

STATUS AND REMEDIES OF FEMALE SEX WORKERS: AN INDIAN PERSPECTIVE

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Titulo: Mumbai, India - 6th May, 2017. Hardened Sex workers haggling with their customers over the prices in Mumbai's ill famous red light area 'Foras Road' • Autor: KishoreJ

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Abstract

The occurrence of prostitution, even after considering all of its connotations, has remained an exploitative concept and is generally related to a patriarchal capitalist system. The article elucidates modern social contract theories, such as the Marxist feminist theory, which portrays sex workers as victims, subjugated by society at large. On the contrary, academic scholars like Ronald Weiser advocate the decriminalization/legalization of prostitution, and emphasize the fact that it can be positively regulated. The article examines the two basic entry channels to sex-work as a profession in India: first; a workforce generated by the market for manual labour/hard chores, and second, direct entry into the industry in lieu of a lucrative avenue to generate income. The Indian political approach has been to try to achieve a carefully balanced mix between the views that sex work is immoral and that sex trade is exploitative. Prostitution per se is not illegal in India, although specific activities are penalized, such as soliciting, economically supporting an adult, etc. Furthermore, prostitutes suffer from atrocities like forceful detention in rescue homes, mandatory medical examinations and lack of access to higher judiciary. The article discusses the role of the State and the laws governing and regulating sex workers. This paper seeks to provide recommendations to alleviate their appalling conditions with certain short and long-term initiatives. This article uses an interdisciplinary methodology, based on secondary data.

Keywords: modern feminist theory, protection of sex workers' rights, Immoral Trafficking (Prevention) Act, recommendations

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ESTADO Y RECURSOS DE LAS TRABAJADORAS SEXUALES: UNA PERSPECTIVA INDIA

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Resumen

La incidencia de la prostitución, incluso después de considerar todas sus connotaciones, sigue siendo un concepto de explotación y generalmente se relaciona con un sistema capitalista patriarcal. El artículo explica teorías modernas del contrato social, como la teoría feminista marxista, que retrata a las trabajadoras sexuales como víctimas, subyugadas por la sociedad en general. Por el contrario, académicos como Ronald Weiser defienden la despenalización/legalización de la prostitución y enfatizan el hecho de que puede ser regulada positivamente. El artículo examina los dos canales básicos para ingresar al trabajo sexual como profesión en la India: primero, una fuerza de trabajo generada por el mercado para trabajo manual/trabajo físico duro y, segundo, el ingreso directo a la industria por falta de una forma lucrativa de generar ingresos. En la India, el enfoque político ha sido tratar de lograr una mezcla cuidadosamente equilibrada entre las opiniones de que el trabajo sexual es inmoral y que el comercio sexual es explotador. La prostitución per se no es ilegal en la India, pero ciertas actividades específicas son penalizadas, como solicitar, apoyar económicamente a un adulto, etc. Además, las prostitutas sufren atrocidades como detención forzada en hogares de “rescate”, exámenes médicos obligatorios y falta de acceso a mayor poder judicial. El artículo analiza el papel del Estado y las leyes que rigen y regulan a las personas que ejercen el trabajo sexual. Este documento busca proporcionar recomendaciones para aliviar sus duras condiciones con ciertas iniciativas a corto y largo plazo. Este artículo usa una metodología interdisciplinaria, con base en datos secundarios.

Palabras clave: teoría feminista moderna, protección de los derechos de las personas que ejercen el trabajo sexual, Ley (de prevención) de la trata inmoral, recomendaciones

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Introduction

The existence of sex work has long been a matter of concern for civil societies in different eras and times. It has also been one of the most convoluted issues within feminist discourse. The option of prostitution could be a choice for economic reasons, as well as a forced activity through traffickers and other agents. The occurrence of prostitution, even after considering all of its connotations, has remained an exploitative concept and is generally related to a patriarchal capitalist system. Feminist debates surrounding prostitution as a concept encapsulate themes of agency¹ and victimization, as well as the notion that a patriarchal system² is to blame for its prevalence. Considering of sex work as an issue generally places women that participate in it as pawns in a larger patriarchal system. Furthermore, it is thought that due to the underlying situation of the concept of prostitution, the voice of sex workers is often silenced in third world nations, although their voices are well heard and responded to in more developed legal systems (their opinions are either echoed or denied, but they are always responded to).

In India, the principal legislation dealing with sex work/ prostitution is the Immoral Traffic Prevention Act (ITPA). The origins as well as the title of the legislation itself reflect the stigmatization and conception of sex work as synonymous with trafficking. The legislation was enacted in pursuance of the ratification by the Indian government of the International Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others.

