



RIGHTS OF SEX WORKERS IN INDIA: AN ANALYTICAL STUDY

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Abstract:

Human rights have always been a controversial issue in India when it comes to the rights of the sex workers. In India, the law relating to sex work is ambiguous, i.e. India neither criminalizes nor condemns it. Human rights advocates wellbeing with equal treatment of all persons. However the Indian government has failed to uphold the rights of women especially those of sex workers be it the civil or socio-economic rights, despite being a signatory to many legislations. The sex workers are stigmatized and are looked down upon by the society. They are often subjected to discrimination, abuse, rape and harassment which results in denial of their rights. The health, safety and equality of the sex workers under the law are some of the major concerns which should be looked into as a matter of their right. And further steps should be taken to decriminalize prostitution for the betterment and protection of the sex workers.

Keywords: Human rights, sex workers, prostitution, violation, equality, health, decriminalize.

1. INTRODUCTION:

‘Only rights can stop the wrongs’

In the Indian society, the term ‘sex work’ portrays a negative meaning by itself. Prostitution is defined in such a way, which itself is exploitative in nature.¹ Being a part of the society they are denied the right to basic livelihood and other the fundamental right which are guaranteed to all citizens of India, i.e. right to life, liberty and dignity. They are criticized and are considered to be a stigma to the society. They are often the subject of abuse, violation and harassment. It is believed that the sex workers threatens the structure of the family life and are therefore most often ostracized by the society. The Society views sex workers as morally corrupt, and thus considers them guilty and deserving of the abuse and violations which they are subjected to. The sex workers are often violated of their rights which include, denial of health services, denial of basic necessities they are publicly shamed and are subject to arbitrary detention.

The attitude and response of the people towards the sex workers is a pity affair. All this takes a step further and marginalize them at every level of their existence which can be supported by the fact

that they are being neglected, their children are ill-treated in schools, the callousness of the hospitals in treating them, all these lead to the conclusion that the attitude of the society towards them needs to change and they are to be treated or in other words they should have a right to be treated like any other persons in society.ⁱⁱ

Therefore, there is an urgent need to take into consideration the rights of the sex workers which are being violated on a daily basis, so that they can also live in the society with respect and that they are entitled to all the privileges which a 'normal' person enjoys.

2. REGULATORY FRAMEWORK

The sex workers in India are vulnerable to abuse and harassment as the Indian law has failed to protect their basic rights. Laws relating to the sex workers can be categorized as following:

- Suppression of Immoral Traffic Act (SITA) of 1956
- Immoral Trafficking (Prevention) Act (ITPA) 1956

Suppression of Immoral Traffic Act (SITA) of 1956 was the ultimate law which dealt with sex workers in India. It was amended in the year 1986 and further in 2006 which came to be known as **The Immoral Trafficking (Prevention) Act (ITPA)**. It was amended to prevent abuse and harassment of sex workers, it increased the age from 16-18, and increased the punishment for the offence of detaining a person on a premise where prostitution is carried on.ⁱⁱⁱ It seeks to prevent trafficking of persons in India and further prevents outward manifestations of sex work, including operation of brothel and solicitation of public. Though the object of the Act is to protect the sex workers, it has been seen that this law is used against the sex workers instead of protecting them. The Act does not specifically prohibit sex work, but the authorities have misused it to harass them.

According to a recent study it has been found out that ITPA has been used solely against the sex workers on charges of soliciting. Laws relating to prostitution are dealt with under the *Indian Penal Code* also. Section 366A and 366B states that procuring of minor girls and importation of girls from a foreign country is illegal. Further under Section 372 and 373 of IPC the selling and buying of girls for the purpose of prostitution is considered to be a crime.^{iv}

In order to protect their rights, there is an urgent need for sex work reform. There is a kind of fear instilled in the sex workers because of raids, which becomes a reason for disrupted HIV services, which proves adverse to their health. They are not allowed to support their families, as there is a risk of them getting arrested, for living on their money.^v The main factors which are responsible for the lack of recognition of the legal status of the sex workers is the absence of voter card, birth certificate, or any means which allow to recognize an individual thus, depriving them of the benefits of citizenship. Because of the fear of stigmatization, sex workers are prevented from accessing their rights. As a result

of this, they have been denied the right to carry on their business and further denied education safety, health care.

