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Prostitution, Sex Work and Law Reform

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The authors draw from the experiences of a fifteen member law student group involved in community based law reform work on prostitution. Rejecting the patriarchal laws relating to prostitution to date, they advocate "Legalisation for Empowerment"

Societal reaction to prostitution or sex work is many a time an instinctive one, not a reasoned or thought out response. This instinct is the result of a socialisation no human can escape successfully, and while to some extent such conditioning is necessary for certainty and stability, it becomes dangerous when it takes away one's ability to make reasoned value choices and forces one to make moral judgements that are really not one's own. Prostitution is seen as a necessary evil: necessary because the patriarchal structure demands that man's natural aggression and sexual drive need outlets. What one does not see, or rather refuses to see, is that the so called dominance is not irreversible. The role of men and women have to be examined and not accepted blindly as natural law¹.

Our society does not differentiate between the individual in prostitution and the institution itself. Or rather, they see her not as part of a larger network of power play, but as the villain of the piece. She is the offender, she lurks in the shadows luring men, destroying families and eventually the moral fabric of society. This view reflects a moral stand where sex outside marriage or without procreation is sinful and immoral. So she is the 'bad woman' as compared to the 'good woman' who fits the sexual stereotype while in a monogamous heterosexual marriage.

What is not considered is that prostitution is not about free sex. Free sex implies mutuality and free choice. Prostitution, especially in its more exploitative manifestations is about no choice in customers and no choice in what customers can or cannot do. If she is abused the reaction is 'you can't rape the willing', or 'she asked for it'. The view is that since prostitution is a 'necessary evil' it can be allowed to be carried on as long as nobody can see it. The woman is pushed into an invisible sphere and her mobility is restricted society being content with the limits of decency being answered. However facts do not cease to exist simply because people choose to ignore it.

Unfortunately, our law makers do not seem to have made much of a conscious effort not to toe the line of society's conditioned attitude to the issue. No other legislation has proved to be more innocuous, ineffective and irrelevant in dealing with fundamental issues of human dignity and human rights as the

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1 *Too Much Heat, Not Enough Light - Our Experiences with Sex Workers in Karnataka*, Memorandum on Labour, Workers and the Right to Work submitted by the National Law School of India, in the Second All-India Community-based Law Reform Competition 1992-1993, at 8.

Immoral Traffic in Persons Prevention Act, 1986 (ITPPA). The Act reflects total confusion and ambiguity with respect to legislative intention and policy towards prostitution in our country and is a confusing mixture of approaches like suppression of promiscuous sexual activity, by effectively penalising soliciting, for instance, and at the same time toleration of prostitution under certain circumstances.

A detailed study of the Act reveals its sexist assumptions and the gender biases against prostituted women. The underlying assumption of the Act reek of patriarchal attitude². The double standards of male sexual morality are evident in the penal provisions for the prostituted women, which are absent as against the client. The moral judgement and conditioned patriarchal ideas of the law makers is evident in this dichotomy. Sections 7³, 8⁴ and 20⁵ have been specifically aimed at the sex workers. These provisions have been used more than any other and have resulted in curtailing the prostituted woman's right to life, equality and freedom of movement. These provisions have been interpreted by our courts according to a morality that prioritises the rights of the public over the rights of the women concerned, thus resulting in targeting prostituted women as opposed to exploitative elements. The Act also does not address the issues of health and abuse of the prostituted women.

Another significant impact of these double standards is that it is only street prostitution which is criminalised, while prostitution behind closed doors is left largely untouched.⁶ The idea is that though everybody knows of the existence of prostitution, public evidence of the fact is condemned - prostitution is pushed from the public into the private sphere in the hope that if it cannot be seen, it will stop happening. The section penalizing soliciting seeks to do just this. It is a way of assuring the community that their morality is being upheld and public decency and order is being maintained - all at the cost of a class of people who can be used, abused and forgotten. This is apart from its classist bias.

The title of the Act itself is absurd. It gives the impression that the Act seems to deal with the exploitative elements of prostitution, namely, trafficking, while in actuality it is not so. Besides, trafficking in any person without the will of the trafficked person is objectionable and 'Traffic in Person Prevention Act' would have sufficed amply without the need for qualifying prostitution in terms of immorality. Its definition as a taboo subject leads to a silencing that has pushed it off the main political agenda. Nobody wishes to take notice of it or attempt an improvement in the status of the women involved in this 'immoral activity'. It is 'immoral' because it implicitly and explicitly draws attention to sex outside marriage and as such an affront to 'decent' people.

2 Jean D'Cunha, *The Legalisation of Prostitution* (Bangalore: Ward Makers, 1991), at 45.

3 Prostitution in or in the vicinity of public place is punishable.

4 Soliciting in a public place is punishable.

5 A Magistrate can remove a prostitute from any place on receiving such information.

6 See *Supra* n.2, at 46.

Now, with a law as hypocritical as the ITPPA, law can never be an instrument of social change. Structures such as patriarchy, capitalism, racism, etc., manipulate the law against the oppressed and underprivileged in an unequally structured society. What is required is an understanding of these forces and a recognition that their removal alone is the removal of oppression and as a consequence of such an unlearning process would flow a conscious attempt to redefine the law to benefit the oppressed and to cause a change in social responses to the issue.

