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“DECRIMINALIZING SEX WORK IN INDIA: A SOCIO-LEGAL ANALYSIS”

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Chapter: 1

Introduction:

One of the most marginalized and unaddressed sections of Indian society are prostitutes or sex workers. Prostitution is an ancient institution which has an interesting past but unfortunately became the biggest challenge for the modern civil society.

Sex workers are denied or forcefully deprived of their very basic rights which is required to live as a human being i.e. education, health, privacy and most importantly dignity or self-respect. It is done sometimes by state (directly, by enacting laws, banning certain activities etc.) or through uncodified norms of the society (indirectly, as the guardian of the individual living in a particular region). The very simple understanding of Universal definition of ‘human rights’ is that every human being irrespective of his/her sex, caste, creed, religion or any form of identification has certain basic human rights¹ which is a priori (from the very beginning). But when it comes to the *sex workers*, the principles of human rights are ignored and their profession is labelled as immoral.

The debate of legality of prostitution is not a new invention, it was debated even in the *Constituent Assembly* before the adoption of Indian Constitution by *Shri Brijeshwar Prasad* who argued in favour of legalizing prostitution considering it as an ‘old institution’ which according to him cannot be abolished, if it is done, it will create black market and this will go

¹A. George, U. Vindhya & S. Ray, Sex Trafficking and Sex Work: Definition, Debates and Dynamics- A Review of Literature, 65 ECONOMIC AND POLITICAL WEEKLY 64 (2010)

underground.² Moreover, the position or legal status of prostitution is still unclear, therefore controversial in India.

There is no proper legal definition of 'prostitution' or 'sex work'. However, various legislations deal with the matters associated with it i.e. Indian Penal Code, 1860, The Suppression of Immoral Traffic in Women and Girls Act, 1956 etc. The United Nations Convention in 1949, to which India is a signatory, condemned all forms of prostitution.³ However, the profession of prostitution or sex work per se is not illegal but all other related activities are considered as illegal and therefore, punishable under different provisions of law.

History of Prostitution in India:

The correct way of understanding the roots and history of any institution lies in its power to deconstruct it from the prevailing notions of moral perceptions. There is no well documented source on prostitution as it was never taken seriously for the purpose of research or study. However, there are many known ancient traditions where sex workers enjoyed high degree of agency, they were categorized differently as per their role in the society. *S.M. Edward* in his writing titled '*Crime in India*' discussed how Indian society was tolerant towards prostitutes which surprised him. Some references are found even in the Ramayana, Mahabharata and Buddhist scriptures such as Jataka⁴ Tales which proves the existence of prostitution in India.

As time passed, some developments happened in terms of regulating prostitution. Accordingly, prostitutes were categorized into *Kumbhadasi* (a lower class prostitute woman who will be a maid and sexually please the household), *Rupajiva* (higher in the hierarchy, ranging from household heads to professional dancers) and *Ganikas* (a high seat honour attained through beauty and intellectual attainment).

When Britishers came to India they were amazed to see the position of sex workers. Unfortunately, without understanding the nature of prostitution in India, they pushed forth their colonial project with the intention of exploiting prostitute women or to satisfy the natural sexual

² The Constituent Assembly was a body of electoral representatives whose purpose was to draft the Constitution of India. The Assembly spent three years, beginning in December, 1946 to draft the Constitution. See: Austin Glanville, THE INDIAN CONSTITUTION, CORNERSTONE OF A NATION (1990).

³ As of 2009, ninety-five countries have ratified.

⁴ SINHA & BASU

desires of their troops. Slowly they succeeded in manipulating the people with moral values and public order. The Britishers enacted a legislation called 'The Contagious Disease Act, 1868', this Act gave them unlimited power to arrest, detain and torture them physically. They made certain camps known as *Chaklas* where they were detained. They also categorized certain areas as Red Light Districts which were totally absent in ancient Indian society.

Statement of Problem: The need for the formation of society was felt due to insecurity. To regulate society, State, Government and Law evolved. However, sometimes the absence of law or existence of inadequate laws creates problems to the society as a whole or to some specific minority groups, some of them are:

- Criminalizing sex work (in any form) is depriving them (sex workers) from demanding the very basic human rights which any human being, other than them can avail easily;
- Legal status of prostitutes or sex workers is not clear in India. It does not either make it legal or illegal per se which promotes black market and the whole profession goes underground.
- Various legislations deal with prostitution indirectly. However, legislations dealing with prostitution are not adequate to cope up with problems faced by the sex workers

Research Questions:

- What is the role and contribution of society in either reducing or promoting prostitution in India?
- What is the actual legal status of sex workers in India?
- Do sex workers make a case for legal and policy response for the protection of their rights and interests?

