The Chanakya Law Review (CLR)

Vol. I Issue I, July-Dec. 2020, pp. 74-93

A MORAL DIVERGENCE FROM INDIAN SEX WORK LAWS

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ABSTRACT

Sex workers are amongst the most marginalized and ostracized members of Indian society today. While some part of the ill-outlook towards them stems from the societal stigma surrounding sex, the laws also contribute significantly in shrouding them with a perception of criminality and reinforcing the ideas of immorality associated with the profession. This paper seeks to analyse the legal framework relating to sex work through morality and legal reasoning. It argues that while international law has come to slowly acknowledge sex workers' human rights, Indian laws have failed to do so.

The paper presents a comprehensive analysis of Indian law, depicting its friction with morality since its inception till the present date and shows that such an outdated framework is no more valid in light of new research and evolved legal understanding of various concepts. At the end, suggestions are made to tackle with the problems plaguing the extant as well as newly proposed laws.

KEYWORDS: sex work, morality, exploitation, prostitution, dignity, human rights

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INTRODUCTION

Sex workers are amongst the most marginalized and ostracized members of society today. This is a result of the traditional discourse around them, which has framed their existence as antithetical to the principles of human rights. As a corollary to this, laws aimed at sex workers are not only controversial, but oft-ignored and counterproductive. The law in India too, having been inspired from the dominant view, fails to be unequivocal in its objective and address the rights of sex workers. In between its continuing loyalty to a particular idea morality and its penchant for paternalism, it has injured the autonomy and interests of sex workers in multiple ways.

This paper seeks to view the topic of sex workers from the vantage point of their human rights. Part I deals with the moral and rights-related ideas of prostitution, which are often used to oppose sex work itself, or laws in favour of it. Part II analyses the traditional position of international law regarding sex work, and the changing trends within it. In Part III, the Indian response to sex work is evaluated. Beginning from a legal historical account and moving towards its gradual evolution, the picture depicts confusing and moralistic aims of the Act along with naïve efforts of the judiciary, both of which leave much to be desired. In Part IV, we present concluding remarks and suggestions, seeking a more humane outlook of Indian laws, which is compatible with the revered ideas of both rights and dignity, as well as in keeping with the global outlook on sex workers.

RECONCILING SEX WORK AND HUMAN RIGHTS

Sex work, along with being contentious morally and ethically for many, is also difficult to associate with rights. Traditionally, sex work has been conflated with sex trafficking[3] and even when viewed independently of trafficking, is often seen as inherently exploitative and a modern form of slavery.[4] However, there is a more rational view that is able to reconcile it with rights, and is a more principled and fair approach towards sex worker-related laws.

Sex Work is often seen as intrinsically linked with dignity and shame. This argument has two facets. In one sense, it assumes that the degradation of a woman prostitute's self-esteem and

[3] Sujata Gothoskar and Apoorva Kaiwar, "Who Says We Do Not Work?" Looking at Sex Work", 49 Economic & Political Weekly 55 (2014).
[4] Sameena Azhar, Satarupa Dasgupta, et al., "Diversity in Sex Work in India: Challenging Stereotypes Regarding Sex Workers", 24 Sexuality & Culture 1774-1797 (2020).

feeling of shame is due to her failure to live up to the ideal[5], which varies in cultural contexts, but most often and more so in India, tends to rest on a notion of chastity of women, and procreation and childbirth as motives for sexuality. Furthermore, it supposes that certain legal sanctions are justified to prevent the woman from going through such a ritual of shame and violation of dignity. These views are hardly tenable today; in fact, ideas like autonomy and self-determination now are included in the idea of an individual's dignity as opposed to dominant cultural notions, which has been recognized by the courts as well, such as in decriminalizing same-sex relationships.[6]

Seen from another angle, the idea of prostitution offending dignity is often associated not with individual women, who may find it empowering and even granting them the dignity of liberty,[7] but rather with collective virtues as dignity. This idea is similarly based on prevalent notions and practices which the society collectively views as symbolic of a civilized society, and the violation of which offends the conscience of the whole society and impacts it.[8] However, such ideas of dignity – which may even be referred to such "public morality" – are malleable and therefore not legally enforceable. Instead, constitutional morality should prevail over public morality, especially when public morality is dictated by external considerations rather than personal ones i.e. concerned more with assignment of opportunities to others rather than focusing on one's own enjoyment of opportunities.[9] Arguments such as those stating that this kind of work degrades the prostitute in some way by emotionally alienating her often fail to stand up too, as many similar kinds of work are widely prevalent and encouraged in other fields.[10]

Since dignity cannot be a decisive factor, the issue of sex work is inevitably linked with choice. It is often argued that prostitution is either always coerced, or even if chosen voluntarily, it is still not a free choice. Right to choice is a defining part of a person's life and has even been protected by the Indian judiciary in many cases. More specifically, right to choose a profession is guaranteed by Article 19 (1) (g) of the Constitution and prostitution as a chosen profession

[5] David A. J. Richards, "Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution", 127 University of Pennsylvania Law Review 1195-1287 (1979).
[6] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[7] Leslie Meltzer Henry, "The Jurisprudence of Dignity", 160 University of Pennsylvania Law Review 169-223 (2011).
[8] *Ibid.*
[9] Rohit Sharma, the Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment, (2009) 2 NUJS Law Review 445.
[10] *Supra* note 3 at 1258.

