

Sex Work And The Law: Law Reform Proposal For Sex Work In India Centre For Feminist Legal Research (CFLR)

Editorial Introduction:

Current Indian law on sex work is similar to a number of other countries: sex work is technically legal, but all activities required to carry it out (for example, seeking out work, living off the earnings, etc.) are criminal. The following is a synopsis of a law reform proposal by the Centre for Feminist Legal Research (CFLR), presented at the first National Conference of Sex Workers (India), organised by DMSC, Calcutta. This presentation highlights the problems caused by current legislation and offers proposals for legal reform that would address these concerns. The consistent message within these proposals is the important legal shift from 'morality' to the same rights to protection and redress as for all citizens.

Note: This law reform proposal addresses female sex workers. The dual legal threat faced by male sex workers (the criminalisation of homosexuality plus the 'sexual morality' laws) calls for further legal reforms.

Legal Regulation of Prostitution in India (The terms prostitution and prostitute have been used by CFLR in their presentation.)

The legal regulation of prostitution in India is governed by The Immoral Traffic Prevention Act, 1986 (ITPA), with some provisions from The India Penal Code, 1860 (IPC) re trafficking and slavery of women and children, and also state-level police, railway, beggary, health, and public order statutes.

The ITPA and other laws operate against prostitute women in many ways:

1. Targetting the women directly - no soliciting, no work near a public place, etc.
2. Targetting her family:
 - a child found with a prostitute is presumed to have been used for sex work and can be removed;
 - partners, parents, or adult children, dependent on her earnings, are liable to prosecution.
3. Perhaps the worst: Section 20 of ITPA says that any woman can be forced to prove that she is not a prostitute or risk being removed from the jurisdiction. There is no restriction as to how many times she can be moved on.

4. At the same time, the welfare or rehabilitation measures in ITPA treat her either as a victim or as a morally corrupt person, who must be removed to prevent negative impact on public morality - either removal to a 'protective' home or removal to a corrective institution, to be reformed.

These laws devalue and criminalise the prostitute and then deny her access to the legal remedies for all citizens against economic exploitation, rape, sexual abuse, coercion, debt bondage, misappropriation of earnings, lack of access to health facilities, etc. They deny her legal protection within work that, due to economic need, etc., she may have chosen 'voluntarily' and with consent to do.

This Law Reform Proposal also acknowledges that there are different dynamics at play which require thoughtful, 'complex' solutions:

- the nature of exploitation when a woman enters into prostitution can not be equated with issues that concern her when she is already in the profession;
- there are also a separate set of concerns at the time of her exit from the profession.

Therefore, these three periods are addressed separately.

1. Entry into Prostitution

*We recommend repeal of ITPA dealing with trafficking and procuring, as the provisions are vague, based on a conservative sexual morality that regards all prostitution as immoral and women as either victims or criminals, and targets women, but rarely the traffickers, as ITPA provisions are so difficult to prove.

*IPC is better equipped to deal with a wider variety of offences, although it still focuses on 'moral good' rather than the person. We would suggest the retention of criminal law to deal with situations of exploitation, where women are being trafficked, and propose:

- amendments to IPC, which focus the trafficking issue on the use of force, fraud, deception, criminal assault, etc., and removal of the morality or immorality of the purpose for which trafficking occurs;
- criminal law should only be applied where trafficking occurs without the consent of the woman. The woman herself can then take up this legal remedy;
- the sale and purchase of a person must remain within the criminal domain, no matter what the purpose;

-these above provisions should be brought in line with current laws re prevention of slavery or indebted labour, to redirect the inquiry from moral issues to the issues of economic exploitation and coercion.

*Amendments of rape and sexual assault laws are needed, as it is difficult for any woman, let alone a prostitute, to use these as legal remedies.

*Women used as witnesses, and their families, must be protected (through witness protection programmes) during the trial and afterwards, as well as given access to safe houses and half-way homes.

2. During the Work:

We recommend the repeal of the ITPA and its replacement with a 3-pronged law reform strategy:

I. Decriminalisation

*complete decriminalisation of voluntary prostitution and the 'related activities', under the ITPA, by consenting adults;

*regarding child prostitution, the issues are completely different, as, under age 16, the above distinction between consent and coercion does not exist. Therefore, a separate statute is needed, as well as the urgent inclusion of issues of sexual abuse of minors and young people in the IPC (as highlighted in an earlier CFLR proposal).

II. Rights of Prostitutes and Women in the Sex Industry

*We recommend statutory recognition of the fact that women in sex work have the same rights as other citizens, as a way to redress the disadvantages of social marginalisation, including statutes on specific rights,:

1. The right to work - no discrimination due to engagement in sex work, and compensation awarded if such discrimination occurs.
2. The right to safe work conditions. A corollary would be the right to claim damages / compensation from any person who causes her physical harm during the course of her work (in addition to any remedy under existing criminal law).
3. Women working in brothels should be entitled to all benefits under existing industrial laws, and to facilities and protections legally available to workers.
4. The right to health, including refusing services to clients who refuse safer sex and access to health insurance and government health facilities for herself and her family without discrimination.

5. The right to association - the right to form collectives, societies, trade unions and have them registered and recognised under the law.
6. The right to education for herself and her children, without discrimination, including schools not requiring the name of the father (which will benefit both prostitute and non-prostitute women).
7. The right to freedom of movement and residence in the place of her choice, including movement within India as well as migration, same as all other citizens, and prohibition of legal or social ghettoisation.
8. The right of privacy, including no state surveillance, regimes of compulsory registration or licensing, or mandatory health check-ups or tests. Violation of this right would mean a woman could claim damages due to invasion of privacy.

III. Redressal Mechanisms:

Some prostitute rights groups in India and abroad propose a specific labour regulation for the sex industry with rights of employer and employees. However, these remedies are often not used with success by the unorganised labour sector, so we recommend legal access to existing labour legislation, but that this should not be the only remedy available.

We recommend that complaints should be filed within already existing legal forums, under the proposed special statutes above, and also leave open the option to invoke already existing laws, such as labour laws and laws on sexual assault and rape.

Corollary:

Police frequently use the IPC, State Police Acts and other provisions, rather than the ITPA provisions, to harass prostitute women. We propose a specific provision within the new law reform that prohibits use of these statutes to arrest or otherwise harass women in prostitution.

Other laws that violate the rights of women in prostitution and must be repealed, including:

1. Section 155(4) of the Indian Evidence Act, 1872, where, in a case of rape, a woman's sexual history can be used to discredit her testimony (implying that if she not chaste, she will lie, particularly concerning sex).

2. The definition of the ‘neglected juvenile’ in the Juvenile Justice Act, 1986, which includes a child of a prostitute, immediately assuming neglect per se because the mother is a prostitute.

3. Section 110B of the Bombay Police Act prohibits ‘indecent behaviour’ and is used much more against prostitute women than the ITPA. Such state Police Act provisions must be identified and repealed.

3. Exit from Prostitution: Duty of the State to Provide Alternatives

We propose that existing rehabilitation policies, which permit placement of women, even without consent, in ‘corrective’ and ‘protective’ custody be dismantled completely, as they are constitutional violations. Also current provisions within the rehabilitation centres offers redundant vocational training, if any, with no follow-up support.

Therefore, we emphasise the duty of the State to provide economically viable alternatives for those who wish to leave the profession, including halfway homes and safe houses (on a voluntary basis), with a policy of openness and public accountability, not connected with the penal institutions. The State should legally be compelled to provide soft loans, infrastructural support and educational scholarships, as a constitutional duty to provide welfare for its citizens.

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