Police, protector or predator?

Police instead of providing protection, are the very perpetrators of the abuse and violence which the sex workers are subjected to.

It has been reported that the police have been misusing the Juvenile Justice Act,^{vi} for example, use of violence during raids, women personnel not being present during raids, girls being subjected to violence and threats who are transferred to rehabilitation center and so on.^{vii} Sex work under the Act is not illegal per se but criminalizing of soliciting, brothel has led to the denial of protection to the sex workers.

Case laws

The Supreme Court of India has observed that sex workers are entitled to right to life and protection which is guaranteed under Article 21 of the Constitution of India^{viii} to every citizen. It directed the state to provide recommendations on the rehabilitation of sex workers who wish to leave sex work of their own free will and further to provide safe conditions to them who wish to continue as sex workers in accordance with Article 21.^{ix}

It was recommended by the Supreme Court panel that central government and Election Commission issue voter Identity cards, relax verification requirements, and State governments and local institutions issue ration cards to the sex workers so that they could be recognized as citizen of the country and could avail the benefits provided by it.^x

The Hon'ble court observed that the sex workers have a right to live with dignity under Article 21 of the Indian constitution as they also belong to the society and their difficulties and problems too need to be given attention. Further, poverty is one of the reasons which compel women to get into this web of prostitution and not pleasure. If proper opportunity to earn livelihood is given, like some vocational or technical training then they would not prefer selling their body. The Hon'ble Court directed the Central and State governments to make proper schemes to provide vocational and technical training to the sex workers in India.^{xi}

Supreme Court Panel: Recommendations

As such prostitution is not illegal in India, however because of the existence of various laws, sex workers have become vulnerable and thus are subjected to harassment and various police actions. In the year 2011, the Supreme Court of India set up a panel which was headed by senior advocate Pradip Ghosh, to look into the working conditions of sex workers and also to protect their rights.^{xii} The panel has made the following recommendations:-

- There is a need to amend the clauses relating to imprisonment of the sex workers.

- As far as the family of the sex workers are concerned, they would not be subject to any action until it has been proved that they had a role to play in forcing the girl/women into prostitution.
- Consenting adults who engage in sex work should not be arrested nor be subjected to any kind of criminal action as Prostitution is not per se illegal in India.
- The panel was of the opinion that, since running or keeping a brothel is considered to be unlawful in India the sex workers who voluntarily join prostitution should not be arrested, victimized or for that matter be harassed since voluntary sex work is not illegal in India. It further recommended that the term 'soliciting' in Section 8 of the ITPA Act 1956 should be removed as it is misused by various enforcement agencies. It had been often found that the police go beyond their authority and efforts in their attempt to enforce the laws and thus catch hold of the prostitutes and clients who are consenting adults and thus harass them.
- It also recommended measures for the rehabilitation of sex workers who wanted to quit prostitution. And also to provide jobs for them so that they are not forced to go into the same web again.
- It also recommended that sex workers who are caught soliciting in public should be sent to a correctional home instead of jail and that the term should also be reduced from 5 to 1 years.

3. PROBLEMS

Sex workers are pulled towards this web of prostitution not because they derive pleasure but because of some factors which forces them to sell their bodies for money. They do not voluntarily join this profession; rather they are coerced by the factors like poverty, unemployment etc. which is very common in India. In order to earn their livelihood they enter into this profession.

The sex workers are considered a stigma to the society and are denied their basic fundamental rights. Therefore, they face many problems. Some of them are listed below:-

- Lack of access to justice has increased the exploitation and abuse by the police and agents.
- Disempowering the sex workers increases the likelihood of human trafficking
- Provisions against the sex workers lead to lack of prevention of HIV disease.
- Fear of arrest makes negotiation of safe sex difficult.

