

WHETHER PROSTITUTION SHALL BE LEGALISED AND REGULARISED IN FURTHERANCE OF ARTICLE 14, 19 AND 21 OF THE CONSTITUTION OF INDIA

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A. IN FURTHERANCE OF ARTICLE 14 OF THE CONSTITUTION OF INDIA

Equality is one of the magnificent corner-stones of Indian democracy.³The doctrine of equality before law is a necessary corollary of Rule of law which pervades the Indian Constitution.⁴Article 14 however entails that, "equals should be treated alike and unequals should be treated differently. In other words persons who are in like circumstances should only be treated equally. Because if people are not in like circumstances then treating them equally would amount to manifest injustice.⁵ The Constitution is wedded to the concept of equality.⁶ This means that even a Constitutional amendment offending the right to equality will be declared invalid. Neither parliament nor the state legislature can transgress the principle of equality. Art. 14 enjoins the state to take into account *de facto inequalities* which exist in the society and to take *affirmative action* by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality.⁷Equal protection requires affirmative action by the state towards unequals by providing facilities and opportunities.⁸ The basic principle underlying Article 14 is that law must operate equally on all persons under like circumstances.⁹ Equality before law is co-relative to the concept of rule of law for all round evaluation of healthy social order.¹⁰ A basic postulate of the rule of law is that "*justice should not only be done but it must also be seen to be done.*" *Reasonableness and fairness is the heart and soul of Art. 14 of the Constitution.*¹¹The reasonableness is to be judged with reference to the object of the legislation and not moral considerations,¹² of course, there may be cases where gross immorality of measure may condemn the legislation as arbitrary or irrational.¹³*The Court by evolving the doctrine of protective discrimination intended to lay a law that in terms of our Constitutional scheme no group of persons should be held to be more equal than the other group.*¹⁴ Legislation should not only be assessed on its proposed aims but rather than implications and the effects. The bottom line in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis.¹⁵*But where the statute shows shows on the face of it that the legislature made no attempt at all to make a classification but singled out a particular individual or class without having any difference peculiar to*

³Indira Sawhney v. Union of India, A.I.R. 1993 S.C. 477.

⁴Ashutosh Gupta v. State of Rajasthan, (2002) 4 S.C.C. 34

⁵Indira Sawhney v. Union of India, A.I.R. 1993 S.C. 477 ; Ashutosh Gupta v. State of Rajasthan, (2002) 4 S.C.C 34

⁶KeshavanandaBharati v. State of Kerala, A.I.R. 1973 S.C. 1461

⁷IndraSawhney vs. Union of India, AIR 1993 SC 477 (paras 4, 365, 397) : 1992 Supp. (3) SCC 217 – **9 Judge Bench.**; Kailash Chand Sharma vs. State of Rajasthan, (2002) 6 SCC 562, 592 (para 48) : AIR 2002 SC 2877; E.V. Chinnaiah vs. State of A.P., (2005) 1 SCC 394, 425 (para 79) : AIR 2005 SC 162.

⁸PanchayatVargaSharmajiviSamuadaikSahakariKhedut Cooperative Society vs. HaribhaiMevabhai, (1996) 10 SCC 320 (para 10) : AIR 1996 SC 2578

⁹M. Nagaraj vs. Union of India, (2006) 8 SCC 212, 270 (para 106) : (2006) 8 SLT 1

¹⁰Dalmia Cement (Bharat) Ltd. vs. Union of India, (1996) 10 SCC 104 (para 18).

