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Keywords

India, Supreme Court, term, sex worker, commercial sexual exploitation, prostitution, advocacy

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AGAINST THE MAINSTREAMING OF THE TERM *SEX WORK*: ADVOCACY WITH INDIA'S SUPREME COURT

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KEYWORDS

India, Supreme Court, term, sex worker, commercial sexual exploitation, advocacy

JUST AS A CIVILIZATION BECOMES OLD; with it, its system of commercial sexual exploitation and sex trafficking (CSE&T) also gets structured, well-oiled, and institutionalized. The exploiters continue to exploit with the conviction that it is their right. The exploited consider their sexual exploitation as their fate and the system of exploitation as a custom or tradition, sometimes a sacred one. This sums up CSE&T in India.

Nevertheless, the Indian situation is unique in the world as it cannot be fully explained without its inescapable interface with the notorious caste system of India. While a majority of women and girl victims of CSE&T are trafficked from southern and western India through the Devadasi system (the temple-based sacred system of dedicating pre-pubescent girls of the downtrodden untouchable castes into the sex trade under the garb of getting married to the God) the rest of them especially in the north Indian sex trade belong to the scheduled tribes like Banchhada, Bedia, Nat, Rajnats, Kanjars etc.) Under the Criminal Tribes Act of 1860-70, these tribes were declared as born criminals, subjected to an extremely unfair and horrible life, wantonly tortured, and stripped of any access to resources or developmental opportunities for almost a hundred years under the Criminal Tribes Act which was repealed in 1951 immediately after independence.

The Devadasis were commercially sexually exploited by setting up localized sex trade zones popularly called the redlight areas under two British laws, The Contagious Diseases Act (between 1860-65) and The Cantonment Act (1865), mainly to facilitate easy access to clinically supervised commercial sex for the colonial soldiers and sailors who landed in India at the port cities and were later shifted to the landlocked cantonment areas. During India's independence movement, there were some reforms introduced through the laws banning the dedication of girls to the sex trade under the garb of marriage with God or temple (a place of Hindu worship).

The localized sex trade in most parts of India existed uninterrupted till 1970 as a socio-cultural tradition not to be interfered with. They existed outside the periphery of urban civilization. Certain social movements in the 1970s aimed to end the Devadasi system. Around this time, the phenomenal growth of the Indian economy and the rise of metropolises created fierce demand for land. The nearness to the ports—the earlier strong point of the localized Indian sex trade—soon became their

disadvantage. The conventional redlight areas started shrinking and thinning. In the last decade and a half, there has been a clear trend of delocalization of the sex trade. On the other hand, the rising demand for women and girls in the sex trade encouraged the trafficking of girls from the north western states of India to the metropolises under the garb of entertainment like dance bars, orchestras, record dance, live bands, etc., where dancing girls were made available for commercial sex.

Rural distress like droughts, economic depressions, disasters, and ethnic violence dictated the supply, while the 'male select migration' to the Indian metropolises dictated the demand. The two factors of sex trafficking in India that remained unchanged need to be mentioned here: one, the victims came from the Dalit society (the down-trodden castes and tribes structurally exploited for centuries). Second, the phenomenon was tolerated and left un-interfered as a social custom or sacred tradition.

It is important to note that selling sex was never considered as a form of 'work' in any of these forms. It was always considered a clandestine activity, and the policy was to deny its existence but tolerate it as a necessary evil.

The spread of the modern-day, USA-driven initiative against human trafficking mobilised the state and civil society from the late 1990s. However, its Indian version adopted a non-Indian, non-structural, non-political framework for analysis and intervention. There was no mention of the caste system in any literature on sex trafficking.

The entire discourse on human trafficking tried to present the problem of sex trafficking as episodic criminal behaviour by random individuals served by highly organised criminal syndicates to be corrected with a trident of police stations, courts, and jails. I call it the Crime & Punishment model. The intervention processes, legal reforms, and capacity-building programmes for the state functionaries talked about some things that rarely existed in India, namely the 'Criminal Syndicates and Organised Crime of Sex Trafficking.' They quoted baseless figures about the incidence and financial turnover of the trade when no data were maintained except for the arrests, discharges, and convictions by the state CID (Crime Investigation Department of the Police).

The only reliable Indian database on trafficking is that of the cases reported at the police station, which is compiled at the national level. However, it is hardly representative of the overall incidence. Until 2013, Indian law did not even have a definition of trafficking in any of its law books, let alone maintain data base based on the definitions. On some platforms, the state agencies have indicated that in India, around three million women are living the lives of victims of commercial sexual exploitation. The civil society sector, however, says that the figure is around six million. Regardless of the absence of a reliable data system and the factual difference in the figures, all the state and the non-state agencies believe that the incidence of CSE&T is alarmingly high.

The civil society that had initiated and innovated the anti-human trafficking interventions even before the 1990s, i.e., prior to the modern initiative against sex trafficking, was pushed into the background, and the bureaucracy and regimental forces took over. Police stations, courts, and jails started defining the anti-human trafficking programme. While the state taking over a larger responsibility in this domain was expected and welcomed, the shrinking role of the civil society and the social movement they had initiated was unfortunate. The social movement, social reforms, and social renaissance were the three strong points that characterized Indian civilization, and democracy became weak.