is technically legal in India, and is exercised by many voluntarily.[11] The idea behind protecting these choices resonates with Dworkin's study of rights in the American context, from where we have borrowed the concept of fundamental rights. He refers to rights as "trumps" over all majoritarian and utilitarian considerations, which are to be weighed only against other rights. The human right to choice in such a sense presupposes the capacity of autonomy and equal respect for such autonomy, and trumps over other considerations of whether the choice is advisable or ethical.[12]

While this position is straightforward, it gets complicated when choice itself is dissected to determine if it is really "free". If choice isn't free, autonomy and right to choice are both restricted. For instance, Katherine MacKinnon questions: ""If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?"[13] However, the equation of wealth with choice and poverty with coercion[14] suggests that only poverty constrains our ability to make choices, ignoring other social, familial and religious factors that often come into play. In fact, effective autonomy and correspondingly, effective freedom to choice, is difficult to be ensured in practice; however, the capacity of autonomy can be granted and "regulating our conduct and institutions accordingly can facilitate the moving vision of persons as equal and autonomous, with servility and non-consensual dependence reduced to a tolerable minimum".[15] The idea of choice means granting people the right to decide how they wish to live their own lives by abiding to their own notions of what is good for them. At times, the choices are irrational, unappeasable or quirky, but the autonomy "gives to persons the capacity to call their lives their own."[16]

Despite this, many feminists hold the notion that prostitution is inherently exploitative of the women's bodies and violates their human rights. One limb of the argument states that the work reduces women to objects, by making them sell their bodies. However, it is false to equate selling sexual services as selling of the body, when this is not said of any other profession where people are similarly involved in selling their talents or services.[17] Not only is this a sexist

[11] We do it out of choice, not compulsion: Sex workers, available at: available at: https://timesofindia.indiatimes.com/city/bengaluru/We-do-it-out-of-choice-not-compulsion-Sex-workers/articleshow/52099867.cms (last visited on November 3, 2020).
[12] *Supra* note 3 at 1258.
[13] Views on the Legalisation of Prostitution Sociology Essay, available at: available at: https://www.ukessays.com/essays/sociology/views-on-the-legalization-of-prostitution-sociology-essay.php (last visited on November 4, 2020).
[14] *Supra* note 2 at 1774.
[15] *Supra* note 3 at 1227.
[16] *Id* at 1225.
[17] *Supra* note 3 at 1257.

conception of sex where women are seen as surrendering and giving access to men, this view often fails to acknowledge the empowered roles that women often play in the profession by acting on their own terms.[18] Even arguing that such a profession – being the worst example of sexual objectification of women – should not be allowed and reformed as it violates the dignity of persons, is an incomprehensible argument. In other areas of life, objectification or stereotypical notions in professions, such as in aviation industry, film industry etc., are not so harshly criticised, and in fact, sometimes seen as "socially reproductive work".[19]

Therefore, the special moral claim against prostitution is that objectification here involves treating the prostitutes not as the grammatical 'object', such as of one's endeavours as we do in other relationships, but rather treating them as a non-person,[20] which has no concrete basis. Patrons of prostitutes engage the services for various motivations[21] and ends which may often be dictated by fair bargain and understanding,[22] and similarly prostitutes too are not passive recipients in the trade.[23] David Richards cheekily puts it in this way: "If one thinks of the prostitute as an unloved sex object, the alleged symbol of sexually exploited women carried to its immoral extreme, the crucial difference becomes clear: the prostitute demands and exacts a fair return, as an autonomous person should, for service rendered."[24]

A different form of this argument argues that prostitution itself is exploitation of the self. The idea behind such arguments is that while humans are free to do and choose as they wish to, their "body acts as an absolute and inexplicable limit on autonomous freedom", whose autonomy and rights they cannot surrender as is done in slavery, for instance.[25] This view presents false equivalence between slavery and voluntary services of sex engaged in by the prostitute, which no more harm the buyer or seller than any other services in the market.[26] Nevertheless, one of the reasons why this view has continued to survive despite its flaws is because it is often permeated through legal frameworks, both national and international.

[18] *Supra* note 2.
[19] *Supra* note 1 at 57.
[20] *Supra* note 3 at 1261.
[21] *Supra* note 1 at 57.
[22] *Supra* note 3 at 1262.
[23] *Supra* note 2.
[24] *Supra* note 3 at 1262.
[25] *Id* at 1259.
[26] *Supra* note 3.

INTERNATIONAL LAW: MOVING FROM TRADITIONAL TO RIGHTS-BASED APPROACH

At the very premise, the problem with the instruments of international law is of fusing and treating trafficking and prostitution within the same lines and still continuing with the same notion.[27] However, the abolitionist approach of international law to treat prostitution as trafficking and the non-compatibility of human rights with prostitution stands dated in the contemporary times. The international conventions relating to prostitution throw light on the changing outlook.