Trafficking would be generally understood as transporting a person by means of threats, force, coercion, abduction, fraud, or deception. However, the legislation did not have a definition of trafficking at its inception and for most of its existence, leaving aside provisions to check it. Yet so deep is the association of prostitution with trafficking that the law with regard to sex work is called prevention of “immoral traffic.”

¹ Sahni Rohini and Shankar Kalyan, *The First Pan-India Survey of Sex Workers: A Summary of Preliminary Findings*, 1st ed. (Mumbai: Centre for Advocacy on Stigma and Marginalization, 2011), 6-10.

² Janice Raymond, “Ten Reasons for not Legalizing Prostitution and a Legal Response to the Demand of Prostitution.” *Journal of Trauma Practice* no. 2 (2003): 315-332, <http://www.prostitutionresearch.com/Raymond%20Ten%20Reasons%20for%20Not%20Legalizing%20Prostitution.pdf> (accessed October 3, 2017).

The Constitution of India guarantees the fundamental right to carry on any trade, business, or profession.³ ITPA has been held as constitutionally valid, and the limitations imposed by the statute on the right of sex workers to carry on their trade, business, or profession have been considered permissible reasonable restrictions. The Constitution also prohibits traffic in human beings, as well as *bandhua* (bonded labour) and other forms of forced labour.⁴ The Indian Penal Code of 1860 also contains some provisions that deal with buying and selling for prostitution. There are a number of judgments interpreting the ingredients of the offences created by the law, as well as public interest litigations filed in courts with regard to sex work/prostitution.

This research paper uses an interdisciplinary methodology, based on secondary data. A combination of doctrinal methodology and law reform research was performed while writing this article. The article seeks to understand different views on sex work (as a profession) among modern and postmodern theoreticians, which forms the basis on which our society treats/reacts to sex workers. In what follows, the article examines the perception and reception of sex work as an alternative job in India and various channel(s) of entry to this profession. It discusses the laws that regulate and govern sex workers, as well as the atrocities faced by them in India. It emphasises the role and intervention of the State to alleviate these atrocities. Finally, the article offers recommendations through a combination of short-term and long-term initiatives.

1. Dilemma among modern and postmodern theoreticians regarding the morality of sex work

Radical feminists are generally of the opinion that sex workers are victims, as they are subjugated by a properly organized and socially authorized system of patriarchy.⁵ Marxists feminist theory seems to concur to some extent with this approach. This point of view helps to mitigate, to a certain extent, the problem of power structures or to expose such historically biased systems. Radical feminism is famous for arguing for the eradication of all forms of prostitution, and some theoreticians even go as far as to condemn all forms of sex as a domination of the feminine by the masculine. Thus, both pornography and prostitution are similarly

³ Article 19(1) (g) of the Constitution of India, 1950.

⁴ Article 23 of the Constitution of India, 1950.

⁵ Shannon Bell, *Reading, writing, and rewriting the prostitute body*, 1st ed. (Bloomington and Indianapolis: Indiana University Press, 1994), 50-56.

responsible for reinforcing the social contract of the capitalist system, which is inherently anti-women and anti-humanist.⁶

Modern feminist theory, thus, has a fundamental difference of opinion with postmodern deconstruction theory. The postmodern theory believes that there are no really morally problematic forms of prostitution, which should be necessarily eradicated regardless of their moral agency. The modern or Marxist theory is shown to believe in the good/bad women dichotomy as suggested by Laurie Bell.⁷ Thus, the problem of sex workers becomes even more convoluted, given that they are looked down as the “Other of the other”⁸ under such dichotomies. Sex workers occupy such a position, since they belong to this specific cast of people who have not upheld the principles or rules of modern feminist theory. In this way, both modern feminist theory and Marxist theory are responsible for taking away the voice of sex workers, or for excluding them from having a voice. Modern theory wants to categorize them as victims or agents, without leaving enough space for any other approach within such a context.

The rectification of such problems is only possible through the recognition of sex workers as genuine workers, and their work as a (morally) un-judged profession. Such recognition would then give them a position to decide their place in society as either victims or agents, and, in either case, to uphold their dignity regardless of their agency in the matter. It is still possible to argue for or against such an agency as a “just use of agency,” but it can never be denied to any person.

Although it is possible to find different ideas or reasons for not thinking of sex work as intrinsically immoral, such voices might, in turn, give us a more holistic point of view on the situation in hand, help realize the methods needed to remedy with the pitiable sight of sex workers.

2. Perception of sex work as a profession in India

After analysing the paradigm of morally addressing sex workers, it is viable to examine the practical spectrum of things in India. Violation of the basic human rights of

⁶ Megan Cornish, *The Radical Women Manifesto: Socialist Feminist Theory, Program and Organizational Structure*, Rev. ed. (Seattle: Red Letter Press, 2001), 2-26.