HIV AND SEX WORK

Carol Leigh's (1982) initiative of calling prostitution 'work' and a prostitute a 'sex worker' was prominently echoed in the Sonagachi redlight area of one of India's biggest metropolises, Kolkata. Their collective Durbar Mahila Samanvay Committee (DMSC) has been at the forefront in working tirelessly to get the sex trade recognised as an economic activity and the prostitute as a 'sex worker.' The articulation as the basis for their claim to consider prostitution as work like any other work and recognize a prostitute as a sex worker DMSC's ideological position is logically very weak and unconvincing.

The advent of HIV/AIDS in India and the scare of spreading it through the sex trade gave a phenomenal push to the DMSC in terms of finance and access to the head office of the National AIDS Control Organization (NACO) attached to the Health Department of India's Central/Union government. The Targeted Intervention approach of NACO was essentially a condom distribution programme ensuring the safety of the client against HIV infection. The NACO felt that their condom distribution programme could only be successful if they had the sex traders on their side. Hence, it was an alliance of convenience. Under this misperceived compulsion, the Targeted Intervention programme of NACO befriended the sex traffickers, pimps, and brothel keepers. It projected them as the frontline crusaders cum saviours in the glorious national war against HIV/AIDS. This access and legitimacy by NACO helped the sex traders to push forward their demand to get the sex trade legitimised as sex work.

In such an unfavourable situation, the competing pro-trafficking alternative thought 'sex work is real work' found roots and fertile soil to flourish. I sum up this brief introduction about the Indian situation of institutionalized sex trafficking by pointing out that although it was considered a tradition and custom and although no eyebrows were raised against the 'evil tradition,' it was never given the status of 'work' and certainly not that of legitimate work or decent work or secular work, unlike any other wage work or profession. It was always looked down upon and pushed under the carpet. The central government, except NACO, the lawmakers and the civil society working against human trafficking continued not to entertain any such demand.

THE IMMORAL TRAFFIC PREVENTION ACT (1956): THE INDIAN LAW ON PROSTITUTION

In India, the major hurdle in getting the sex trade open and declared lawful was the law dealing with sex trafficking and commercial sexual exploitation (commonly called prostitution), The Immoral Traffic Prevention Act (ITPA) 1956, which was majorly revised in 1986. It is a uniquely progressive legislation.

Surprisingly, the term 'traffic' appears only once in the law's title but nowhere in the entire text of the law. It covers sex trafficking under Section 5 by the term Procuring. Sex trafficking, in my opinion, is a better-defined term than the one given by the Palermo optional protocol 2000. The ITPA is a gender-neutral law and, through its revision in 1986, defined prostitution as essentially commercial sexual exploitation. Through the Criminal Amendment Bill passed in 2013, the Palermo definition of trafficking was adopted, with some modification, in the Indian law by changing Sec 370 of the Indian Penal Code, the principal criminal law of India. The ITPA does not penalize an adult woman (after 1986 'person') for voluntarily (not just involuntarily) selling her bodily sex (not pornographic material) alone in her private premises, which are beyond 200 meters distance from a school, a place of worship or a hospital or any other place declared by the state, to a customer without causing a public nuisance. At

the same, it does not give a formal license or permission to a woman (after 1986 'person') to sell her bodily sex.

The law is against an organized sex trade. It penalizes recruitment/procuring, detaining (very progressively and comprehensively defined), pimping, brothel keeping and managing, providing a place for selling sex or for running a brothel, causing a public nuisance, seducing anyone under one's authority to sell their bodily sex. It shows sensitivity towards the Indian reality where Dalit women facing even a trivial crisis can easily get trafficked into the sex trade for someone else's profit and have no return ticket.

Some proposed amendments in ITPA tried to punish the customer by introducing one subsection in Section 5 in vain. There is a provision to temporarily close down the place or conveyance used as a brothel. The ITPA provides for the rehabilitation of the women and children rescued during search operations. Even when women violate the provisions against soliciting in public places and thereby cause public nuisance, the magistrates have been told that such women need not be punished but may be given an opportunity to adopt an alternative means of livelihood.

The ITPA considers the prostituted persons as victims and not as workers or offenders. It goes after the sex traffickers and sex traders but offers protection and rehabilitation to the victims. While doing all this, it takes due care not to come in the way of an adult woman's (now a person's) right to sell her bodily sex to another heterosexual person in her private premises without causing a nuisance to the public. At the same time, it does not give explicit permission or formal license to the woman (or person) to sell her bodily sex. It attempts to strike a balance between a person's sexual liberty and the Indian anti-women reality in which several social hierarchies (like caste, class, education, employability, etc.) and hostile situations like alcoholic husbands, marital desertion, disasters, droughts, etc. conspire against the vulnerable women and gets them trafficked into the sex trade for someone else's profits. It is based on the premise that in Indian society, a prostitute is highly condemned, a large number of women and children are trafficked into the organized sex trade, prostitution remains the last resort for a woman to survive, and it is not a legitimate economic activity. Both the Union and the State governments in India have, from time to time, announced that they are not considering recognizing prostitution as work or prostitutes as workers.