¹¹Delhi Development Authority vs. Joint Action Committee, Allottee of SFS Flats, (2008) 2 SCC 672, 692 (para 43)

¹²Garg R.K. vs. Union of India, AIR 1981 SC 2318 (para 17) : (1981) 4 SCC 676 C.B. [Bearer –bond Case]

¹³Garg R.K. vs. Union of India, AIR 1981 SC 2138 (para 17) : (1981) 4 SCC 676 C.B. [Bearer-bond Case]

¹⁴Nair Service Society vs. State of Kerala, (2007) 4 SCC 1, 25-26 (para 47) : AIR 2007 SC 1274, relying on T.M.A. Pai Foundation vs. State of Karnataka, (2002) 8 SCC 481; P.A. Inamdar vs. State of Maharashtra, (2005) 6 SCC 537 : AIR 2005 SC 3226; IndraSawhney vs. Union of India; 1992 Supp (3) SCC 217 : 1992 SCC; Ashok Kumar Thakur v. State of Bihar, (1995) 5 SCC 403 : AIR 1996 SC 75.

¹⁵AnujGarg vs. Hotel Association of India, (2008) 3 SCC 1, 15 (paras 37 and 38).

that individual or class, the presumption of reasonableness in favour of the legislature is instantly rebutted and the person challenging the statute cannot be called upon to adduce further or external evidence to discharge his onus.¹⁶ In such a case, the presumption of constitutionality is of no avail and the court is bound to invalidate the statute as violating the guarantee of equal protection.¹⁷ Right to self-determination is an important offshoot of gender justice discourse. *It is their life; subject to constitutional statutory and social interdicts a citizen of India should be allowed to live her life on her own terms.*¹⁸ At the same time, security and protection to carry out such choice or option specifically, and state of violence free being generally, is another tenet of the same movement. Privacy rights prescribe autonomy to choose profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship.¹⁹ Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as modelling done on this behalf. Also with the advent of modern state, new methods of security must be developed.

The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from the others left out of the group. The corollary that also follows is that person or things grouped together are 'equals' for the purpose of classification. Henceforth, if a classification is not proved on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held as arbitrary and discriminatory.²⁰

Now in this case, the classification of sex workers does not fall under this classification. Thus the "test of intelligible differentia" failed. The differentia which is adopted as the basis of the classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question²¹. The plain reading of Section 370 of the Indian Penal Code makes it clear that it recognises prostitution itself as exploitation and thus endangers sex workers instead of protecting them from sexual exploitation. Therefore, there is no reasonable nexus between the classification and the purpose that it seems to achieve, and henceforth Prostitution should be legalised in furtherance of Article 14 of the Constitution of India.

B. IN FURTHERANCE OF ARTICLE 19(1) (G) OF THE CONSTITUTION OF INDIA

Article 19(1) (g) of the Constitution entails freedom of profession, trade, business and these freedom mean that every citizen has the right to choose his own employment or to take up any trade. The fundamental right guaranteed in Art. 19(1) (g) as comprehensive as possible and to include all avenues and modes through which a person earns his livelihood. If by a statutory provision the right of a person to carry on his business is affected, he may in his own right maintain an action. A person must be held to have access to justice if his right in any manner whether to carry on business is infringed or there is threat to his liberty. Access to justice is a human right.²²

Decency or morality is not confined to sexual morality alone. Decency indicates that the action must be in conformity with the current standards of behaviour or propriety.²³ The question whether an utterance is likely to undermine decency or morality is to be determined with reference to the probable effects it may have upon the audience to which it is addressed.²⁴ The age, culture²⁵, and the like of the audience thus

¹⁶ State of Bombay vs. Balasara, 1951 SCR 682 (708) : AIR 1951 SC 318; Ram Prasad Narayan Sahi vs. State of Bihar, 1953 SCR 1129 : AIR 1953 SC 215; State of Rajasthan vs. ManoharSinghji, 1954 SCR 996 : AIR 1954 SC 297; K.R. Lakshmanan (Dr.) vs. State of T.N., (1996) 2 SCC 226 (para 47) : AIR 1996 SC 1153

¹⁷ Ameeroonissa Begum vs. Mehboob Begum, 1953 SCR 404 (417) : AIR 1953 SC 91.

¹⁸ AnujGarg vs. Hotel Association of India, (2008) 3 SCC 1.