The sex workers view the State as an instrument of violence rather than considering it as a protector of rights. The police authorities abuse them, demand sexual favors, illegally detain and torture them in custody. Their ability to seek protection from the police is diminished because of the stigma which is attached to them because of the nature of their work.

The rights of the sex workers are also human rights and also that the right to trade their body is their own choice. They belong to a community where they are shunned by the society. The moral lens and stigma which is attached to the sex work further highlights the barriers to accessing justice.

Sex work and trafficking, is there any difference?

Various laws, policies at local and national level continue to treat human trafficking and sex work as ‘synonyms’ which consequently affects the fundamental rights of the sex workers. It is often said that the sex workers are lured by money or rather deceived into sex work and might be trafficked as well, however there is an enormous number, who looks up to this profession as a source of better life and livelihood and not deceived or lured into it.

There is a difference between voluntarily entering the profession of sex work and human trafficking. In case of the former they are not coerced or deceived into sex work rather they opt it voluntarily because of poverty less, economic opportunities or any such reason and the latter involves cases where minors and adults are tricked into this profession and it does not involve a major ingredient, “*consent*”. Sex work as well as sex trafficking ignores the realities of the sex workers and endangers those women who are engaged in it. Therefore, sex work and human trafficking needs to be separated from each other and should be treated as another form of work.

4. RIGHT TO HEALTH IS A HUMAN RIGHT!

In India, the sex workers are referred to as the major transmitters and carriers of HIV. The workers are considered as one who has been affecting the larger society, irrespective of the fact that there are other several reasons for the transmission of the disease. The sex workers also have a right to access to health care services like other people of the society but unfortunately they have no access to such services which leaves them more prone to suffer from Sexually transmitted disease (STD’s). If they have the power to negotiate they can play an active role in reducing the transmission of these diseases. They are entitled to as much safety as any other citizen.

In India, the sex workers demand that the laws which criminalize the sex work be repealed and further they should have an access to the fundamental and basic rights. With the fear of spreading of HIV/AIDS, the Government has set up clinics but these clinics treat sex workers infected with only STDs and not any other diseases and that too not for the protection of sex worker but for the society.^{xiii}

According to International Labor Organization (ILO), the sex workers health and safety should be protected and they should have the right to take part in the developing of health and safety standards and also that of the workplace.^{xiv} They are often treated as invaluable resource in law making process.^{xv} The CEDAW committee^{xvi} recommended measures to prevent discrimination against sex workers and also to ensure that laws relating to their working conditions are guaranteed.

The lack of negotiation skills, information etc, increases the possibility to contract HIV, therefore the sex worker should be protected especially with respect to health and safety. They are more vulnerable to exploitation and harassment by police, agents, clients and this is aggravated by the fact that there are no adequate provisions to protect their rights. The working conditions, if controlled

by the sex workers, will give positive results in HIV prevention programs, as these programs can be effective only when the sex workers have the power to negotiate the use of condom with the clients.^{xvii}

5. SOLUTIONS!

Is criminalization of prostitution the way out?

Though criminalizing sex work has been an easier way out, the main issue which requires attention is to regulate it, so that there will be a track of the sex workers and crimes such as human trafficking which can be minimized. Criminalization of sex work, leads to denial of rights of the sex workers in the field of healthcare, education, police protection, housing. It therefore aggravates their economic instability. On various occasion it has been noticed that violence, abuse, harassment by police go unpunished.

The sex workers are adversely affected and their potential to make choices related to health is compromised by criminalization of sex work. Further, abuse and violation by police contributes to HIV vulnerability against the sex workers. They are often subject of abuse and sexual harassment as they are considered a stigma and thus deserving of such punishment. Criminalization of sex work legitimizes violence and therefore makes the sex workers more reluctant to report abuse and also makes the authorities hesitant to give them protection. Thus, in my opinion criminalizing sex work would worsen the situation more.

