

TOR 3 *Conditions conducive for sex workers to live with dignity in accordance with the provisions of Article 21 of the Constitution of India.* **SUBMISSION TO THE SUPREME COURT PANEL, BY NATIONAL NETWORK OF SEX WORKERS, INDIA**

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Background

The ITPA (formerly SITA) was enacted more than half a century back. The understanding of fundamental rights of equality, life and liberty has expanded since then with the inclusion of a number of newer dimensions. The provisions of ITPA are contrary to and in violation of the present content of fundamental rights against discrimination, arbitrariness, life with self-respect and dignity, livelihood, right to agency and choice, right to reside in any part of India and the right to carry on any business under provision enshrined in Articles 14, 15, 19 and 21 of the Constitution.

The TOR itself is implicit in understanding that an adult consenting sex worker is capable of making an informed choice of remaining in sex work and that such a person needs to be accorded the same dignity available to a citizen under the Constitution.

Sex workers need to be treated as equal citizens before the law and must have access to all the legal rights and protection under the Constitution. The basic tenet of equality is violated by various provisions of ITPA which single out adult consenting sex workers for reform, punishment, externment and eviction.

The provisions pertaining to 'rescue' and incarceration without consent for reform of 'adult' women carrying on sex work, coercive rehabilitation, prosecution of family members of sex workers, forcible externment from an area and other punitive measures around sex work need a re-look and change to bring them in harmony with fundamental rights of women in sex work.

Specific laws are needed to deal with the offence of Trafficking – in the absence of this the Supreme Court needs to make orders to frame rules and guidelines that acknowledge consent, agency, privacy of adult consenting sex workers ensuring such rules and guidelines are not violative of their human rights.

Urgent need to align India's laws with the global articulation on Sex Worker Rights

India as a signatory to various global conventions and treaties is part of the global community, needs to recognise the global demand to protect the rights of adult consenting sex workers and to support their struggle for dignity, choice and self – assertion.

A. In April 2014, the Special Rapporteur on Violence Against Women (SR – VAW) on her visit to India has observed that "measures to address trafficking in persons should not overshadow the

- need for effective measures to protect the human rights of sex workers". The SR-VAW has also called for a review of the Immoral Traffic Prevention Act, 1956 in India that criminalizes sex work¹.
- B. United Nations(UN) Resolutions, International agencies and Commissions have stressed on a rights based response to sex work and the need to protect rights not just by ***decriminalising sex work, but by eliminating the unjust application of non - criminal laws and regulations*** against sex workers.
- i. The UN Economic and Social Commission for Asia Pacific resolution calls on members to address legal barriers² to HIV responses including reviews³ of national laws, policies with a view to eliminating discrimination against vulnerable populations.
- ii. The Independent Commission on AIDS in Asia,⁴ UN Special Rapporteur on Right to Health,⁵ Global Commission on HIV and the Law⁶ and UNDP Asia Pacific⁷ have recommended the decriminalisation of sex work involving consenting adults.
- C. UN organisations, International agencies and Commissions call for ***recognition of Trafficking in persons for sexual exploitation and Sex Work as two different concepts*** to be understood and legislated accordingly.^{8,9,10} Sex Work organisations have also called for a review of laws ***that criminalise third parties*** who support sex workers to work within a safe environment.¹¹
- D. The International Labour Organisation (ILO) and UNDP have emphasised on the need to provide sex workers with legally enforceable rights to ***occupational health and safety and right to participate in the process of developing workplace health and safety standards.***^{12,13}
- E. Elaborating the scope of Article 6 of CEDAW; General Recommendation 19 calls on States to recognise that their (sex worker's) unlawful status makes sex workers vulnerable to violence and hence ***need equal protection of laws against rape and other forms of violence.***¹⁴ ***States were asked to report on the measures to protect women in sex work and the effectiveness of these measures.***¹⁵ The CEDAW Committee has recommended the need for measures to prevent "discrimination against sex workers and ensure that legislation on their right to safe working conditions is guaranteed".¹⁶

¹UNHRC (2014) Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to India, p 19. A/HRC/26/Addl.1

²UNESCAP Resolution 66-10, *Regional call for action to achieve universal access to HIV prevention, treatment, care and support in Asia and the Pacific*, 2010

³UN ESCAP Resolution 67-9, *Asia pacific regional review of progress in achieving declaration of commitment on HIV and political declaration on HIV/AIDS*, 2011

⁴Commission on AIDS in Asia (2008), *Redefining AIDS in Asia, Crafting an effective response*, New Delhi: Oxford University Press.