⁷ Laurie Bell, *Good girls/bad girls: Feminists and sex trade workers face to face*. Toronto: The Seal Press, 1987.

⁸ Jane Flax, “The End of Innocence” in *In Feminists theorize the political*, ed. Judith Butler and Joan W. Scott. New York: Routledge, 1992, 445-46.

expression and dignity is particularly prevalent in the lives of people involved in sex work. Discrimination against sex workers in India is not like discrimination faced by other marginalized groups along lines of caste, class, race, or religion. It is probably one of the most horrendous and unjust treatments of a certain group of individuals. Sex work is not treated as work, but as a dirty, immoral lifestyle, which poses a threat to the general public. The result of this stigma is a denial of basic rights for both sex workers and his/her families, who are dependent on the money earned through sex work. Constitutional safeguards and other statutes that protect civil liberties and political rights of all individuals only apparently protect the rights of sex workers.

3. Sex work as an alternative job in the Indian context

Illiteracy and poverty are the primary factors responsible for women to look for avenues for sustainability and to enter, the labour market at early ages. Such labour markets vary from hard physical-chores to human trafficking. Sex work was found to be one of several options available to women in the labour market. Most of the women who enter sex work come have a history of very poor incomes in other labour markets; the median value of incomes in most of the jobs ranges from of Rs. 500 to 2000 (USD \$ 7-29) per month.⁹

Economic factors are overwhelmingly predominant for women to have leave their jobs in informal markets comprising low pay, insufficient work, seasonal work, etc. The following list presents some of the factors that may coax women to enter sex work:

- Working conditions: Hard physical chores and low wages in industries such as mason work, woodcutting, water fetching, *bedi*¹⁰ making, agricultural work, or petty selling.
- Personal or family-based reasons: Poor family income or social pressure for not sending a daughter to work after she attains puberty.
- Migration: To bigger cities in lieu of better life.
- Harassment: Poor income coupled with sexual/physical abuse in order to maintain a job.

⁹ Rohini and Kalyan, *The First Pan India Survey of Sex Workers*, 2.

¹⁰ Bidi is a type of cheap cigarette made of unprocessed tobacco wrapped in leaves.

4. Channel(s) of entry into sex work

Irrespective of the channel of entry to the world of prostitution, the foremost reason for women to opt for such profession often comes from their poor economic condition. This statement has been confirmed by the pan-India survey of sex workers conducted by the Centre for Advocacy on Stigma and Marginalization (CASAM). It took more than two years for CASAM to cumulate data, which pools together a sufficiently large, national-level sample of females divided by geographies, languages, sites of operation, migratory patterns, incomes, cultures, to mention just a few of the variables.¹¹

Based on the survey, entry into sex work for money needs to be subtly differentiated across two basic divisions. Primarily, workforce generated from labour markets economic factors may have propelled their decision to look out for lucrative profession. Second division, when direct entrants mention coming in the industry for money, they are basically looking to derive some livelihood income out of sex work.

The categories of force/sold/cheated, or those involving an element of abuse, are similar across the two set of females: 22.1% for direct entrants and 24.8% for those who come from the labour market. Human trafficking is the major source for direct entrants of sex workers. According to the pan India survey of sex workers, directly-entering women show the highest frequency, and in 18-22 years age group this comprises 60.27% of the total sex workers. On the other hand, women from other labour industries also enter sex work in the age group of 18-22, though they continue to have high frequencies of entry at later ages as well (24-30 years).¹²

	Mode of entry into sex work ¹³						Total
	By Self	Forced	Sold	Cheated	Devadasi ¹⁴	No reply	
Women entering directly into sex work	805	83	104	68	31	67	1158
Percentage of total	69.5	7.2	9.0	5.9	2.7		
Women with prior experience of other labour industries	1086	132	64	172	45	29	1488
Percentage of total	73.0	8.9	4.3	11.6	3.0		
Women with sequence of other work identities but sequence of entry unknown	259	23	9	30	2	3	326
Percentage of total	79.4	7.1	2.8	9.2	0.6		

¹¹ Rohini and Kalyan, *The First Pan India Survey of Sex Workers*, 2.

¹² Rohini and Kalyan, *The First Pan India Survey of Sex Workers*, 18.

¹³ Rohini and Kalyan, *The First Pan India Survey of Sex Workers*, 9-11.

¹⁴ Woman dedicated to worship and service of a deity or a temple for the rest of her life.