Is legalization of prostitution, the correct approach?

In India, prostitution itself is not illegal, but acts like soliciting and public prostitution is a crime. The ITPA Act^{xviii} makes it legal for a woman to voluntarily use her body for earning money but criminalizes the organized form of prostitution.

It is believed that, if sex work is legalized in India, the Government which failed to recognize the rights of the sex workers would be able to keep a track or monitor the trade and further rehabilitate the workers and will also help the government to exercise control over this profession through licensing. It would involve compulsory HIV testing, registering with the government etc. In India, licensing did not show favorable results in case of implementing legislations like labor laws. It has been seen that licensing leads to more of what we can call unlicensed sex workers which are more prone towards violation, abuse, brutality. Further, the mandatory HIV testing is not carried out and they are still considered a stigma and are subjected to shame and alienation.

With the aim of protecting the sex workers from violence and abuse, promote their rights and to remove the stigma attached to them, countries like Netherland and Germany legalized Sex work. However, legalization did not give positive results. For instance, in case of Germany, legalization resulted in more men buying sex on a everyday basis. It resulted in expansion of the sex industry. Thus, in my opinion, legalizing sex work will not help in protecting the rights of the sex workers.

Decriminalization, the antidote!

Decriminalization means that the State not only approves sex work, but also does not prosecute against it until and unless other violation of laws is involved. Thus, it will help in creating a safe and healthy environment. Decriminalizing sex work would help the sex workers to have access to their rights and justice and keep a track of trafficking. There should be laws to deal with the acts of violation, exploitation, trafficking rather than laws which criminalize sex workers and endangering their lives. Therefore, decriminalization of sex work means not violating any law by carrying out sex work, which would mean that their human rights will be protected. Countries like New Zealand has adopted decriminalization of sex work, and it has considerably shown an improvement in the conditions of working and an access to justice. Decriminalizing sex work alludes to the laws being repealed which prohibit the sale of sexual services. Further, one cannot say or rather there is no evidence to prove that decriminalization will lead to increasing in trafficking. Many organizations like Amnesty International, world health organization etc. have made efforts to fight against HIV and AIDS by requesting states to decriminalize sex work which would provide an opportunity to the sex workers to have an access to various health services. Awareness among the society, training to the police can contribute in reducing the stigma which the sex workers face and further help them to report any violence to the police authorities. The government should take measures to decriminalize sex work, with criminalizing the buyers of sex and providing the sex workers with welfare assistance and services.

6. COMPARATIVE STUDY

According to the Statistics of Prostitution in countries^{xix}, prostitution is lawful in 49 nations and unlawful in 39 and limited legality in 12 countries. In nations like Australia, there is limited legality for sex work where in some different nations prostitution has been decriminalized despite the fact that brothels are viewed as unlawful while in a few nations it is even lawful to operate brothels.

Prostitution has been legalized so that the sex workers can be protected from abuse and also that their rights can be recognized. Pimping and brothels are illegal in Hungary and France. Whereas in Sweden and Iceland sex work is legal however it is illegal to pay for sexual services.^{xx} Thus, it can be clearly seen from the above image that most of the countries have legalized prostitution taking into consideration the health and the rights of the persons involved in the sex work. Decriminalizing sex work is the answer, if the health of the sex worker is to be protected as well as their right which in the current time is being violated.

7. CURRENT STATUS OF SEX WORKERS IN INDIA

Even after various amendments, the sex workers are still subjected to high levels of abuse, violence and harassment. They are afraid to report crimes committed against them. What is more worsening is the post arrest procedure, which is a traumatizing experience. And further those sex

workers who are sent to rescue homes are subjected to violence, often raped, beaten and also denied medical care. Some steps which have been taken to improve the situation in the current years are:

- ***Ambiguous law***

The current law criminalizes everything related to sex. The sex workers are charged because of soliciting, obscenity and not because of sex work as it's not illegal. The law seems to have no practical applicability, as it does not allow the sex workers to provide for her children which drag them as well into this profession to earn a living. There have been instances when they have been harassed even when they are not soliciting and even when they go to buy groceries. The law is being misused in every possible manner. The 2006 amendment has incorporated some provisions which provide protection to the sex workers.

