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Sex-Workers' in India: Examining Their Situation in the Light of Covid-19 Pandemic

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ABSTRACT

A plethora of studies examining the plight of sex-workers have been undertaken in the past. Most of the academic discourses on the subject of sex-work have been from different quarters advocating for legalization of sex-work, catering to the rights of the children of sex-workers, their health concerns and standard of living. The present research explores the plight of the sex-workers in the post COVID-19 pandemic.

COVID-19 pandemic generated, broadly two categories of discourses within the discipline of humanities and social sciences, one on examining the vulnerabilities of certain sections of population, like the migrant workers, small and mid-level businesspersons, students, medical personnel et.al. and two on emergence of newer kinds of phenomenon like increase in cases of domestic violence, rising mental health concerns, debilitating medical infrastructure, challenges in the field of education et.al. However, not much is known about the plight of sex-workers in India during and in the aftermath of the pandemic. This paper examines their concerns not just in the light of the COVID induced lockdown which had abruptly halted all source of livelihood for them, but also attempts towards developing strategies to address the peculiar nature of challenges that are bound to surround sex-work in the aftermath of the Pandemic.

Keywords: Sex-Workers, Vulnerabilities, COVID-19 Pandemic, Prostitutes, Rehabilitation

I. INTRODUCTION

By the middle of March 2020, the COVID-19 pandemic had engulfed the humanity. The nations across the world could just endeavor to protect its people and hence, the world was shut down. All the countries across the globe went in for a complete lockdown accompanied by stringent restrictions and bringing the human life to a screechy halt. A health scare, as it looked in the beginning, impacting just the rich and wealthy, or those who have had an international travel history in the days leading to the pandemic, felt like some covert political move of an international scale. However, a week into the imposition of the lockdown, the ripple effects of COVID-19 became apparent and it became clear that this was nothing short of a humanitarian crisis that had swept all strata of the human society and like all humanitarian crisis, which

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affects different people differently, it brought into light structural inequalities, aggravating gender inequality and disproportionate impacts on the marginalized and dispossessed.

The deplorable conditions in which the sex-workers live in India is no longer a contested discourse, in this paper, the author makes an attempt to look into the socio-legal framework within which the sex-workers reside and operate and examine the particular vulnerabilities that they are witnessing in the light of COVID-19 pandemic.

The paper therefore is divided into three parts: the *first part* explores the existing socio-legal framework on sex-work in India and the judicial articulation of the rights of sex workers; the *second part* attempts to look into the impact of COVID-19 in the lives of sex-workers; in the *third part* the author tries to bring out the findings of the study and also propose a cohesive policy that the state may adhere to in the future for upholding and safeguarding the dignity of sex-workers in accordance with the goals of human rights and constitutional morality.

II. SEX-WORK IN INDIA: EXAMINING THE SOCIO-LEGAL LANDSCAPE

The term sex-work is often used interchangeably with Prostitution. Literary, historical and anecdotal evidence tells that prostitution is the oldest profession in the world². Prostitution is known to be the practice of engaging in relatively indiscriminate sexual activity, in general with someone who is not a spouse or a friend, in exchange for immediate payment in money or other valuables. Prostitutes may be female or male or transgender, and prostitution may entail heterosexual or homosexual activity, but historically most prostitutes have been women and most clients' men. Perceptions of prostitution are based on culturally determined values that differ between societies. In some societies, prostitutes have been viewed as members of a recognized profession; in others they have been shunned, reviled, and punished with stoning, imprisonment, and death³.

In this paper, the author chose to refer to sex-work to emphasize on the labour and livelihood aspects of the work as well as for advocating towards dignity of labour to anyone who offers sexual services. The term sex-work also frees the connotation from a specific gender identity. Additionally, sex-work, although having a uniform connotation of offering sex for money, but it does have diverse varieties as well from involving direct physical contact to luring customers for the act; from the sex workers belonging to high economic dependencies to persons choosing

² Wesley J. Schroeder, A Few Thoughts on Prostitution: "The World's Oldest Profession", <https://san-jose-criminal-defense-law.com/thoughts-prostitution-worlds-oldest-profession/> accessed on June 2, 2022, 4:00 PM

³ Brienna N. Meffert, Danielle A. Sawicki, *et. al.* Culturally Competent Health Care for Sex Workers: An Examination of Myths That Stigmatize Sex-Work and Hinder Access to Care, *PMC, Sex Relation Ther.* 2019; 34(3): 355–371

to be sex-workers for other reasons. According to statistics presented by the National Aids Control Organisation (NACO) there is a total of 7.76 lakh sex workers in India in the year 2020-21.⁴ This figure is also representative of those that could be identified by NACO and have been registered with them. The term sex-work, in that way is an “umbrella term” for the provision of sexual services or performances by one person for which a second person, the client or customer, provides money or other markers of economic value (i.e., goods, services)⁵. Sex work refers to prostitutes, escorts, strippers, porn actors, sex phone operators, and the like. The legal framework on sex-work is essentially based on two pronged approach of penalizing trafficking of humans into sex work and regulating public spaces from the nuisance of loitering sex-workers. This nature of law makes sex work stigmatized and creates the reasons for anonymity and invisibility amongst the sex-workers.

In 1950, the Government of India ratified the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of Others, 1949. Under Article 23 of the Convention, traffic in human beings is prohibited and any contravention of the prohibition is an offence punishable by Law. Under Article 35 such a Law has to be passed by Parliament as soon as may be after the commencement of the Constitution.