⁵Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Anand Grover, A/HRC/14/20, 27 April 2010

⁶Global Commission on HIV and law (2012), *op. cit.*, p 43

⁷UNDP (2012), *Sex Work and the Law in Asia and the Pacific, HIV and human rights in the context of sex work.* p 34- 39

⁸Global Commission on HIV and the law (2012), *op. cit.*, p 43

⁹UNDP (2012), *op cit.*, p 24

¹⁰Human Rights Council (2010), *op. cit.*, p 15

¹¹Global network of sex work projects (2013), *Third parties briefing paper.*

¹²ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No 200), Geneva: ILO

¹³UNDP (2012), *op cit.*, p 35

¹⁴UN CEDAW, *CEDAW General Recommendations Nos. 19, Article 6. Adopted at the Eleventh Session, 1992.*

¹⁵*ibid.* Specific recommendations 24 (h)

¹⁶UN CEDAW, *Concluding Observations on the combined 7th and 8th periodic reports: Hungary*, 26 March 2013, CEDAW/C/HUN/CO/7-8

Specific Recommendations on ITPA

I. Brothel - Keeping (2.a)

Concerns

The expression “... **Or for the mutual gain of two or more prostitutes**” criminalises adult consenting sex workers who are coming together for their own mutual gain. Frequently, sex workers stay together in rooms or homes to ensure safe working conditions and to reduce chance of violence and abuse.

In order to protect the dignity of women in sex work and ensure them safe working conditions it is essential to protect their right to work in safe houses where they collectively negotiate for safe working conditions in partnership with third parties. There is no element of sexual exploitation in these transactions.

Recommendations

- i. Delete the phrase “**or for the mutual gain of two or more prostitutes.**”
- ii. Add Proviso to 2a. to the effect - “**this definition does not include a safe house where adult consenting commercial sex happens or where two or more sex workers come together for their mutual gain**”.
- iii. Section 3 on punishment for brothel keeping must accordingly be read to exclude from its ambit two or more adult consenting sex workers coming together for their mutual gain; and safe houses where sex workers collectively work in partnership with third parties and in non – exploitative conditions

II. Living on the earnings of prostitution(4)

Concerns

This law stigmatizes the earning of a sex worker and violates the right to equality of women in sex work. Like many single women across India, who support their families, sex workers also willingly support adult and minor children, partners, parents and other family members. This section however criminalizes any person who is being supported by a sex worker and is highly discriminatory.

Consent of the sex worker is not considered significant in ascertaining whether there is an offence under the Section. Further, there is no reason to prosecute an individual for being “habitually” in the company of a prostitute. This sub – section is deeply stigmatizing for adult consenting sex workers. Consent of adult sex workers must be at the root of defining an offence under this section.

Recommendations

- a. Consent of the sex worker must be key to ascertaining an offence under this Section

- b. Amend 4 (1) to recognize consent of the sex worker in supporting adults on her earnings. “Any person over the age of eighteen years who knowingly lives... on the earnings of the prostitution of any other person **without such person’s consent...**”
- c. Delete Section 4 (2) (a) – habitually living in the company of a prostitute
- d. Amend 4 (2) (c) to exclude from the purview of the Section; touts and pimps who are working on behalf of the sex worker with her consent. “to be acting as tout or pimp on behalf of a prostitute, **without her /(such person’s) consent**”.

III. Procuring, Inducing or Taking for Prostitution (5)

Concerns

The Section does not differentiate between a minor and an adult. An adult sex worker who provides consent with the knowledge that she is accompanying the individual for purpose of better livelihood opportunities in sex work is bought within the purview of the Act, criminalizing those individuals who are assisting her in seeking better livelihood options. The section violates the right of an adult consenting sex worker to safely migrate to other places within India for her livelihood.

Recommendations

- a. Amend the section to take into consideration knowledge of sex worker and express consent given by adult sex worker to enable her to migrate to other places for sex work.
- b. Amend 5 (1) (a) - Procures or ..., ~~with or~~ without his consent, for the purpose of prostitution;
- c. Amend 5 (1) (b) Induces a person to go from any place, with the intent that he may for the purpose of prostitution become the inmate of, or frequent, a brothel **without the person’s knowledge of such purpose or express consent to such purpose**;
- d. Amend 5 (1) (c) to de – link adult and child trafficking. Amend the section to enable any adult sex worker to give express consent to move freely for sex work.

IV. Detention in premises of prostitution (6)

Concerns

The section does not make a distinction and includes within its ambit adults who may have consented to being in the brothel.

Recommendations

Amend the section to recognise the consent of adult sex workers who have expressly consented to work in brothels.

V. Prostitution in the vicinity of Public Places. (7)

Concerns

Many street based sex workers or part time sex workers do not have safe houses or brothels in which they can do sex work. In these cases the sex worker and the clients hire rooms in lodges or hotels for a commission. The definition of a public place brings within its ambit almost every form of hotel or lodge where a safe worker can work in a safe environment. In the absence of these places, sex workers will be forced to work on the streets in risky conditions; exposed to violence and abuse. In many cases, brothel spaces which have been existence for many years and being run in a non – exploitative manner with consenting sex workers also come under the ambit of the section. Some brothels have been in existence even before the surrounding institutions emerged.