Methodology: For this paper titled, 'decriminalizing prostitution I n India: A Socio-Legal Analysis' the doctrinal method was judged to be most appropriate. All the sources used in this paper is secondary in nature. Secondary resources like books and journals, most of them

accessed from the Sikkim University library. Other sources like articles, and the like were accessed online through the use of online databases.

Literature Review: *In The Law Commission of India-Sixty-fourth Report (The Suppression of Immoral Traffic in Women and Girls act, 1956)* the report pointed out certain issues and guidelines dealing with the matters relating to Prostitution. Firstly, it justifies the reasoning of not legalizing prostitution completely by saying that it is a threat to marriage life in the society. Secondly, it identifies its nature and blames that the man are responsible for not controlling its desire and compares men with animals. Thirdly, it stated that the legalizing prostitution is not a solution neither its ban is a good solution as the society has always tolerated it as a necessary evil, and so on.

However, the Sixty-fourth Law Commission Report failed to give any justified reasoning as to how it is against the marriage life or what does it mean when it labelled prostitution as a necessary evil. It also give any accurate outcome or solutions and very conveniently supports the status quo.

An Article published in *SSRN Electronic Journal (2016)* by Shivam Goel highlights the vulnerable situation of sex workers in India. The laws in India relating to prostitution is silent and does not deal with it directly. It also does not define what amounts to prostitution and when it becomes immoral. The Article has reviewed various reports and legislations to find out whether laws in India are competent or at least in existence to address a minority group of people. It also provides solutions to the problems emerging out of prostitution.

However, the paper does not elaborate much on the core issue or the reason why the situation of sex workers are so vulnerable and what is the role society either prohibiting or promoting prostitution. It also does not deal with the threat or danger associated with it and therefore, does not talk about the protection of sex workers in detail.

Chapter: 2

Society, Morality and Prostitution:

One of the main reasons why people formed society was to eradicate the injustice done by one person or persons to another and people came together by agreeing not to harm each other which

is known as 'Social Contract Theory'. As time changed, the concept of religion, morality etc. evolved.

The main reasoning behind criminalizing prostitution in India and other parts of the world is that it is against morality, civilization or society and cannot be permitted to spoil the essence of the modern civil society. It sounds good when we hear about morality but unfortunately, criminalization of prostitution does not decrease the population of sex workers in India. Thus, question arises whether today's modern civil society really want to end the prostitution, if yes then what are the contribution and achievements in eradicating prostitution?

It is extremely important to mention that, the customary initiation of women in the practice of Devadasi⁵, Jogins and Venkatasins (though prohibited by law) is still prevalent in not just Andhra Pradesh, but also in Karnataka and Maharashtra. This is in fact a clear and gross violation of human rights, against the principle of human dignity and self-respect but pursuit of customary beliefs traps the fair sex into this glorified unworthy self-sacrifice, which ultimately leads to prostitution in temple and other charitable institutions. In a number judgements it has been held that, dedication of minors to the service of a temple as Dasis (servants) amounts to a disposal of such minors knowing it to be likely they will be used for purpose of prostitution.⁶

Social Barriers: Societies do not allow (indirectly) the children of sex workers or children coming from *red light* areas to get admission in schools. Its self-made criteria of admission rejects them when they cannot provide their father's name (now even mother's name can be given) and address of any reputable locality etc. Most disturbing fact is that the modern civil societies are too obsessed with their self-created morality and ideology which can be different to different people or society, they restrict them from education which is a Fundamental Right under *Article 21 A* of the Constitution. The question then arises that if their children are not allowed or treated like any other child coming from any other area, how they are going to join the mainstreams population and how it is going to end? With the denial of getting admission the children are forced to join the same profession and it continues.

⁵ Traffic in human beings include Devadasis; Vishal Jeet v. Union of India, 1990 SC 1412: (1990) 3 SCC 318: 1990 Cr. LJ 1469.

⁶ See: Queen-Empress v. Basava, (1891) 15 Mad 75; Reg. v. Jaili Bhavin, (1869) 6 BHC (Cr C) 60; Queen-Empress v. Tippla, (1892) 16 Bom 737

Apart from deprivation of education, the women involved in sex works are identified differently by the name giving norms of the society. They are called with some specific disgraceful names. These norms single out them in a society and since law is also silent they are left alone on the mercy of society.