Thus, the Act was called Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA), aimed at suppressing the evils of prostitution in women and girls, and to provide opportunity to fallen women and girls to rehabilitate themselves as decent members of the society. The definition of prostitute under SITA stated it as an ‘act of a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind, and whether offered immediately or otherwise, and the expression prostitute shall be construed accordingly’.

In 1986, the SITA was amended and substituted by a new legislation, the Immoral Traffic (Prevention) Act, (ITPA) which among other changes introduced a new definition of a prostitute. According to the new definition under the 1986 amendment ‘prostitute’ means ‘the sexual exploitation or abuse of persons for commercial purposes.’

Thus, prostitution is not confined to the act of a female offering her body for hire, but includes sexual exploitation or abuse of a female or a child for commercial purposes. The object of the ITPA was not only to suppress immoral traffic in women and girls, but also to improve public morals by removing sex-workers from public places in the vicinity of religious and educational

⁴ <http://www.naco.gov.in/documents/statistics>, accessed on June 3, 2022

⁵ *Supra* note 3.

institutions.

Though the law does not abolish prostitution, it regulates or curbs ‘open manifestation’ of prostitution. Anyone who carries on prostitution within close proximity to a public place, including a hospital, nursing home, place of religious worship, hostel, educational institution, or in an area notified under the provisions of the Act, can be punished with imprisonment. What is therefore punishable under Section 8 is not the actual sexual act between the woman and the customer. But that it is only where a woman or a girl solicits for the purpose of prostitution she is made punishable.

Interestingly, it can be noted that the title of the legislation also does not reflect the word ‘Prostitution’, in fact it uses ‘Trafficking’ which is also for ‘immoral’ purposes. The ‘immorality’ connotation has been seemingly attached to women involved in sex work, owing to the British connotation of obscenity. The ITPA overtly treats a woman in prostitution as an offender under Sections 7(1) and 8(b). Hence, contrary to its declared objectives, these Sections of the ITPA criminalise the woman in prostitution. Section 8 can be and has been misused by the police to put any woman behind bars. Any person can say that a woman was soliciting with her eyes and that a price was settled and she assured him complete pleasure etc. Thus, bringing the effect of both the provisions together, it can be seen that the legislation not just penalizes a victim but also attaches a strong layer of stigma to such work. This, further leads to the women doing sex-work seeking anonymity and are shoved under the carpet by the State thereby furthering their invisibility.

The Act prohibits anyone from maintaining a brothel and living off the earnings of a prostitute⁶. If the husband lives with his wife and allows his wife to be a prostitute there is no reason for not believing that the husband was doing so for the purpose of living on the earnings of prostitution of his wife. There is therefore, no reason not to apply the presumption mentioned in Section 4(2)⁷ of the Act. When such a presumption is drawn until the contrary is proved, it can be presumed that the husband is knowingly living on the earnings of prostitution of his wife. When such a presumption is drawn, that would be sufficient to constitute the house of the husband a brothel.

Further, to constitute a place as brothel, the place must have been used for purposes of prostitution. A solitary instance of prostitution committed within any house or room or place would not satisfy the ingredient of brothel⁸. Section 2(a) will also have the effect of mitigating

⁶ Section 3, Suppression of Immoral Traffic in Women and Girls Act, 1956, No. 104, Acts of Parliament, 1956.

⁷Section 4, Suppression of Immoral Traffic in Women and Girls Act, 1956, No. 104, Acts of Parliament, 1956.

⁸Amy Farmer and Andrew W. Horowitz, Prostitutes, Pimps, and Brothels: Intermediaries, Information, and

much of evil of the prostitution. It would be noticed that what has been prohibited is not the profession or trade of a prostitute but the carrying on of that profession for the gain of another person or for mutual gain of two or more prostitutes.

Procuring or inducing and detaining a woman for prostitution are criminal activities, as well⁹. There is a geographical restriction, as the activity cannot take place in a public place or a notified area, in addition a ban on soliciting or seduction for prostitution¹⁰. In fact, Section 8, which deals with soliciting, is hugely criticized by activists.

Like its predecessor SITA, there is no punishment for the client of the prostitute in the ITPA. It further provides for provisions which pushes the woman to the edge. For instance, a hugely contentious clause, which violates the fundamental right to privacy, and is challenged by the activists is section 20 vested power in the Magistrate to order removal of a prostitute from any place within his jurisdiction if he deems it necessary¹¹.

Therefore, even though a strictly legal understanding of the relevant statutes leads us to believe that prostitution in India is legal per se, this is a misleading thought. While a consensual exchange of sex for money is not criminal, everything associated with the activity is illegal. Since the activity itself cannot be insulated from other transactions that will come along with it, it is impossible to engage consensual sex for money without actually attracting criminality.

The travesty of the written law in India in general, and of ITPA in particular, is that it has resulted in wide disparity between how law is drafted and how it is followed in practice. In effect, prostitution attracts the same treatment of sex workers as it would if it were deemed illegal. The state's entire enforcement apparatus exploits sex workers, pushing them underground just as any other illegal activity. This generates the role of middlemen who negotiate the trade with state agencies and, in turn, feed on sex workers' earnings. A close reading of the ITPA enables us to observe how the law has effectively rendered prostitution as a criminal activity. The ITPA defines prostitution as "the sexual exploitation or abuse of persons for commercial purposes"¹².

