

Advocating for the rights of people in sex work

Sex worker rights groups partner with women's groups for recognition of rights of women in sex work

Written by Aarthi Pai - May 2013

In the aftermath of the gang-rape of a young woman on a moving bus in Delhi in December 2012, the Government of India set up a Committee on Amendments to Criminal Law, headed by Justice J.S. Verma. The Committee was mandated to “look into possible amendments of the Criminal Law to provide quicker trials and stricter punishment for criminals committing sexual assault.”

The National Network of Sex Workers (NNSW) decided to use the setting up of the Committee and the ongoing debate on the lack of security for all women to seek a wider consensus in law on the rights of sex workers. The decision to capitalise on this opportunity was cognizant of the challenges involved in seeking collaboration with women's groups on granting legitimacy to sex work as a form of work – a position that some sections of the women’s movement in India do not uphold. Also arguable is the demand for State intervention to curb violence against sex workers, given the fact that the State is one of the biggest perpetrators of violence against sex workers, apart from showing complete apathy towards their concerns when they came forward with complaints of violence.

The National Network of Sex workers made a written representation calling for recognition of the violence that existed within sex work. Drawing on the observations made by the Supreme Court of India that sex workers were entitled to live with dignity, the submission argued at two levels: One, that continued violence against sex workers has led to denial of fundamental right to life and dignity. Two, that stigmatization of sex workers has resulted in their invisibility before the law thereby denying them equal access to and protection under the law.

The submission also sought recognition for the violence *within* sex work and for any non – consenting acts of sex to be placed within the definition of sexual assault. The submission also sought the issuing of directives to law enforcement authorities to take remedial action against such acts of violence, including registering complaints against offenders and decisive action against perpetrators of sexual assault. The submission used the terms ‘people in sex work’ and includes women, persons who identify as women and transgender women.

The oral submission also drew the Committee's attention to *three additional arguments*

- ✚ The need to distinguish between consenting adult sex work and trafficking (“The trafficking debate often hijacks the rights based discussions on sex work and tends to see all sex workers work as victims”).
- ✚ Recognise and create separate laws to deal with the trafficking of adults and the trafficking of children.
- ✚ Recognize the fact that the role of sex worker communities is critical to the elimination of trafficking of women and girls into sex work.

VERMA COMMITTEE AND SECTION 370 INDIAN PENAL CODE

The chapter on trafficking in the Verma Committee Report on Amendments to Criminal Law, January 23, 2013 submitted to the Government of India, recommends the amendment of Section 370 of the Indian Penal Code which deals with the offence of “buying and disposing of any person as a slave”.

The Report recommends that Section 370 be replaced with new Sections 370 and 370A to define and punish the offence of trafficking and the offence of employing trafficked persons. The definition of ‘**trafficking**’ recommended by the Committee is borrowed from the UN Protocol 2000 but the definition of ‘**exploitation**’ in Explanation 1 has been changed.

Consequent to this the recommendations made in the report were then adopted into the Criminal Law (Amendment) Ordinance on 3rd February 2013. The explanation of the expression '**exploitation**' was explained as "**prostitution or other forms of sexual exploitation**". This means that, "prostitution" would be seen as exploitation, which could be highly problematic for people in sex work and result in measures that would criminalize prostitution and all activities related to it.

Secondly, India is a signatory to the UN Protocol 2000 which was ratified in 2011. In the Protocol, '**exploitation**' is seen in the context of **exploitation of the prostitution of others** which simply means - benefiting from the prostitution of another individual comes within the ambit of law/ regulation. Hence these two positions were contradictory. The amended section would be open to interpretation that prostitution in of itself was exploitative and thereby all acts and activities related to it would be criminalized.

The NNSW decided to seek a clarification from the Committee on Section 370 IPC stating that the amended section could be interpreted by law enforcement to further abuse adult consenting sex workers.