- ***Voter identity cards***

Steps has been taken to provide voter identity cards to the sex workers and some of them now do have identity cards however because of address proof apart from their status, they face problems in getting the identity cards.

- ***Banking facilities***

Banking facilities have also been extended to the sex workers in India. Usha, a cooperative bank owned and run by the sex workers of Sonaganchi in Kolkata It was established in the year 1995 with only a few members however now the they have more than 21,000 members. It provided facilities to the marginalized workers. The Bank provided to the sex workers both economic and social security.^{xxi}

- ***NGO's role***

No doubt, the NGO's played a vital role in promoting the rights of the sex workers and ensuring their safety. Many different tactics have been used to help the sex workers, the NGO drop in centre is one of the examples of such. It is used to educate the sex workers about STD's, contraceptives and hygiene and further gave counseling about their personal and professional life. They also form groups at district levels and village and appoint leaders, with the aim of identifying the sex workers and helping them address issues. Social marketing with the help of which condoms are made available has proved to be of great help in the protection of the sex workers.

8. RECOMMENDATIONS

In my opinion, among others, if the following recommendations are implemented by the Government, the rights of the sex workers in India can be protected and they can live a life with dignity like other citizens.

- The society all over the world assumes human trafficking and sex work to be the same. There is an urgent need to understand the distinction. Public education strategies can be one of the ways to understand this issue.
- Countries should decriminalize sex work and eliminate the laws which are against the sex workers.
- The sex worker should have access to health services without any sort of discrimination and stigma.
- Sex workers and the non- governmental organizations should work together to prevent violence against the sex workers.
- Steps should be taken to promote the protection of sex workers right, (right to equality before law, freedom from arbitrary detention and arrest etc.)
- Participation of sex workers in policy making which will allow them to identify their problems, analyze the causes and find solutions to it.
- The sex workers should be given the right to initiate suo moto reports relating to abuse and violation.
- They should have an access to free legal aid, lawyers specialized in dealing with matters relating to their rights.
- The privacy of the sex workers in cases of abuse, violence, sexual assault should be maintained.
- The law needs a thorough revision as it has been seen that the present law has failed to prevent trafficking of women and also has become a source of repression for sex workers.
- Education can be one useful tool to remove the stigma. Government should take steps to provide educational seminars to the clients which talks about sex work, the industry, and safe sex.

The sex workers are entitled to civil, economic, political, social rights. In addition to these they are also entitled to the right to livelihood, health, education, equality. These can be attained only if discrimination is eliminated from their lives. In order to achieve equality and freedom in India, we have to ensure that the sex workers have their equal rights just like any other citizen. It is rightly said that only the recognition of rights can stop the wrongs.

9. CONCLUSION

In my view, there is an urgent need to put an end to trafficking and the entry of minors into prostitution, irrespective of the view of legalization, decriminalization or prohibition. The sex workers should be involved in policy making and separate voluntary sex work from trafficking. Furthermore, the law in India should clearly define the difference between minors and adults as far as consent is concerned. Rather than strict law, self -regulation will be helpful as it would involve self-regulatory boards of sex workers in terms of consent.

Raid and rescue operations have to be carried out from the perspective of privacy, dignity and human rights. As it has been noticed that the rescued workers feel that they are confined. And further, the consent of the adult workers is to be ascertained, irrespective of whether they entered the profession voluntarily or not at the time of the operation. The adult worker can remain in the profession even though she might have been illegally trafficked.