Source: Statistics showcasing different channels of entry into sex work. Information derived from the Pan India Survey of Sex Workers by CASAM, which was conducted as part of the Paulo Longo Research Initiative in 2011. The survey spanned over two years surveying 3000 women in sex work from fourteen states and one Union Territory.¹⁵

5. Ambiguous nature of sex work

Opponents of the sex workers' rights movement, such as Melissa Farley and Janice Raymond, argue that sex work should be criminalized and abolished, because its legalization can increase incidents of human trafficking. The UN Trafficking Protocol by Raymond argues that many victims are trafficked to countries in which sex work is legalized or decriminalized, and because they are trafficked under the guise of migrants, they are not protected. She states that engagement in voluntary sex work is a decision made by women in absence of alternative choices, and that it therefore cannot accurately be described as a voluntary decision arriving through free consent.¹⁶

A study conducted by Melissa Farley et al. suggest that violence, which includes physical and mental abuse, form an intrinsic part of prostitution, in which the chance of experiencing violence increases with the number of years involved in prostitution. Farley et al. used Netherlands as an example to support the point that legalized prostitution can still inflict harm on those who are involved. They stated that over 90% of sex workers tend to show symptoms of Post Traumatic Stress Disorder (PTSD).¹⁷

On the other hand, the proponents of legalization or decriminalization believe that sex is a commodity that can be sold or bought, and this exchange would continue in any case, as it is evident since the inception of prostitution. The only way to effectively control violence or fictions amongst people conceiving sex work as a taboo is by recognizing and acknowledging sex work as a standard labour by the

¹⁵ The survey was conducted in Andhra Pradesh, Assam, Bihar, Chandigarh [UT], Delhi, Gujarat, Goa, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Nagaland, Orissa, Uttar Pradesh and West Bengal.

¹⁶ Janice G. Raymond, *Women as Wombs: Reproductive Technologies and the Battle Over Women's Freedom*, 1st ed. San Francisco: Harper, 1993, 76-138.

¹⁷ Melissa Farley, Ann Cotton, Jacqueline Lynne, et al., "Prostitution and Trafficking in Nine Countries: An Update on Violence and Post-traumatic Stress Disorders", *Journal of Trauma Practice* 2, no. 3-4 (2003): 36, <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf> (accessed September 23, 2017).

government, and to build policies and laws, which clinically cater to the needs and wellbeing of sex workers.

Ronald Weitzer, a well-known proponent of the legalization/decriminalization of prostitution, stated that non-scientific evidence about prostitution has contributed to a “moral panic,” because opponents commonly use the argument that prostitution is inherently violent and impossible to be regulated. He criticises the US government’s strategy to tackle prostitution, which contrasts sharply with the position of several other countries namely, Australia, Canada, Britain, New Zealand, etc., which have either legalized some form of indoor soliciting (brothels) or are investigating alternatives to blanket prohibition. He supports the idea that the government should reject the notion that prostitution is evil, and explore instead ways to regulate it, “guided by the principle of harm reduction”.¹⁸

6. Laws governing sex workers in India and the atrocities faced by them

The Indian political approach, at least in the statutes, has been to try to achieve a mix of different methods, with a careful balance between views that sex work is immoral, that sex trade is exploitative, and that sex workers’ rights need to be protected. The very name of the major legislation related to trafficking and sex work in India the Immoral Traffic (Prevention) Act of 1986 (ITPA) makes clear a social attitude about sex work as immoral.

Prostitution per se is not illegal in India, but specific activities related to commercial sex are penalized. Sex workers are restrained under the ITPA with dangerous consequences for their health, safety, livelihood, and protection. During their working life, sex workers in India are subjected to frequent harassment and detention by police, even though, according to ITPA, sex work itself is not illegal if practiced privately and independently.

On April 1st, 2014, Ms. Rashida Manjoo, Special Rapporteur in the 26th session of the United Nations Human Rights Council, described ITPA in her report titled ‘Violence against Women, Its Causes and Consequences’, and recommended that the Government “review the Immoral Traffic (Prevention) Act, 1956 that de facto

¹⁸ Ronald Weitzer, “The Growing Moral Panic over Prostitution and Sex Trafficking”, *The Criminologist* 30, no. 5 (2005): 2-5, 3. http://www.bayswan.org/traffick/Weitzer_Criminologist.pdf (accessed October 12, 2017).

criminalises sex work and ensure that measure to address trafficking in persons do not overshadow the need for effective measure to protect the human rights of sex workers”.¹⁹

The Supreme Court of India has observed that sex workers are entitled to a right to live and it must be accorded to the protection guaranteed to every citizen. It instructed the State to provide recommendations on the rehabilitation of sex workers who wish to leave sex work of their own volition, and to provide conducive conditions for sex workers who wish to continue working as sex workers in accordance with Article 21 of the Constitution of India.²⁰ A Supreme Court panel recommended that the central government and the Election Commission issue voter ID cards to sex workers, relaxing verification requirements, and that state governments and local institutions issue them ration cards.²¹ Stigma related to their work and identity, and the migratory nature of their job, prevents sex workers from having identification documents, essential to access entitlements and privileges from the government. For instance, in 2009, it was estimated that only 20% of over 5000 sex workers in Delhi had a voter ID card.²²

