Budhadev Karmaskar v state of West Bengal*¹⁴, that "sex workers are also entitled to a life of dignity". Since The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021¹⁵ has not yet been passed, the Court had to invoke powers under Article 142¹⁶ to render the guidelines it has, till it comes into force. A panel was set up in 2011 to oversee the prevention of trafficking, rehabilitation of sex workers, and conditions which could be conducive for those who want to be in this profession of their own volition. The submission of which was submitted to the court while this order was rendered.

The three-judge bench directed the police to respect the dignity of sex workers and that they are not to be abused whether it is verbally or physically. They cannot be subjected to any sort of violence or sexual activity. The Bench came down heavily on the demeanour of the Police as to how they treated this marginalised section. It resorted to saying to the extent that, "it is as if they are a class whose rights are not recognised." It further asked State governments to undertake a

¹³ Constitution of India, 1950, art.21

¹⁴ *Budhadev Karmaskar v State of West Bengal* (2011) 10 SCR 577

¹⁵ Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021

¹⁶ Constitution of India, 1950, art.14

survey of protective homes as under the ITPA¹⁷ to re-assess the cases of “adult women” who are detained there along with processing their release timely. The court further suggested that the it is government’s responsibility to draw suitable legislation to give these voluntary sex workers the rights they deserve and that centres and States must involve their representatives in the exercise of reforming laws.

RIGHT TO DIGNITY & RIGHT TO EQUAL PROTECTION

The court upheld the dignity of sex workers saying they are entitled to it despite their profession just like any other citizen. For, it is important to remember no woman can be subjected to exploitation, neither by a client nor by police claiming to be their protectors. For, no means no even if it is a woman of easy virtue.¹⁸

THE PLIGHT OF THE CHILDREN OF SEX WORKERS

Recently, in the same judgement,¹⁹ the Supreme Court reiterated that the children of sex workers along with themselves possess the right to live with dignity and human decency. Therefore, irrespective of the profession a citizen chooses to exercise, each of them is still albeit entitled to the right to a dignified life. The court’s directions are more or less the very recommendations by the panel which was formed by the Supreme Court in July 2011²⁰ to analyse the conditions existing for sex workers who wanted to continue being in their profession, but with a right to live with dignity as pursuant to Article 21 of the Constitution of India.

It was further recommended that no child of a sex worker should not be split up from the mother only on the basis that she engages in a profession of sex work. There cannot exist an assumption that just because a minor is found to be living in a brothel with sex workers, then she/he has been trafficked. There is no law that instructs setting apart the child from the mother, albeit it assumes trafficking on being found there. On being discovered in a brothel, a child can then be

¹⁷ The Immoral Traffic (Prevention) Act, 1956

¹⁸ *Pankaj Chaudhary & Others v State (Govt. of Nct Of Delhi)*, (2009) Criminal Appeal No. 384/2000

¹⁹ *Ibid*

²⁰ *Ibid*

sent to a child care institute recognised under the Juvenile Justice Act by the Magistrate.²¹ In *Gaurav Jain v Union of India* (1997)²², the Apex Court held that the children found to be living in brothels should be shifted to reformatory homes that are to be made approachable for them. This also calls for an amendment in order to accommodate the latest directions passed by the court of law.

ENFORCEMENT OF DIRECTIVES

The Government of India maintained a stance of having reservations on 4 out of 10 recommendations of the panel, nonetheless, the court ordered the implementation of the rest of those, for the rights to this vulnerable section have been denied for pretty long.

These are:

1. To make immediate medical assistance accessible to the sex workers subjected to sexual assault.
2. To release adult sex workers who have been arbitrarily detained in protective homes against their wishes.
3. Sensitization of the law enforcement agencies along with the police to recognise and respect the right of sex workers to live a dignified life.
4. To prevent the revelation of the identities of sex workers when arrest, raid, or rescue operations are being reported. To involve the Press Council of India in the process of issuing a set of guidelines for the same.
5. Health measures that have been adopted by the sex workers for their safety such as contraceptive measures should not be seen as evidence of the commission of an offence.
6. Disseminate knowledge amongst the sex workers about the nature of their work and their rights through the Legal Service authorities with the help of the respective Central and State Governments.

²¹ Juvenile Justice (Care and Protection of Children) Act, 2015, s 30

²² *Gaurav Jain v Union of India* (1997) SCR Supl. (2) 173

A provision already exists in the Code of Criminal Procedure (CrPC) that seeks to provide medical assistance to sex workers who fall victims to sexual assault.²³ However, the law remains quiet on revealing the identity of sex workers.