¹⁹ AnujGarg vs. Hotel Association of India, (2008) 3 SCC 1, 15 (paras 46, 47, 50 and 51).

²⁰ Sube Singh v. State of Haryana, (2001) 7 S.C.C. 545

²¹ Supra note 25; LaxmiKhandsari v. State of U.P., A.I.R. 1981 S.C. 873; State of Haryana v. Jai Singh, (2003) 9 S.C.C. 114; Welfare Association A.R.P. v. Ranjit P. Gohil, (2003) 9 S.C.C. 358; see Javed v. State of Haryana, (2003) 8 S.C.C. 369.

²² TashiDelek Gaming Solutions Ltd. vs. State of Karnataka, (2006) 1 SCC 442 (paras 34 and 37), **relying on** Calcutta Gas Co. (Proprietary) Ltd. vs. State of W.B., 1962 Supp (3) SCR 1 : AIR 1962.; Dwarka Prasad Agarwal vs. B.D. Agarwal, (2003) 6 SCC 230.

²³ Ramesh YeshwantPrabhoo (Dr.) vs. PrabhakarKashinathKunte, (1996) 1 SCC 130 (paras 28 and 29) : AIR 1996 SC 1113, relying on Knüller (Publishing, Printing and Promotions) Ltd vs. Director of Public Prosecutions, (1972) 2 All ER 898, at 905 : (1972) 3 WLR 143.

²⁴ Ranjit D. Udeshi vs. State of Maharashtra, AIR 1965 SC 881 (885) : (1965) 1 SCR 65, condemning 'Lady Chatterley's Lover' as 'obscene'.

²⁵ Rajani Kant Verma vs. State of Bihar, AIR 1958 All. 360

becomes a material question. The test of obscenity is whether the publication, read as a whole,²⁶ has a tendency to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall. Hence, though it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of general public, yet the banning of the slaughter of cow progeny is not a prohibition but only a restriction.²⁷

The Court cannot impose a restriction on the freedom of trade.

Moreover a 'law' as per this context, postulates a law which is otherwise valid. Hence, any imposition, which restricts a citizen's right to carry on an occupation, trade or business must, accordingly, be held to be invalid.²⁸ Restrictions can be imposed by subordinate legislation executive order,²⁹ such as a circular or policy decision in terms of Art. 162 of the Constitution or otherwise. Such a law must be one enacted by the legislature.³⁰ It is further humbly stated that in order to constitute a 'reasonable' restriction, both the law as well as any order made there under must satisfy the test of reasonableness.³¹ A restriction, to be permissible under Art. 19(6), has to be commensurate with the danger posed. The word "occupation" has a wide meaning such as any regular work, profession, job, principal activity, employment, business, or a calling in which an individual is engaged. The object of using four analogous and overlapping words in Art. 19(1)(g) is to make the guaranteed right as comprehensive as possible to include all the avenues and modes through which a man may earn his livelihood. The guarantee takes into its folds any activity carried on by a citizen of India to earn his living.³² The freedom guaranteed under Art. 19(1)(g) is valuable and cannot be violated on the grounds which are not established to be in public interest or just on the basis that it is permissible to do so. For placing a complete prohibition on any professional activity, there must exist some strong reason for the same with a view to attain some legitimate object and non-imposition of such prohibition might result in jeopardizing or seriously affecting the interest of the people in general. Otherwise, it would not be a reasonable restriction.³³

In order to determine whether total prohibition would be reasonable, the court has to balance the direct impact on the fundamental right of the citizen thereby against the greater or social interest sought to be ensured.³⁴ Occupation would be an activity of a person undertaken as a means of livelihood or a mission in life.³⁵ Now in the present case, sex work being legal, the sex workers have fundamental right under Art. 19(1)(g) to carry out such profession because they are doing it for a living and also due to abject poverty.