Section 2(a) of ITPA defines “brothel” as “any house, room, conveyance or place which is used for the purpose of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes.” Section 3 of ITPA provides punishments for keeping, running, and managing brothels. The term “mutual gain of two or more prostitutes” renders premises shared by sex workers as illegal, including their own residence. Since they (sex workers) are in harm’s way with society at large, they form interdependence among themselves and live together. There have been several instances where sex workers have lost their homes and earnings under the guise of “closing down brothels” and “good governance”.²³

Section 4 punishes any adult person being economically supported by the earnings of sex workers. Therefore, aged and ailing parents, siblings, spouses, and children over the age of majority, who are dependent on sex workers, are treated as criminals.

¹⁹ Paragraph 78 (e) A/HRC/26/38/Add.1.

²⁰ *Budhadev Karmaskar v. State of West Bengal* (2011) 11 SCC 538.

²¹ Interim Orders, Sex Workers Rehabilitation Case, Supreme Court of India, 16th September 2011. Source: Law Resource India.

²² John Godwin, *Sex Work and the Law in Asia Pacific*, 1st ed. Bangkok: UNDP, 2012, 56. <http://www.undp.org/content/dam/undp/library/hiv/aids/English/HIV-2012-SexWorkAndLaw.pdf> (accessed September 4, 2017).

²³ Aarthi Pai and Meena Sandhu, “Violence against People in Sex Work in India,” https://www.sangram.org/resources/violence_against_people_in_sex_work_in_india.pdf (accessed November 12, 2017).

Thus, a mother cannot provide fund for the education of her children or cannot look after her parents, because if she does so, people who are associated with her would be regarded as criminals. In reality, a significant majority of people, particularly women, turn to sex work to support their families, including children and parents, ironically, these very people are treated as criminals.

Section 8 of ITPA punishes sex workers for drawing attention of potential customers from a visible, conspicuous site, whether on a street or from a private dwelling. The criminalization of soliciting is one of the most obvious legal problems for sex workers, who faced court hearings, arrests, and convictions on a routine basis. Sex workers are arrested even when they are not soliciting. Most pleading guilty find themselves in a vicious cycle of criminalization, as the onus of providing proof rests on them. A report commissioned by the National Human Rights Commission found that the solicitation statute was the primary law used in ITPA, and it observed, "It is disturbing to note that out of almost 14,000 persons arrested every year under ITPA, approximately 90% are women." A study on red light areas found that 66% of the cases registered in Mumbai and 56% in Delhi were under the solicitation statute.²⁴

Section 15(5A) of ITPA and the Contagious Diseases Act of 1864 mandates the medical examination of persons removed from brothels for, *inter alia*, detection of sexually transmitted diseases. Sex workers are reportedly forcibly tested for HIV, and their results are disclosed in open courts; this is against the national policy of confidentiality, free consent, and counselling for HIV testing.²⁵

All offences under ITPA are cognizable in nature (section 14), that is, the police does not require a warrant to arrest or search any premise. The general principle of law enforcing agencies is "raid and rehab" rather than "aid and rehab". Perhaps the most widespread human rights abuse emerges from the rescue and rehabilitation provisions of ITPA. These interventions involve brothel raids by special police officers and NGO workers, where women are "rescued" and placed in rehabilitation facilities. Police raids, however, frequent in red light areas and under the pretext of rescuing minors, do not distinguish between minors and consenting adults. In 2012, in perhaps one of the largest raids in recent times, an operation was carried

²⁴ Lawyers Collective, *Legislating an epidemic: HIV/AIDS in India*. Delhi: Lawyers Collective and Universal Law Publication Company, 2003, 125.

²⁵ Lawyers Collective (NGO), "Sex Workers Meet Law Makers," <http://www.lawyerscollective.org/vulnerable-communities/sex-work/94-qsex-workers-meet-law-makers-on-1st-march-2011-report> (accessed August 19, 2017).

out over 3-4 days in a red light area called Simplex Building in Mumbai and over 200 women were “rescued and sent to correction homes.” Narratives of raid and rescue operations indicate the highly abusive and violent nature of these operations.²⁶ The consent of adult women in sex work who are “rescued” is immaterial, and they are remanded to correction homes despite testifying that they were in sex work willingly.²⁷ These adult women are released into the care of parents or family members on the condition that they will give up sex work. Often judgments when handing over the “custody” of an adult sex worker to a parent or family member are based on moral judgments.