THE POLICE

In India's federal structure, the police (Home Department) is a concurrent subject. While the Union government has specialized police forces, the day-to-day work of crime control and law and order in the state is managed by the state police. Therefore, it reflects the socio-cultural political context of the state. All over India, in the last ten years, the state police have received considerable hours of 'in service' training on human trafficking, anti-trafficking interventions and child protection.

With modernization and the instillation of competitiveness, the Indian police force has generally improved, but from state to state, the improvement is highly uneven. For civil society actors like us who have worked at ground zero for over 35 years on the anti-human trafficking front, the improvement in police functioning is remarkable, at least in the metropolises like Mumbai and in the state of Maharashtra. When it comes to the recruitment and presence of children in the sex trade, the police have shown zero tolerance. They might not have shown a matching zeal in curbing commercial sexual exploitation of adult women. The scene in certain Indian states makes

you believe that the police are still party to the crime. In some other states like Andhra Pradesh and Telangana, for years, the police have been enthusiastic about rescuing adult women to the tune between 300 to 600 in a year while that would result in conviction only in one or two cases.

THE HANDBOOK ON COMBATING GENDER STEREOTYPES BY THE SUPREME COURT OF INDIA

The Supreme Court of India has time and again shown significant sensitivity to the situation of the women victims of sex trafficking, the prostituted women. Out of this concern, during the Covid-Induced Lockdown (CiL), the apex court asked the state governments what measures they were taking to relieve the prostituted women in the humanitarian crisis of Covid-Induced Lockdown. Many state governments, especially the State of Maharashtra, not only instantly declared a free supply of food grains and other essentials like oil, spices, and cash assistance to the women and extra cash for every school-going child of the prostituted women. In those critical times, the word often used by the honourable court was sex workers. Subsequently, in mid-August 2023, when the SC felt the need to cleanse the language used by various agencies in the functioning of the courts by purging it of the deeply rooted stereotypes, it came up with a *Handbook on Combating Gender Stereotypes*. It recommended that the terms prostitute, slut, etc. be replaced with the term *sex worker*. This was done as a step towards restoring their dignity as human beings. While the intentions of the Supreme Court were laudable, anti-human trafficking civil society organizations like us felt that the error in using the term *sex worker* and its harmful consequences may be brought to the notice of the Hon'ble Court, and a correction may be requested.

ADVOCACY BY ANTI-HUMAN TRAFFICKING ORGANIZATIONS

On 28 August 2023, a few primarily anti-human trafficking organizations like ARZ Goa, Prerana-Mumbai, VIPLA Foundation-Mumbai, and a few developmental organizations like Prayas- a university project-Mumbai, SPID-Delhi, KIDS-Karnataka, Nedaan-Assam and NLF-Manipur under a banner 'Anti-Human Trafficking Forum' wrote to the Chief Justice of India at the Supreme Court, requesting him to reconsider the use of the term *sex worker* in the glossary of terms mentioned in the Handbook. Their two-page petition relied mainly on the argument that most women in prostitution are forced, kidnapped, lured, and trafficked into situations of commercial sexual exploitation. By using a generic term like *sex worker*, one may be assuming that all women engaged in commercial sexual activity may be in this out of free and positive choice. The suggested reference negates the reality that most women enter the trade through force or fraud, and many remain in it out of negative choice due to a lack of better alternatives.

ADVOCACY BY THE ANTI-TRAFFICKING CENTRE (ATC) OF PRERANA

The Anti Trafficking Centre (ATC) of Prerana set up in 2000 with grants from the Trafficking in Persons (TIP Office) of the USA government, has a reputation of functioning as a trusted knowledge partner of the State, Civil society, international non-governmental organizations (INGOs), researchers, scholars, policy analysts, and other knowledge seekers in their fight against human trafficking. At the ATC, we felt the need to comprehensively comment on this issue and submit our independent request to the Chief Justice of India to reconsider its suggestion to use the term *sex worker*.

The text of our 11-page petition, dated 6th September 2023, submitted to the Chief Justice of India is given below.

To: Dr. Justice Dhananjaya Y Chandrachud, Honourable Chief Justice of India Supreme Court of India, Mathura Rd. New Delhi – 110001

Honourable Sir, First and foremost, let me congratulate the Supreme Court and express our most sincere gratitude for bringing out the valuable Handbook on Combatting Gender Stereotypes under your leadership. This is such a unique and extraordinary initiative. It depicts the vision behind the blindfold of the deity of justice and her compassionate heart.

Honourable Sir, we are a leading civil society organization active in the anti-trafficking sector since 1986. We have been working in the midst of Mumbai's redlight areas since 1986 on 24X7 basis to end intergenerational sex trafficking and prevent and address sexual and other forms of violence against the prostituted women and children. We have over time evolved to work for the broader goal of child protection and against gender-based violence. In our work some three decades back we have replaced the term 'prostitute' by the terms 'prostituted woman/person', 'person by sex trafficking' and 'person affected by commercial sexual exploitation (CSE)'. We believe that every word represents a reality from the universe but used inappropriately it can grossly misrepresent the reality causing disservice. We sincerely feel that the term/nomenclature Sex Worker is one such term that grossly misrepresents the reality of the prostituted women who are actually the victims of sex trafficking and victims of CSE.

