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Rights of Sex Workers in India: A Broader Picture

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ABSTRACT

The aim of this article is to kernel the convoluted structure of the society which alienates the sex workers of India of their basic amenities, rights and privileges to which they ought to be entitled as per the principles of natural justice and humanity. The Indian Constitution in itself entitles individuals with dignity, the right to practice their profession and the right to equality. The stigmatization of sex work as a profession in India has made it repugnant for the communities indulged in such practices to prosper in society. The condescending nature of the approach obliterates their integration into a society which thereby deprives them of their basic rights. When society fails to develop, we expect the law to provide a sentinel to shield the marginalised from the atrocities. The beleaguered term of the realm where we have established a post-modern society is that at times, we fail to get backing from the law. It is the phase where we find ourselves to be hapless. Such is the case with sex workers working in India. Expounding to the latest developments, the post-modern democracy of India direly requires legitimacy of sex work as a profession and the sex workers working in India ought to be guaranteed dignity.

I. INTRODUCTION

Human Rights, as neo and sophisticated as this term might seem in the neo-liberal society we live in today, dates back to centuries ago and have been an inalienable part of human existence. As a concept, human rights are categorically required to be differentiated from mere rights. While the latter talks about the association of certain privileges with ambiguity and restrict them to the so-called “privileged class”, the former unequivocally connotes rights that a human as their mere existence deserves. Human rights are, therefore, inalienable, universal, and fundamental for the virtue of human existence which empowers an individual with liberty, equality, justice, welfare, and self-determination, regardless of their wealth, status, gender, race, or caste, creed, etc.

As the human rights movement gathered momentum, people’s conscience and myriad societal needs also led to the emanation of protection of rights of certain sections of communities who

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were supposedly marginalised like women, children in war crimes, indigenous communities etc. The 2007 Declaration on the Rights of Indigenous People recognises indigenous people's right to self-determination and value of their culture, and ecology and preserves their very identity and helps them live a life full of dignity². The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 to prohibit discrimination against women and help them get an adequate representation in every realm of development³.

This evinces that Human Rights being a key safeguard of an individual's existence, act as a **sentinel on qui vie** which emerges, moulds, transforms and expands to protect and preserve an individual's dignity, welfare and growth. We, as global citizens must develop a conscience to develop our mindsets and let the ever-growing nature of rights that an individual is entitled to, be accommodated in our societies and that our practices do not hamper or inhibit the rights of any section of the community, else this evolution would lead to a pyrrhic victory.

The paramount question which emerges here is, have we been able to adhere to the norms and principles of natural justice? Has the candour in our lifestyle made it accommodative to the communities that were hitherto and today considered marginalised? Have these marginalised communities been entitled to "modern versions" of equality, dignity and justice? Have we even provided them with an apposite opportunity to help them reach a pedestal to catapult their growth and assimilation? It takes a heavy heart to deny these aforementioned claims. This denial is concerning the myriad instances of sheer discrimination, and injustices prevailing around the world today which makes one believe inevitably that so much is direly required to be done to emanate the principles of natural justice and human rights.

This article thereto focuses on the rights of sex workers in the Indian context. It focuses on the monumental and grave drawbacks with the prevailing society in terms of the legal principles it adheres to, principles of justice it abides by, and brutality it entails, which persistently have led to the sheer denial of rights of the sex workers, which they inherently ought legitimately to claim.

II. DIRE NEED

There has been enough stigmatisation and dramatisation of women in Indian society since time immemorial which is, poignantly, still prevalent today. The prejudicial uptake of them breaking

² United Nations (General Assembly). Declaration on the Rights of Indigenous People. 2007.

³ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

the shackles of society, and trying to assimilate into the mainstream realm has always had a contradictory impact on family mobilization. If a woman does “X”, it hinders family mobility. If she does “Y”, it hampers the family’s reputation and if she does “Z”, it is told and taught rigorously that the family would not even be able to show their pride to society. The omnibus of stereotypes and the plethora of dogmas attached to their growth is not commensurate to “we let them grow”, but tantamount to “we barely make them survive”. Enough was not said and done when this prejudice, ridicule, and reprimand was obnoxiously brought to the professional realm of women as well. The lives of the sex workers, who practice their profession, ought to be let to live a life of dignity, have been condescended to such a grave extent that they time and again, have been put into a dingy cell of mere sustenance, from where there is no way for going back. The Supreme Court of India held in *Budhadev Karmaskar versus State of West Bengal*⁴:

Sex workers face great difficulty in getting ration cards, voter’s identity cards or opening bank accounts-Sex among human beings is different from sex among animals. Sex in humans has a cultural aspect to it also and is not just a physical act. A sex worker who has to surrender her body to a man for money is not leading a life of dignity. Ordinarily, no woman will willingly surrender her body to a man because she loves and respects him, but just for her sheer survival. As Nancy says in Charles Dicken’s novel ‘Oliver Twist, “you adapt or you die”⁵’.

If the above-mentioned argument is true, then what is the dire need for a woman to indulge in sex work? “A woman becomes a sex worker not because she enjoys it but due to abject poverty. One estimate suggests that there are three million sex workers in India, many even from Nepal, Bangladesh, and even the former Soviet Union. This is due to massive poverty in the country, and abroad⁶”. Many of the women even leave their meagre income jobs to indulge in sex work because it promises them a lump sum of money for their livelihoods and sustenance. The COVID pandemic heralded a paradigm shift in the employment sector. Millions of people become jobless. In such a scenario, the hapless, unemployed women had nowhere to go but to indulge in sex work⁷. The latest Periodic Labour Force Survey evinces that the overall

⁴ *Budhadev Karmaskar v. State of W.B.*, MANU SC 0881 2011.

⁵ *Id.*

⁶ *Budhadev Karmaskar v. State of W.B.*, *supra* note 3.

⁷ Maya Oppenheim, ‘Growing numbers of women turning to sex work as Covid crisis pushes them into ‘desperate poverty’’, INDEPENDENT (Jan. 8, 2021, 19:39), <https://www.independent.co.uk/news/uk/home-news/sex-work-coronavirus-poverty-b1769426.html>.

unemployment rate was at 4.2% in 2020-21 as compared to 4.9% in 2019-20⁸. However, there is nothing to be complacent about the debilitation of the unemployment rate. The survey also encloses that the debilitation has also been in tandem with the transfer of employment into lower productive and unpaid jobs away from salaried employment.⁹ The Anganwadi workers have not been paid their salaries for years by the government¹⁰. This is a poignant reality of the job sector of India. Under such a scenario, it has been found that women, even though they are employed, the fact that they are not paid off, or paid minimal wages, which barely acts as a source of their meagre survival, captivates them to resort to working as a sex worker. Thus, the profession which they choose is not about livelihood, it is about their sustenance. There is a humungous divide between the two. While the former fosters amenity which encapsulates a feeling of dignity, the latter kernels around bare survival, a haven from exhaustion, ridicule and dinginess.

III. LACUNAE IN THE LAW

The term sex workers or sex work is nowhere defined in Indian law. The law which governs sex work (however, not limited to it) is the Immoral Trafficking (Prevention) Act (hereinafter 'ITPA Act')¹¹ of 1956. When the society does not evolve gradually by impeding to be the assimilation of their mindsets into a realm of development, structured and intellectual growth and liberty, we expect the law to modify, rectify and imbibe that into the mainstream society. This is the reason why we witnessed years and years of struggle from Shayara Bano to let the judiciary finally abandon the triple talaq law. Likewise, we had the tenacious vigour of the homosexual community who fought tooth and nail for the tardy decriminalisation of homosexuality by having the abrogation of Article 375 of the Constitution of India¹². The same holds when we encountered the women personnel fighting for permanent positions in the army, navy and air force by the Supreme Court.

Unfortunately, for sex workers, much is direly required to be done to bring about amendments. The Immoral Trafficking Prevention Act, 1956 (hereinafter 'ITPA Act'), defines prostitution

⁸ PIB Delhi, 'Periodic Labour Force Survey (PLFS) – Quarterly Bulletin [January-March 2022]', MINISTRY OF STATISTICS AND PROGRAM IMPLEMENTATION (June 16, 2022, 15:57), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1834530>.

