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Prostitution in India: Sociological Aspect and Judicial Response

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ABSTRACT

“To no one will we sell, to no one deny or delay right or justice”

- Clause 40, Magna Carta

This clause of the Great Charter, Magna Carta laid the foundation and spirit of individual liberty enshrined in the Constitution of India. The rights that Constitution grants in favor of sex workers essentially include, but are not restricted to, right to live with dignity, right to carry own profession of own choice, right to free legal aid, right against exploitation, right to healthcare, right to vote, right to shelter, right to carry on any trade business or profession, amongst others. Beyond articulating these rights as indivisible, Welfare State concept obligates the State machinery to take all appropriate measures to eliminate discrimination against women. The historical norms for the prostitution are seen as the root of such profession. Here, the research delves upon the historical and sociological approach towards women who choose the prostitution as profession.

The present paper discusses the vicious circle of rights, laws and legal status of women as sex workers from pre-independence era to present times. Further, it throws light upon the constitutional and legal provisions that safeguard the rights of the women who choose prostitution as their profession. Also, the legal implication in support of judicial interpretation with the relevant case laws succinctly mention the real state of a women known for sex workers fighting for their rights and social status even in the contemporary era.

Keywords: *Prostitution in India, Sex workers, Sociological Perspective, Rights of Sex Workers*

I. INTRODUCTION

Sex workers are adults who receive money or goods in exchange for sexual services, either regularly or occasionally.³ Prostitution is the crudest manifestation of societies where women have been compelled to sell their bodies as means of survival. Such women are expected to

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³ Sex Workers in Asia, http://www.equalpartners.info/Chapter5/ch5_6Glossary.html, last visited 14 July'2021 at 11PM

satisfy the irrepressible vice of malesexuality. Prostitution has been a part of our society since time immemorial. India has witnessed prostitution as an evil action and social ostracism. This is a sexual intercourse which is unacceptable to the society as it seems against the social norms. Today we see Indian society has changed their outlook towards the social issues and uplifted with the modern view point of being “equals” where the focus is on Gender neutrality. As the society with the gender stratification or differentiation restrict the boundaries for working women. Also, we see women are still not allowed to choose for themselves. They find the restricted backgrounds to go as their career. But in the country like India we see the people are of different economic sections, where women also earn for the family and sometime work independently. Here researchers highlight the controversial sexual behavior which is still in the issue in conservative societies and considered as society’s moral decay. Society’s conduct shows the negative view towards the sex workers. Here the questions by researchers are “why women cannot choose her profession of her will? What suppose her to do such jobs if the society says it immoral or mention it as social ostracism? Why this profession is not given dignity equivalent to the other professions? The reason behind the issue is mainly poverty and illiteracy which make the women to choose the job as a sex worker. In an opinion with the arguments and the mentioned research shows that the Indian constitution itself highlight the Fundamental Right under Article- 19(1)(g) which provides the right to practice any profession. This give rights to an individual to choose their profession. Further, the Immoral Traffic in Women and Children (Prevention) Act is the main statute which deals with the issues direct and incidental to prostitution. This act prohibits or ban prostitution and punishes the soliciting, brothel keeping and renting premises for such illegal activities.

II. SOCIOLOGICAL APPROACH

Literature and other historical texts bear a testament to the fact that since time immemorial prostitution is prevalent in India. During the ancient period, sex workers were classified into three categories-Kumbhadasis, Rupajivas, and Ganikas. History speaks with the ideologies of various sociologists in the 19th century where they talked about the different roles of women and the exploitation faced by them in their life. The root cause is the patriarchal notion in the society. The oldest practice known for the sex services by women and these women were tagged as “Devdasi” (handmaiden of God) in the historical period. The sociologists define the occupation as a sex worker with three interlinked theories. The first theory namely, functionalist theory suggests the societal view where society’s functioning where certain people in the society needs an alternate for completing their sexual desires. This gives employment to the women chosen by men for sex and pays them for the same. This kind of