Honourable Sir, I am writing to you on behalf of the Anti-Trafficking Resource Centre (ATC) of Prerana to submit our request to your Honour to reconsider the suggestion to use the term Sex Worker in place of the term prostitute, made through the above document (Handbook on Combatting Gender Stereotypes) released on 14 August 2023 by the Supreme Court. This submission is limited to those terms only.

Sir, a vast majority of the women and children that is at the core of your Honour's concern is actually the victim of commercial sexual exploitation & sex trafficking (hereafter abbreviated as VOCSET). We appreciate your Honour's important and timely intervention in sanitizing the various terms commonly but casually used which end up misrepresenting the reality or are derogatory and unfair to the persons they refer to.

Hon'ble Sir, this submission is not to suggest any alternative terms right away although for better analysis we have discussed the terms as suitable alternatives to 'prostitutes' or Sex Worker. This submission is also not to present our views viz a viz the policies of legalizing or licensing the sex trade/organised sale of bodily sex as it deserves a detailed discussion independent of the current submission on the use of the term Sex Worker.

Having worked closely with thousands of prostituted women and their children of the notorious redlight areas of Mumbai and other locations, having worked on the broader issue of CSE&T at the state, national and international levels and having closely witnessed and participated in the social action against organised sexual violence for over 3 decades we have also seen how the discourse has changed over time. Based on that we fear and share our fear with you that term Sex Work and Sex Workers are not true representations of the situation of the women and child victims of CSE&T and such usage would cause injustice to them instead of helping them.

The two categories of terms namely; 1) CSE & T and the nomenclature Victims of CSE&T (VOCSET) or Prostituted women/persons or Persons Affected by CSE&T and 2) Sex work and Sex Workers are entirely different and often represent mutually opposite situations.

Since 1990 we have been suggesting to use the term commercial sexual exploitation in place of prostitution and the Govt of India National Plan of Action against child trafficking -1998 echoes that.

The *REPORT OF THE COMMITTEE ON PROSTITUTION, CHLD PROSTITUTES AND CHILDREN OF PROSTITUTES & PLAN OF ACTION TO COMBAT TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION OF WOMEN AND CHILDREN* Dept. of Women and Child Development, Min of HRD Govt of India 1998 on its opening page no. 4 states as follows:

II. Definitions 3. Various terms are used while speaking of this subject like prostitute, women and children in prostitution, commercial sex workers, sex worker etc. The words “prostitution” and “prostitute” have derogatory connotations wherein the stigma of the offence is placed on the victim. It is therefore proposed to use the term “commercial sexual exploitation of women and children” which was also used in the Declaration of the World Congress against Commercial Sexual Exploitation of Children.” This also tallies with the meaning given to the term prostitution in Sec 2(f) of ITP Act (or PITA)-1956 (revised in 1986).

The position of Govt of India: Around the year 2003 the then Union HRD Minister Mr. Murali Manohar Joshi made a statement ruling out the possibility of the state recognising prostitution as Work and prostitutes as Sex Workers. Subsequently, at least two Union HRD ministers have echoed the same position.

1. WHY DO WE THINK CALLING IT ‘WORK’ AND CALLING THEM ‘WORKERS’ OR ‘SEX WORKERS’ IS UNFAIR?

Work and Workers are innocent secular terms which also bring along with them an element of legitimacy. Calling prostituted women ‘Workers’ makes the offenders and the perpetrators like traffickers, procurers, brothel keepers, pimps, premise arrangers, financiers etc. completely invisible as if they just don’t exist or play no role when, in fact, customers create the demand and these anti social elements ensure that the demand is met by trafficking vulnerable women and children. The use of the terms Sex work and Sex Workers makes the sexual transaction look like a harmless business activity and the trade look innocuous when the reality is exactly the opposite. All over the world there is a consensus that the activity of commercial sexual exploitation is innately violent, the damage is irreversible and due to HIV/AIDS it is often fatal and the victim and their children alone take the entire brunt of the crime.

Calling a victim woman Sex Worker hides the existence, role, and culpability of the perpetrators like traffickers, brothel keepers, pimps, customers, financiers as if only the woman exists as a self-employed entrepreneur and runs the sex trade. This mistake had also seeped in the drafting of original SIT Act-1956 which was corrected in the 1986 revision of the law (from SITA to PITA or ITPA).

Since our intention is to make justice with the victim women whose bodily sex is traded in the sex trade, we must note that the claims of a victim of crime on the state and the society are limitless and open ended. On the contrary, the claims of a ‘worker’

on the state and the society are limited by the instruments like industrial policy, labour laws, laws on collective bargaining, labour welfare policies, labour courts etc.

Workers in a civilised society are not recruited, placed, or kept on work against their will or by using force, fraud, coercion, deception or any other criminal or inappropriate means. When these means are used to put anyone to work it is not work; it is slavery or bonded labour. The UN Sustainable Development Goal-8 seeking Decent Work globally disapproves that. The civilised world is mostly clear about the difference between 'legitimate work' and 'slavery'.

2. ARE THERE ANY BENEFITS OF MERELY REPLACING THE SYSTEM OF ADDRESSING THEM?

Yes! The words used to address the trade and the victims create an imagery and impression which, in turn, in this case also mobilise the state and the civil society to do something about it by way of encouraging or discouraging it. No doubt the term Sex Work gives the first impression of being a non offensive way of addressing the victims but analysed carefully it emerges that it is a part of a larger conspiracy of traffickers and sex traders to neutralise the stance of the state and the society of opposing the organized sex trade and combating human trafficking.