The Law Reform Proposal

For the students involved in the Law Reform exercise throughout the year and a half of the exercise, intentionally, the basic question was 'what are the implications of our work for the redistribution and consolidation of power among women and men?'. The methodology of research adopted was a feminist approach to participatory research that would involve an open and critical process in which all intellectual tools inherited from a male intellectual tradition are questioned so that subjective experiences of women as women and as people could be validated without imposing our definitions of reality on them⁷.

Our present law is ineffective as it keeps the women outside the legal system, thus denying them recourse against exploitation and victimisation. Prostituted women are one of the most disadvantaged groups in India today - socially ostracized, morally condemned and legally helpless. In such a situation the human rights question takes the front seat. A new law that confers and reinforces positive rights on prostituted women is required, one that would facilitate social reform along with legal reform.

As a consequence of our interaction with the community we felt the need for a legal framework that is not against these women.⁸ The favoured policy was 'Legalisation for Empowerment'. The underlying assumption behind such a policy is that the woman in prostitution is the focus; her concerns are the guide to the proposal; her situation will define the policy. Our proposal is in relation to the women presently in prostitution.

We are not looking for abolition in the long run, but our aim is to change the conditions in prostitution as we know them; by eliminating the exploitative conditions in her work and otherwise.

Many argue that sex work is degrading, contemptible and the severest form of gender discrimination, economic exploitation and a violation of human rights, therefore legalisation would encourage such exploitation. Our policy is not to condone either the discrimination or the violation. Our policy makes the

7 See, *supra* n.1, at 19.

8 The community referred to are the prostituted women we met at Tadavalg (Bijapur), Doddi, Dombbarapalya, Moparapalli, Mandya, Jeevanapalli, Chikkadombbarapalya and Bangalore city.

distinction between the right to prostitute and the rights of prostituted women. We are not suggesting prostitution as a career option⁹, purely because gender and economic inequality exists. Our focus here is on the woman in prostitution - irrespective of whether she is there by choice or by force, her working conditions must improve, there must be collectives to improve her health, abuse taken care of, and her civil rights protected. Even if we have not covered the exploitative condition at the entry point, the exploitation in her work and otherwise have been looked at and addressed firmly.

If prostitution is going to be looked at purely as a form of violence against women rather than work, then there is a failure to reflect her experience, her needs and her concern. We are not claiming that every woman who is forced ends up wanting to remain in the profession. However, unless there is an alternative to shabby state rehabilitation, or proper economic choices and a lessening of social stigma, her rights still need protection, and her outlaw status needs to be removed. Otherwise the situation will just continue to get worse¹⁰.

The highlights of our proposal are :

- (a) There shall be no specific criminal laws; only the relevant provisions of the Indian Penal Code, 1860 shall be enforced with the suggested amendments.
- (b) The proposal lays down enabling provisions which facilitate the formation of collectives. It also provides for a model collective of prostituted women.
- (c) A positive right to solicit has been suggested to enable her to carry out her work without harassment. The nuisance factors associated with prostitution is addressed by the general criminal laws and the municipal bye-laws and would not require penal provisions within our Act. If the act is explicitly repugnant to the nuisance laws or obscenity laws applicable to the citizens, then the prostituted woman be dealt with under the same law, as any other citizen would.
- (d) Our proposal includes provisions on abuse, aggravated abuse, and appropriate relief for the same. Though we seek to legalise sex work, we condemn and penalize every form of abuse. Consent is not a defence available to the perpetrator of sexual abuse. Abuse against her is penalized not only during her work but also outside it. Abuse, which is the crux of our proposal, has been blindly bypassed by all earlier legislations.
- (e) On the question of health the issues that our proposal addresses are discrimination,¹¹ right to objective information, diagnosis and treatment,

9 See, *supra* n.1, at 100.

10 *Id.* at 101.

11 Eg : Compulsory AIDs testing only for sex workers, denial of health facilities.

contraception, maternity & pregnancy, access to medical care, STD, treatment, hygienic conditions and HIV prevention.¹²

- (f) As regards conditions of work, the minimum insured by wage and social security laws have been provided for in the Bill.
- (g) We have specifically suggested guidelines for the judiciary and the executive in order to minimise personal biases and discrimination against these women, merely because they are sex workers. Personal liability has been imposed on the police if they harass sex workers.
- (h) We have tried to protect the rights of children of sex workers and asked for the concept of 'illegitimacy' to be done away with. Minimum state interference has been sought to avoid evils of red tapism and bureaucracy as well as the misappropriation of funds.
- (i) We have suggested that a uniform civil code should come into existence as soon as possible to ensure equality between the sexes and between women themselves with respect to property rights, marriage, divorce and maintenance laws and laws relating to children's rights.

12 Eg : Dispelling myths about AIDs and undue blame on sex workers for the spread of AIDs.