The very first convention which paved way for the abolitionist approach in international law was the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.[28] The preamble at the core reflects the objective that prostitution is incompatible with the human dignity and treats trafficking and prostitution equivalent to slavery-like practice.[29] Article 1 of the 1949 Convention further states that the consent is immaterial when exploitation of the prostitution is in question.[30] India also ratified this Convention on 9th January 1953 and subsequently brought in the legislation in 1956.[31] However, the 1949 Convention has faced backlash over the past few decades due to its poor implementation and ambiguous wordings, used without distinguishing enforced and voluntary forms of prostitution.[32]

The Convention also did not gain much international community support, as till date there are only 82 State Parties who have ratified it.[33] Moreover, one of the major drawbacks of this Convention is that it did not provide for any mechanism to deal with the human rights violations committed against the women and any supervisory body to look into the state of affairs. In toto,

[27] *Supra* note 1 at 54.
[28] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, available at: https://www.ohchr.org/en/professionalinterest/pages/trafficinpersons.aspx (last visited on October 17, 2020).
[29] Laura Reanda, "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action", 13 Human Rights Quarterly 202 (1991).
[30] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, art. 1.
[31] The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956).
[32] *Supra* note 27 at 210.
[33] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-11-a&chapter=7&clang=_en (last visited on October 21, 2020).

despite criminalizing all the related aspects of prostitution except for prostitution itself, it did not prove to be promising model and unjustly conflated trafficking with prostitution.[34]

Thereafter, the 1979 Convention on the Elimination of All Forms of Discrimination against Women extensively dealt with the human rights of women and called for equality between men and women both at political and public front. Not only this Convention has received a tremendous support from over 189 state members[35], but it also has a supervisory body (known as 'CEDAW Committee') to inquire into the implementation and compliance by the state members.

Article 6 of the Convention calls upon the State Parties to take appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.[36] The Article thus deals separately (Change) into "trafficking" and "exploitation of prostitution". While the CEDAW Committee has tried to address the issue of trafficking, the term "exploitation of prostitution of women" again finds no definition and remains in a state of ambiguity.[37] However, a notable distinction in language is evident through the deliberate usage of the term "exploitation of prostitution of women" instead of "suppression of all forms of prostitution", hinting at the purpose and differentiation in approach that the provision seeks.[38] On the flip side, it falls short of specifying the suggestive measures the state members should take to suppress trafficking and exploitation of prostitution.

In the year 2002, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children or commonly known as the Palermo Protocol made a significant departure from the conservative view that was advocated for trafficking. The term "trafficking in persons" requires 3 elements i.e. actions (recruitment, transportation, etc.), means (coercion and fraud, etc.) and purpose (for exploitation of the prostitution of others or

[34] Annie George, U. Vindhya, et al., "Sex Trafficking and Sex Work: Definitions, Debates and Dynamics- A review of Literature", 45 Economic & Political Weekly 64 (2010).
[35] Convention on Elimination of All Forms of Discrimination against Women, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited on October 22, 2020).
[36] Convention on Elimination of All Forms of Discrimination against Women, available at: https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article6 (last visited on October 22, 2020).
[37] UNDOC. The Concept of 'Exploitation in the Trafficking in Persons Protocol, available at: https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf (last visited on October 23, 2020).
[38] The Smart Sex Worker's Guide to the Convention on the Elimination of All forms of discrimination against women, available at: https://www.nswp.org/sites/nswp.org/files/smart_guide_to_cedaw_-_nswp_2018_0.pdf (last visited on October 23, 2020).

other forms of sexual exploitation, etc.).[39] This definition apparently tried to delink prostitution from trafficking, and for the purposes of trafficking only included exploitation of the prostitution of others, provided means and actions are also present.[40] However, the Palermo Protocol too, like other instruments, did not define the key terms such as sexual exploitation, forced labour, practices similar to slavery or servitude etc. and left it to the discretion of the state parties to assign definition to these terms.

The constant conflation of sex work with trafficking in international agreements has more often than not reflected in the local policy of state parties and their model to tackle trafficking and prostitution. The international law instruments treats prostitution as a violation provided it involves an element of coercion or exploitation. They remain silent when it comes to the human rights implications of voluntary sex workers or situations that do not fall under the defined umbrella of international law. The framework provided by the international law has not yet addressed the meaning of prostitution and its related problem from a human rights perspective.[41]

However, certain improvements can be witnessed when it comes to addressing the issues of sex workers and their human rights violations. Though the CEDAW Committee has not yet adopted a clear position on a woman's right to choose sex work, in 1992 it issued the General Recommendation No.19 which specifically recognized that the prostitutes are marginalized and vulnerable to violence because of their illegal status. It was for the first time the human rights abuses against sex workers were recognized.[42]

The CEDAW Committee in its concluding observations while reviewing Fiji's Report observed that it was concerned with the criminalization of sex work, as a result of which the sex workers are victims of violence and vulnerable to ill-treatment by the police.[43] In its concluding observations at Hungary in 2013, the Committee expressed concerns over the discrimination against the women sex workers and recommended to take measures to prevent discrimination against sex workers and to pass legislation in respect to their right to safe

[39] *Supra* note 32 at 66.
[40] Framework on Rights of Sex Workers & CEDAW, available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf (last visited on October 26, 2020).
[41] *Supra* note 27.
[42] Chi Adanna Mgbako, "The Mainstreaming of Sex Worker's Rights as Human Rights", 43 Harvard Journal of Law & Gender 120 (2020).
[43] UN CEDAW, Concluding Observations of Fiji, and Forty-Sixth Session, 12-30 July 2010, available at: https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-FJI-CO-4.pdf (last visited on November 2, 2020).