If despite using the strong words like 'sex trafficking' and 'CSE' the offence is only growing in scale, one can easily imagine what could happen if they are replaced with terms which make the crime and violence invisible or trivialise the gravity of the offence of CSE&T?

3. WILL IT BE CORRECT TO ADDRESS THE CHILD VICTIMS AS SEX WORKERS TOO?

We are very happy that your abovementioned document most appropriately suggests the words "child who has been trafficked" as an alternative /preferred way to "child prostitute."

The state and the civil society organizations, researchers concur on the point that the proportion of children (persons below 18 years of age) among the CSE victims is anything between 35% to 40%. It is also seen that those who are well above 18 years of age today state that they were inducted into the trade at the age of 13 to 16 years and they continued to be there as the state and the society did not rescue them in time. Today, a large portion of the prostituted persons in India is below 18 years of age and hence cannot be called Workers. Besides civic morality the legal age of consent as well as the hazardous nature of work, both are against that. Studies show that many of those traffic victims who are adults today, have been trafficked and prostituted when they were below 18 years of age. In the infamous Devadasi system, the institution of temple based prostitution going by the rules and rituals only pre-pubescent girls could be dedicated. There is a social function of auctioning the right of deflowering that girl as soon as she reaches puberty. That day the highest bidder gets the right to deflower her on that night and thereafter until she is dumped in the sex trade as a public woman for anyone to use. Can they be called Sex Workers?

Most underage girls of North West India belonging to the Banchhada, Bedia, Nat, Rajnat, Bawaria, Kanjar and such other communities (the ex-criminal tribes now called the Denotified Tribes or DNT) are by tradition dedicated to the sex trade. From their young age they are groomed for the role. The majority of the girls don't have the right to get married and set up a family. There are similar communities in the south (e. g. Sugalas, Dommaras in pre-division Andhra Pradesh) where young children are

inducted in the sex trade under the garb of shadow entertainment activity. This is a one-way ticket journey. A large number of girls rescued by police through search (commonly called raids) operations under the ITPA-1956 is that of girls below 18 years of age. Most of the others who were found to be adults had been trafficked into the sex trade when they were below 18 years of age. They remained there as the state and the society did not rescue them in time. Will it be fair to call them Sex Workers?

4. OBJECTION TO USING THE TERM VICTIM?

There are some groups that object to the use of the term “victim” to refer to the women and children trafficked into the sex trade. We feel that their objection is not based on any reasoning. They argue that the term “victim” condemns an affected person as incapable or permanently weak. This understanding appears to be based on sheer bias and not empirically established facts. Nowhere in any analytical literature, policy documents or legal instruments a victim is defined that way. Victimhood is case specific. A person victim of a petty crime like pick pocketing may be far from being a victim of illiteracy or ethnic violence.

A victim of project displacement or Covid could be a highly educated and socially empowered person and still a victim of a pandemic. In short, the term victim is not derogatory or undermining. Hence there is no substantial ground other than personal biases for rejecting or disapproving the term Victim.

Some people who presume (they do not explain why) that victim is a degrading way of addressing a person suggest that a Survivor is a better term. Agreed that being a victim or a winner is just a phase and part of one’s life and not one’s complete identity or permanent and innate capacity. In the anti-trafficking domain however no one has yet defined, let alone satisfactorily defined, the term Survivor. It is a vague and undefined term that causes more confusion and has dangerous consequences that far outweigh its utility. To avoid distraction from our main purpose we shall not comment upon that at this stage.

For a detailed discussion on the appropriateness or inappropriateness of using the term “Survivor” kindly refer to my article of 2020 ‘Survivor: An Analysis of the Term from India’ *DIGNITY: A Journal of Analysis of Exploitation and Violence* (Patkar, 2020).

5. ON COMING ACROSS A VICTIM OF CSE&T WHAT SHOULD BE THE PRIME RESPONSIBILITY OF THE STATE?

Let us take an example. There is an honest, diligent, and law-abiding man working in the informal wage sector. One day while returning from work he gets hit by a speeding car driven by a reckless driver. People on the road rush him to a public hospital. He has no health insurance whatsoever. His right hand had to be amputated. After a preliminary treatment he is discharged. His treatment continues. He never recovers enough to resume the work. Long absence at work costs him his job. He has already spent his lifetime savings on the treatment and on maintaining his family of a wife and two children. He has borrowed money from friends and relatives. As the last resort, he sits by the side of the road and starts begging in order to survive. In such a situation what should be the responsible response of the state and the society?

- 1) The state should book the offender, conduct an inquiry, punish him if found guilty, make him provide compensation to the worker. Restore the victim’s employability by training the victim suitably and help him acquire alternative livelihood, provide to him the benefits of social protection schemes, provide easy loan to help her/him start a small business, give her/him suitable preferential treatment in public domain

such as reservation in education and employment, take measures so that people can walk safely on the road etc. OR

2) The State should designate the 'once dignified self-reliant and honest' worker with a new title "Beggar Worker". Make him believe that calling him a beggar worker is just and fair and it is his right. Suggest to him to find out more like him and form a Beggar workers' Union. Suggest to him to feel proud to be a beggar while the mainstream society continues to disrespect beggars. Indoctrinate them to acquire a defence mechanism of claiming themselves as dignified workers regardless of fact that the society looks at them with contempt and treats them with stigma and discrimination.