2.2 Justice System in the Society: Every society has certain justice system. In these situations where conflict arise then aggrieved persons may approach the court of law. Though laws in India unlike England and United States, does not have sentencing guidelines on the issue of prostitution which gives discretionary powers to the court. The court is also not out of the society and social norms and perceptions sometimes does not go in favour of the sex workers. This is glaringly visible in rape sentencing. *Mrinal Satish's* research demonstrate that, in cases where rape victim is a sex worker, the accused usually receives a far lesser sentence than if the raped woman was 'modest'.⁷ Therefore, it creates a huge impact in the minds of judges in deciding such matters.

Many theorists claimed that law has an expressive function in addition to a sanctioning function.⁸ The expressive theory argues that the courts play an important role in expression of social values.

Justice A.K Sikri in a conference at Chintan Bhawna, Gangtok, Sikkim has emphasised and explained the importance of *Social Context judging (SCJ)*. The duty of the judges are to decide cases as per the law. But is that all and is it that simple? While deciding the cases the rule of law principle must be followed. He cited some of the examples where courts applied the principle of *Social Context Judging*. The issue of euthanasia where the question of right to life was raised had no existing law but court had to deliver justice, the cases of *LGBT* and *termination of pregnancy*, *triple Talaq*, moral values, ethics etc. are some of the few examples to cite where judges dealt not only as per the strict principles of law but on the discretion analysing the social context and public demand of the society.⁹ In *Gaurav Jain vs. Union of India*¹⁰, certain guidelines were given for the upliftment of prostitutes and establishment of the juvenile home for the child prostitutes.

⁷ Mrinal Satish, *The Role of the Victim in Indian Criminal*, in support for Victims of Crime in Asia (Chan Cheong ed. 2007)

⁸ See: Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021,2022 (1996)

⁹ Regional Conference on Enhancing the Excellence of Judicial Institutions: Challenges and Opportunities (East Zone-II) Gangtok

¹⁰ AIR 1997 SC 3021

Various laws are made after the court interpreted in the absence of and as per the need of the society. However, a challenging view comes from social response in case of legalizing prostitution, which contends that new law may meet with resistance if it departs too visibly from established social values.¹¹

Chapter-3

Indian Legal Framework on Prostitution:

There is something 'right' about prostitution, which the law violates by criminalizing it.¹² Around the world, the laws governing prostitution have been drafted so that the institution of prostitution is de facto criminalized in most countries.¹³

India became a signatory to the *United Nation International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women, New York, 1950*. Subsequently, in 1956 India enacted a legislation called *the Suppression of Immoral Traffic in Women and Girls Act (SITA)*, this act dealt with sex workers in a tolerant manner however, considered it as a *necessary social evil*. Debates started around the world and this led to the amendment of the existing law in 1978 and in 1986 the Parliament of India enacted the *Immoral Traffic in Persons Prevention Act, 1986*. The new Act replaced the word 'suppression' with 'prevention' which simply shows the strictness towards the sex workers. Though prostitution in India is not completely illegal but everything relating to it is criminalized except prostitution by choice. This created many confusion among the people and led this institution to go underground.

Laws governing Prostitution: Some of the Indian legislations dealing with prostitution are:

- Indian Penal Code, 1860
- The Constitution of India, 1950 (Article 23 rights against exploitation)
- Suppression of Immoral Traffic in Women and Girls Act, 1956

¹¹ Weber mentioned the normative basis of public reactions to authority (Max Weber, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (G. Roth & C. Wittich eds., 1978). For more formal treatment, see Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC'Y REV.* 513, 524 (2003)

¹² See, Laurie Shrage, *Moral Dilemmas of Feminism: Prostitution, Adultery and Abortion* (New York Routledge Publication 1994)

¹³ The Washington Times reports that prostitution is legal in fifty percent of countries, illegal in thirty-nine percent, and 'limited legal' in eleven percent (which includes India). *Worldwide Diversity*, WASH. TIMES, <http://www.washingtontimes.com/multimedia/image/prostitutionjpg/>

- Indian Trust Act, 1882 (Section 4)
- The Immoral Traffic in Persons Prevention Act, 1986

