



SEX WORKERS IN INDIA: LEGALITY V. REALITY

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ABSTRACT

In the 21st century, not only females but also men and Trans community is involved in sex work. Sex work in India remains a major taboo and the required attention is not paid for regulating and protecting the sex workers. While violence, exploitation and discrimination have become the synonyms for the word 'sex work' it is high time to look into the effects of legalization. There are various Acts regarding sex work and also various articles and books on legalizing sex work while these work examine the border aspects of the problem, this research paper is very specific and scrutinized that mere legalizing is not going to help the sex workers if the society continues to treat them as indecent, immoral and evil.

This research paper examines the legality of sex workers in India and analyze the effect legalization would have on sex worker. To suggest regulations also find drawbacks in the Indian law relating to sex worker to empower them. The paper focuses on the challenges encountered by sex workers and proposes on legalizing sex worker as to protect their rights and health. Sex workers are here to stay, even if it is criminalized or not hence it is better to find techniques to remove the problems which is being faced by the sex workers.

Keywords – Voluntary, consent, violence, harassment, Immoral Traffic (Prevention) Act.

Introduction

Sex worker is said to be a person who exchange sexual services for material compensation. It only refers to the voluntary sexual transaction but that does not refer to nonconsensual sexual transactions or human trafficking in any way. It must take place between legal adults who can give valid consent. It is pertinent to note that sex work in India it is a very old profession even in various Hindu mythology there are reference of sex workers who were basically referred as apsara. India is definitely no stranger to sex work, being a historically prevalent profession, the rights and the dignity of sex worker should be upheld.

It is to be noted that though sex work in India is not illegal and the person involved in sex work are not to be criminalized still the rights and

dignity of the sex workers are infringed on a daily basis. While dealing with harassment by the clients and police force is one of the major concern in the orthodox society wherein voluntary sex work is considered to be immoral. The reality is entirely different as the sex workers are often mistreated, abused and extorted even when they have not broken any law.

The paper aims to establish the connection of sex worker with the society and further what measures can be taken to empower the sex worker from legalization of sex work as a profession and regulating the laws as such there is protection of sex work from violence and brutal behavior of the police officials and the society.



Research Methodology

In order to provide better understanding on sex workers, their causes, the effect, of legalization, the existing laws on sex work, major drawbacks and suggestion, doctrinal research was opted and conducted. The research involved analysis of several books, articles, websites, law journals and judgment present in online form and is not restricted to cases of a particular time span it includes various countries where sex work is legal and is compared with the situation in India.

Literature Review

There are several work related to sex workers, the major source of information is the Immoral Traffic (Prevention) Act, 1956⁷, it provides the definition of prostitution and several regulations regarding this profession and punishments in case of breach. Indian Penal Code⁸ also contains provisions which prohibit several activities related to sex work and provides punishments for the same.

The book 'Designing Prostitution Policy-Intention and Reality in Regulating the Sex Trade' contains the analysis of stigma and challenges in framing policies regarding sex workers. It helps this research in analysis the advantages of legalization of sex workers in India.

Article on Legalization of Prostitution in India and its Impact on the Exploitation and Violence Against Women⁹ provides several reasons for legalizing sex work in India also determines the role Government can play to protect the rights of sex workers.

Causes of sex work

To engage in commercial sex work among the several reasons poverty and unemployment is the most influential factor. The increasing rate

of poverty and unemployment have forced the needy and helpless person to enter into the profession of sex work as India has very less job opportunity for the unskilled labor, by way of sex work income can be generated to sustain life.

The literature suggests that lack of education, qualification and training impacts the vulnerability and affect the ability of the person to find employment in mainstream which limits the opportunity to earn and further forces the person to enter into sex work. In was held in the case of *Budhadev Karmaskar vs State of West Bengal*¹⁰, that if women are indulged in sex work it is not for pleasure but it is due to poverty. If such a women gets opportunity to learn technical skills or vocational training, she can easily make her living out of it. The Supreme Court also directed the Central Government and the State Governments to make schemes and policy for giving vocational training to the sex workers to enable them to lead a peaceful life.

According to the conflict theory, as stated by the American social scientist, S. Rosen that 80% of sex workers is forced due to financial hardship. This view is supported by the rise in sex workers during the 19th century that resulted due to war, as most women lost their husbands and the circumstances forced them to turn into a sex worker to support themselves and their children.