working conditions being guaranteed at local and national level.[44] Moreover, in 2014 the Committee also reviewed India's report and stated the reason for persecution of women in prostitution is because of the measures taken to tackle trafficking such as raid and rescue operations.[45]

The change in approach of international law from the conservative view to a more progressive view is quite evident. The soft response was observed initially in the 1979 Convention (CEDAW) where not all forms of prostitution was suppressed; rather called for suppression of those who exploited the prostitution of other. Then the Palermo Protocol defining the term "trafficking in person" comprehensively delinked voluntary sex work from trafficking and was perhaps one of the significant positive changes. Moreover, the CEDAW Committee's continuing endeavours to appraise the plight of the sex workers and acknowledge their humans rights points to a change in outlook towards sex work.

LAW IN INDIA REGARDING SEX WORKERS

A. HISTORY

The Indian law relating to prostitution was not the result of a mass movement, but stemmed mainly from its international commitments.[46] India had become a signatory to the first International Convention for the Suppression of Traffic in Women and Children of 1921, and decided to follow a general policy of abolition towards prostitution by passing various regional Acts to close down brothels.[47] In contrast to this, many dignitaries felt that India had taken a wrong step; she needed to retract from her international commitments and move towards licensing of brothels and registration and medical check-ups of prostitutes, which would prevent the spread of prostitution from 'recognized streets' to the whole city, unchecked by police.[48] After India signed the United Nations International Convention of 1950[49], a national law addressing the issue was sought to be enacted. The 1950 Convention is against prostitution wholly along with the accompanying evil of trafficking. However, the word 'prostitution' is

[44] UN CEDAW, Concluding Observations of Hungary, Fifty-Fourth Session, and 11 Feb-1 March 2013, available at: https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.HUN.CO.7-8.pdf (last visited on November 2, 2020).
[45] UN CEDAW, Concluding Observation of India, 1219th and 1220th Meeting, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IND/CO/4-5&Lang=En (last visited on November 2, 2020).
[46] Jean D'Cunha, "Prostitution in a Patriarchal Society: A Critical Review of the SIT Act", 22 Economic & Political Weekly 1919-1925 (1987).
[47] Government of India, Report of the Advisory Committee on Social and Moral Hygiene 13 (Central Social Welfare Board, 1956).
[48] *Supra* note 45.
[49] *Supra* note 26.

not defined in the Convention and the States were free to define offences and punishments in conformity with their domestic law.[50]

Tasked with ascertaining the societal realities and drafting a law on prostitution, the Report of the Advisory Committee on Social and Moral Hygiene was consulted which had studied the issue of prostitution in detail. There was a machinery of pimps, brothels and landlords operating in India who exploited and victimised women for their own gains and destroying it could limit opportunities for exploitation, but the Committee felt that prostitution per se could not be prohibited as it would infringe upon the right to practice any chosen profession.[51] However, this is not to say that the Committee viewed sex work favourably – it described it as an "evil" which is "degrading and debasing" and a "cause of serious injury to the social and moral health of the community". Commenting on the causes and growth of prostitution, the Report criticized the laws which were solely directed at the prostitute and not the client.[52] However in the same vein, it suggested economic upliftment, social education and modern ideas of morality and clean living as solutions to deal with the issue.[53] The language of the Report is confusing – it recognizes the right but looks down on the exercise of it, and similarly it criticizes the law but stops short of suggesting changes to it.

In the Lok Sabha too[54], there were varying and contradictory tones while debating the then-newly drafted Suppression of Immoral Traffic in Women and Girls Bill. For instance, Shri Datar while introducing the Bill downplayed the role of morality in determining the illegality of a profession. Along with this, it was largely acknowledged that harsh realities such as socio-economic conditions drove women to sell sex out of necessity. However, along with this rational analysis of the situation, there were also undercurrents hinting that "biological urges" were responsible for the "evil sin" of prostitution, which had existed for years and could never be eradicated.

Eventually, the UN Convention was largely followed; while sex work itself was preserved as a profession in theory, activities closely related to it such as procuring prostitutes, keeping brothels for prostitution, living on the earnings of prostitution or carrying prostitution near

[50] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, art. 12.
[51] *Supra* note 45 at 11.
[52] *Supra* note 45 at 12.
[53] *Supra* note 45 at 14.
[54] Lok Sabha Debates on November 29, 1956, available at: https://eparlib.nic.in/bitstream/123456789/56072/1/lsd_01_14_29-11-1956.pdf#search=prostitution%20[1952%20TO%201959] (last visited on November 6, 2020).

public places was penalized by the Suppression of Immoral Traffic in Women and Girls Act, 1956. Prostitution here was defined as the "act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind"[55]. Therefore, the three important ingredients were (i) sexual intercourse; (ii) promiscuity, which was interpreted as indiscriminately offering the body for sexual intercourse to anyone who desired it[56]; and (iii) doing so for hire.

Therefore, sex work was largely prohibited, albeit a narrow scope was left open for sex workers to operate from their own homes (as opposed to brothels and rented places), individually and voluntarily where they could receive men for the purpose of sex work (instead of themselves being procured or induced).[57] This ensured that the morality which denounced sex work as sinful as shameful trumped over other considerations, although a narrow scope was still left open for the fulfilment of "uncurtailable biological urges", and possibly as a token towards freedom of profession.

