

**INTERNATIONAL JOURNAL OF LAW  
MANAGEMENT & HUMANITIES**  
**[ISSN 2581-5369]**

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**Volume 3 | Issue 4**

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**2020**

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# Prostitution in India: Protection of human rights of Sex Workers in India

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## ABSTRACT

*Prostitution is the second oldest occupation after agriculture and has its roots in India since ages. Its existence is evident in the historical texts. The question that remains unanswered is whether the sex workers have any human rights at all or whether they are merely seen as a sexual object. India is a signatory to a number of international covenants on human rights along with rights of women and also the Constitution of India protects the right of individuals against discrimination, nonetheless it has failed to adequately protect the human rights of sex workers. This paper seeks to unravel some concealed facts about the human rights of sex workers in India and whether the Indian legal system acknowledges the rights of the sex workers. It also aims to uncover the prevailing condition of them in our Indian society. The research paper is concluded with noteworthy findings and recommendations that may assist to re-establish the fundamental human right of the sex workers in India.*

*“We want laws to be refocused on making sex worker’s lives safer and improving the relationship they have with the police while addressing the very real issue of exploitation. We want governments to make sure no one is coerced to sell sex, or is unable to leave sex work if they choose to.”*

**-Tawanda Mutasah,**

**Senior Director for Law and Policy (Amnesty International Secretariat.)**

**Keywords:** - Prostitution, sex workers, brothels, human right, right to work with dignity, workplace, sexual harassment.

## I. RESEARCH QUESTIONS:

1. Whether the basic human rights of the sex workers are safeguarded by the laws in India?
2. Whether the law protects the right of the sex workers to work with dignity in India?
3. Whether decriminalizing prostitution will restore the basic human rights of the sex workers in India?

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## II. HISTORICAL BACKDROP OF PROSTITUTION

Prostitution commonly means intercourse between two individual in exchange of money or kind. It is not a new concept but date backs to the time of ancient eras. Even Indian mythology characters such as Menaka, Rambha, Urvashi were believed to be sex workers because of their charm and divine beauty. Even in Vedic literature, prostitution is evident. At those times, girls who did not have any brothers were offered to rishis by kings as slaves. It was only during the Brahamana period that prostitution was acknowledged as a profession and was often referred to as “*Vishya*” at first and then “*Beshya*” which means one who can be approached by any person. During the Early Medieval Age, the profession grew stronger and bigger and they were known for their lust and habit of exploiting people. They were given a variety of names like *Panapanyangana*, *Ganika* and *Bhujishya*. Likewise, during the Mughal period, the nababs kept girls at their private residences and they were generally foreigners and slaves from Persia. Prostitutes were even classified into various types like, *Swarini* (a married girl who is a prostitute), *Paricharika* (mistress of the masters), *Ganikas* (professional prostitutes and lived in brothels), *Muhuttika* (girl for pleasure appointed for short duration).

## III. INTERNATIONAL BACKDROP:

The concept of human rights as the basic, inalienable rights was recognized by law in the Universal Declaration of Human Rights, 1948, by the United Nations General Assembly. Thereafter plethora of international human rights agreements and covenants were framed which protected the basic human rights, like the International Covenants on Civil and Political Rights (ICCPR), Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>3</sup> According to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000, provides the definition of immoral trafficking. Under Article 6 of CEDAW, it is pertinent to note the General Recommendation of the UN Committee on the Elimination of Discrimination of Women is that the States should acknowledge the fact that due to the unlawful or illegal status attached to the sex workers in the respective countries making them vulnerable to violation of their basic human rights and equal protection of law. The CEDAW Committee has also recommended that the sex workers should be provided with safe working conditions.<sup>4</sup>

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<sup>3</sup> Gitanjali Misra et al., *Protecting the rights of sex workers: Indian experience*, JSTOR 88, 89 (2000).

<sup>4</sup> UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendations Nos. 19, Article 6. Adopted at the Eleventh Session, 1992, (Aug. 1, 2020, 9:12 PM),

The UNDP and the International Labour Organization (ILO) have stressed on the necessary enactments to provide sex workers with rights that are enforceable by law, like the right to safety, occupational health and also the right of participation in the developmental process of laying down the health and safety standards at workplace.<sup>5</sup>

Prostitution and traffic in human beings for the purposes of prostitution acquired such monstrous proportions that the international community responded it by signing various conventions like the International Agreement for the Suppression of White Slave Traffic<sup>6</sup>, International Convention for the Suppression of Traffic in Women and Children<sup>7</sup> and the International Convention for the Suppression of Traffic in Persons and the Exploitation of Prostitution.<sup>8</sup>

#### IV. LEGISLATIVE BACKDROP RELATING TO PROSTITUTION

The Preamble of Constitution of India protects the right to liberty, equality, justice and dignity of every individual. The Constitution of India under Article 15 provides for prohibition of discrimination on grounds of religion, race, caste, sex or place of birth and Article 23 provides for prohibition of trafficking and all forms of exploitation. It is aimed at putting an end to all forms of trafficking in human beings including beggary and prostitution. The International Convention for the Suppression of Traffic in Persons and Exploitation, 1950, to which India was a signatory and also ratified it. Thereafter the Immoral Traffic (Prevention) Act, 1956, was passed by the Central Government which aimed to inhibit and abolish the commercial vice of trafficking in women, men and children for the purpose of prostitution as an organized means of living.