Further, the patriarchy makes life difficult and pushes them to operate from ghettos or other

Market Structure in Prostitution Markets, 79 JSTOR 513, 513-528, (2013).

⁹Id, at 523.

¹⁰ Section 8, The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956.

¹¹Section 20, Removal of prostitute from any place.— (1) A magistrate on receiving information that any [person] residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, may record the substance of the information received and issue a notice to such [person] requiring [him] to appear before the magistrate and show cause why [he] should not be required to remove [himself] from the place and be prohibited from re-entering it.

¹² Section 2(f), The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956.

shady places. The Act does not aim to abolish prostitution; rather it forbids trafficking in women and girls for the purpose of prostitution as an organized means of earning a livelihood and disallows prostitution near public places so that the atmosphere is not 'contaminated'.

Thus the basic aim is not to safeguard the interests of the women but to protect public spaces from being 'contaminated'. It reflects the moral decay of the society and thus, the State cannot legalize sex-work in its entirety.

Hence, by its very definition, since any kind of exploitation or abuse is illegal, sex work (in the Act, 'prostitution') becomes illegal. More importantly restricting sex work to sexual exploitation and abuse keeps "sex work by choice" outside the criminal space. Since anti-trafficking laws handle "sexual slavery", or "forced prostitution", the law remains silent on "sex work by choice". Similarly, the law keeps a track on just the brothel based prostitution and does not seem to be taking care of women in cases where sex-work is her livelihood or her hereditary profession¹³. In the case of *Smt. Shama Bai v. State of Uttar Pradesh*¹⁴, A woman in prostitution challenged the constitutional validity of Section 20. She argued that prostitution was her hereditary trade, that it was her only means of livelihood and that of members of her family and the rights guaranteed in Art 14 and 19(1) (g) were violated. The Court held that prostitute women were subjected to punitive form of surveillance to which other women were not, and that this differential treatment constituted discrimination between persons who were similarly situated. The court recognized that women entered the profession because of social and economic hardship, rather than immorality.

The Allahabad High Court held that it was true that the work of a prostitute was a profession, occupation or trade within the meaning of Art 19 (1) (g) of the Constitution of India and that the SITA had imposed restrictions on the same.

However, the Supreme Court in *Kaushalya*¹⁵ case, overruled these previous judgments on the point. The Supreme Court, in adopting the reasonable classification approach, held that the difference between prostitute women and non-prostitute women was a reasonable classification. Further, the Court ruled that there were real differences between a non-prostitute woman who does not deserve in the public interest any restrictions on her movements, and a prostitute, whose actions in public places call for the imposition of restrictions on her movements and even deportation. The Court noted that *the object of the ITPA was not only to suppress immoral traffic in women and girls, but also to improve public morals by removing*

¹³ Smt Shama Bai v State of Uttar Pradesh, AIR 1959 All 57

¹⁴ *Id.*

¹⁵ The State of Uttar Pradesh v. Kaushalya and Others, 1964 SCR (4) 1002

prostitutes from public places in the vicinity of religious and educational institutions.

On a closer look at the decision, it becomes clear that it is based on a formal model of equality. The differences between prostitute and non-prostitute women, and the differences between prostitutes in busy localities and prostitutes working discretely, were seen to justify the differential treatment. The effect was to preclude an entitlement to equality for those women working in busy areas.

Thus, the primary curse of sex work, as noted above is the covert criminalisation and deep-rooted stigma attached to it that also seems to result a judicial bias. The existing law continues to criminalise aspects of sex work including soliciting, brothels and living off the earnings of sex work. Sex workers are raided, “rescued” and confined in shelter homes usually under abysmal conditions¹⁶. For these reasons, those who practice it often do so clandestinely and sex workers are not willing to come forward, acknowledge their identity and access services provided by government. Their lives and work are in a grey zone that is considered illicit, spills over into practical issues such as a lack of identification documents such as voters’ ID cards, Aadhaar numbers, caste certificates or ration cards which remain inaccessible to the majority of sex workers. Many are single mothers and unable to produce proof of residence for long periods of time or show ancestral documents required for obtaining caste certificates.

III. THE PROGRESSIVE INTERVENTIONS OF THE SUPREME COURT

The Supreme Court has however shown consistent benevolence and recognized the human rights of sex workers in the matters that went before it through Public Interest Litigations (PIL). The first PIL case was filed by two Professors of Delhi University, concerned the deplorable conditions found in a Protective Home established and Working under Sections 17, 19 and 21 SITA in Agra, India¹⁷.

The case, which spanned a period of 16 years, beginning under SITA and continuing until 1997, eleven years after the implementation of ITPA, began after a letter was written by Upendra Baxi and Lotika Sarkar, both at the time professors at Delhi University, to Justice P.N. Bhagwati. The letter was a letter to the editor, published in a daily newspaper called the Indian Express that revealed a shocking news regarding Protective Home. The Supreme Court converted the letter into a writ petition and ordered the superintendent of the Protective home to furnish explanations regarding the allegations presented in the writ petition.