B. 1986: AMENDMENT WITHOUT A CHANGE

One of the important changes brought forward by the amendment in 1986, for the purposes of this issue, was the change in definition on prostitution, which now came to be known as 'the sexual exploitation or abuse of persons for commercial purposes'[58], thereby shifting the focus of the Act from sex work to commercialized exploitation.[59] The interpretation implies that those who sexually exploited persons for commercial purposes were to be punished[60], i.e., by taking unjust and unlawful advantage of trapped women for their own benefit.[61] Moreover, the commercial sexual exploitation of women seems more closely related to the titular aim of the Act to punish 'immoral trafficking'.

Still, the amended Act renamed as the Immoral Traffic (Prevention) Act, 1956 (hereinafter "ITPA") is not without its problems and contradictions. In the eyes of a simple observer, the Act thus seems to depart from its moralistic outlook and approve of voluntary sex work and couch itself around the human rights issue of trafficking and forced prostitution and exploitation. However, the reason for the change is certainly less revolutionary; it is to expand

[55] The Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No.104 of 1956), S. 2.
[56] State of Mysore v. Susheela, (1965) SCC Online Kar 119.
[57] *Supra* note 52.
[58] The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986 (Act 44 of 1986), s. 3.
[59] Poonam Pradhan Saxena, "Immoral Traffic in Women and Girls: Need for Tougher Laws and Sincere Implementation" 44 Journal of Indian Law Institute 508 (2002).
[60] Pramod Bhagwan Nayak v. State of Gujarat, 2006 SCC OnLine Guj 29.
[61] Gaurav Jain v. Union of India, (1997) 8 SCC 114, para. 19.

the definition to cover many forms of sexual exploitation and not just limit it to sexual intercourse, which may be difficult to prove.[62] In the light of this change and the otherwise intact Act, the purposes and aim of the amended Act are quite perplexing.

A case in point is Section 7 of the Act, which makes prostitution punishable if carried on in the vicinity of a public place. This meant sex work in the original Act, and prohibited such activity near public places in order to prevent a debasing effect.[63] After the amended definition, it now punishes commercial sexual exploitation near public places; this is nonsensical as such exploitation is prohibited without regard to places, by virtue of other sections which punish procuring for prostitution, living on earning from prostitution etc. Thus, in effect, due to the unsuitable wordings of Section 7, which are misfits amidst the scheme of the present Act, along with a lack of definition of the term "commercial sexual exploitation"[64], it is often the voluntary sex workers who are rounded up under this section for operating near public places, as they are seen as exploiting themselves for commerce.[65] This has created ambiguity whether sex work is itself an offence or whether trafficking /exploitation of others for the purpose of prostitution are an offence.[66] Apart from violating the principle of legality, the wordings make the voluntary sex workers bear the brunt of arbitrary arrests, police threats and violence.

Similarly, Section 8 which punishes seducing and solicitation for the purpose of commercial sexual exploitation, also applies to voluntary sex workers and is often used only to grossly harass them and extort money.[67] This has also led to stigma around sex work and reinforced the perception of sex workers as criminals, which was characteristic of the older version of the Act. Quite in contrast to criminalization, there are provisions[68] for correction home facilities for prostitutes, which victimizes them at the behest of the state. While it is the duty of the State to provide relief for genuine trafficking victims and provide them with employment opportunities for protection, these provisions are much more notorious.

The provision of corrective institution for violations of the gender-neutral Sections 7 and 8 are only applicable on women, which merits the question whether the idea behind the provision is

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[62] Lok Sabha Debates on August 22, 1986 available at: https://eparlib.nic.in/bitstream/123456789/3764/1/lsd_08_06_22-08-1986.pdf#search=Prostitution%20[1980%20TO%201989] (last visited on November 4, 2020)
[63] *Supra* note 52.
[64] Centre for Policy Research, "A Review of the Immoral Traffic Prevention Act, 1986" 3 (2017).
[65] Rajalaksmi RamPrakash, "Delinking Prostitution from Trafficking-A Look at India's Immoral Traffic Prevention Act 1956", 22 Canadian Women's Student Journal 111 (2003).
[66] *Supra* note 62.
[67] *Supra* note 63.
[68] The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956), s. 10A.

really to provide relief and protection from the supposed exploitation, or to "correct" women. The latter notion becomes even stronger when one considers the conditions for their admission and release – the various requirements are of considering the "character", "health" and "mental condition", and an order of release demands that the prostitute will lead a "useful" and "industrious" life – which are nowhere defined and tend to be as gender biased as the provision itself.[69] Moreover, these provisions are often invoked to forcefully "save" sex workers during raids and detain them in corrective institutions against their will,[70] at times for months.[71] This is highly restrictive of the principle of autonomous personality and freedom of profession and movement of these women, along with causing additional hardship instead of providing relief.