⁹ *Id.*

¹⁰ Shreya Basak, 'No Pay And False Promises: Watch The Plight Of Delhi's Anganwadi Workers', OUTLOOK (Feb. 11, 2022, 20:51), <https://www.outlookindia.com/national/low-wages-no-pay-and-false-promises-the-plight-of-delhi-s-anganwadi-workers-news-122230>; Jagriti Chandra, 'Anganwadi workers continue agitation in Delhi', THE HINDU (Feb. 9, 2022, 13:08), <https://www.thehindu.com/news/cities/Delhi/anganwadi-workers-continue-agitation-in-delhi/article38399073.ece>.

¹¹ Immoral Trafficking (Prevention) Act, 1956, No. 104, Acts of Parliament, 1958 (India).

¹² INDIA CONST. art. 375.

in its Section 2(f) as “sexual exploitation or abuse of persons for commercial purpose¹³”. Similarly, Section 2(a) of the aforementioned act defines a brothel as “any house, room or place which is used for purposes for a gain of another person or the mutual gain of two or more prostitutes¹⁴”. Nowhere does this law legitimises a sex worker consenting to indulge in sexual activities for monetary requirements. At this stage, it becomes pertinent to note that Section 3 of the ITPA Act¹⁵ blatantly criminalises a brothel without even taking into perusal whether the sex happened with the consent of the woman or not. The law herein presumes that any sex involving the exchange of money is illegitimate as it falls under the purview of a brothel as per Section 3¹⁶.

Many times it is believed that law cannot bring drastic changes which is to say that even if the provision under section 3 would have been taking into consideration consent-related sex work, it would not have made a change as changes depend upon societal behaviour. In actuality, the law is backing the so-called policemen to egregiously, obnoxiously raid the brothels, put them behind bars and eviscerate the children of the sex workers from them, either by putting them (the ones who are adults) behind bars or by providing them to the Child Working Committee (CWC) for rehabilitation, which, in reality, is much worse than letting them grow with their mother in brothels. This happens because, by Section 6(2) of the ITPA Act¹⁷, it is presumed that any minor found within the premises of a brothel is detained. There are even interviews and claims made by sex workers about how the policemen treat them by demanding money from them. Many times, policemen have sex with them without even wearing contraceptives. This is a sheer violation of humanity which the law blatantly *prima facie* supports.

At this stage, it becomes pivotal to take into consideration the recent Supreme Court Order, where a three-judge bench of the Supreme Court recognised sex work as a profession¹⁸. It is crystal evinces that sex work per se is a legitimate profession and sex workers (including men, women and even transgender persons) are allowed to carry out sex for monetary benefits. The court held that every individual is entitled to a life with dignity concomitantly with them exercising their right to the profession. Sex workers ought to be entitled to equal protection of the law. The rule of law which binds everyone on this land unanimously would be repugnant if it were to discriminate based on the profession people carry. The order was passed by the Supreme Court in light of a writ petition filed by the sex workers for relief measures from

¹³ Immoral Trafficking (Prevention) Act, 1956, §2(f), No. 104, Acts of Parliament, 1958 (India).

¹⁴ Immoral Trafficking (Prevention) Act, 1956, §2(a), No. 104, Acts of Parliament, 1958 (India).

¹⁵ Immoral Trafficking (Prevention) Act, 1956, §3, No. 104, Acts of Parliament, 1958 (India).

¹⁶ *Id.*

¹⁷ Immoral Trafficking (Prevention) Act, 1956, §6(2), No. 104, Acts of Parliament, 1958 (India).

¹⁸ *Budhadev Karmaskar v. State of W.B.*, 2022 SCC OnLine SC 704.

central and state governments as they faced myriad hardships during the COVID-19 pandemic¹⁹. The order also asks the police to act by the law when a sex worker lodges an FIR since in most cases police do not even accede to registering their complaint.