6. HOW DOES THE ITPA-1956 DIFFERENTIATE BETWEEN THE FEMALES (SINCE 1986 'PERSONS') SELLING THEIR BODILY SEX AND THOSE WHO ARE THE VICTIMS OF CSE&T?

The ITPA-1956 addresses the problem of CSE&T primarily of women and girls (after 1986 revision of all 'persons').

The change in the definition of prostitution

(Sec 2-f) made through the 1986 amendment is remarkable and progressive. The term prostitution defined in SITA 1956 was Sec 2(f) -- "prostitution" means the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind"

And that in 1986 revised Act (now called ITPA or PITA 1956) is:

Sec 2(f) -- "prostitution" means the sexual exploitation or abuse of persons for commercial purpose, and the expression "prostitute" shall be construed accordingly"

The SITA definition perceives the woman as a solo operator selling her sex on her own willingly to make money. It presents the sex selling woman without the context of her social situation, the sex trade, the act of trafficking.

The 1986 definition takes cognizance of the reality of sex trafficking. It defines prostitution essentially as an exploitative act. Hence minimally there are two actors the exploiter and the exploited. It shows the woman to be in a situation without agency and freedom to give or withhold her consent for sexual transaction.

The 1986 amendment also makes the SITA (now ITPA) gender neutral by introducing the term 'person/s'

The essential position of the ITPA on selling sex is: -- The ITPA does not come in the way of an adult woman/person (not a minor or child) of selling her bodily sex (not pornographic material) on her own (with free will and not through a pimp), alone in her private premises (which are not public) and which are not within 200 meters from a place of worship, educational institution, hospital or any other place notified by the state, against money or kind without causing nuisance to the public.

ITPA punishes the followings:- Owning financing, running, or managing a brothel or providing one's premises for running a brothel (Sec 3), making commission /living on their earnings (pimping)(Sec 4), procuring women for prostitution (Sec 5) (trafficking), detaining them in various ways in order to make them sell their sex (Sec 6), giving one's premises for running a brothel (keeping traffic victims) or for any woman to sell her bodily sex on her free will(Sec 7 (1) and (2) soliciting in public (Sec 8 (a & b), Seducing anyone for prostitution (Sec 9).

In essence, the Indian law (ITPA) is against organised sex trade and not against an adult woman selling her bodily sex. Unlike Bangladesh it does not give a positive or explicit permission or recognition to a woman applying for license to sell her sex.

It is important to take into consideration here the vision of the law makers. The ITPA law did not want to pass a legal or moral judgement or to come in the way of the sexual liberty of an adult woman (since 1986 'person'). But like any other citizen she is subjected to punishment if by her action she causes nuisance to the other members of the society. Further, it did not insist on penalizing the woman violating Sec 7 or 8. Instead, it recommended a state sponsored reformation or correction. (ITPA Sec. 10A)

7. DANGERS OF POSITIVELY RECOGNIZING SELLING OF SEX AS SEX WORK IN A HIGHLY INEGALITARIAN SOCIETY LIKE INDIA.

Knowing the fact that by and large the Dalit women and girls are the victims of Commercial Sexual Exploitation and Trafficking (CSE&T), that for the majority of women and girls life is so fragile that any small crisis is sufficient to let the criminals drag them into the sex trade and force them to sell transactional sex, being well aware of the Indian reality that life as a prostitute is highly condemned and full of violence and hence no one chooses to be a prostitute the law makers did not think it right to give any positive formal recognition for voluntarily selling sex although it was a rarest logical possibility. The law (ITPA or PITA) does keep the theoretical possibility of voluntary sale of bodily sex. It also doesn't pass a judgement or come in the way of an adult woman's right to sell her bodily sex. Considering the rampant vulnerability of women and children in India it makes sure that such sale of sex should not cause public nuisance. Even when they do, they are not penalised but are given an opportunity to find alternative means of livelihood (Sec. 10A).

That was quite a responsible move. The law makers feared that giving a slightest positive recognition could have opened the floodgates of sex trafficking victimizing the marginalised, vulnerable, and supportless women and children.

You can't make a small hole to a wall of a dam, put up a board' gate for staff only' and expect that only the staff will pass through the gate and not the water of the dam. When so much of sex trafficking is happening despite a progressive law one can imagine what boost it will give to sex trafficking once a positive recognition is given to it or penal provisions against organised sex trade are removed. They knew that as long the organised trade continues, trafficking will continue. In essence, the law did not come in the way of an adult woman consensually selling her bodily sexuality (not pornography) in her private premises without causing public nuisance. The law tried to protect the women and children from the vulnerable populations against sex trafficking by banning organised sex trade. This was a mark of a responsible law maker.