Section 20, too, is a section which grants power to the magistrate to evict a sex worker from his jurisdiction simply on the basis of her profession. Flavia Agnes notes regarding this provision that it is so vague that it is capable of putting any woman, prostitute or not, at the behest of the magistrate's court in order to prove her "moral righteousness" i.e., that she is not a prostitute.[72] In the challenge to the said section, the Supreme Court justified the provision as protecting the morality of certain localities while containing the 'evil' of prostitution.[73]

However, the SC's views cannot be said to be valid today. Firstly, the settled law was related to the pre-amended Act which looked with contempt and largely criminalized sex work in many settings. However, the amended Act seeks to address exploitation and trafficking, not the sale of sexual services itself. Moreover, going by the Dworkinian view of rights, the right of profession can justly be restricted by balancing it against other rights of civilians, but cannot be done so on moralistic considerations alone through a vague and unbalanced provision to harass its practitioners, even if a remedy for such action is provided later on.[74] In light of the change in Act's philosophy, the balance of proportionality tilts against sex workers in present times.

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[69] *Supra* note 63.
[70] Rescued but not released: the 'protective custody' of sex workers in India, available at: https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/rescued-but-not-released-protective-custody-of-sex-workers-in-i/ (last visited on November 7, 2020).
[71] PTI Mumbai, "Bombay High Court orders release of three women sex workers detained in Mumbai", Deccan Herald, September 26, 2020, available at: https://www.deccanherald.com/national/west/bombay-high-court-orders-release-of-three-women-sex-workers-detained-in-mumbai-893303.html (last visited on November 7, 2020).
[72] *Supra* note 63.
[73] State of U.P. v. Kaushailiya, (1964) 4 SCR 1002.
[74] *Supra* note 3.

C. JUDICIAL APPROACH

The judiciary too has not always clearly differentiated between trafficking and prostitution, and has almost moved parallel to the law. From earlier decisions condemning prostitution, in place of trafficking, as an 'evil' running sore on civilisation destroying all moral values, it has at the very least come to address it not through a moral-religious lens but instead acknowledge the socio-economic necessity behind it.

Even while it has reiterated that sex workers have a right to dignity of life under Article 21, the Supreme Court has stopped short of recognizing voluntary sex work as a valid, dignified profession on its own and has instead insisted on rehabilitation.[75] By assuming that sex work is and will always be undignified, and any work outside of it will ensure dignity, the court has oversimplified matters. On the contrary, research indicates that sex workers are aware of and experience commercial and sexual exploitation in other fields as well, and if anything, recognize prostitution as another form of such experience.[76]

Apart from that, the SC itself described its perception of sex work as animal existence of women surrendering their body[77], and engaging in sexual acts but not "out of love"[78]. However, it is a myth to say that all sex workers lead a lie of animal existence; many have multiple identities as mothers, sisters etc. and sustain their life and family through sex work.[79] Similarly, love is an all-too-important concept which the SC has strived to protect by decriminalizing same-sex relationships, for instance, and the lack of love is a decisive factor while looking down on prostitution. However, the expression of sexuality through love is not the only morally acceptable and enforceable ideal; many deem it a "narrow and parochial narcissism', including a certain category of feminists who criticize the special application of the idea of "loving self-sacrifice" to women to blind them to their other socio-economic inequalities.[80]

While these ideas may not be worth any weight, the other reason offered by the Court was a lack of employment choice, which pushed women into prostitution, thereby justifying the court's noble effort of rehabilitation.[81] As argued earlier, it is possible to reconcile choices – even those which are as unappetising and unethical to many – with autonomy of the person who makes the choice, and respect his capacity for choice. However, even if one assumes that

[75] Budhadev Karmaskar v. State of West Bengal, (2013) 1 SCC 294.
[76] *Supra* note 2.
[77] Budhadev Karmaskar (3) v. State of West Bengal, (2011) 10 SCC 277.
[78] *Ibid.*
[79] *Supra* note 2.
[80] *Supra* note 3 at 1249.
[81] *Supra* note 73.

the court wished to grant the ideal of 'effective freedom of choice' to sex workers, rehabilitation certainly did not ensure it, as it is almost impossible to do. This is evident from the court's orders itself, which gives evidences of voluntary sex workers – who are unwilling to leave the profession, who are unable to leave the profession and gain respect and dignity, and those who have been rehabilitated and still continue to engage in sex work.[82]

D. RECENT TRENDS

The Parliament in India has made multiple attempts recently to amend the law relating to trafficking, which impacts the sex workers as well. The first of these was the introduction of The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 which was passed in the Lok Sabha but never made its way to the Rajya Sabha, perhaps due to the criticisms it faced. The definition of "trafficking" provided in the Bill was vague and suffered from the same issue that had been plaguing Indian law since decades – the conflation of trafficking and voluntary sex work.[83] The Bill also failed at harmonizing local laws in lines with the international commitments of India. For instance, despite ratifying the Palermo Protocol of 2000, the incorporated definition of "trafficking" – which is same as that in S.370 of the Indian Penal Code, 1860 – contradicts Article 3 of the Protocol as it omits the essentials terms mentioned thereunder.[84] Moreover, the Bill was meant to be in addition to other laws such as the ITPA, and this would have certainly meant double jeopardy for the sex workers.[85]

The Bill just like other laws on sex workers, focuses more on rescuing and rehabilitation rather than acknowledging that such strategies often backfire as the statistics present a contrasting reality when those who were voluntarily engaged in this return to sex work.[86] The prevalent presumption of State that the rescued sex workers are the 'victims' time and again seems to overweigh the interest of those who consent to sex work.[87]