There are other legislations which provide for the protection of human rights in India like the Protection of Civil Rights Act of 1955, the Protection of Human Rights Act, 1993, the National Commission for Women Act, 1990 and provisions of the Indian Penal Code, 1860.

The Supreme Court of India in the landmark case of *Budhadev Karmaskar v. State of West Bengal*<sup>9</sup> has observed and recognized that the right to life is the basic human right guaranteed to every individual including the sex workers. The Court directed the State to provide for recommendation, on the rehabilitation of sex workers wherein the sex worker wants to quit

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<http://www.refworld.org/docid/453882a422.html>

<sup>5</sup> ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No 200), Geneva: ILO, (Aug. 1, 2020, 9:28 PM) [https://www.ilo.org/global/topics/hiv-aids/WCMS\\_194088/lang--en/index.htm](https://www.ilo.org/global/topics/hiv-aids/WCMS_194088/lang--en/index.htm)

<sup>6</sup> Dt. 18-05-1904, as amended by the UN General Assembly on 3-12-1948

<sup>7</sup> Dt. 30-09-1921, as amended by the UN General Assembly on 20-10-1949

<sup>8</sup> Dt. 9-05-1950

<sup>9</sup> (2011) 11 SCC 538

their work on their own volition and also provide for suitable environment where the sex worker wishes to continue working, in light of Article 21 of the Indian Constitution.<sup>10</sup>

## **V. RECOMMENDATIONS**

Firstly, it is recommended that the definition of workplace under Section 2 (o) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as Sexual Harassment at Workplace Act, 2013), should be widened to include the sex workers who are working in the brothels. The sex workers should be taken into consideration under the definition of employees under the Sexual Harassment at Workplace Act, 2013. The Immoral Traffic (Prevention) Act of 1956 where the prostitutes are being punished under the Act and since prostitution is illegal in India there are no rights of the prostitutes specifically against sexual harassment. This Immoral Traffic (Prevention) Act of 1956 mainly aims to prevent traffic in women and girls for purpose of prostitution as an organized means of living as held in the case of *Ratnamala, re:*<sup>11</sup>. The person who is trafficking women or girls for the purpose of prostitution should be punished but not the person who has been trafficked for prostitution. The prostitutes or sex workers who are forced into this profession are themselves the victims and by punishing them under various provisions of the Act, they are being further victimized. Their workplaces, here the brothels, should be recognized as workplace under the Sexual Harassment at Workplace Act, 2013, so that at least they can take the help of the judiciary to protect their right and dignity. The sex workers are also human beings having the right to live with dignity and right to work with dignity, they cannot claim their right against sexual harassment at workplace as their right is not recognized under law. They are selling their body for their subsistence and that is their profession and brothels are their workplace. When the customer or the brothel owners sexually harass the sex workers they remain helpless as they cannot go and complain at the Local Complaint Committee or the Police Station.

Various reports and interview studies show that the atrocities to which the sex workers are subjected to on their refusal to sexual intercourse. The sexual harassment of the sex workers remains within the four walls of the shady room. In case there is a raid in the brothels, due to political pressure or for some other reason, the Police raids the brothels without warrants and picks up the women prostitutes and put them in the custody and beat them up. Sometimes, the

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<sup>10</sup> Aarthi Pai et al., Status of sex workers in India, (Aug. 1, 2020, 10:02 PM), [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT\\_CEDAW\\_NGO\\_Ind\\_17395\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17395_E.pdf).

<sup>11</sup> AIR 1962 Mad 31

Police take bribe from the brothel owners or demand for sexual favours from the sex workers. There are many instances of custodial rape of sex workers by the Police. It is a shocking fact that the law protectors are law breakers.<sup>12</sup> The laws should be enacted in a manner that it is able to provide protection to the basic rights of the sex workers. Prostitution is still seen a taboo in India. The views of the sex workers as to whether prostitution should be decriminalized or not, many opined that it should be decriminalized and they should be seen as a part of the society. Section 20 of the Immoral Trafficking (Prevention) Act provides that in the interest of the general public, the Magistrate may order removal of such prostitute from a particular place and prohibit her or his re-entry. This provision is evident that the prostitutes are seen as offenders and criminals in the society. Thus the solution has to be humane and not portraying the persons who are trafficked for prostitution as a public or private nuisance from whom the rest of the people in the society need to be protected. In the case of *Gaurav Jain v. Union of India*,<sup>13</sup> where it was illustrated by the Court that: “these constitutional and human rights to the victims of fallen trade of flesh track need care and consideration of the society. This case calls upon us to resolve human problem with caress and purposeful guidelines, lend help to ameliorate their socio-economic conditions, eradicate social stigma and to make available to them equal opportunities or the social order.”<sup>14</sup>