It is also not clear as to the link between this section and the objective of the Act of preventing trafficking. Since sex work is not illegal and in case the women are working indoors in hotels or lodges, then the purpose that the section seeks to achieve is not clear. It is broad and overreaching in attempting to regulate the moral behaviour or conduct of a specific class of people, i.e. sex workers and their clients; and is a violation of the sex worker’s right to equality before the law.

In reality the law is used to harass sex workers and lodge owners which has a direct impact on the lives of sex workers. They are denied rooms as is being seen in the case of sex workers in Kolhapur after they were evicted from the brothels in 2013.

Recommendations

Exclude from the ambit of this section adult consenting sex workers and their clients who are operating in the privacy of spaces such as lodges and hotels.

Exclude safe houses where adult sex workers are working for their mutual gain with the support of third parties; from the ambit of this section.

VI. Seducing for prostitution (8)

Concerns

The section is widely used by the police to harass and punish adult sex workers, especially part- time and street based sex workers. The section has no link to the objective of preventing trafficking.

Recommendations

Delete Section 8.

VII. Detention in corrective institutions (10A)

Concerns

The construction of adult consenting women exercising a choice to choose sex work as a form of livelihood; as a woman needing correction and reform is deeply repugnant to her dignity. It violates the freedom of every woman to choice and bodily integrity and punishes the woman for moral transgression seeking a certificate of moral reform from corrective institutions. The section has been used to detain women in sex work in corrective institutions without access to appeal or hearing. She is very often at the mercy of the discretionary powers of magistrates who seek verbal assurances of her willingness to give up sex work before she is released.

The maximum sentence for the offence of prostitution in the vicinity of a public place is three months imprisonment. However, it is ironical and anomalous that the court for the purpose of “reform” can send the sex worker to a minimum of two years and maximum of seven years detention in a corrective detention. Neither the client nor the sex worker must be punished in any manner for a consenting act done in private. The section is broad, over reaching, violative of the dignity of adult women and stigmatizes sex workers.

Recommendations

Delete Section 10A

Exclude adult consenting sex workers from the ambit of this section

VIII. Removal and/ or Rescue of person and remand to protection home (15,16,17)

Concerns

The search and removal and rescue provisions of ITPA are extremely violent, abusive. There are numerous instances of women being pulled by their hair or abused during the raids. Despite protests from adult consenting sex workers that they are in sex work of their own volition, their pleas are ignored by the police and they are removed from the brothels. The agency of adult women and their consent is considered immaterial for the purpose of assessing whether they want to be “rescued”.

Detention of an adult woman against her will is a violation of her dignity and her rights. This section does not take into account the right of an adult person to be in a place of his / her own will and volition. Regardless of the will of an adult person the provision authorizes removal and rescue. Despite the fact that the persons “rescued” are not accused of any crime, yet can be sent for one to three years detention.

The provisions of mandatory testing of any adult consenting person is discriminatory and violative of her dignity and right to personal liberty. It denies adult women the agency to take decisions in their best interest.

Recommendations

Exclude from the ambit of these section adult consenting sex workers.

The provisions of removal or rescue and remand to protection home must be undertaken keeping the women’s perspective, agency and consent at the centre of the efforts.

All medical tests must be conducted only after the individual has been counselled and provides informed consent for the tests.

IX. Closure of a Brothel and eviction of offenders (18)

Concerns

Many adult consenting sex workers and their families have been forcefully evicted from their homes, which have been closed after issuing a seven day notice. Many adult consenting sex workers reside in places that come within the vicinity of public places and hence are covered under the ambit of Section 7. There absence of right to appeal against the order of closure by the Sub – divisional magistrate is violative of the rights of sex workers to access justice.

Recommendations

Exclude adult consenting sex workers and their homes, work places from the ambit of Section 2A and Section 7.

Remove from the ambit of this Section, adult consenting sex workers who come together and work for their mutual gain.

Amend the section to allow for the right to appeal by the women affected by the order of eviction and closure.

X. Removal of Prostitute (20)

Concerns

Despite sex work not being an offence under the law, sex workers are externalised from their villages and areas. Many sex workers narrate the ignominy of being ordered to leave their villages or areas of residence and state that they are unable to return due to the shame and stigma. Being separated from their homes and families, they face destitution and are often forced into further risk. Clearly the provisions of the section are deeply repugnant to a woman's right to earn a livelihood with dignity. The provision is clearly discriminatory and violative of equality and the fundamental rights to move freely and reside in a place of choice.

Recommendations

Repeal Section 20.