C. IN FURTHERANCE OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

Article 21 which is one of the luminary provisions in the Constitution and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e., personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State and its functionaries.³⁶ Right to life, enshrined in Art. 21 means something more than survival or animal existence.³⁷ It would include the right to live with human dignity.³⁸ It would include all those aspects of life which go to make a man's life meaningful, complete and worth living.³⁹ That which alone

²⁶State vs. RamanandTiwari, AIR 1956 Pat. 188 (195) : 1956 BLJR 612

²⁷ State of Gujarat vs. MirzapurMotiKureshiKassabJammat, (2005) 8 SCC 534 (paras 78, 79, 122 and 127) : (2005) 12 JT 580.

²⁸Yasin Mohammad v. Town Area Committee, A.I.R. 1952 S.C. 115.

²⁹Khoday Distilleries Ltd. v. State of Karnataka, (1995) 1 S.C.C. 574; Khoday Distilleries Ltd. v. Registrar General, Supreme Court of India, (1996) 3 S.C.C. 114

³⁰State of Bihar v. Project UchchaVidya, SikshakSangh, (2006) 2 S.C.C. 545.

³¹Oudh Sugar Mills v. Union of India, A.I.R. 1970 S.C. 1970.

³²Sodan Singh vs. New Delhi Municipal Committee, (1989) 4 SCC 155, **affirmed in** T.M.A. Pai Foundation vs. State of Karnataka, (2002) 8 SCC 481 : AIR 2003 SC 355.

³³B.P. Sharma vs. Union of India, (2003) 7 SCC 309; U.P. Power Corporation Ltd. vs. Sant Steels & Alloys (P.)Ltd., (2008) 2 SCC 777, 802 (para32).

³⁴ Indian Handicrafts Emporium vs. Union of India, (2003) 7 SCC 589, 605 (para 38) : AIR 2003 SC 3240

³⁵T.M.A Pai Foundation vs. State of Karnataka, (2002) 8 SCC 481, 535 (paras 20 and 25) **affirming** Sodan Singh vs. New Delhi Municipal Committee, (1989) 4 SCC 155, and **partly overruling** Unni Krishna, J.P. vs. State of A.P., (1993) 1 SCC 645.

³⁶Munshi Singh Gautam vs. State of M.P., (2005) 9 SCC 631, 637 (para 4) : AIR 2005 SC 402

³⁷State of Maharashtra v. Chandrabhan, AIR 1983 SC 803 (paras 1, 20).

³⁸Francis Coralie Mullin v. Union Territory Delhi, Administrators, AIR 1981 SC 746 (para 3).

³⁹Maneka Gandhi v. Union of India, AIR 1978 SC 597.

can make it possible to live must be declared to be an integral component of the right to live.⁴⁰ The right to life guaranteed under Art. 21 of the Constitution embraces within its sweep not only physical existence but the quality of life. If any statutory provision runs counter to such a right, it must be held to be unconstitutional and ultra vires the Part III of the Constitution.⁴¹ The Article embodies the concept of 'distributive justice' which connotes, inter alia, the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society. This may be achieved by the State by lessening of inequalities. There can be no justice without equality. Article 14 guarantees the fundamental right to equality before the law on all persons. The concept of welfare State would remain in oblivion unless social justice is dispensed. Dispensation of social justice and achieving the goals set forth in the Constitution are not possible without the active, concerted and dynamic efforts made by the person concerned with the justice dispensation system.