3.1 Legal status of prostitution: According to *Section 2 of the Immoral Traffic (Prevention) Act*¹⁴ read with *Section 372 of Indian Penal Code*¹⁵, prostitution is the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind. In re: Deva Kumar¹⁶, it was held that prostitution involves indiscriminate employment of a woman's body for hire. Prostitution per se is not illegal in India. However, law prohibits certain activities associated with it. Specifically, it prohibits anyone from maintaining brothel¹⁷ and living off the earnings of a prostitute.¹⁸ Procuring or inducing¹⁹ and detaining²⁰ a woman for prostitution are criminal activities as well. It also prohibits prostitution in public place or notified area,²¹ which means that in private place without forming group a sex worker can operate its work for its livelihood. The clients are not punished for visiting sex workers subject to the criteria mentioned above. However, the legal status is so ambiguous and there is a lack of awareness among the sex workers that time and again their privacy rights are violated. In *Maharashtra vs. Madhukar Narain Mardikar*²², the court held that right to privacy is paramount and *Section 20* cannot be misused against women of easy virtue. But in practice, private residence of sex workers are frequently raided by the corrupt police officers. The Act also empowers magistrate to order removal of a prostitute from any public place within his jurisdiction if s/he deems it necessary.²³

Therefore, though law does not criminalize prostitution per se, but everything associated with it is so restricted that leads to take help of third parties (agent or dalaal) and the institution has gone underground.

¹⁴ 104 of 1956

¹⁵ 45 of 1860

¹⁶ 1972 MLJ (CR.) 150

¹⁷ Section 3

¹⁸ Section 4

¹⁹ Section 5

²⁰ Section 6

²¹ Section 7

²² AIR 1991 SC 207

²³ Section 20

Law Commission of India-Sixty-Fourth Report: The Law Commission of India in its 64th Report made the following observations, some of them are discussed briefly:

1. Prostitution is a threat to the institution of marriage and is a means of exploitation of females; prostitution is a social evil which leads to social justice.
2. The institution of prostitution is the external manifestation of the failure of man to control his animal will within the limits set by the institution of marriage. Because man has not always remained satisfied with the company of his wife and has sometimes sought the pleasures of the flesh by straying beyond the limits of the marital wedlock, the result has been that the institutions like prostitution and concubines have existed side by side with marriage since times immemorial.
3. Any attempt to stop prostitution by legislation or any other means has been proved to be unsuccessful. Prostitution, has therefore, been tolerated as a 'necessary evil'.
4. Total prohibition of prostitution is not possible. The practice is deeply entrenched/rooted in the Indian social background.
5. Adoption of a "wider view" albeit prostitution is undesirable.²³ Conduct of a particular type may be: (a) approved by law; (b) permitted without approval or disapproval by law; (c) disapproved but not prohibited by law; (d) prohibited by law. Prostitution falls partly within category (c) and partly within category (d). The fact that certain types of prostitution are not totally prohibited by law, does not necessarily imply that they are approved by the law.
6. According to the Report of the Street Offences Committee (1928), as quoted in the Report of the Committee on Homo-sexual Offences and Prostitution (1957) – Firstly, as a general proposition, it is universally accepted that, the law is not concerned with private morals or with ethical sanctions. The law is plainly concerned with the outward conduct of citizens in so far as that conduct injuriously affects the rights of other citizens. Therefore, certain activities are brought within the categories of offences. Law should not always however, be based on moral sanctions. But any attempt to exclude the immorality of an act as a relevant factor in deciding whether to make it illegal, is both dangerous and futile. It is dangerous because it leads to the illusion that a legal system can function

without the foundation and the frame of reference of a moral system, and it is futile because moral values have a way of infiltrating into even the most anti-septic legal system.

7. Call-Girls: So long as prostitution itself is not a crime, the individual act of a girl who offers her services on phone cannot be prohibited. What is prohibited is prostitution of another person for profit of oneself, or promoting prostitution by letting out a house, exploiting girls for prostitution in specified places and the like.
8. The legal attitude world-wide towards prostitution can be classified in four broad categories: (a) total prohibition; (b) regulation; (c) repression; and (d) total toleration.
9. Countries in category (a) regard prostitution as illegal in all cases. In these countries prostitution *per se* is a crime, and even clandestine misconduct is punishable. Countries in category (b) regulate prostitution by licensing or other measures, but do not prohibit it totally. Countries in category (c), to which India belongs, repress prostitution by forbidding its blatant manifestations, while those in category (d) impose no prohibitions or restrictions on prostitution.
10. Prostitution like many other evils is a social problem, the eradication of which cannot be achieved by legislation alone, for it requires the co-operation of every individual citizen of the country. When the general moral level of the community will rise to an exalted idealistic level, prostitution shall be brought down and thus will be effectively reduced.