Once declared as Sex Workers like other Workers and self-employed skilled workers, will they not get subjected to the various obligations such as maintaining records, registers, paying and submitting timely returns like income tax and pay GST or such taxes. Unable to do it on their own because of illiteracy, and lack of education will they not come under pressure to submit themselves to the organized sex traders to handle that part of their life. This way, besides the majority of sex traffic victim population, the theoretically possible category of truly independent and voluntary sellers of sex will also be forced to operate through the sex traders like pimps and brothel keepers.

There is a fear that calling the victims sex workers will make it easier for the other criminal operators to demand new nomenclatures for themselves like traffickers calling themselves "Recruitment Managers' or "Head Hunters' brothel keepers calling

themselves Establishment Managers, and pimps calling themselves 'Commission Agents' and so on. Legitimizing the term Sex work will open up the highway to get the organised sex trade legitimized. The Indian society and the Indian laws like IPC, ITPA have persistently opposed this.

8. WHY DO ONLY THE WOMEN OF CERTAIN SOCIO-ECONOMIC CATEGORIES CONSIDERED AS MARGINALISED AND DISCRIMINATED AGAINST HAPPEN TO BECOME “SEX WORKERS”?

The Indian society is characterised by several open (e. g. class based) and closed (e.g. caste based) hierarchies. As can be seen clearly almost all these abovementioned hierarchies conspire against (dalit) women who finally find themselves condemned into the sex trade. Every other woman that was up on the hierarchy and had an opportunity to benefit from education, political support, income, wealth etc. has taken great care to stay away from becoming a “Sex Worker” or being associated with the sex trade or selling their bodily sex?

9. IF THESE WOMEN TRULY BELIEVE THAT THEY ARE WORKERS AND THE SEX TRADE WAS WORK LIKE ANY OTHER WORK THEN WHY DO THE GIRLS RESCUED IN THE POLICE RAIDS FROM BROTHELS AND DANCE BARS, INSTEAD OF FLASHING THEIR FACES WITH PRIDE, ALWAYS COVER THEIR FACES, HIDE THEIR IDENTITY AND HATE TO BE EXPOSED BY THE VISUAL MEDIA?

The main reason behind that is their own conviction that they are doing something that in their own eyes and that of the society is a stigmatised act. There is no doubt that a prostituted woman whose last survival strategy is selling bodily sex gets further revictimized due to the treatment of contempt, stigma and discrimination. It is also unfair if the social morality prohibits a woman from selling her bodily sex especially as a survival strategy. But *fate accomplice* that is the situation which must be changed. Fortunately, the state and the social reformers are at work to change that treatment through the competitive process of public opinion making, social education and such other lawful means and appropriate use of terms is expected to boost that effort.

10. DO PARENTS WANT THEIR CHILDREN TO BECOME SEX WORKERS?

Most professionals and skilled workers want their children to excel them in their career. If that is not possible, then they want their children to be at least like them and carry forward the traditional trade. How come the “sex workers” never want their children to be sex workers? (Exception-a minority of those like Devadasis and other who have been condemned into prostitution for centuries and made to firmly believe that it is their sacred tradition defying which would invite the wrath of the God etc.) But that is also not their choice as they have no option but to make their young daughters available to the local village elites and members of upper castes and classes for promiscuous sex.

11. DO SOCIETIES CONSIDER SELLING BODILY SEX (TRANSACTIONAL SEX) AS ‘WORK’?

All societies respect their professions and work categories and open training centres, schools, centres of higher learning, declare incentives, offer scholarships to spread that profession. They issue Diplomas, Degrees and higher learning in the profession. It is important to note that no country including those who have legalised the sex trade (including the forerunner The Netherlands) has ever asked for any such social provision from the state or initiated one on their own. Words represent social reality. Using the right terms is extremely important. The classical example is the change of the definition of the term prostitution in the SIT Act of 1956 and its revision into ITP Act in 1986. This point is discussed in details elsewhere in this submission. The changed definition Sec 2(f) describes prostitution essentially as an act of commercially sexually exploiting a person. It indicates that there is a person who is exploited, (the victim) and there are others who exploit her namely the offenders/perpetrators). It instantly becomes clear that the state and the society have to rescue, protect and rehabilitate the victim, book the exploiters and bring them to justice. Is there a need for the law to provide an explicit positive recognition to the voluntary selling of sex? Apparently like many other micro level economic survival oriented human transactions there isn't. Is there a need for the state to bring every human interaction under taxation? Apparently like many other micro level economic survival oriented human transactions there isn't.

12. THERE ARE MAINLY TWO MUTUALLY CONFLICTING FORCES THAT USE THE TERM “SEX WORK”

There are mainly two mutually conflicting forces that use the term “sex work. The first is comprised of the well-meaning, compassionate, conscientious, civilised liberal democratic, persons who think that the prostituted woman is a victim of crime, circumstances, vulnerability, helplessness, or evil social customs, state's apathy and society's indifference and hence they should be treated accordingly to restore their dignity offered by the Constitution. They think that the established terms of addressing them such as prostitute, whore, randi, slut etc. are crude, non-sanitized and unfair and cause revictimization of the victims. At the face value they think that, in comparison, Sex worker is a modern, secular, non-discriminatory and civilised nomenclature. On detailed analysis however they realise that the term misrepresents the reality, trivialises the violence, protects the offenders and denies justice to the prostituted women/persons. The other platform is comprised of those who want the sex trade to be opened, licensed and prospered. They hold that all is well in the trade except the police raids and demand that ITP Act should be repealed. A cursory look at their literature and submissions brings out one fact glaringly, the complete absence of the mention of the traffickers, pimps, brothel keepers, brothel managers, henchmen, and financiers who actually run the trade and make profits at the cost of the victim. They are reversing the progressive social thought captured well by the law makers in the 1986 revision of SITA to PITA (or ITPA) which corrected the misrepresentation of the prostituted and trafficked woman as a solo enterprising woman selling her sex on her free will and brought into focus the traffickers, pimps, brothel keepers, brothel managers, premise providers and sex buyers that exploit the trafficked victim under detention.