From 1981 to 1997, the Supreme Court monitored this case and found serious abuses and

¹⁶ Kamala Bai v State of Maharashtra, AIR 1962 SC 1189

¹⁷ Upendra Baxi and Lotika Sarkar v. State of Uttar Pradesh (1983) 2 SCC 308

omissions in the functioning of the protective home, but never implemented a concrete decision to punish the responsible persons. Instead of ordering administrators to furnish reports and giving tall instructions, the Supreme Court failed to take material action in the case. However, the judges did take the opportunity to state in their unfinished discourse that the inmates in the Protective Home should not continue to live in inhuman and degrading conditions and that the right to live with dignity enshrined in Article 21 of the Constitution should be made real and meaningful for them. Suddenly in 1997 the Supreme Court decided to transfer this case to the National Human Rights Commission (NHRC) for future monitoring and removed this case from Supreme Court supervision without obtaining satisfactory results, after its extensive period of monitoring.

NHRC, a statutory body which only has recommendatory power, lacks the supreme judiciary's authority. It is quite evident that nothing more can be expected from the NHRC than what was expected from the Supreme Court.

If one of the most powerful tribunals in the world could not improve conditions of a protective home run by the state satisfactorily, and allowed the Home to continue its abuses after 16 years anyone can presume the conditions that undoubtedly exist in other protective homes where no such monitoring has taken place. The case, nonetheless a good attempt at raising the consciousness of the Court towards the plight of sex workers. However, the lack of political-will of the State seemed clearly evident in this matter.

Another important public interest litigation filed before the Supreme Court was *Vishal Jeet v. Union of India*¹⁸, which addressed the root causes of the burgeoning sex slavery in India.

The petitioner, an advocate, entered a writ petition before the Supreme Court requesting for issuance of certain directions, directing the Central Bureau of Investigation (CBI) to institute an enquiry against those police officers under whose jurisdiction red light areas are flourishing and to take necessary action against such erring police officers and law breakers. This provided an opportunity for the Supreme Court to look at the failure of the law in India, and to hold the culprits, including corrupt police officers accountable.

However, instead of addressing the principal demand of the petitioner, the Supreme Court went on to discuss the moral harm of the prostitution to society.

The Supreme Court refused to issue directives, observing that "this malady is not only a social but also a socioeconomic problem and, therefore, the measures to be taken in that regard should

¹⁸1990 AIR 1412.

be more preventive rather than punitive¹⁹. In spite of that insight, it went on say that “prostitution always remains as a running sore in the body of civilisation and destroys all moral values”²⁰.

The justices did not hesitate to observe that:

“It is highly deplorable and heartrending to note that many poverty stricken children and girls in the prime of youth are taken to 'flesh markets and forcibly pushed into the 'flesh trade, but termed that act as "being carried on in utter violation of all cannons of morality, decency and dignity of humankind, neglecting to recognize that these acts are also in violation of national and international law”.

The judgment seems to have been written according to the whim and fancy of the justices, as it contradicts itself in several places, where they have accepted the violation of law, but have refused to provide legal protection. The court instead of feeling the urgency of the matter and applying available laws, the Court sidestepped the law and helped to divert state governments from taking immediate action to prevent sexual slavery.

In another case of *Gaurav Jain v. Union of India and Other*²¹, the court issued an order that stated:

“The prostitutes were to be rehabilitated through self-employment schemes, and that would be provided with adequate safety, protection and rehabilitation in the juvenile homes manned by qualified trained social workers or homes run by NGOs with the aid and financial assistance given by Government of India or State Government”.

This decision was later overruled by the three justice bench of the Supreme Court.

There are many other judgments of the various High Courts as well as the Supreme Court²² highlighting the various vulnerabilities of the sex workers. Elaborate guidelines, for instance, have been issued by the courts on noting the unfortunate state of affairs of care and protection of trafficked children through empowered streams of governance, or for the rights of children of sex workers.

In 2011, *Budhadev Karmaskar v State of West Bengal* led the Supreme Court to hold that sex workers have a right to dignity under Article 21 of the Constitution, which ensures the right to life and livelihood. In 2019, the Calcutta High Court stated that under ITPA, no sex worker

¹⁹Id.

²⁰ Id.

²¹1990 AIR 292.

²² See for instance, *Prajwala v. Union of India*, 2016 (1) SCALE 298

exploited for commercial sex can be tried as an accused unless there is substantial evidence that she was a ‘co-conspirator’ in the crime. In September 2020, the Bombay High Court ordered the immediate release of three women sex workers jailed at a state correctional institution, stating that sex work was not a criminal offence under the law and that an adult woman had the right to choose her profession.

Now, in 2022, a three-judge bench of the Supreme Court issued a historic order that recognised sex work as a profession and said that sex workers are entitled to dignity and equal protection under the law. The apex court elaborated that ‘voluntary’ sex work was not illegal²³. It issued guidelines along the lines that when a sex worker makes a complaint of an offence, the police must take it seriously and act in accordance with law; that when a brothel is raided, the sex workers concerned should not be arrested; that no child of a sex worker should be separated from the mother merely on the ground that she is in the sex trade; that the police should treat all sex workers with dignity and should not abuse them; and more other positive directions.

The Court also passed directions for issuing Aadhaar cards to sex workers who cannot submit proof of residence, on the basis of a ‘proforma certificate’ issued by a Gazetted Officer.

While the Supreme Court directions include sensitisation of police and other law enforcement agencies to the rights of sex workers, who also enjoy all basic human rights and other rights guaranteed in the Constitution to all citizens, the three-judge Bench led by Justice L. Nageswara Rao asked the Press Council of India to issue “appropriate guidelines for the media to take utmost care not to reveal the identities of sex workers during arrest, raid and rescue operations, whether as victims or accused and not to publish or telecast any photos that would result in disclosure of such identities”²⁴.