Chapter-4

Is legalizing prostitution a solution

Before discussing the need and importance of legalizing prostitution, it is important to mention the disadvantages of criminalizing it. It is also important to raise certain question before the law makers and to the society as whole.

Many questions raised in the past are still unanswered as to why it is considered as immoral and illegal activity? If it is an immoral activity what is our role as a society to resolve it? Is criminalizing prostitution just and not inhumane approach? Or, are we, as a civil society responsible for increasing the population of sex workers? And moreover, what should be the approach for advocating decriminalization of prostitution in India?

The laws dealing with prostitution and related activities do not make it illegal per se, but it does punish certain persons involved in certain specific mentioned circumstances as prohibited. This makes the life of sex workers difficult. On the other hand, decriminalizing prostitution in toto, or more directly, legalizing it, will enable them to demand their basic human rights more effectively and without any hesitation or fear of social stigma attached to it. The two-fold argument in favour of legalizing prostitution is that, firstly, legalizing prostitution would mean that brothel owners would be held accountable/responsible for the protection of 'fallen women', and that, the ill-treated/abused women will have an option of turning to the law for their protection as a matter of right. One of the reasons why women involved in the prostitution are exploited more is because of the presence of third party in the profession. Therefore, legalising prostitution will reduce the black market and the presence of third party and it will also reduce the scam done on the part of police by taking bribe. Second important advantage of legalizing prostitution is that it will ensure proper health check up on a regular basis which is also important to keep a society healthy and free from various diseases. There is 8.4 billion industry which is illegally operated in India every year. Prostitution has been legalized in Netherlands, New Zealand, Germany, Iceland, Switzerland, Austria, Denmark, Greece, Turkey, Senegal, Venezuela, the state of Nevada in the United States and among the Northern Territory. In Netherlands, like ordinary citizens, prostitutes have been brought under the tax net; prostitution in India is an 8.4 billion underground industry, if prostitution is legalized the whole flow of money will be brought under the legal arena it may result in better economic growth of the country as well which in return will provide protection under existing labour laws (till now prostitution is not brought under the umbrella of welfare social legislations, specially labour laws), health safety etc.

Right to self-determination of Sex workers in India: The preamble of the Indian Constitution emphasizes on socio-economic justice to all its citizens in India. Does it exclude sex workers? No. Therefore, the rights and privileges given to any other citizen shall be enjoyed by sex workers equally as they are the equal shareholders of '*we the people*'. The people coming into this profession are mostly poor, illiterate and helpless. Therefore, sex workers are always seen as an object/instruments of sexual gratification, and never seen as complete human beings with dignity and self-determination. Self-determination in this case is limited to their legal organization which can raise their voices, their union like any other organization and a means of

self-representation. Though Supreme Court in a catena of judgements has categorically laid down that un-chastity of a women does not make them open to any and any person to violate her person. In *Mohan v. State of M.P.*²⁴, it was held that, it is no defence as against the crime of rape, that the girl so raped was of easy virtue and was habitual to sex. The root is there in India for the self-determination of sex workers, especially apex court recognized and emphasized in a number of judgements. However, the nature of sex work and its legal status is such which does not allow them to exercise such rights and remains on paper only.

Conclusion

“There is no greater tyranny than that which is perpetrated under the shield of law and in the name of justice”
~Baron de Montesquieu

The very purpose of law is to provide justice to the aggrieved person. But law does not always mean justice, sometimes it is used as a tool to satisfy collective conscience of the society.

The reasons for supporting decriminalization of sex may differ from person to person or society to society. However, the approach for this paper to support decriminalization of sex work (completely) is basically based on human rights demand, legal demand (the essence of law law in truest sense which delivers justice to all irrespective of any identification). Therefore, change in legal approach will be a humane approach due to various reasons. Firstly, legalizing prostitution will allow sex workers to demand their basic rights which includes right to education, dignity and overall developments as a normal citizen which will build a sense of confidence and self-respect thereby bring them back to the mainstream society. Secondly, it will reduce cruelty and harassment of the women working as a sex worker. Thirdly, legalizing prostitution will guarantee them a right to proper health check-up which is needed to keep our society healthy. Lastly, they can continue their work in a normal environment which will create a sense of equality among people.

²⁴ 2001 Cr. LJ 3046 (M.P.)

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