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[82] Budhadev Karmaskar (4) v. State of West Bengal, (2011) 10 SCC 283.
[83] Oxford Human Rights Hub, The Indian Anti-Trafficking Bill, 2018: A misguided Attempt to Resolve the Human Trafficking Crisis in India, available at: https://ohrh.law.ox.ac.uk/the-indian-anti-trafficking-bill-2018-a-misguided-attempt-to-resolve-the-human-trafficking-crisis-in-india/ (last visited on July 15, 2021).
[84] Dipa Dube, Ankita Chakraborty, et.al., "The Anti-Trafficking Bill, 2018: Does it Fulfill India's Commitment to the International Community" 7 Journal of Human Trafficking 29 (2021).
[85] Tripti Tandon, "India's Trafficking Bill 2018 is Neither Clear nor Comprehensive", available at: https://www.epw.in/engage/article/trafficking-of-persons-prevention-protection-and-rehabilitation-bill-2018-is-neither-clear-nor-comprehensive#:~:text=The%20bill%20is%20founded%20on,of%20laws%20against%20human%20trafficking (last visited on July 17, 2021).
[86] Aarthi Pal, Meena Saraswathi Seshu, et.al., "In its Haste to Rescue Sex Workers, 'Anti-Trafficking' is Increasing Their Vulnerability", available at: https://www.epw.in/engage/article/raid-and-rescue-how-anti-trafficking-strategies-increase-sex-workers-vulnerability-to-exploitative-practices (last visited on July 17, 2021).
[87] *Ibid.*

More recently, the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 was opened to the public for their suggestions and comments and is scheduled to be introduced in the Parliament. Meant to resolve all the criticisms faced by the earlier Bill, the issue of conflation of trafficking and sex work still strikes at the core of this Bill which paves way for criminalisation of sex work and victimisation of those consenting to it.[88] The definition of trafficking in the Bill is vaguely worded wherein expressions such as "vulnerability" are not defined. Moreover, the term "exploitation" is worded problematically, and if applied loosely, brings into its ambit voluntary sex workers as well, who may be seen as exploiting their own selves through this trade. Reading the two together, trafficked victims could potentially include people who may choose to engage in sex work due to financial vulnerabilities.

The second Explanation to the provision of "Trafficking in Persons"[89] in this Bill states that *"The consent of the victim shall be irrelevant and immaterial in determination of the offence of trafficking in persons if any of the means mentioned at (b) above is used to commit the crime."* This creates a major impediment for the sex workers who are the risk of arbitrary rescue and rehabilitation operations by being identified as a victim of trafficking, in spite of having voluntarily entered into the profession.

E. NHRC ADVISORY

The National Human Rights Commission of India recently released an advisory on the human rights concerns relating to women during the Covid-19 pandemic, containing recommendations for concerned Ministries and all States and Union Territories.[90] Regarding sex workers, the NHRC proposed their recognition and registration as informal workers in order to enable them to get worker benefits, and similarly the inclusion of migrant sex workers in the scheme meant for migrant workers.[91] It also advocated for issuance of temporary documents for easy access to schemes such as the Public Distribution Scheme as well as access to healthcare services and commodities.[92]

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[88] Sensitive and precise: On anti-trafficking bill, The Hindu, available at: https://www.thehindu.com/opinion/editorial/sensitive-and-precise-the-hindu-editorial-on-anti-trafficking-bill/article35398372.ece (last visited on 19th July, 2021).
[89] The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021, s.23.
[90] NHRC, Human Rights Advisory on Rights of Women in Context of Covid-19, available at: https://nhrc.nic.in/sites/default/files/Advisory%20on%20Rights%20of%20Women_0.pdf (last visited on July 20, 2021)
[91] *Id* at 6.
[92] *Ibid.*

However, what was hailed as a "critical victory" by the sex workers[93] and had potential to create a more inclusive and accepting atmosphere for them, instead led to disagreements by certain stakeholders regarding the provision of recognizing sex workers as informal workers. This led to the NHRC issuing a modification in the notification, instead recommending that sex workers be provided benefits on "humanitarian grounds" as well as "for their survival".[94] Unsurprisingly, this backtrack by the NHRC has been fuelled by the outdated notions of morality and culture that the various stakeholders continue to value over basic human rights for sex workers. What is remarkable is that the most notable of these oppositions – dismissing sex work both as a profession and as a voluntarily made choice– was met with disapproval by sex workers themselves, as well as 255 organizations working towards their causes from all over India.[95]

SUGGESTIONS

A. DOING AWAY WITH THE CONFLATION OF TRAFFICKING WITH VOLUNTARY SEX WORK

The law relating to sex work has long been plagued by the problem of conflation of the crime of trafficking with the profession of sex work. In spite of bringing a change in the ITPA, the vaguely worded provisions have adversely impacted sex workers who are often wrongly implicated and arrested by the police. To solve the confusion, the term 'exploitation for commercial purposes" in the ITPA needs to be defined comprehensively and clarified, in a way that voluntary sex work is not understood as a form of such exploitation.

Moreover, other provisions such as S.7 and S.8 need to be reanalysed in the view of the suggested clarification. Section 20 of the ITPA, being obsolete in the scheme of the amended Act as explained above, and disproportionately tilting against sex workers, needs to be removed from the ITPA.

