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Recognising Prostitution as a Profession and holding up its dignity under Article 21: How can Conventional barriers be challenged?

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Recognition of prostitution as a profession is still a highly debatable topic in a society with staunch supporters of patriarchal norms. The word prostitution or sex work habitually generates the stigma that comes attached to it. The rising rights debate at the international and national levels highlights the importance of sex workers' rights as individuals and citizens under the Constitution as a foundation for endeavours to safeguard, defend, and give due regard to their rights as well. On the same note, the Supreme Court of India recently issued various guidelines to facilitate sex workers to have a dignified life. This research paper begins by underlining how prostitution has always been a part of Indian society throughout history. This is followed by an introduction of constitutional provisions that protect the rights of sex workers, ending with a presentation on what are the real challenges and stereotypes accompanying prostitution. In the conclusion of the research paper, suggestions with regard to approaches in policy making have been made.

Keywords: *prostitution, article 21, sex workers, dignity, constitution.*

INTRODUCTION: TRACING THE HISTORY OF PROSTITUTION IN INDIA AND EXAMINING ITS LEGALITY

Prostitution is considered to be one of the oldest professions to exist in the world. In India, prostitution as an institution found its existence as early as the presence of Kautilya's Arthashastra which contained the rules and principles that guided the behaviour and lives of the prostitutes. In the same document, there has been a mention of the rules for the conduct of their clients.¹ Skipping to the medieval period, prostitution developed as a profession thanks to royal patronage. Following the fall of the Mughal Empire, large masses of girls, ladies, and concubines who used to sing, dance, and perform in the royal palaces emerged in the society, that had no jobs in particular to offer them. Thus, they found themselves at a point where there was no financial stability due to the presence of an economic dilemma. They resorted to this trade of commercial sex because of the lack of options at hand.² Things did not improve for these women even during the British era as their condition only deteriorated at the reason of the dearth of official supervision and regulation of this commercial trade that was underlined by corruption and exploitation of the weakest.³ These women found themselves socially impaired and ridden with economic misfortunes and thus, became an easy target for their exploiters. All these facts suggest that prostitution existed in India since time immemorial and continues to persist in society. However, it is often looked at from a negative perspective rather than an economic opportunity for the people from communities that do not have lucrative options to rely on for finance.⁴

The Immoral Traffic (Prevention) Act, 1956, defines "prostitution". According to it, prostitution connotes the victimization or maltreatment of persons for sexual purposes that are purely commercial in purpose.⁵ If we look at the stretch of the business of prostitution, it generates an annual deal of Rs. 40,000 crores in India. Statistics also speak that around thirty percent of the sex worker population is comprised of youths and the people who exploit them earn a

¹ Rajni Bala, 'Prostitution in India' (2016) 3 Scholarly Journal for Interdisciplinary Studies 19

² *Ibid*

³ Biswa Nath Joardar, *Sex work in Modern & Historical Perspectives* (Inter-India Publications 1984)

⁴ *Ibid*

⁵ Immoral Traffic (Prevention) Act 1956, s 2(f)

staggering amount that accounts for nearly Rs. 11k crores.⁶ Mumbai, which is also sometimes referred to as Asia's booming hub of the sex industry, is home to approximately one lakh sex workers out of the general 10 million sex workers in the Indian population.⁷ What is also commonly noticed is the fact that statistics present that there are nearly 500,000 child sex workers in India. Approximately 80% of these children who work as sex workers are solely found in Bangalore.⁸ These numbers speak volumes when it comes to the accounting of the population of people who turn to prostitution or commercial sex as a way to earn their livelihood. This also demands the inevitable obligation of the State to implement laws and regulations that will overlook and supervise this vocation.⁹ A particularly interesting fact, however, is that although prostitution as a profession is not explicitly declared to be illegal in India, but is also not expressly allowed as far as the public arena is concerned. Three bodies of law under the legal structure of India contain provisions regarding sex work. These are the Constitution of India, 1950; the Immoral Traffic (Prevention) Act, 1956; and the Indian Penal Code, 1860.