WIDER IMPLICATIONS

Albeit the SC took time to take a progressive stance and accord sex workers the protection they deserve, the Central government has expressed its own reservations. One of those is to prevent the police to not take any criminal action against a worker where 'age' and 'consent' form the basis of participation. Another reservation of the government pertains to the non-victimization of sex workers on account of any raid since voluntary sex work is not illegal and only running a brothel is unlawful. As per the said ITPA, a 'brothel' includes any place which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more sex workers.²⁴

However, what needs to be pondered upon is what if the willing sex workers are living amicably without having any issues with their brothel owner or manager. Therefore, what really needs to be decided by the government as a policy is taking account of such situations where two or more sex workers are living together of their own volition for receiving mutual gains. There could also be a scenario of management by a third person. Therefore, the decision of criminalisation or non-criminalisation needs to be decided by the government. This is a discussion that would require a wider horizon of deliberations.

EXISTING IRONY

It is to be noted that it is not punishable to carry on sex work outside the notified areas or outside a distance of 200 m of any place of public religious worship, educational institution, hospital, etc. under the ITPA²⁵. However, the irony remains, that when an indispensable ingredient of sex work is "sexual exploitation" or "abuse of persons" for "commercial purpose," then with that

²³ Code of Criminal Procedure, 1973, s 53

²⁴ Immoral Traffic (Prevention) Act, 1956, s 2(a)

²⁵ Immoral Traffic (Prevention) Act, 1956, s 7(b)

rationale should this be acceptable at any place, at any point in time? With the Apex Court finally speaking up for the benefit of Sex Workers, it is the appropriate time for the Government of India to make an effort to separate prostitution from the voluntary exercise of sex work and whether they seek to ban prostitution at the first instance or allow consenting sex workers to continue while thinking about the general public interest. It cannot be argued that a lot of women in this trade end up there as victims of unfortunate socioeconomic conditions. Therefore, they are more than the offenders that they are labelled as.

WAY FORWARD & RECOMMENDATIONS

Doing Away with The Stigma

The directions of the Apex Court could go a long way in giving sex workers the respect they deserve and ending the conflation between exploitation and voluntarily choosing a profession and not being questioned for it. This could help reduce the stigma around it and help to get them to exercise their labour rights when they were also associated with bonded labour in their precarious situation. There is a need to follow the action on the ground. Also, the survey of protective homes and institutions ordered by the SC must be done on a priority basis to release the involuntarily detained sex workers.

For the recommendation of police sensitisation, it is time to allow that responsibility to an organisation or an NGO or maybe an oversight law enforcement agency. So is the discussion on the access to legal aid by sex workers, the only exception being such responsibility has been entrusted to the Legal Service Authorities existing at the national as well as State levels, but it also remains seen as to what extent can they actually enforce it. However, the base of this discussion lies in the fact that the enforcement agencies have to change their orientation towards these workers and not treat them like objects or it can't be just that they lose their credibility or right to say something by simply seeing them as women of easy virtue.

BATTLE CONTINUES

The battle has not finished yet, the phoenix is yet to rise. Sex workers still want to demand decriminalisation of their profession. The basis of this discussion is supported by a judgement of the Bombay High Court ruled in 2020,²⁶ that voluntary sex work isn't a criminal offence or punishable under any law. However, there are still concerns, foremost about the fact that the 2011 Panel had worked on anti-trafficking, dignity, and rehabilitation for five years before submitting their recommendations, all of which have not been accepted. The main issue which still remains is that instances of trafficking and exploitation decimate and dilute the discussion of voluntary prostitution. Further, only time will tell about the spirit of change in people's attitudes towards these classes of workers and the enforcement of these directions.

RECOMMENDATIONS

- Clearly and unambiguously distinguishing 'sexual exploitation' from sex work.
- Complete decriminalisation of sex work, including sex workers as well as their clients.
- To make sure that sex workers are accorded labour rights as defined by ILO on the lines of employment, the rights of work are followed by social protection and social dialogue.
- Respecting bodily autonomy, choices, and agency of sex workers.
- Develop a thrust for better access to food and health services by involving the immigration authorities for the migrant sex workers. They were severely affected during the lockdown and yet ignored.

CONCLUSION

Sex workers live a life of fear, of hiding from the authorities who are supposed to aid them, fearing exploitation, of not having access to a basic minimum, of not having respect. They are all the more exposed to assault. The conditions of their living call for improvement along with their position in society. They are to be looked at as persons, like all of us and not to be judged by what they do. This entails seeing sex work separate from sexual exploitation as we

²⁶ *Kajal Mukesh Singh and Ors., v The State of Maharashtra* (2020) Writ Petition (Criminal) No. 6065/2020

understand and distinguish between consensual sex and rape. Therefore, this seems an opportune time for the Government, to post the Apex Court's directions to improve their conditions of living, inform them about their rights, rehabilitate them if they wish to, and form a safe environment for them. Lastly, the Government must aim to fix the prevalent ambiguities in the present laws.