The final step in the rescue intervention is the (often) involuntary rehabilitation of women in sex work. Rehabilitation programmes are run either by non-governmental organizations or are part of government programmes. Sex workers taken to these rehabilitation programmes are kept in jail-like conditions, experience repeated sexual abuse²⁸, and are eventually released. Sex worker organizations have drawn attention to the health and safety concerns of women involuntarily removed from brothels. Rehabilitation programmes often undermine the very purpose of their existence, given the high rates of violence experienced by women in rehabilitation homes, their return to sex work, and, the disruption of their everyday existence due to being detained for extended periods of time.

Sex workers are often evicted from the premises and are unable to return to their residences. In the case of the Domburwada raid in Kolhapur Maharashtra in 2013,²⁹ over 200-250 women were residing in 30-40 houses, and many had been residing there for the past 30 years. Ever since the raid, the place has been locked down, and sex workers are being prevented from entering their houses. The women have

²⁶ Natul Nitasha, “180 Accused Held during Raid”, *Times of India News Network (e-newspaper)*, Section Delhi (October 6, 2012). <http://timesofindia.indiatimes.com/home/The-180-accused-held-during-a-raid-at-a-brothel-in-Simplex-building-Grand-Road-were-remanded-to-judicial-custody-by-a-local-court-Their-bail-applications-were-rejected-by-the-court-Meet-some-of-the-most-incredible-inspiring-and-unstoppable-Indians-and-witness-their-extraordinary-stories-on-this-season-of-AMAZING-INDIANS-every-Saturday-at-330-pm-and-Sunday-at-1030-am-on-TIMES-NOW/articleshow/16703761.cms> (accessed September 16, 2012).

²⁷ Amit Chattopadhyay and Rosemary G. McKaig, “Social Development of Commercial Sex Workers in India: An Essential Step in HIV/Aids Prevention”, *Aids Patient Care and STD* 18, no. 3 (March 2004): 159-168.

²⁸ HT Correspondent, “Shelter Home Case: Court tells Police to Register FIR”, *Hindustan Times (e-newspaper)*, Section Bombay, December 1, 2012, <http://www.hindustantimes.com/mumbai/shelter-home-case-court-tells-police-to-register-fir/story-4fH4HmHLasB8cWSV8STq1I.html> (accessed August 26, 2017).

²⁹ Phadnis Samrat, “Aids Control Officers Worried About ‘Lost’ Sex Workers in Kolhapur.” *Times of India News Network (e-newspaper)*, Section City News (June 12, 2014). <http://timesofindia.indiatimes.com/city/kolhapur/Aids-control-officials-worried-about-lost-sex-workers-in-Kolhapur/articleshow/36411090.cms> (accessed August 26, 2017).

requested the district authorities to provide them with alternative residences, but the authorities have ignored them.

In 2013, the Justice Verma Commission recommendations to the Criminal Law Amendments inserted the amended Section 370 to define the offence of trafficking. Clarification issued by the Verma Commission stated that the amended Section 370 was to protect women and children from being trafficked. The section did not include within its ambit sex workers who practice of their own volition. The Commission further clarified that the amended section should not be interpreted to permit law-enforcement agencies to harass sex workers who undertake activities of their own free will and their clients.³⁰

7. Key findings

Despite irrefutable evidence emerging from government and, non-government research and through the voices of numerous affected sex workers, the State has failed in its obligation to respect, protect, and promote the rights of sex workers, who are arbitrarily arrested and evicted. State inaction to assess and amend punitive laws that impact sex workers and their families has led to sex workers living in a criminal and stigmatized environment. By offering rehabilitation schemes as the only option to sex workers, the State has failed in its duty to protect their rights.

Access to justice for women is constrained by social barriers ranging from lack of knowledge of their rights, dependence for assistance and resources, and threat of sanctions, as well as the incapacity of the justice system to respond to the particular needs of women.³¹ In the case of sex workers in India, stigma and moral lens attached to sex work further accentuate barriers to accessing justice. Although Free Legal Aid is enshrined in the Indian Constitution and the State Party ensures free legal services to poor and marginalized women, as well as monitors the quality and impact of such services, access to legal services for sex workers remains a pipe dream. It has been observed that women and trans-women in sex work are unable to access appeals. A preliminary analysis of 40 cases in twenty-two high courts between 2010 and 2013 pertaining to sex work/ prostitution and loitering

³⁰ Aarthi Pai et al, "Status of Women in Sex Work in India." Report submitted at the 58th session of CEDAW committee in Geneva as part of the National Alliance of Women's Organization, India, June 2014, 33-38. <https://www.sangram.org/resources/status-of-women-in-sex-work-in-india-submission-to-CEDAW-committee.pdf> (accessed October 11, 2017).