The note to the Committee raised the following concerns

i. Section 370 criminalized adult consenting sex workers since it did not differentiate between "coercive prostitution" and prostitution, nor did it mention the "exploitation of prostitution". The significant difference in the formulation between Section 370 IPC and the UN trafficking Protocol in defining prostitution would "potentially criminalize sex work".

ii. The legal formulation was likely to cause harm to sex workers. By introducing the language of prostitution itself as exploitation, the amendment endangers the sex workers instead of protecting them from sexual exploitation.

Any practice that criminalized prostitution, would drive the practice underground, subject sex workers who are already vulnerable to violence to more violence, expose them to HIV and deepen the lack of legal remedy to violence.

iii. Law must harmonise with existing legal formulations. The Supreme Court had upheld the right to dignity of sex workers who wished to continue in sex work.

iv. Formulation will result in contravening the human rights of sex workers. Formulation is a setback to sex workers who are fighting for legal and societal recognition of their fundamental rights to dignity and pursuit of a livelihood.

The Justice Verma Committee responded via e-mail to NNSW (Annexure 1). It stated that the members of the Committee wished to clarify that the thrust of their intention behind recommending the amendment to Section 370 was to protect women and children from being trafficked. And that it had not intended to bring within the ambit of the amended Section 370 sex workers who practice of their own volition. They also clarified that the recast Section 370 ought not to be interpreted to permit law-enforcement agencies to harass "sex workers who engage in prostitution of their own volition and not pursuant to inducement, force, or coercion" and the clients of such sex workers.

This communication from the Verma Committee was welcomed by the NNSW because for the first time, a government appointed Committee had recognised the fact that there is a distinction between women who are trafficked for the purpose of prostitution and adult women who are in sex work of their own volition.

The NNSW then wrote to the Ministry of Home Affairs (MHA), using the clarification of the Verma Committee and the Supreme Court decision in the case of *Budhadev Karmaskar v. State of West Bengal*, wherein a regular criminal appeal relating to the murder of a sex worker in Kolkata had been converted into a broader Public Interest Litigation (PIL) to look into the issues of sex workers. [A Panel was constituted by a Supreme Court order dated 19.07.2011 to look into prevention of

trafficking, rehabilitation of sex workers who wish to leave sex work, and conditions conducive for sex workers to live with dignity in accordance with the provisions of Article 21 of the Constitution (as modified by the order of the Supreme Court dated 26.07.2012).]

NNSW asked for the removal of the word **‘prostitution’** from Explanation 1. The NNSW proposed ‘forced prostitution’ instead of prostitution in line with ‘forced labour’ and ‘forced removal of organs’ but this was not accepted by the MHA.

In the final formulation that was approved and passed by the Government of India, the explanation is as follows - The expression “exploitation” shall include “any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude.”¹

¹370. (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—

First.— using threats, or

Secondly.— using force, or any other form of coercion, or

Thirdly.— by abduction, or

Fourthly.— by practising fraud, or deception, or

Fifthly.— by abuse of power, or

Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.— The expression “exploitation” shall include **any act of physical exploitation or any** form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.— The consent of the victim is immaterial in determination of the offence of trafficking...

[Criminal Law (Amendment) Bill 3 April 2013]