Few women have entered into the profession by the shame and stigma that the society imposes on them for being raped. It is unfortunate that most of the rape victims are blamed for the occurrence of rape, not only the society but also their family members in most cases have not accepted them. The victims have no roof and dignity hence have to take up this profession.

While most of the person have put into this profession by their own family and parents as their ancestors have also been sex workers and they have to gradually wind up in sex work as if it is the custom of their family. The

⁷ The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India).

⁸ Indian Penal Code, 1860, Act No. 45 of 1860.

⁹ Yukta Suresh, Legalization of Prostitution in India and its Impact on the Exploitation and Violence Against Women, 4(2) IJLMH Page 961- 968 (2021).

¹⁰ Budhadev Karmaskar v State of West Bengal, LiveLaw (SC) 525.



discrimination which takes place in the society with people having a criminal record, they are vulnerable and have difficulties in finding employment and in few cases end up into sex work to survive.

Right to physical autonomy

Every person has the fundamental and basic right to bodily autonomy, it is considered as the most fundamental freedom any person can have. The right holder can freely use their body in any way they seem right and the state shall not prohibit them or interfere if it is not illegal. In the guiding light judgment of *Lawrence v. Texas*¹¹, it was laid down that the right to bodily autonomy should be understood in a broader sense and should also include a major's decision about how they want to live their lives privately in regards to sex and this privilege must also extend to sex workers. The two aspects of this right is that the power of governing oneself and the freedom from external influence of one's thought process and decision-making. This right of physical autonomy would provide the sex workers the freedom to use their body in the way they want which includes performing sexually activities in exchange of money.

Violence on sex workers

Violence in form of physical, sexual well as verbal is habitual for most of the sex workers. Most of studies on sex work settings indicate violence as the eminent features in the lives of sex workers which are the greatest threat faced by them. A study which was conducted by Harding in 2005, which analyses the experience of sex workers in Nottingham, concluded that all the sex workers who were interviewed have experienced some form of violence.

The consequences of physical violence have adverse effect on physical and mental health of the sex workers. While in most of the cases sex workers do not report any such crime against them due to the fear of harassment by police

officials as the society does not accept them and one of the major reason for not getting any legal help is that the profession is not entirely legalized and regulated by Government. Violence against sex workers have even led to death, in the case of *Steve Wright*¹² who murdered five of the sex workers in Ipswich in the year 2006.¹³

It is in most cases observed that the relationship between sex workers and police officials is poor and lacks trust as well as understanding from both the sides. Dr. Annie Sprinkle and the Sex Workers Outreach Project USA which was on December 17, 2003 were the first to observe the International Day to End Violence against Sex Worker.¹⁴ This day is observed in the recognition of victims of the Green River Killer in Washington and many of the sex workers across the world that have lost their precious lives due to physical violence and to empower the sex workers. It attracts attention to end violence and hate crimes against sex workers.

Legality of sex work in India

There have been discourage as to providing legal status to sex work in India especially because sex is still a taboo in the society and sex workers are considered immoral and indecent in the society. In India sex work is not illegal as it is not specified in any law to be punishable only certain activities related to sex work such as running brothels, soliciting, trafficking and pimping are illegal and punishable under The Immoral Traffic Act, 1956. It may be said to be partially criminalized as it allows both the commercial buying and selling of sex between two consenting major party but not the selling of sex in brothels or in public places like street solicitation, but this has severe consequences such as criminalization of coalition of sex workers and this has also led them to work alone which is again not safe. It is therefore best to regulate the sex workers and

¹² Steve Wright v. State, 113 S.W.3d 687

¹³ <http://www.guardian.co.uk/uk/2008/feb/22/wright.sentenced>

¹⁴ NSWP (2010-11-26) Global Network of Sex Work Projects.

¹¹ Lawrence v. Texas: 539 U.S. 558 (2003)- Justia Supreme Court.



provide them the legal status as the chances of abolishment of sex work are negligible.