affairs helped the marriages with the less divorce rate. The second theory which is the conflict theory reflects the idea of income stability and this conflict of income is between men and women holding the individuality in their own terms. Money has a dominant hold to move an individual's life. Living in a patriarchal society where women seen as a house worker and lack of access to the education compelled them to choose such jobs if there is no source of income. As discussed about the historical culture where women titled as devdasi in their profession choose to take money for their services now. During the nineteenth century, women turned up with the equal income as men and started deciding their source of income. Whereas attaching the feminist version, prostitution attach with the patriarchal culture which shows that men play a dominant role and exploit women with the forceful sexual intercourse which is seen as an unsafe sex among sex workers. Thirdly, the theory symbolic interaction gives the larger view that this is now become a part of the system where now there is a market for interaction to the sex workers. This market view shows the real buying and selling of sex in exchange of money and the dealing areas known for brothels, streets etc. However this approach gives the negative impact of prostitution in the society where they see sex workers as other women abandoning the married life. Sociologists in their study mainly emphasized on the view point where the word prostitution is attached to women. Prostitution can be done by either of the gender including transgender yet the society targets only women for sex working jobs. Therefore, the history mention the Indian culture where women seen as a commodity and can be used and influenced for male's sexual gratification.

III. ISSUES FACED BY SEX WORKERS

Sex workers constitute to be a vulnerable section and this group faces the innumerable issues and discrimination which is seen as the violation of human rights of an individual. The issues faced by them range from health, poverty, education, to psychological side-effects. Lack of basic healthcare facilities is the first and foremost issue faced by sex workers. This occupation has a greater risk of sexually transmitted infections (STIs) and HIV. Some of the sex workers are also addicted to drugs. This addiction and need for drugs make them to do unsafe sex. This occupation demands the sex with different men and in a very frequent manner which affects the women health. Also, in some cases the women were force to do the intercourse without the protection. These become the violent sex practices. According to the study, the violent sexpractices drag them into the serious health conditions which end up with infertility and disease like cervix cancer. Also, infections like herpes, syphilis, gonorrhea or chlamydia

increases the risk of HIV.⁴ The unsafe sex also bring the unwanted pregnancy to the women selling sex which may leads to abortion which is also perilous for her health. These sex workers do not have sound knowledge related to the STIs and are not well versed with the treatment to prevent from it. Also, the society where we live have already excluded them from the normal living is also the reason that health centers refuse to provide them proper treatment. Second issue that assumes importance is the income instability in this profession. A low income or no income affects an individual lifestyle and choosing the sex worker job by women is the reason for the same. Low income backgrounds with no education compel them to sell their body on streets for their survival. Looking to the condition of women shows lack of income stability and also there are women who are the only bread earners for the family which include thousands of immigrants and widows have no choice other than working as sex workers and title themselves as sex workers. Another issue faced by them is non-access to educational facilities. Education plays a prominent role in an individual's life. Illiteracy in India drags the women towards the vulnerable state. The position of vulnerability shifts to the next generation which creates the business perpetual in nature. The involvement of children in such jobs is seen at an early age. This deprives them to go to schools and work in such areas with their parents. Mainly the girls are affected with this and have to spoil their lives at a premature age. Also pointing towards our society's mindset where children up bring in such backgrounds neglected and face discrimination in every sphere. This makes their life difficult and to face all this they choose to live in their areas and continue the jobs as sex workers. The most dreadful issue faced by sex workers is violence at the hands of customers, pimps and brothel owners. Sex workers are unrecognized victims of sexual harassment. The experience of women in this field face a lot of distress working in strip clubs, massage centers or involves in street prostitution are disastrous where they face verbal and sexual abuse. Their customers grab them in an inappropriate manner, also beaten up and even humiliate them by ejaculating on their face and give them a disgust feeling. This shows that a paid sex does not need consent from women and they are force to do sex. This also shows that profession does not allow them to choose for their body as they sell their body for money and end up with the ill treatment from their customers. Psychological side-effects of this profession are enormous. Sex working jobs are damaging and this damage is carried forward even to next generations. According to the study by the American Psychiatric Association 1994, explains the Post Traumatic Stress Disorder (PTSD), which commonly found in the sex workers.⁵ This may also give rise to anxiety, bipolar,

⁴ Health problems of sex workers, https://en.hesperian.org/hhg/Where_Women_Have_No_Doctor:Health_Problems_of_Sex_Workers, last visited on 6th May, 2021 at 12:51a.m.