Prostitutes have the same rights and obligations as other citizens of the nation under the Indian Constitution since they are no less than members of society and are thus regarded as citizens of the state. Thus, the provisions of equality from articles 14 to 18 of the constitution of India, the specifications of freedom of association under article 19¹⁰, and the right to life and personal liberty under article 21¹¹ of the Indian Constitution are thus conferred upon the sex workers as well. This ensures that they are treated equally with all other citizens, preventing distinction in the first place. The Indian Constitution, however, also preserves and guarantees the ban on human trafficking in addition to these rights. Furthermore,¹² the Indian Constitution forbids any form of forced labour. According to many decisions made by the Apex Court, article 21 of the

⁶ Dharmendra Chatur, 'Legalization of Prostitution in India' [2009] Human Rights Law 21

⁷ Robert I Friedman, 'India's Shame: Sexual Slavery and Political Corruption Are Leading to an AIDS Catastrophe' (1998) 3 Trends in Organized Crime 60

⁸ 'Coalition Against Trafficking in Women [WorldCat Identities]' <<https://worldcat.org/identities/lccn-no00102365/>> accessed 15 August 2022

⁹ *Ibid*

¹⁰ Constitution of India, art 19(1)

¹¹ Constitution of India, art 21

¹² *Ibid*

Indian Constitution also protects the right to subsistence. The right to a sufficient means of livelihood is also guaranteed in an equal manner to both men and women using the State policies¹³ and its directions. This is assured under Part IV of the Constitution of India, i.e., directive principles of state policy. In *P.N. Swamy, Labour Liberation Front, Mahaboobnagar v Station House Officer, Hyderabad*¹⁴, the Andhra Pradesh High Court ruled that the following obligations from Part IV and their corresponding rights are granted to sex workers as a unified set. The State must focus its policies on ensuring that employees' health and strength are not exploited and that individuals are not coerced to work in jobs that are not appropriate for their strength and age out of need¹⁵, that marginalized groups in society are safeguarded from social injustice and exploitation by promoting their educational and economic interests¹⁶, the need to promote adherence to treaty commitments and international law¹⁷, and obligation to promote the application of human rights norms¹⁸. All of these clauses vouch for the fact that the country's constitution has substantial and appropriate protections for the rights of sex workers in India. But when it comes to the profession and way of life of sex workers, reality offers a bleak image of the overall situation and stands in sharp contrast to the beliefs and rules that are in place.¹⁹ Since rights do not have an absolute character, they also have limitations that guarantee the security of the rights of other citizens. Similar prohibitions are placed on the practice of this profession by another body of law, the Immoral Traffic (Prevention) Act of 1956.

In its primary sense, the right to life holds fundamental importance for humanity. It gives meaning to our very existence and ensures that the protection of the conditions suitable to it is prioritized at all times. Along these lines, the Supreme Court of India has reiterated multiple times that the right to life guaranteed by Article 21 of the Constitution is not limited to bovine

¹³ Constitution of India, art 39(a)

¹⁴ *P N Swamy, Labour Liberation Front, Mahaboobnagar v Station House Officer, Hyderabad* 1998 (1) ALD 755

¹⁵ Constitution of India, art 39(e)

¹⁶ Constitution of India, art 46

¹⁷ Constitution of India, art 51

¹⁸ Constitution of India, art 47

¹⁹ *Ibid*

survival, consequently giving the broadest elucidation of the article that is possible. Following are the words of the Apex Court in the judgment of *Francis Coralie v Union Territory of Delhi*²⁰:-

“The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing, and shelter over the head and facilities for reading writing, and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to necessities the necessities of life and also the right to carry on functions and activities as constituting the bare minimum expression of the human self.”²¹

The Indian Constitution's Article 21 protects all individuals and professions, including sex workers and their children. This protection was recently upheld by the bench of three judges of the Apex Court in May 2022.²² The judge's position was that, by article 21 of the Indian constitution, every person has the right to live a life that is honourable in all aspects, regardless of vocation. The judges presented on the bench who unanimously gave this judgement were Justices L. Nageswara Rao, BR Gavai, and AS Bopanna.²³ This order was issued as a follow-up to the recommendations of a five-member panel, presided over by senior advocate Pradip Ghosh, which was established in 2011 to provide advice to the court on these three issues: how to end human trafficking; (ii) how to assist sex workers who want to leave the industry in getting their lives back on track, or more specifically, their rehabilitation; and (iii) how to create the conditions necessary for the sex workers to live their lives The following are specifics of the directive and the panel's suggestions, upon which the Supreme Court elaborated:

- a) According to Section 357C of the Code of Criminal Procedure, 1973²⁴ a person indulging in prostitution who experiences sexual assault should be granted access to all services accessible to a sexual abuse victim, particularly rapid hospital care. This specific rule was

²⁰ *Francis Coralie v Union Territory of Delhi* 1981 AIR 746

²¹ *Ibid*

²² J Venkatesan, 'Sex Workers Entitled to a Life of Dignity: Supreme Court' (*The Hindu*, 14 February 2011) <<https://www.thehindu.com/news/national/Sex-workers-entitled-to-a-life-of-dignity-Supreme-Court/article15444256.ece>> accessed 15 August 2022

²³ *Ibid*

²⁴ Code of Criminal Procedure 1973, s 357C

framed by the Ministry of Health and Family Welfare. This should be read with "Guidelines and Protocols: Medico-Legal Care for or Survivor/Victims of Sexual Violence depicting the same terms of what has been held in the Code of Criminal Procedure, 1973.

- b) The Government of the respective state may be required to order an audit of most Immoral Traffic Prevention Protective Homes to guarantee that matters involving women beyond the age of 18 being kept without their consent are examined as well as authorized to be set free without undue delay.
- c) As sex workers are also human beings with recognized rights, the police, and local authorities should be dealing with them in a manner that is not fierce and inhumane. All sex workers should be treated with respect by police, who should also refrain from verbal or physical abuse, using force against them, or forcing them to engage in any sexual activity.
- d) While sex workers are being rescued, detained, or evicted as part of various operations, the Press Council of India should set rules in order to make sure that the identity of those indulging in prostitution is in any case not divulged.
- e) The respective legal services authorities at all levels must host discussion groups, seminars, etc. on the legitimacy of prostitution, the functions and responsibilities of law enforcement, and the boundaries between what is legally allowable and what is expressly prohibited.

These directions and guidelines, which were seen as welcome by the people of the profession, and if followed, can remarkably enhance the conditions of the sex workers who most often find themselves in a strange situation of being exploited at the hands of the police on one hand, and the society on the other.²⁵

DEFYING STEREOTYPES AND DICHOTOMIES PRESENT

As previously noted, the right to a dignified life is of fundamental importance to the existence of us human beings. Thus, robbing off of basic prerequisites of a dignified life like access to education, health facilities, or justice mechanisms also counts as a violation of rights. These violations are not limited to a particular gender or put a particular section at a risk higher than

²⁵ *Budha Dev Karmaskar v The State of West Bengal & Ors* Criminal Appeal (SC) No 135 of 2010

that of the other. Sex workers, in general, are victims of such violations every day. Accordingly, observing, facing up to, and breaking stereotypes become obligatory on the part of the government and society at large. The approach of the Indian policymakers has mixed objectives to achieve. Though it is balanced, in the sense that the sex trade is exploitative and that the dignity of those indulging in prostitution must be taken care of, subsequent to this, it renders confusion because sex work is only permitted privately, away from the public eye and society in general. The attitudes and mindsets of diversified populations have been kept in mind while making laws regarding prostitution. The dichotomy arises when the Immoral Traffic (Prevention) Act, 1956 which supervises and deals with prostitution, contains provisions like severance against brothel owners and rehabilitation of sex workers while being silent about the legal status of sex work itself. When the legal status of sex workers is being considered, what is noticed is that the sex workers find it difficult to get ration cards or voter ID cards. Due to their inability to create bank accounts without the necessary papers, it has been noticed that the sex workers had no access to either state-sponsored rehabilitation programs or credit facilities.²⁶

As a consequence of this, a stereotype that can be challenged is that sex workers are mostly coerced or victimized into prostitution as a profession.²⁷ However, something that is overlooked is the voluntary decision of these workers to engage in sex with different and personal reasons. Following are the findings of a study²⁸ that presents how the stereotypes cannot be prophesying reality²⁹-

- a) Sex workers recognised that prostitution was only a particular expression of this collaborative process and that other forms of labour may also be exploitative. Women preferred to work in sex because it gave them more choice over their employment and their bodies despite being cognizant of the underlying injustices of gender and class.