IV. COVID-19 LOCKDOWN IN THREE WAVES: THE IMPACT ON THE LIVES OF SEX-WORKERS IN INDIA

A study of the three waves of COVID-19 pandemic, both separately and conjointly is necessary to highlight the specific nature of impact that each wave had on the lives of the sex-workers.

The first wave was primarily remembered by the nature of restrictions that it had suddenly generated, owing to a complete lockdown, suspending the economy and disrupting the supply

²³ ANUBHUTI JAIN, SUPREME COURT ORDER ON SEX WORK HISTORIC, BUT EXECUTION WILL BE THE REAL HURDLE, [HTTPS://THEPRINT.IN/CAMPUS-VOICE/SUPREME-COURT-ORDER-ON-SEX-WORK-HISTORIC-BUT-EXECUTION-WILL-BE-THE-REAL-HURDLE/988049/](https://theprint.in/campus-voice/supreme-court-order-on-sex-work-historic-but-execution-will-be-the-real-hurdle/988049/) ACCESSED ON JUNE 3, 2022

²⁴ Sameer Yasir, India’s Sex Workers Win Benefits from the Country’s Top Court, <https://www.nytimes.com/2021/12/15/>, accessed on June 3, 2022

chains across the country. Barring essential commodities and services, nothing was available. Since the Coronavirus spreads through human contact, restrictions on human movement and physical contact was rapidly introduced as the essential protocol in all human behavior. This, very feature of the virus can have devastating effects on the lives of those persons whose basic livelihood is dependent on physical human contact. The only source of income in the lives of sex-workers and their children, are the customers, which suddenly stopped, in this case. To add to this, the looming uncertainty of when normalcy would be restored, added to the helplessness. The COVID-19 pandemic stranded many sex workers in cities, towns and districts. They were refused rations and any relief since they did not have ration cards belonging to the city or district they were found in. Once their savings ran out, women were asked to vacate their rented rooms amidst the nationwide lockdowns. Women reported attempting to resort to desperate measures to return to their hometowns²⁵.

Additionally, a large proportion of sex workers (male, female and trans-persons) work from home and arrange clients via mobile phones, independently or through an agent. A large percentage of women are housewives, and their families do not know of their work.

During the pandemic, their livelihood came to a complete halt. They were unable to explain the loss of livelihood to their families or approach collectives who were extending relief to sex workers in brothels²⁶.

The invisibilisation by the state has been evident during the pandemic. While the government identified several categories of marginalised groups such as transgender people, persons with disabilities, informal sector workers and migrants for immediate relief, sex workers were left out of all relief packages. States historically make assistance contingent on giving up sex work. For instance, the scheme of the Karnataka government in 2018 under assistance for “exploited” women require them to provide an undertaking that they will not return to sex work²⁷.

After sustained lobbying over the years, in July, the Government of Maharashtra in a first, recognised sex work as work and a special category requiring assistance during the pandemic²⁸. This good practice however was not replicated in other states.

²⁵ MEENA SARASWATHI SESHU, AARTHI PAI, LAXMI MURTHY, LOCKED DOWN: SEX WORKERS AND THEIR LIVELIHOODS, ECONOMIC AND POLITICAL WEEKLY, VOL.56, ISSUE NO.11, MARCH, 12, 2021.

²⁶ *Id.*

²⁷ SEX WORKERS IN INDIA ON THE VERGE OF DEBT BONDAGE AND SLAVERY, DIVYA A., THE INDIAN EXPRESS, DECEMBER 24, 2020

²⁸ Chandra, Jagriti (2020): “Maharashtra Govt. Directs Officials to Help Sex Workers,” *Hindu*, 27 July, <https://www.thehindu.com/news/national/other-states/maharashtra-govt-directs-officials-to-help-sex-workers/article32199125.ece>. Accessed on June 3, 2022

The circular issued by the Department of Women and Child Development on 23 July 2020, called upon the district administration and WCD to support sex workers and those rescued under ITPA, making a clear distinction between the two groups. The circular states:

“With reference to the COVID-19 pandemic and the lockdown since March 2020, we want to inform you that, women who have been rescued under ITPA and those who are in sex work are finding it difficult to survive and take care of their families. ... The women in sex work (Veshya Vyavsay) and the women who have left sex work have lost their income generation options. Due to lock down they are not able to get other jobs either which leads them and their families to starve. You should provide free ration and all essential services to the above mentioned women.”²⁹

Another timely intervention took place on 29 September 2020, when the Supreme Court passed directives for sex workers to receive dry rations and other benefits without insisting on proof of identity through documents.¹⁴

A further step in the acknowledgement of sex workers as informal sector workers was recognition by the National Human Rights Commission in its advisory issued on 7 October 2020, on the rights of women during the pandemic, stating that sex workers must be “recognised as workers and be registered so that they are able to get worker benefits.” The advisory also recommends the issuance of temporary identity documents, especially for migrant sex workers, to enable them to access welfare benefits, healthcare and protection from domestic violence.³⁰ While these are welcome responses to the crisis brought about by the COVID-19 pandemic and the lockdown, there is still a long journey to transform social perception and accept sex workers as equal citizens and an integral part of our society.