⁵ Prostitution Is Sexual Violence, <https://www.psychiatrytimes.com/view/prostitution-sexual-violence>, last

depressive disorder. This highlights the harmful attitude towards the sex workers as not only they are giving their body for money but also disturb their psychological state which destroys them entirely.

IV. JUDICIAL RESPONSE

There has been a paradigm shift in judicial response towards prostitution and the approach has transformed from punitive to rehabilitative. It is no more *res-integra* that human trafficking is expressly prohibited under Article 23 of the Constitution and hence, it is the Fundamental Right of every citizen not to be trafficked.⁶ In cases of child trafficking The Child Welfare Committees constituted under The Juvenile Justice (Care and Protection of Children) Act, 2015 are entrusted with the responsibility of immediate care, protection and rehabilitation of children rescued from trafficking circuits. In *Vishal Jeet v. Union of India, (1990) 3 SCC 318*⁷ the Supreme Court adopted a rehabilitative approach for child victims of trafficking and suggested implementation of social welfare programmes for their care, protection and rehabilitation. The Court reiterated that the child victims of trafficking should be dealt with bearing in mind the possibility of their reformation and rehabilitation. The Hon'ble Apex Court in *Gaurav Jain v Union of India, (1997) 8 SCC 114*⁸ upheld the fundamental rights of the children of sex workers and stated, "*The children of the sex workers have the right to equality of opportunity, dignity, care, protection and rehabilitation without pre-stigma attached on them; and formulated a welfare scheme, Children of Sex workers & Children Associating with Sex workers and Prostitution Scheme for rehabilitation of children of sex workers.*"

Courts have adopted a right-based approach to uphold the dignity of the sex workers and from time to time issued necessary directions to States to meet its obligation to respect and protect the rights of sex workers. In a landmark case, *Budhadev Karmaskar v. State of West Bengal, (2011) 10 SCC 283*⁹, Supreme Court directed Central and the State Governments to formulate and execute welfare schemes for sex workers through Social Welfare Boards in all cities. While passing necessary directions, the Bench reiterated, "*The sex workers also have a right to live with dignity under Article 21 of the Constitution of India.*" During outbreak of COVID-19 in 2020, Apex Court being the *guardian of fundamental rights* directed the State Governments and Union Territories to provide ration to sex workers without insisting on proof of identity. State/District Legal Services Authorities were directed to take active steps in assisting the

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⁶GeetaKanchaTamang v. State of Maharashtra.

⁷Vishal Jeet v. Union of India, (1990) 3 SCC 318.

⁸Gaurav Jain v. Union of India, (1997) 8 SCC 114.

⁹Budhadev Karmaskar v. State of West Bengal, (2011) 10 SCC 283.

ration distribution and vaccine registration of sex workers without insisting identity proofs. In a significant ruling passed by the Supreme Court in 2018, it was unequivocally ruled that women in sex work have a right to refuse to submit herself to sexual intercourse to anyone.”¹⁰

V. WELFARE SCHEMES

In a welfare federation, the responsibility of State doesn't end with the punishing the perpetrators and extends to ensure that victims of human trafficking gets required compensation, support and rehabilitation. The Ministry of Women and Child Development is the nodal ministry, and Department of Women and Child Development of each State is the state ministry, dealing with the subject of prevention of trafficking in women and children. A comprehensive scheme, titled, “Ujjwala” was launched by Central Government in 2007 for preventing, protecting, reintegration as well as rehabilitating the women and child victims of human trafficking. The Women Ministry for implementing the scheme has adopted a 360-degree approach by collaborating with the State Governments, Women Commissions, Child Protection Commissions and NGOs for running various projects and rehabilitation homes.