In the Sexual Harassment at Workplace Act, 2013, the definition “workplace” should also include religious places like temples, ashrams, churches, madrasas, etc. and the persons working there should be subjected under this Act to prevent, prohibit any act of sexual harassment and redress the complaints of sexual harassment. The Supreme Court of India, recently in a PIL for enforcing anti-sexual harassment guidelines at religious places, was dismissed.<sup>15</sup> This PIL was filed to ensure protection of women against sexual harassment and redressal of their sexual harassment complaints.

## VI. CONCLUSION

With regards to the first research question, the hypothesis was that the sex workers are seen as a human body which is available for the indiscriminate sexual use, devoid of any basic human right in the society. The outcome of the research is that the hypothesis is proved to be true, the sex workers have no basic human right which the human being owns by virtue of being a human

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<sup>12</sup>Groovy Ganges, *Interview with sex workers*, (Aug. 1, 2020, 10:30 PM), <http://groovyganges.org/2009/03/interview-with-sex-workers/>.

<sup>13</sup> (1998) 4 SCC 270.

<sup>14</sup> Mamta Rao, *Law relating to women and children* 186 (Eastern Book Company, Lucknow, 4<sup>th</sup> edn., 2018).

<sup>15</sup>Supreme Court junks PIL, (Aug. 1, 2020, 11:10 PM), <https://indianexpress.com/article/india/supreme-court-junks-pil-for-enforcing-anti-sexual-harassment-guidelines-at-religious-places-5842500/>.

being, and the rights that are enshrined in the Universal Declaration of Human Rights cannot be effectively exercised by them. It is truly disheartening to find that the sex workers are not treated as a human being, they are not socially recognized. Their lives in the brothels are limited to their four walls of the shady rooms. If one closely sees the lives they are living are in gross violation of the basic human rights which are the inherent rights of the human beings. The basic human right to healthy food, health care, education, marriage, to participate in cultural activities, etc. are not available to the prostitutes. They are cornered by the society as if they are untouchables. They are the victims of their fate and they are further victimized by the society.

With regards to the second research question, the hypothesis was that the sex workers have no right to work with dignity. The sex workers are treated by the society with disgrace, no basic rights are acknowledged. Though, Constitution of India under Article 21 guarantees right to life includes right to work with dignity, but unfortunately since prostitution is illegal in India, there is no recognition of their profession. The sex workers simply sell their body for a living and in fact all the people in the society sell either their manual labour or their intelligence to earn their living. It is perceived that there is no dignity attached to their work. The irony is that prostitution is the second oldest profession after agriculture and this profession would not have existed without its customers. Yet it is seen as a disgrace to be associated with this profession. The sexual harassment of the sex workers also remains unrecognized and remedied, as the Sexual Harassment of Women at Workplace Act of 2013 does not cover the brothels and the religious places like temples, ashrams, churches, madrasas, etc. thereby there lies no scope for the sex workers to complain and redress their grievances.

With regards to the third research question, as to whether prostitution should be decriminalized or not, the recommendation of the Special Rapporteur on violence against women has mentioned in the report that “measures to address trafficking in persons should not overshadow the need for effective measures to protect the human rights of sex workers.”<sup>16</sup> The report also recommended that the Immoral Traffic Prevention Act, 1956, should be reviewed as it criminalized sex work in India. If prostitution is decriminalized then at least the sex worker will have the right to live with dignity. The UN Resolutions along with other International agencies and International Commissions have emphasized that the rights of sex workers can be protected not only by decriminalizing sex work, but also by reforming the application of

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<sup>16</sup> (UNHRC (2014) Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to India, p 19. A/HRC/26/Addl.11), (Aug. 1, 2020, 11:28 PM), <https://www.unwomen.org/en/docs/2014/5/special-rapporteur-on-violence-against-women-a-hrc-26-38#view>.

criminal laws and other legislations against the sex workers. Forced prostitution should be made punishable but voluntary prostitution should be made legal so that the law recognizes the rights of the sex workers. If a sex worker is harassed by the brothel owners then they will have the basic right to complain and action can be taken by the authorities. The sex worker will have the right to seek justice under law. Despite the Immoral Traffic (Prevention) Act which is enacted to prevent it, it is practiced, promoted and protected openly. Criminalizing prostitution and making it illegal is victimizing only the sex workers as they are left with no option to enforce their basic human rights under the Indian legal system.

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