However, many a times, it is ‘not the intent’ of the State, but the very ‘nature’ of the problem that makes it difficult for the relief measures to reach the sex workers. For instance, many sex workers’ families often depend on their daily earnings to run their families, and do not have savings, access to loans and other financial institutions. Public sector banks routinely refuse loans to sex workers since they have no one to stand surety. Private money lenders take advantage of this situation, lend them money at exorbitant interest rates, compounded on a weekly or monthly basis, thus leading to their debt burden³¹. During the pandemic, sex workers took loans from private money lenders, self-help groups (SHGs) and obtained gold loans to

²⁹ *Id.*

³⁰ NHRC (2020): “Human Rights Advisory on Rights of Women in the Context of COVID-19,” 7 October, https://nhrc.nic.in/sites/default/files/Advisory%20on%20Rights%20of%20Women_0.pdf.

³¹ See *Supra* note 25

support their families. They are being pressured to pay back their loans at high interest rates, which is difficult without any income.

The lack of regular income had a domino effect on access to other basic necessities, including housing. Most sex workers who run single-headed households live in rented accommodation; paying rent on a weekly basis. During the lockdown period, there have been accounts of sex workers being asked to give rent or else vacate the premises. Moreover, their children who were staying away from them for educational purposes have returned home due to the lockdown. Providing for them has further added to their distress. Over 90 per cent of commercial sex workers across three states will be pushed into permanent debt bondage by end of this year, reveals a new research. As mainstream prostitution came to a standstill earlier this year due to the pandemic, and their daily earnings dried out, the situation forced them to rely on loans from brothel owners and pimps³².

With business hit badly by Covid-19 pandemic, sex workers have diversified their services routing through the Internet. Ravi Kant, President of the Delhi-based NGO Shakti Vahini, said several sex workers started Internet-based solicitation through using various social media platforms and smartphone applications such as WhatsApp and Facebook.

On the other hand, some of them have stopped offering their services online as they fear there is a risk of being recorded and their videos getting leaked online³³.

Most of the women working as sex workers are victims of human trafficking. According to an independent research published in Live Law, the commercial sex-working industry globally is worth \$186 billion³⁴.

An estimated over 20 million (2 crore) sex workers are there in India alone. Most sex workers enter the industry before the age of 18, and are often forced into the profession.

According to the study published in Live Law, sex workers enter the profession as they are able to earn double than labourers employed in other informal sectors. NGO Saheli Karyakarta Sangh's Tejaswi Sevekari said around 700 sex workers went back to their home states such as Karnataka and West Bengal during Covid-19. Some others have taken to vegetable selling or got employed in making masks and sanitizers.³⁵

³²SEX WORKERS IN INDIA ON THE VERGE OF DEBT BONDAGE AND SLAVERY, DIVYA A., THE INDIAN EXPRESS, DECEMBER 24, 2020.

³³ *Supra* note 25.

³⁴ SUSHMITA GHOSH, "HOW SEX WORKERS ARE DEALING WITH COVID-INDUCED JOB LOSS, LIVELIHOOD CHALLENGES", INDIA TODAY, JUNE 3, 2021, ACCESSED JUNE 3, 2022

³⁵ *Id.*

Besides, the online sex-work there is a substantial number of sex workers who are street based. Due to Covid-19 situation, they are more affected than the brothel-based sex workers. It is easier to locate, target and give welfare to brothel-based sex workers but difficult to identify a sex worker who is on street or regular women staying at home in their families, the fear of stigma looms large.

The intervention by the Apex Court

The Supreme Court of India, in an order dated 14th December 2021 said that the federal and local governments must issue voter and ration cards to sex workers. The panel of three judges also said they should be enrolled in Aadhar, the biometric system meant to cover the whole country that is often crucial to getting welfare benefits.³⁶

The Supreme Court noted that “The fundamental rights are guaranteed to every citizen of the country irrespective of his or her vocation...There is a bounden duty on the government to provide basic amenities to the citizens of the country.”

The court was hearing a plea filed by the Durbar Mahila Samanwaya Committee, a collective of sex workers based in Kolkata, that highlighted problems faced by sex workers during the coronavirus pandemic. The collective, which said it has more than 130,000 registered members, said that sex workers faced destitution, and it sought relief measures for female and transgender sex workers across India.

The Durbar Mahila Samanwaya Committee filed its original petition a decade ago as an effort to win protection under the Indian Constitution. In September 2020, the court had ordered state governments to give dry food rations to sex workers, without requiring identity cards, citing an earlier directive.

In December, 2021, the court demanded that a status report on the directive be filed within four weeks. In the meantime, it said, governments should provide sex workers with the documents.

The court then stepped in, telling the government to provide the rations, in response to multiple pleas by advocacy groups after a survey by the collective found that less than half of sex workers benefited from any government food program for the poor. The majority, it said, had gone without work.

V. CONCLUSION

As is evident from the data (or the lack of it), that sex-workers have a marginalized existence,

³⁶ See *Supra* note 24.

the fragility becomes even graver when the existence of this population is relegated to invisibility. They have been further pushed to the brink during the COVID-19 induced lockdown with their only source of livelihood being snatched away from them. The sex-workers, who have been dealing with several health concerns prior to the onset of lockdown ranging from mild STDs to AIDS or from hypertension to severe heart conditions, had an abrupt halt to their treatments and medical care. Due to lack of identity-cards or Aadhar registration, the sex-workers are fully dependent on the non-government organizations, self-help groups or independent activists for their basic needs medical or otherwise.