TIMELINE

16 December 2013	Brutal rape of young woman in New Delhi, India, draws public attention to the "failure of governance to provide a safe environment for women in India who are constantly exposed to sexual assault."
23 December 2012	Verma Committee constituted to make recommendations on the Criminal Law Amendment. Terms of reference to give recommendations to ensure speedy justice and amend laws for sexual assault against women.
5 January 2013	Written submissions made to the Verma Committee. National Network of Sex Workers (India) along with CBOs makes a submission on rights of people facing violence in sex work.
19, 20 January 2013	Verma Committee seeks depositions. National Network of Sex Workers (India); presents a verbal deposition. Additional submission made because that discussion focused on trafficking of girls and missing children. Submission argues that the trafficking discourse is hijacking the discussion on sex work and obliterating the violence faced by them.
23 January 2013	Verma Committee submits recommendations to the Government of India. Recommendations include - Trafficking section be introduced as Section 370 IPC and define the offence of trafficking and stipulating punishment.
2 February 2013	Government Ordinance developed and based on the Verma Committee recommendations. The trafficking section is accepted <i>in toto</i> by the Government of India but Section 370 IPC is problematic since it defines within its explanation "exploitation" to mean / include prostitution or other forms of sexual exploitation.
2 February 2013	NNSW urges President not to sign the Ordinance , puts out press release.
3 February 2013	President signs Criminal Law (Amendment) Ordinance .
4 February 2013	Decision to seek intervention of the Verma Committee itself.
5 February 2013	NNSW writes to the Verma Committee seeking its intervention on the problematic drafting of Section 370 IPC.
8 February 2013	Justice Verma Committee sends a written clarification saying that the intent of the drafting was not to bring within the ambit of the law, consenting adult sex workers and their clients.
9 February 2013	Brief sent to Ministry of Home Affairs seeking clarification on wording. Separate brief sent to Minister of Home Affairs, Sushil Kumar Shinde.
15 February 2013	Pressure builds from anti-trafficking groups to retain the wording of S 370
22 February 2013	Criminal Law (Amendment) Bill 2013 draft with amended Section 370 IPC. The expression "exploitation" amended to mean "any act of physical exploitation".
18 March 2013	Union Cabinet approves Criminal Law (Amendment) Bill 2013 retains age of consent for sex at 18.
19 March 2013	Criminal Law (Amendment) Bill 2013 passed by Lok Sabha (Lower house of Parliament)
21 March 2013	Criminal Law (Amendment) Bill 2013 passed by Rajya Sabha (Upper House of Parliament)
3 April 2013	President of India gives assent to Criminal Law (Amendment) Bill 2013.

ANNEXURE 1

Gmail - Fwd: Clarification in respect of recommended amendment to S... <https://mail.google.com/mail/u/0/?ui=2&ik=3e6b6dc147&view=pt&...>



Aarathi Pai <aarathi.cfar@gmail.com>

Fwd: Clarification in respect of recommended amendment to Section 370, IPC by the Justice J. S. Verma Committee

meena seshu <meenaseshu@gmail.com>
To: Aarathi Pai <aarathi.cfar@gmail.com>

Fri, Feb 8, 2013 at 6:22 PM

----- Forwarded message -----

From: **Gopal Subramaniam** <gs.jsvc@gmail.com>
Date: Fri, Feb 8, 2013 at 6:17 PM
Subject: Re: Clarification in respect of recommended amendment to Section 370, IPC by the Justice J. S. Verma Committee
To: meenaseshu@gmail.com
Cc: Vrinda Grover <vrindagrover@gmail.com>

Dear Ms. Seshu

The Committee, in its report of January 23, 2013, proposed certain amendments to Section 370, IPC, to introduce a definition of the offence of 'trafficking' into the IPC and the punishment thereof. The Committee also notes that the Ministry of Law and Justice, Government of India, by way of the Criminal Law (Amendment) Ordinance, 2013 ("**Ordinance**"), dated February 3, 2013, has amended Section 370 of the IPC in terms of the Committee's recommendations.

The Committee, however, notes your representation on behalf of the National Network of Sex Workers to the effect that the Section 370, IPC, after being amended by the Ordinance, could be misused by police and other governmental authorities to harass (i) sex workers who engage in prostitution of their own volition, and not pursuant to inducement, force or coercion, as the amended Section 370 provides, and (ii) the clients of such sex workers, by bringing the act of gratification for a sex worker's services under the scope of the amended Section 370.

The members of the Committee wish to clarify that the thrust of their intention behind recommending the amendment to Section 370 was to protect women and children from being trafficked. The Committee has not intended to bring within the ambit of the amended Section 370 sex workers who practice of their own volition. It is also clarified that the recast Section 370 ought not to be interpreted to permit law-enforcement agencies to harass sex workers who undertake activities of their own free will, and their clients. The Committee hopes that law enforcement agencies will enforce the amended Section 370, IPC, in letter and in spirit.

Yours sincerely

Abhishek Tewari
Advocate
Counsel to the Committee

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In solidarity,

meena saraswathi seshu