The law must be such as the fundamental rights of the sex workers are protected. It includes the right to live with dignity, the right to reside in a place of their choice. They should be allowed to live like any other common citizen of the country. If the sex workers in India are to enjoy their rights, the mentality of the society about this work needs to change. They are capable of standing for themselves and demand their rights. They are not a threat to the society with respect either to the morals or HIV. They voluntarily indulge in sex work to earn their bread and butter. They require the society to fight against their own misconceptions and fears and to help the sex workers to recognize their human rights which they yearn for. Human rights, self-determination and dignity are not a luxury and therefore is not reserved for particular group of people, sex workers too have rights.

Bharati Dey, AINSW president and secretary of Burbar Mahila Samanwaya Samiti, Kolkata which works for sex workers in relation to the rights of sex work stated that, a state level regulatory board should be constituted to prevent human trafficking, and violence against the sex workers who are working voluntarily. The law makers should take into account that sex work cannot be abolished by coercive action. Challenges such as violence, poverty, gender discrimination are to be looked into in order to achieve this.^{xxii} Therefore, the law should take into consideration all these factors, and work towards protecting the rights of the sex workers.

References:

- ⁱ <https://www.thehindubusinessline.com/opinion/For-a-law-that-liberates-sex-workers/article20913588.ece> 24 march 2018.
- ⁱⁱ Rohini Sahni, V. Kalyan Shankar, Hemant Apte, 'Prostitution and Beyond: An Analysis of Sex Workers in India' SAGE Publications, 2008
- ⁱⁱⁱ The Immoral Trafficking (Prevention) Act 1956.
- ^{iv} Indian Penal Code, 1860 Bare Act.
- ^v Rights and Issues of People involved in Prostitution and Sex Work in India- by (SANGRAM) and VAMP <http://sexualrightsinitiative.com/wp-content/uploads/India-UPR-1.pdf>
- ^{vi} The Juvenile Justice (Care and Protection of Children) Act, 2015
- ^{vii} <http://www.thehindu.com/2002/05/10/stories/2002051006690400.htm> December 2017.
- ^{viii} Constitution of India 1950
- ^{ix} Budhadev Karmaskar v. State of West Bengal (2011) 11 SCC 538
- ^x Interim Orders, Sex Workers Rehabilitation Case, Supreme Court of India, 16 September 2011, Law Resource India. <http://indialawyers.wordpress.com/2011/09/16/sex-workers-rehabilitation-case>.
- ^{xi} Tara v. State, W.P. (CRL) 296/2012 before the High Court of Delhi
- ^{xii} <https://www.hindustantimes.com/india/adult-sex-worker-participating-with-consent-should-not-be-arrested-sc/story-pILs1o0QIcPRMqNjnz2PPM.html> February 2018
- ^{xiii} http://www.thehindu.com/opinion/columns/Harsh_Mander/emerging-from-the-shadows/article5664286.ece May 2018.
- ^{xiv} ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No 200), Geneva: ILO
- ^{xv} WHO, UNFPA, UNAIDS, Global Network of sex Work Projects, The World Bank. Implementing comprehensive HIV/STI programmes with sex workers: practical approaches from collaborative interventions. Geneva, World Health Organisation, 2013. P XX

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- ^{xvi} The United Nations Committee on the Elimination of Discrimination against Women (CEDAW)
- ^{xvii} Legislating an Epidemic: HIV/AIDS in India the lawyers collective Universal Law Publishing Co pvt. Limited ,2003,122.
- ^{xviii} *ibid.*
- ^{xix} <http://prostitution.procon.org/view.resource.php?resourceID=000772> December 2017.
- ^{xx} http://timesofindia.indiatimes.com/india/2006-law-prevents-sex_workersharassment/articleshow/45017819.cms May 2018.
- ^{xxi} <http://www.thehindu.com/todays-paper/tp-national/sex-workers-participate-in-kolkata-fair/article7695911.ece> February 2018.
- ^{xxii} http://timesofindia.indiatimes.com/city/delhi/Sex-workers-meet-to-demand_rights/articleshow/21966951.cms May 2018.