Further, it is also noted that the landscape of sex workers in India is far from uniform- it ranges from street side “brothel-based” prostitutes, or to elite prostitutes, who operate through agents or are also called call girls, a sizeable population of the sex-workers are victims of trafficking or are involved in sex-work due to dire poverty. The location, identification and problems of each category and sub-category of sex-worker is different and calls for differential approach in catering to their concerns. Largely, sex industry is found in the cities and those areas in the cities where sex industry operates are considered as illegal parts of the city. The law regulating sex-work in India although does not make sex work illegal per se, but supporting activities such as maintenance of brothels, pimping or soliciting customers are punishable offences. The fact that the Act criminalises brothels, which includes two or more women working together as prostitutes, implies that if women want to work as sex workers legally, they should do so alone. Moreover, sex workers who are often exploited by pimps or brothel owners can’t take the resort of the legal system because, under the law, they will be prosecuted for working in a brothel and hence, they silently continue to suffer at the hands of brothel owners. Section 8 of the act notably criminalises the act of seducing or soliciting customers³⁷. Though the act may not prohibit prostitution, it certainly makes it very difficult for sex workers to legitimately exercise their right to work.

Many of the sex-workers who have now become pimps thereby can be brought within the purview of the legislation. Sex-workers who are loitering and soliciting on streets may also be punished, however, the other kind of sex-workers who operate electronically or through agents are out of the clutches of the penal statute. Further, there are some other kinds of sex-workers who are engaged in offering sexual services as a way of hereditary trade.

This uneven fabric of ‘situational difficulties’ and ‘locational differences’ of sex-workers in

³⁷Section 8, Suppression of Immoral Traffic in Women and Girls Act, 1956, No. 104, Acts of Parliament, 1956.

India makes for a challenging terrain for the state and other stakeholders. The criminalisation and extreme stigma that is attached to this industry also makes it difficult for a cohesive government policy for the social upliftment.

Moreover, since the nature of work involves intimate physical contact, in the aftermath of COVID, the sex-workers deserve special protection from infection as the law does not regulate the customers, it becomes a pertinent issue for the state to ensure fully vaccinated and infection free customers as much as it holds importance for the sex-workers themselves.

For developing and implementing COVID and post COVID related strategies for sex workers, the government has to keep all the aspects of these vulnerabilities in mind.

VI. WAY FORWARD

The marginalization of sex workers during the pandemic has put the lid-off several innate fragilities that the sex-workers lives have been infested with. It is therefore pertinent to bring forth a stringent policy framework for the overall protection and equitable rights discourse for the sex workers. Most of the proposals in this section of the paper stems from the deficiencies that are identified above and is aimed at plugging the same.

As noted above, substantial number of sex-workers are trafficked and forced into this work. In 2021, a bill was presented in the House, named as the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2021 which intends to address the deep ingrained human rights issue of trafficking of human beings under the following broad heads – (i) prevention of trafficking, (ii) rescue and rehabilitation of victim, (iii) prosecution of offenders.

The object of the Bill reads as, “to prevent trafficking in person, especially women and children and to provide care, protection and rehabilitation to the victims of trafficking, to prosecute offenders and to create a legal, economic and social environment against trafficking of persons and for matters connected therewith or incidental thereto”.³⁸

At first glance, the bill appears to have no impact on sex workers due to the conspicuous absence of the words “prostitution” and “sexual exploitation and abuse for a commercial purpose.” However, this is deceptive and misleading for the following reasons.

First, the bill adopts the definition of trafficking of persons in Section 370 of the IPC which includes “any form of sexual exploitation” and is rigorously applied to sex work³⁹.

³⁸Id, at 1207.

³⁹S.Naveen Kumar @ Naveen v. The State of Telangana, (2015) 6 SCC 363 & Sahil Patel and Others v. The State of A.P., 2016 CrLJ 2764.

Second, the proposed crime of trafficking “resulting in pregnancy” or “causing exposure to HIV” is more likely to occur in sex work than any other sector.

Third, the bill introduces an offence of “soliciting or publicising electronically, taking or distributing obscene photographs or videos or providing materials or soliciting or guiding tourists or using agents which may lead to the trafficking of a person” punishable with five to 10 years of imprisonment⁴⁰. Like everyone else, sex workers too increasingly use online platforms to solicit work and communicate with potential clients. The proposed provision does not even require actual trafficking, but will get triggered if a WhatsApp message or image “may lead to trafficking.” This comes perilously close to criminalising all sex workers. Besides, the ITPA and other criminal statutes laws will continue to be enforced as the bill is “in addition to” existing laws. It is to be seen how does the Supreme Court’s recent intervention will impact the tenor of this Bill.

Secondly, although the existing legal framework in the ITPA does have a component of ‘rehabilitation’, but it certainly seems like the weakest or rather ineffective component in this context. Even though many non-governmental agencies have developed strategies towards ensuring rehabilitation of the sex workers, but there certainly lacks a strong state will in this regard. The state has to build a strong political will to develop comprehensive and meaningful rehabilitation programs, create alternative employment opportunities and launch skill developing programs for the sex workers. The component of rehabilitation is important not just for trafficked women but also for those who are forced due to poverty and other systemic vulnerabilities. Special legal protection must be developed for the children born of sex work including maintenance and health insurance.