²⁶ Sohini Chowdhury, 'Supreme Court Directs UIDAI to Issue Aadhaar Cards to Sex Workers without Insisting on Proof of Residence' (*Live Law*, 25 May 2022) <<https://www.livelaw.in/top-stories/supreme-court-sex-workers-uidai-issue-aadhar-card-confidentiality-200026>> accessed 15 August 2022

²⁷ *Ibid*

²⁸ Sameena Azhar & Ors, 'Diversity in Sex Work in India: Challenging Stereotypes Regarding Sex Workers' (2020) 24 *Sexuality & Culture*

²⁹ *Ibid*

Contrary to the stereotype that only depicts sex workers as victims, these individuals actively participate in the industry and choose to choose this line of work over others.

- b) According to the findings of this research, sex workers don't always live alone and frequently have many identities, including those of mothers, brothers, sisters, and fathers, contradicting the stereotype that only single women constitute the sex worker population. Many sex workers in studies C and D of this research show that demographics of male and gender nonconforming sex workers were spouses to cisgender women and fathers of numerous children. Several of these respondents were supported by their income by dependents. Many participants mentioned that they had been the only ones responsible for caring for their elderly parents. Other participants helped younger family members, including nephews and nieces, who were unemployed financially.³⁰

Regardless of the existence of safeguards and legislation for the rights of sex workers, the dearth of proper implementation leads to several violations. Studies have found that the authorities responsible to enforce these legislations often exploit these sex workers due to which access to justice mechanisms becomes a far-sighted utopian dream. Sex workers view police enforcement as the most oppressive governmental organization. They frequently utilize explicit sexual language and innuendo to verbally harass sex workers. Police torture, sexually attack, and illegally detain sex workers while holding them.³¹ Sex workers have been harassed and arrested under the terms of the Immoral Traffic (Prevention) Act of 1956, regardless of whether they are performing the profession willingly or under coercion. The inadequateness of the rehabilitation houses established by the Immoral Traffic (Prevention) Act of 1956 is a further issue that sex workers encounter. These reformatory houses reportedly lack enough housing options, which causes them to be always overcrowded.³²

³⁰ *Ibid*

³¹ Aarthi Pai & Ors, 'Review the Immoral Traffic (Prevention) Act, 1956 that de facto criminalizes sex work and ensure that measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers' (CASAM, April 2014) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17395_E.pdf> accessed 15 June 2021

³² Sankar Sen, 'A Report on Trafficking in Women and Children in India 2002-2003' (2002-2003) 1 National Human Rights Commission 455

CONCLUSION AND SUGGESTIONS

If prostitution is only looked at negatively while paralleling victimization with coercion, seldom can the perspective change to make room for validation and recognition of voluntary engagement in sex work. For the recognition of sex work as dignified prostitution, it is imperative for us as a society to sensitize ourselves to ground realities and overcome the conventional barriers both mental and institutional. As previously noted, due to the shortcomings in the implementation of the provisions of the Immoral Traffic (Prevention) Act, 1956, the plight of the sex workers goes unheard and unnoticed. To quote the words of Justice Ramaswamy: *“women found in flesh trade should be viewed more as victims of socio-economic circumstances and not offenders of the society, some police authorities have already set out the process of sensitization towards the sex workers and their treatment.”*³³

When it comes to the legalization of prostitution as a profession, lawmakers must first ensure that these sex workers have all of the essential human rights provided by international laws in their domestic country. Suitable and appropriate rehabilitation and training should be provided to them so that they get an opportunity to further enhance their social position. Jobs and employment opportunities with a better wage that ensure a fixed income should be provided to these sex workers while also making certain that the work environment is amicable. In a study of 37 sex workers in Kolkata, India, disempowerment, limited personal choice, economic uncertainty, family poverty, the loss of a male breadwinner, and, on rare occasions, aggressive or manipulative attempts into sex work were developmental concepts from interviews about reasons for entering the industry.³⁴ Policies that are solely focused on rehabilitating and rescuing sex workers or that are centred on the premise that sex work is equated with immorality can hardly achieve any success in ensuring the protection of the rights of the sex workers and further, leading a dignified life.³⁵ A substitute model of approach in this sense could be involving NGOs and sex worker representatives while formulating policies that recognize and

³³ *Gaurav Jain v Union of India & Ors* AIR 1997 SC 3021

³⁴ Swendeman D & Ors, 'Whatever I have, I have made by coming into this profession' (2015) 44(4) National Library of Medicine 1011-23

³⁵ *Ibid*

uphold these rights, and that aim to do away with the stigma attached to sex work as a profession.