In 2015, National Legal Services Authority enacted Victims of Trafficking and Commercial Sexual Exploitation Scheme for victims of trafficking and sexual exploitation, including children, women and transgender. The Scheme aimed at providing access to justice by providing legal services to such victims at all stages, prevention, rescue and rehabilitation through intervention of State and District Legal Services Authority. As per NALSA Report, *“Legal Services Authorities apart from providing assistance during the trial stages can also act as social auditors of existing facilities available for rehabilitation of rescued victims of sexual exploitation and trafficking.”*

The Constitutional Courts have time and again has stressed upon implementing a victim-centric approach in criminal prosecutions. With the insertion of Section-357A to The Criminal Procedure Code, 1973, an obligation was cast upon State Governments to draw up Victim Compensation Schemes. Accordingly, States in the compliance of this statutory obligation promulgated Victim Compensation Scheme for their respective states, with the State/District Legal Services Authority as the Nodal Agency. Every Victim Compensation Scheme has a Schedule which contains the particulars about quantum of minimum and maximum compensation for various crimes. The scheme entails provisions for awarding interim as well as final compensation to victims of human trafficking for loss or injury caused due to such trafficking. For seeking compensation under the said scheme, recommendation is sent by the

¹⁰State (NCT of Delhi) v. PankajChaudhary,2018 SCC OnLine SC 2256.

Court or SHO to the District Legal Services Authority or an application may be moved by the victim or her dependents/heirs before the District Legal Services Authority. The District Legal Services Authority after examining and verifying the claims made in the recommendation or application, may, disburse the compensation to the victim. Even if the accused is unidentified, the compensation can be granted, it is sufficiently established that the crime was committed and resultantly, the victim suffered loss.

VI. RECOMMENDATIONS

The Nodal Ministry should build strong linkages and partnerships with various stakeholders including civil society, NGOs working for the rights of sex workers, international organizations to build an integrated system for combating human trafficking. The Ministry should make public the best practices followed by the States to encourage other states to follow such practices. To illustrate the example of Karnataka, with the collaborative efforts of stakeholders, Devdasi women are trained in various skills and income assistance in the form of subsidy, working capital, work-shed etc. is given free of costs for rehabilitating them. In Andhra Pradesh, housing and medical facilities are being extended to Devadasi women and 60 above women are given pension. The State Legal Services Authority through District Legal Services Authority can identify the sex workers in their respective districts and ensure they are issued identity documents, ration cards and made aware of their rights. Legal-aid helpdesks should be set-up on regular basis to aid and advise them in matters of gender-based crimes, cruelty and trafficking. Through posters, pamphlets and legal awareness programmes, sex workers should be apprised about their Fundamental Rights and the nearest District Legal Services Authority. Furthermore, sensitization workshops should be regularly organized for police personnel, public prosecutors and the judicial officers. In cases of human trafficking rackets, the Police shall extend required witness protection to victims testifying against traffickers and vulnerable witnesses. To ensure that the victims of human trafficking have access to socio-economic justice, collaborative and cooperative efforts should be done by the law makers and law enforcement officers.

VII. CONCLUSION

In conclusion to the above analysis, In India prostitution is still considered a taboo and is not seen as a legit profession. The paper discusses the issues faced by sex workers are incorrigible in India. The Indian culture manifests the practice of prostitution as an evil eye on the marriages which is claimed as “threat to the institution of marriage”.

However the one side of a coin mention the practice of prostitution is a decay for the society

as men are attracted to the paid sex activities which destroy their marriage whereas on the other side shows the humiliation, exploitation and disrespect to the women working for their survival. As indicated by the historical view various sociologists opined the vulnerable state of women as sex workers. Mainly in India, women seen as objects and various cases has also been reported like missing, sexually tortured, rape etc which shows that a profession may destroy the life of a women even if it is for the survival. Therefore, the profession has been legalized with the Immoral trafficking act which safeguard the rights of sex workers.

The legal conundrum in nutshell pertaining to prostitution is whether to advance the woman's right to carry out profession of her own choice or to restrict it on moral grounds. Amongst others, there are two kinds of sex workers, first, who have chosen this profession willingly and second, who have been forced or trafficked into prostitution. The former requires regulation and the latter requires immediate protection and rehabilitation, for they are the victims of crime. The main submission of the authors is that there cannot be a straight jacket formula for protecting the consenting sex workers and victims of trafficking. For the sake of brevity, human trafficking being a criminal offence should not be conflated with consenting sex work.