Red-Light District which is in Amsterdam and Netherlands is the example of complete legalization of sex work wherein all the forms of sex work is allowed only if they have been registered with the said Government. Legalization of sex work is the only way to regulate and safeguard the sex workers. The implementation of laws can help to prevent abuse and exploitation of sex worker as the sex workers are often left unprotected to dangerous sexually transmitted diseases and are also forced to suffer from harassment, poverty, abuse, police brutality, violence and much more. Legalization will also help to protect the minors from being exploited in sex work as child prostitution is bitter reality.

Regulated health checkups of sex workers shall help to prevent sexually transmitted diseases and adequate awareness about birth control methods will ensure unwanted pregnancy. Legalization shall eradicate forced sex work and also will help to remove the middlemen so that the exploitative factors are removed, and they get more wages. Legalization of sex work shall directly reduce rape, sexual violence and assault.

It is to be noted that legalizing sex work can help to transform India in a positive way as the victims of sex work will gain access to the legal system, abuse from middle man can be prohibited, and sex workers can get assistance from police and Government as well. Legalization shall get taxes instead of bribes for the Government. There are several researches that show that legalization of sex work have a huge impact on reduction of rape cases.

One can clearly see that the countries which have legalized sex work and have regulated the profession have improved the conditions of sex workers and have empowered them as they get the bravery and have the trust to approach to the police or courts whenever their rights are violated. The health of sex workers is also

improved as regular health check-ups and safer sex is promoted one good example is Nevada where all the sex workers have to get themselves checked with STDs every month and also requires condoms for all the sexual intercourse.

Rights of sex workers in regard to Indian Constitution

According to the Constitution of India, every citizen of India is entitled of fundamental rights which include sex workers as well. The sex workers are entitled to enjoy the rights incorporated under the constitution including Article 21 of the Constitution which provides right to life and live with dignity. While the Constitution of India does not prohibit sex work in India it prohibits trafficking of humans, beggars and other forms of forced labor under Article 23(1) and any contravention of this provision shall be a punishable offence as per the law under Article 23(2). Every person regardless of the profession they are into have the right to be treated equally before the law and Article 14 of the Indian Constitution provides the same to the sex workers.

The Supreme Court bench consisting of Justices Nageswara Rao, BR Gavai and AS Bopanna held that the sex workers and their children are entitled of protection under Article 21 of the Indian Constitution like every other person and profession in India. It was further said that voluntary sex work is not illegal whereas only running of brothel is illegal, whenever there is raids on the brothel the sex workers should not be arrested, harassed or penalized. The police officials must not take any action if it is clear that the sex worker is a major and have consented to sexual activity.

It is not necessary to specify that the primary protection of human decorum and dignity extends to the sex workers and their children who are repeatedly bearing the brunt of social stigma which is attached to their profession and are often removed to the fringes of the society, deprived of their right to live with dignity



and to provide better opportunities to their children.

Sex work in the internet era

In the era of social networking over internet platform there are adult content-subscription services been provided by the social media content creators who in turn get paid for it. This content may include any selfie, information, video, tutorials related to sex work. The global pandemic due to corona virus had a dramatic effect on people's job which include the sex workers, and many turned to digital platforms. This has changed sex work in a way where the creators are safer and are in powerful condition where they can control on how to perform their sex work. OnlyFans is an example of such adult content-subscription and it has changed sex work over time.¹⁵

Indian laws related to sex workers

The Indian Penal Code prohibits definite activities related to sex work and sex work in general is not illegal per se. Soliciting services of sex work at public places, carrying out prostitution activities in hotels, owning brothel and arrangement of sexual acts with customer are prohibited in the Act. Procurement, importing, selling and buying of Minor girls is prohibited under section 336-A, 366-B, 372-B and 373 of IPC. In the case, Fateh Chand v. State of Haryana¹⁶ the accuse was held guilty under section 366 IPC for procuring minor for sex work.

Immoral Traffic (Prevention) Act, 1956 states that the sex worker are allowed to trade in private but not in public and that the clients can get imprisoned for not more than 3 months and fine if found guilty of engaging in a sexual activity in public place that is within the area of 200 yards of a public space. Pimps who generally live from the income gained by the any person who is indulged in sex work shall also be guilty even if a major man who lives with a sex worker shall be regarded guilty if he doesn't prove his innocence. In the case, Smt.

*Ajfal v. State of U. P.*¹⁷ the accuse was held liable under the Act for running brothel and detaining minor girls for sex work.