³¹ Rakesh Shukla, *Sex Work and Laws in South Asia: A Monograph*, 1st ed. Sangli: Sampada Gramin Mahila Sanstha, 2010, 9-16.

or creating public nuisance under the penal code or police acts has indicated only eight cases.³² This abysmally low number indicates almost negligible access of sex workers to the higher judiciary and courts of appeal. It indicates a denial of opportunities to sex workers for correction of errors made by lower courts, which emerges from a lack of understanding the specific circumstances of sex workers, having to barter sexual favours to lawyers, as well as from bias and prejudice due to their her identity.

Violence against sex workers in India is linked to the perception of sex workers as criminals and non-citizens. This has led to a systemic, systematic, and large-scale violation of human and fundamental rights, such as the right to life, dignity, equality, equal protection, and due processes under the law. Several factors put sex workers at risk of violence. On the other hand, sex workers are unaware of the provisions of the domestic violence act, which provide redress against partner violence. Police apathy leads to denial of access to provisions under the Protection of Women from Domestic Violence Act (PWDVA 2005) and other women welfare acts. Myths surrounding the violence of rape against sex workers ensure that they are constantly on the fringes of access and redress to justice. One of these myths is “a sex worker cannot be raped” (i.e., if she has consented to multiple partners or commercial sex, she has given up the right to refuse other partners or other acts).³³

8. State response and intervention towards sex workers

There has been a duality in the response of the State in meeting its obligations toward sex workers. The Ministry of Health, through its HIV/AIDS programme, emphasized community-owned and community-led HIV prevention services.³⁴ By 2009, this ambitious transition of HIV programmes to the community based organisations (CBO) of sex workers had already begun across the country. Emphasis was placed on training sex workers from the collectives to manage and run programmes, including the design, monitoring and evaluation, as well as financial and administrative management of small grants, which were provided by the Department of Health of the State and central governments. Key to this intervention strategy was the affirmation of the principle of “voluntary entry and

³² Analysis of high court cases in the context of sex work, Rakesh Shukla, Centre for Advocacy on Stigma and Marginalisation, 2014.

³³ Kinnel Hillary, *Violence and Sex Work in Britain*, 1st ed. Devon: Willan Publishing, 2008, 48.

³⁴ Strategy and Implementation Plan, National AIDS Control Programme, Phase III [2006-2011] (November 2006), 26. http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_117311.pdf (accessed November 5, 2017).

exit from sex work”³⁵ and the need to strengthen community ownership through collectivization and strengthening the enabling environment.³⁶ Guidelines were evolved for a systemic approach to implementing a crisis response by engaging in police advocacy. By its own admission, this strategy made it possible to reach out to over 0.68 million sex workers across the country, covering an estimated 53% of the sex worker population.³⁷

The police approach to complaints of violence has consisted of ensuring police reforms for a more sensitive approach towards policing and dealing with vulnerable populations. In 2005, the Inspector General of Police in Karnataka state, in response to complaints of widespread police abuse against sex workers, issued instructions stating that strict disciplinary action would be initiated against police officials who ill-treat, abuse, and extort money from sex workers.³⁸ Similar guidelines were also issued in Andhra Pradesh and Tamil Nadu.

Despite these steps to alleviate the conditions faced by sex workers, the government has failed to address the stigma and marginalization associated with their profession. The nature of sex work as a profession is often regarded as a taboo and something against the Indian ethos. The Indian government introduced an amendment to Section 5(C) of the Immoral Traffic Prevention (Amendment) Bill 2006, seeking to punish clients involved in contracting sex workers.³⁹ This amendment has been criticized by sex workers as an attack on their right to livelihood. The provision is likely to drive the profession underground, contributing to more hazardous working conditions and to hampering aids prevention and health work. The Section could also serve as a tool in the hands of police to extort money from clients.

While many relevant schemes and bills are still pending in the parliament, such as the Sex Workers (Welfare and Rehabilitation) Bill 2016,⁴⁰ the operating schemes

³⁵ Targeted interventions under NACP III, Operational Guidelines, Volume 1, Core High Risk Groups, (October 2007), 17, <http://naco.gov.in/sites/default/files/NACP-III.pdf> (accessed November 5, 2017).

³⁶ Targeted Intervention, National AIDS Control Programme, Phase-III, India; Ministry of Health and Family Welfare, 24.

³⁷ Targeted Intervention, National AIDS Control Programme, Phase-III, India; Ministry of Health and Family Welfare, 24.

³⁸ Karnataka Inspector General of Police, Circular on Action under Immoral Traffic (Prevention) Act, 1956, (November 22, 2005). <http://www.altlawforum.org/gender-and-sexuality/rights-ofsex-workers> (accessed November 10, 2017).

³⁹ Shukla, *Sex Work and Laws*, 20.