There is no doctrine of 'State necessity' in India under Article 21. In each case where a person complains of the deprivation of his life or personal liberty, the court, in the exercise of its constitutional power of judicial review, has to decide whether there is a law authorising such deprivation and whether, in the given case, the procedure prescribed by such law is reasonable, fair and just, and not arbitrary, whimsical and fanciful.⁴² *Any law depriving a person of his livelihood must meet the challenge of Art. 14, 19 and 21 of the Constitution.*⁴³ *Hence the procedure prescribed by such law must be just, fair and reasonable and not arbitrary, fanciful, oppressive, vague, unfair or unreasonable.*⁴⁴ *Enjoyment of quality life is the essence of the guaranteed right under Article 21 of the Constitution.*⁴⁵ Right to reputation is a facet of the right to life of a citizen under Article 21 of the Constitution. The right to dignity, which is recognised as guaranteed by Art. 21 of the Constitution insofar as it is infringed by withholding of the means of livelihood by any means or process whatsoever would attract Art. 21.⁴⁶ Hence the action of the state has to be based on reasonableness and it cannot deprive the basic human rights afforded under Constitution, more so under Art. 21.⁴⁷ It is a basic right of a female to be treated with decency and proper dignity and the search of a woman by a person other than a female officer is violative of it.⁴⁸ The trend in the Supreme Court is that when constitutionality of a statute is challenged as arbitrary or unreasonable, the Court has to test its validity on the anvil of Arts. 14, 19 and 21, read together.⁴⁹

The Supreme Court in *'Unni Krishnan vs. State of A.P.*⁵⁰ stated that "*Right to health and medical aid of workers*"⁵¹ falls within the ambit of Art. 21, since the expression 'personal liberty' is of the widest amplitude. Now in this case, the sex workers should be provided with health insurance as well as their medical fitness should be given paramount consideration. Therefore prostitution should be legalised and regularised from the standpoint of Article 21 of the Constitution of India.

⁴⁰ *Olga Tellis v. Bombay Corpn.*, AIR 1986 SC 180 (paras 33-34).

⁴¹ *Confederation of Ex-Servicemen Associations v. Union of India*, (2006) 8 SCC 399, 429 (para 61).

New Riviera Coop. Housing Society v. Special Land Acquisition Officer, (1996) 1 SCC 731 (para 8).

⁴² *Francis Coralie Mullin vs. Union Territory Delhi, Administrator*, AIR 1981 SC 746 (para 3) : 1981 1 SCC 608

⁴³ *Yadav, D.K. vs. J.M.A. Industries Ltd.*, (1993) 2 UJSC 348 (paras 10, 14) : 1993 (3) SCC 259 : 1993-II LLJ 696 – 3-Judges.

⁴⁴ *Maneka Gandhi vs. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *Inderjeet vs. State of U.P.*, AIR 1979 SC 1867 : (1980) 1 SCC 255; *Francis Coralie Mullin vs. Union Territory*, AIR 1981 SC 746 (para 3) : (1981) 1 SCC 608.

⁴⁵ *Hinch Lal Tiwari vs. Kamla Devi*, (2001) 6 SCC 496, 501 (para 13) : AIR 2001 SC 3215.

⁴⁶ *O. Konavalov vs. Commander, Coast Guard Region*, (2006) 4 SCC 620, 633 (para 20) : (2006) 3 JT 567.

⁴⁷ *O. Konavalov vs. Commander, Coast Guard Region*, (2006) 4 SCC 620, 633 (para 20) : (2006) 3 JT 567.

⁴⁸ *State of Punjab vs. Baldev Singh*, (1999) 6 SCC 172 (para 13) : AIR 1999 SC 2378.

⁴⁹ *Minerva Mills vs. Union of India*, AIR 1980 SC 1789 : (1980) 2 SCC 591; *Olga Tellis vs. Bombay Corp.*, AIR 1986 SC 180 : (1985) 3 SCC 545; *D.T.C. vs. Mazdoor Union*, AIR 1991 SC 101 (para 258-59).

⁵⁰ *Unni Krishnan, J.P. vs. State of A.P.*, (1993) 1 SCC 645 : AIR 1993 SC 2178.

⁵¹ *Consumer Education & Research Centre vs. Union of India*, (1995) 3 SCC 42; *Research Foundation for Science (13) vs. Union of India*, (2005) 13 SCC 661, 664 (para 12) : (2003) 8 Scale 118.