A sex worker is also punishable under ITPA (1986) if found soliciting their prostitution or even if found seducing any person. Further, they can be imprisoned for 6 months along with fine if found that a sex worker is making their phone numbers public. The Act has the object of preventing immoral trafficking, soliciting and other sexual crimes taking into consideration of the morality of society, maintain the decorum in society and provide rehabilitation to the women who are victims and have fallen into the profession by force.

Criticism of India Law on sex workers

The main drawbacks of the provisions are the outlook towards sex work as something indecent, immoral and against the decorum of the society. It is pertinent to note that involving in any kind of sex work taking care of the regulations and precaution does not cause any sort of harm to the society. Sex is a major taboo in the society and this is solely the reason that the sex workers are referred to as indecent and sex work is considered as immoral.

According to the SITA (1956) the definition of prostitution given in section 2(f) states it as an act of a female who offers her body for sexual intercourse... there is no mention of trans community or men. It only acknowledge women as the victims and no reference is made of transgender and men who are also victims of sexual violence, oppression and exploitation.

There are discriminatory punishment provisions in Law wherein the women can be imprisoned for one year and a pimp for the same offence imprisoned for 3 months. One of the major drawback of Indian law on sex workers is that it focuses only on street prostitution and several other form of prostitution is not even been acknowledged.

¹⁵ Sex workers turned to OnlyFans, but so did a lot of amateurs. marketplace

¹⁶ Fateh Chand v. State of Haryana, (1977) 2 SCC 670.

¹⁷ Smt. Ajfal v. State of U.P., 2012 (77) ACC 7 (HC)

It is unfortunate to note that the punishments for the middlemen of the profession is minimal and that the law does not prescribe any legal regulations or method to safeguard the sex workers from assault and violence as the law only allows closed door prostitution wherein the risks of being exploited is more.

Aspect of society on sex workers

There has been existence of sex worker from very long time there have been mentions of them in Hindu Mythology as well. There have been demand for sex workers, people are willing to pay for sex and there are also individuals who are consenting to provide sexual activity in exchange of money and other valuables.

The society is split with two distinct opinions regarding sex workers. There are several countries which have legalized sex work and regulates it also gets taxes through it while some countries have legalized it with some restrictions and rest have criminalized sex work.

It is unfortunate that a sex worker in West Bengal was brutally killed by her client just because she had refused to indulge in sexual activity. Another incident where the female sex worker was killed by her client just because she demanded 1000 Rupees instead of 300 Rupees. The Government is to be held liable for all these cases as it is the duty of Government to frame policies which are sensible for the sex workers and the society. It is high old time to consider sex work as a profession and regulate laws for protecting and providing them with equal rights before law under Article 14 of the Indian Constitution.

There are people who believe that sex work is an evil in itself and needs to be eradicated but the chances of it getting eradicated is nearly negligible. Sex workers are usually considered immoral and are continued to be treated with discrimination, their rights are often infringed, their children are not allowed to get education as their parents are considered to be indecent, they are always victim of violence and they have no protection from law and police officials

which make their life miserable. It is the need of the society to stop exploiting rights of an individual based on their profession and be more welcoming towards people who have been trying hard to survive and fulfill the needs of their children.

Suggestion

Indian Government needs to regulate the sex work profession. Its high time for the government to protect the rights and health of sex workers who voluntarily participate in sex work so that the future generation and their children can pursue education and lead a life of their choice, working in the field of their interest and not involve in sex work just for the necessity of money due to poverty. The drawbacks of the Indian Law is to be looked over and the object should also include the defense of sex workers and providing them the rights they are entitled to rather than harassing them. Police officials should be welcoming and understanding towards the sex workers rather than their violent and brutal towards them. Protection and empowerment of sex worker is the need of the hour and they should not be mistreated only because sex is a major taboo in India.

Conclusion

In order to enjoy the rights, the sex workers are entitled to, mistrust and stereotypes about sex workers needs to be degraded down immediately. Sex workers are no threat to the society and are not even the walking case of HIV, they do not necessarily need or want to be rescued while they continue to fight their battles of hardship, face discrimination and cruelty on a daily basis they do not need any sort of futile pity rather the rest of the society needs to fight against their own misconceptions, judgements and recognize the pain of the sex workers which they are facing due to the society and Government.