13. WHAT COULD ALSO HAPPEN IF THE VICTIMS OF CSE&T ARE DESIGNATED AS SEX WORKERS?

The sex traders, traffickers, pimps, brothel-keepers will seek industry status as they would find it very handy to hide their nefarious activities under that. One common complaint from the groups that promote the term Sex work is that while all is well in the sex trade the courts should pass orders against the police and stop them from conducting raids and enforcing the ITP Act. A quick look at the prayers of the organised body of the Dance Bar Owners in Mumbai high court is one example of this. For 50 years since its inception the SITA/PITA was rarely enforced against the sex traders and offenders of CSE&T. As the research data shows this law and the state laws like the Bombay Police Act were used to repeatedly revictimize the victim women and allow child sex trafficking and CSE to grow. It is no wonder then that the prostituted women support any demand or proposal if it gives them the (false) hope that it will end the harassment by the local police. Getting recognised as Sex Workers is one such demand.

14. SUMMARISING

Replacing the terms prostitute or any such established derogatory terms commonly used to refer to the women whose bodily sex is sold in the organised and criminal sex trade by the term Sex Workers will not only not end the social discrimination and treatment of stigma but will give a huge boost to sex trafficking and commercial sexual exploitation of vulnerable women and children. Such a replacement of term will only make the violent and criminal sex trade look innocuous by making the criminals invisible and the innate violence look trivial. It will pose huge obstacles in the way of the victims seeking justice. It will hinder the efforts of the state and the civil society organizations of protecting them against sexual and other forms of violence and facilitate justice for them. If young women, girls and children can be trafficked and forced to have unsafe transactional sex with numerous strangers for a pittance then how difficult is it to make them give an undertaking that they have joined the sex trade voluntarily and wish to continue to sell sex to strangers? Decisions of one's life especially those which deeply impact a life time can be considered as informed and consensual only if there are realizable options to choose from, conditions of freedom to choose and absence of fear of consequences which are extraneous to the options. Merely saying 'yes' does not indicate consent. Instead, using the terms victim which is adequately defined in CrPC Section 2(wa) as "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir." and also given in the U N Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power-1985) could be a better point of departure. The terms prostituted women/persons and the term Commercial Sexual Exploitation could be quite fair to the victims and compatible with a civilised nation. We, on behalf of the ATC-Prerana most humbly submit to your Honour our request to review your suggestion to use the term 'Sex Worker' in place of prostitute as your Honour's suggestions carry the highest regards in this nation and in our minds. At the same time, we also hereby convey to your Honour our willingness to assist the Honourable Court in articulating the terms and searching for better options.

Sincerely,

Dr. Pravin Patkar Co-Founder - PRERANA

Director – Anti Trafficking Resource Centre-PRERANA

THE IMPACT OF THE ADVOCACY

In the second week of November 2023, we received a letter from the office of the CJI Supreme Court, the content of which is reproduced below.

Ref: Handbook on Combatting Stereotypes published by Supreme Court of India

On behalf of the Supreme Court of India, I acknowledge the receipt of your email/letter addressed to the Hon'ble Chief Justice of India suggesting a change in the "Handbook on Combatting Gender Stereotypes" published by the Court in August 2023.

Based on your suggestion, the nomenclature/word 'sex worker' is being changed to the following. 'Trafficked victim/survivor or women engaged in commercial sexual activity or women forced into commercial sexual exploitation'.

The Hon'ble Chief Justice of India sends his regards to all of you for raising a valid concern.

The change will be updated soon in the Handbook.

Best,

Anurag Bhaskar,

Dy Registrar, CRP. Supreme Court of India

CONCLUSION

Our work to oppose the adoption of the term *sex worker* was successful advocacy through effective articulation and functional networking by the anti-trafficking civil society organizations in India.

AUTHOR BIOGRAPHY

Pravin Patkar, Ph.D., is a co-founder and director of an anti-human trafficking civil society organization named Prerana, which has been running since 1986. It provides a wide range of ground-breaking victim assistance services on a 24X7 daily basis in the midst of Mumbai's largest redlight area. It provides a night care centre (perhaps the world's first night creche) for the care and protection of children of redlight areas based on prostituted women, an education and support programme, institutionalization as the last resort of child protection, rehabilitation, aftercare/post institutionalization care, shelter facilities, post-rescue operations, and a whole range of knowledge building and advocacy programmes for the past 35 years in Mumbai and in South Asia. It regularly trains police, judicial officers, service providers, media and other stakeholders on human trafficking and anti-human trafficking. (www.fighttrafficking.org)

RECOMMENDED CITATION

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