Moreover, the present Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 too suffers from the defect of conflating 'trafficking' with 'sex work' as explained in the

[93] NSWP, NHRC, India backtrack on the recognition of sex workers as informal workers, available at: https://www.nswp.org/news/nhrc-india-backtrack-the-recognition-sex-workers-informal-workers (last visited on July 21, 2021).
[94] NHRC, Modification in the 'Advisory on Rights of Women in the context of COVID-19 Pandemic', available at: https://nhrc.nic.in/sites/default/files/Modification%20of%20Advisory%20on%20Women.pdf (last visited on July 21, 2021).
[95] Explained: Why a NHRC advisory on sex work has rights activists down the middle, available at: https://indianexpress.com/article/explained/nhrc-advisory-on-sex-workers-informal-sector-opposition-6834193/ (last visited on July 21, 2021).

preceding section. To tackle this problem, Section 23(b) needs to be tweaked a little. The use of term 'or vulnerability' needs to be properly defined owing to its ambiguity and unchecked scope, to leave out sex workers out of the ambit of trafficked victims.

As long as sex workers are freely consenting to such activity and voluntarily doing it for the means of livelihood, their right stands at a higher footing and therefore their consent should be taken into account before they are subject to rescue and rehabilitation operations by the respective authorities.

B. RETHINKING THE ARCHAIC APPROACH OF VICTIMIZATION

The law's approach of victimizing sex workers in spite of no compelling reason or veracity needs to be overhauled, as it is counter-productive and terribly dismissive of the sex workers' viewpoints and autonomy.

The provision of corrective institutional stay provided in the ITPA Act should be restricted to actual victims of trafficking, and not used as a way to incarcerate sex workers indiscriminately and against their will. While the clarification suggested above will surely aid in restricting the scope of this provision, sensitizing the authorities towards respecting the differentiation between trafficking victims and sex workers and monitoring mechanisms will ensure that the provision is correctly applied.

The Trafficking Bill of 2021 too stems from this very school of thought, and focuses on rescuing and rehabilitating sex workers by viewing them as 'victims'. As suggested above, a change in the language is required to ensure that voluntary sex workers remain out of the Bill meant to address the crime of trafficking.

C. THE ROLE OF THE WELFARE STATE

Despite being a welfare state, the State has done little to protect the interests of the sex workers till date. While some measures such as establishment of health centres has been undertaken mainly to advance HIV/AIDS programs and stop the spread of diseases in the general population, the sex worker community largely remains side-lined, or self-regulated at best.[96]

[96] Why sex workers are opposing a bill that aims to protect them, available at: https://theprint.in/india/governance/why-sex-workers-are-opposing-a-bill-that-aims-to-protect-them/166087/ (last visited July 21, 2021).

Recently, the Supreme Court was India was compelled to step in to ensure the supply of goods as basic as ration items and basic monetary relief to the sex workers amidst the pandemic, who were unable to avail them due to lack of documents.[97]

In doing so, the SC stressed on the responsibilities of a welfare state and highlighted its duties towards marginalized sections of society. On other occasions, the SC as well as the Parliament have acknowledged the role of socio-economic necessities which compel people to choose this profession. Thus, the state should ensure that sex workers are not incarcerated simply for earning their livelihood. Building up on this, the State should ensure that basic essentials are made available to the deprived and marginalized sex workers and their human rights are put on the same pedestal as that of other citizens of this country. Suggested changes in the law, focused policies directed at this community and issuance of basic documents to access the benefits of these policies can help in acceptance, rather than mere tolerance, of these citizens and removing the cloak of criminality that the sex workers always seem to be shrouded in. In doing all of this, the sex workers' viewpoints should be one of the guiding factors for state action and welfare measures.

CONCLUSION

The unfair laws on sex work – in India as well as in many other countries – have long been justified through a range of arguments that depict sex work variously as coerced, exploitative and/or objectifying. However, these arguments are far from infallible; change in circumstances over the years, new researches documenting the sex workers' viewpoints and critically analysing these arguments exposes their loopholes and disproportionate use in relation to sex work as compared to other services. The notions of dignity and choice, which are often invoked to censure sex work, themselves have undergone an overhaul in current times and are now understood in conjunction with other principles like that of autonomy, in order to honour the individual's right to live life in his or her own right. These trends weigh heavy on the idea that the law in its current form is outdated and not in consonance with the legal understanding and principles that we have come to adopt today.

[97] SC raps UP for delay in identifying sex workers for providing them rations amid pandemic, available at: https://m.economictimes.com/news/politics-and-nation/sc-raps-up-for-delay-in-identifying-sex-workers-for-providing-them-rations-amid-pandemic/articleshow/78914369.cms (last visited July 21, 2021).

The trends in international law depict a changed outlook on sex work and acknowledgement of the excesses meted out to them, which are unfair and against the idea of human rights. In contrast to this, the law in India has remained largely stagnant. Confused in its inception since the very beginning, the changes too have been inconsequential when it comes to safeguarding the rights of sex workers. The judicial response and recent trends are not impressive either and leave much to be desired. Implementation of the suggested changes to address sex workers' rights are not only desirable, but are long overdue.

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