In the landmark case of *Budhadev Karmaskar v State of West Bengal*²⁰: The Supreme Court held that sex workers are also human beings and hence they are entitled to a life of dignity. “Article 6 of Convention of Elimination of All Forms of Discrimination Against Women (hereinafter ‘CEDAW’); General Recommendation 19 calls on States to recognise that their (sex worker's) unlawful status makes sex workers vulnerable to violence and hence need equal protection of laws against rape and other forms of violence²¹”. What becomes paramount to consider over here is that India has not only signed the CEDAW but also ratified it. It thereby makes us legally bound to recognize sex work as a legitimate profession. “In 2013, the Justice Verma Commission recommendations to the Criminal Law Amendments, inserted the Amended Section 370 to define the offence of Trafficking. In a clarification issued by the Verma Commission, it stated that the Amended Section 370 was to protect women and children from being trafficked. The section did not include within its ambit, sex workers who practice of their own volition. It further clarified that the amended section should not be interpreted to permit law-enforcement agencies to harass sex workers who undertake activities of their own free will and their clients²²”.

The aforementioned paragraph evinces that not the UN Bodies, International Organizations concomitant with the National recommendations Supreme Court orders and judgements seek for entitling the sex workers with dignity, a dignity that acts as a spirit and be like a wind beneath their wings which helps them to fly higher and higher and protect the society and law from sabotaging them down. The augmentation of the same might plausibly be by legally recognizing sex work as a legitimate profession or by amending the provisions of the ITPA Act to alienate the consensual sex for money from the criminalised version of brothels mentioned in the Act.

¹⁹ *Id.*

²⁰ *Budhadev Karmaskar v. State of W.B.*, MANU SC 0881 2011.

²¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 19, Article 6. Adopted at the Eleventh Session, 1992, available at: <http://www.refworld.org/docid/453882a422.html> [accessed 14 June 2022].

²¹ Clarification from Justice Verma Committee on Section 370, IPC, February 2013, India. <http://sangram.org/resources/Amending-section370-IPC-verma-commission-clarifies-intention-behind-legislation.pdf> [Accessed on 10 June 2022].

²² Clarification from Justice Verma Committee on Section 370, IPC, February 2013, India. <http://sangram.org/resources/Amending-section370-IPC-verma-commission-clarifies-intention-behind-legislation.pdf> [Accessed on 10 June 2022].

IV. CONCLUSION

Conclusively, what is the broader picture over here? The broader picture portrays a quant societal transgression, where women, men, and transgender communities, regardless of their profession get to live a dignified life. The broader picture is that sex workers get legitimacy for their existence. The wider ambit of this realm is that sex work is recognized as a legitimate profession. The need of the hour is to acknowledge Article 19(1)(g) of the Indian Constitution²³ which evinces that every individual has the liberty to choose any profession or carry out any occupation of their choice. Article 19(1)(g)²⁴ is restricted by Article 19(2) of the Constitution of India²⁵. It states that the limitation to Article 19 of the Constitution is that it goes against public order. However, an individual consensually agreeing to earn a livelihood by surrendering their body to someone else, cannot and ought not to go against public order. It is a part of their right to life. This very right to life enshrined in the Constitution via Article 21²⁶, ought not to make the stigmatization, and prejudice against sex workers legitimate. The egregious deeds of police officers, the arbitrary raids, the illegitimate confiscation of their properties, and the obnoxious behaviour ought to be undone which can be done by making sex work a legitimate profession.

India has signed the International Covenant of Women's Rights. It is our international obligation to shield women from the atrocities committed against them. The unreported molestations, sexual harassment cases of women, and transgender communities in brothels are also a cause of concern. The dire need over here is to recognize not only sex work as a legitimate profession but also entitle them with dignity, valour and respect.

Lastly, it becomes pertinent to address that between stimulus and response there is always a gap. In our body as well, when we touch a hot object and react to the stimulus by removing our hand, the gap may be just for a microsecond and we may not even realise it, but there is always a space. In the body, it is for the signal to reach our brain. Likewise, in real life, the gap between stimulus and response is to grow. The fructification of the response can only be tantamount to fruitful results when the gap between the stimulus and response leads to growth. Otherwise, it is a stalemate which hinders and impedes the overall growth of society. Therefore, the need of the hour is to react, to do some action, to bring the change the world awaits to see.

²³ INDIA CONST. art. 19(g).

²⁴ *Id.*

²⁵ INDIA CONST. art. 19(2).

²⁶ INDIA CONST. art. 21.