The Supreme Court’s intervention to uphold the dignity of the sex workers by recognising sex work as a ‘profession’ meriting all the attendant rights of a regular profession, has received applause and is extremely timely, especially in the post COVID scenario. The first step in this direction would be de-criminalisation of sex work and recognition of the sex industry to some level labour protection.

The nature of this work is such that it requires close physical interaction of the sex worker with the customer. It is therefore pertinent that the customers may be brought within the purview of the legislations regulating sex work. The protocol for COVID testing by making available the tool-kit for Rapid Antigen Test must be introduced before any customer is allowed access to a sex worker. Mandatory COVID testing for both the parties must be introduced in the sex

⁴⁰ Sec.36 of The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2021.

industry. This may cover brothel based sex work, massage parlours, or any other identifiable locales of sex work.

The model that can be adopted by India is pro-work model characterised by measures which ensure that sex workers (like workers in other service industries) receive the full protection of employment law, occupational health and safety legislation, and have access to the protection of the criminal law and other human rights protection. This model typically requires operators of brothels to register the business and provide facilities that meet designated standards. In some countries which have adopted this model, they have added new provisions in the laws that are relevant for the proper and smooth working of the profession, for instance, age limits on workers and constraints on who can operate or manage a sex work business, a requirement that employers supply condoms and ensure that clients use them, targeted health and safety regulations such as fire safety measures, requirements for hot and cold water, proper toileting facilities, and safety measures such as alarm buttons in rooms. Mainstreaming sex work, easing access to birth control methods and medical aid together with educational opportunities will not only enable sex workers to live a more normal life but will also work to a great extent to prevent their exploitation because they will no longer be vulnerable to their perpetrators.

Penalties for failures such as fines or revocation of licences are imposed for failing to meet requirements such as in any other business in operation. The rationale underscoring this approach is that sex workers have the right to work and the right to self-determination guaranteed by both human rights instruments and internationally guaranteed labour rights and should receive full entitlement to the rights and protection of the law.

To control the spread of HIV/AIDS in the red light areas, legalisation could be a great help. As if the practice is being legalised, the prostitutes would be asked for registration and regular health check-ups would be arranged. If a prostitute is found to be HIV positive, the registration would be cancelled, and the person would be rehabilitated under the government's programmes, such as one run by an NGO named Rescue Foundation established in 2000 by late Mr. Balkrishna Acharya, which rescues the girls trafficked from various parts in to India and rehabilitated through various proactive homes⁴¹. As already noted above, special arrangements for COVID testing must be introduced.

Legalization will entrust sex workers with an identity which they have been robbed of for centuries. It will allow their children to feel secure. Though in our constitution it is inscribed

⁴¹Rescue Foundation : Giving them a ray of hope, (April 30, 2022, 02:45 PM), <https://www.freepressjournal.in/weekend/rescue-foundation-giving-them-a-ray-of-hope>.

that every child will have right to education and even state also asked to protect the same. But often the children of sex workers are denied entry in schools turning the fundamental rights of a person into a mere fleeting promise. Legalization can to a great extent help in removing the stigma and end the discrimination which is lingering among the children of sex workers. Legalization of sex work will help the sex worker to have equal rights as we all have and it will help them to strengthen their voice against the injustice in the same way a normal person with a regular job would. Not only this it will also help to modify and strengthen the law to stop the illegal sex work. If we legalize this then these sex work would exist in certain government defined areas and will have proper licenses to work basically all of them will be registered and they will also contribute to the taxes. It could also help to bring down the level of harassment of women or the sex workers by the police officials.

Autonomy is a very significant jurisprudential value, this value cannot ordinarily be parted with and can be compromised only if it deeply hurt community values. Women ordinarily are not provided with adequate financial alternatives. It is crucial for the state to develop strategies to secure women and other marginalized communities' decent living conditions. Sex work does provide an alternative to a large population of financially deprived women. One of the popular reasons for women sex workers to be attracted towards this sex industry is the financial independence that comes along with it. Thus, it becomes important to determine the contours of this 'industry'. As in can the pornographic industry be considered an extended version of sex industry...?? If yes, should there be uniform rules across the board or there has to be specific strategy that may be evolved for each type of work. The questions and issues are overlapping and needs a comprehensive and well-intentioned legal policy to back it up with.

Therefore, apart from choosing a legal approach for sex work, it is also important to prepare a legal framework which would be concerned with the working of this profession. A proper definition of this work must be articulated.

Thus, if the intention of the legislation is to protect sex workers and victims of sex trafficking and provide them with opportunities for growth, it is indispensable to understand their problems and reasons that bring them to this industry from a lived-in perspective. This is possible by making them a part of the decision-making process instead of ignoring their voices and experiences. It is important to understand the nuanced differences between the motivations of why some people voluntarily choose to do sex work and address their interests and at the same time is important to punish sex traffickers and rehabilitate women who were forced into sex work.

Finally, there has to be a community-based and community-led response, allowing the sex workers place a multi-layered response tailored to their needs articulated by their individual constituents. The same approaches that NACO and other NGOs have deployed to address structural and social barriers to HIV may prove equally effective in response to COVID-19: taking services to the community, ensuring participatory processes, protecting human rights, reducing stigma and discrimination, and preventing and responding to violence may go a long way in achieving the cherished constitutional goal of equality and social justice for the sex workers.