⁴⁰ Introduced in Lok Sabha (lower house of India's bicameral Parliament) as bill no. 58 of 2016 by Dr Kirit Solanki (Member of Parliament) <http://164.100.47.4/billtexts/lb/billtexts/AsIntroduced/4227LS.pdf> (accessed August 8, 2017).

are seldom productive. “*Priyadarshini*”,⁴¹ a scheme initiated by the previous United Progressive Alliance government to train women to become self-sufficient, has been closed down, since it was a “very bad programme” and “absolutely no work” was done on the ground⁴². The current National Democratic Alliance government found out that after investing \$4,770,900 USD (31crore INR) there was no improvement in the condition of people.

9. Recommendations

Sex work happens in informal settings, and it can be an occasional form of income or a long-term occupation. Despite this fact, a safe working environment through standard labour protection measures continues to be denied to sex workers.⁴³ These measures include access to benefits, legal redress for workplace grievances, as well as adequate health and safety regulations. Detention of sex workers in rehabilitation centres without access to legal counsel or right to appeal are human rights infringements that need protection under adequate labour clauses. The International Labour Organisation (ILO)⁴⁴ and the UNDP have emphasized on the need to provide sex workers with legally enforceable rights to occupational health and safety, and the right to participate in the process of developing workplace health and safety standards.

Suggestions from sex health organisations should be included in drafting/amending laws, policies, and programs relevant to sex workers, and during its eventual implementation process.

Sensitivity to issues faced by sex workers should be made a part of the training of police personnel, public prosecutors, and the judiciary in partnership with community organizations of sex workers.

⁴¹ *Priyadarshini* is a Hindi word meaning “lovely to look at.”

⁴² Press Trust of India (PTI), “*Priyadarshini* scheme closed, no work done on ground, says Maneka Gandhi.” The Indian EXPRESS (e-newspaper), Section India>New Delhi (April 28, 2016). <http://indianexpress.com/article/india/india-news-india/priyadarshini-scheme-closed-no-work-done-on-ground-says-maneka-gandhi-2774797/> (accessed December 5, 2017).

⁴³ UNAIDS, *UNAIDS Guidance Note on HIV and Sex Work*. Geneva: UNAIDS, April 2012, 10. http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf (accessed October 30, 2017).

⁴⁴ Recommendation No. 200, concerning HIV and AIDS. Adoption: Geneva, 99th ILC session, 2010.

Certain aspects related to sex work should be decriminalized, such as those that prohibit consenting adults from buying or selling sex, and laws that prohibit commercial sex, such as laws against “immoral” earnings, “living off the earnings” of prostitution and brothel-keeping.

Confidentiality and respect of privacy should be ensured for sex workers who approach law enforcement and judiciary for redress in cases of sexual assault, exploitation, and violence. It is important to ensure skills and sensitivity in dealing with women, persons who identify as women and transgender women in sex work, and hence to develop mechanisms to recognize and act against violence faced by women in sex work, while strengthening sex workers’ access to justice.

There cannot be a decisive conclusion to this complex problem, but there can definitely be suggestions that can bring some solace to workers in such an industry (as agents or victims).

The easiest solution to suggest is to ask for the legalization of this industry, but many authors believe that our country is neither socially nor culturally ready for such an intervention. Another problem that is specifically related to such a legalization or fluidity of choices is that as soon as there is a just legalization for such work, there might be an increase or affirmation from the society. This might make pimping an honorary business, and pimps could become legitimate businessmen, who might not shy away from diving into further arrays and deeper problems like selling minor girls for sex or forcing someone to become a sex worker, and then being helped by the law to keep them in the profession, hampering their agency and choices.⁴⁵ Such naturalized women or victims of sex work at younger ages would then again become naturalized sex workers, whose choice would be limited, as they might not even know of different ways or means to lead a life through other economic choices.

Our task in this paper is not to suggest that prostitution, in any way, is a suggestible way of life, but it is to make it conducive for people engaged in such work to at least come forward and have a say about their problems and issues, as members of the social world at large. Thus, we would like to suggest not only the decriminalization of the supply, but the penalization of the demand in the starting process. In this

⁴⁵ Jo Doezeema, “Forced to choose: beyond the voluntary v. forced prostitution dichotomy” in *Global sex workers: rights, resistance and redefinition*. Ed. Kamala Kempadoo. New York: Routledge, 1998, 34-50.

way, society might be able to keep its moral status quo, as well as alleviate the situations faced by workers of such an industry.

India is in a position of advantage, as it already has banned pimping, which greatly helps to reduce the organization of brothels. Another step that we need is to end the demand and to ensure legal resource if caught red handed. At the same time, we must make the laws stronger for sex workers so that they can achieve a position of equality under the eyes of the law.

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