

Section 370, Indian Penal Code Amendments and advocacy to prevent conflation of trafficking and sex work, 2013

Aarathi Pai, CASAM, Sangli

The Government of India set up the Justice Verma Commission in the aftermath of the rape of a young woman in Delhi in December 2012. The committee was mandated to “look into possible amendments of the Criminal Law to provide for quicker trial and enhanced punishment for criminals committing sexual assault.”

The National Network of Sex workers made a written representation calling for recognition of the violence that existed within sex work. The submission sought for non – consenting acts of sex to be placed within the definition of sexual assault and directives to be issued to law enforcement to take remedial action against such acts of violence. (Reference – Document - *Submission, NNSW, Verma Commission*)

The National Network of Sex Workers made a formal deposition on violence faced by women in sex work. However it also became clear during the two days of depositions that the Commission had extended its scope engagement to examine issues related to the “violence” of trafficking of women and children. Accordingly during the verbal submission we attempted to draw the Commissions attention to the distinction between consenting adult sex work and trafficking. Secondly that the role of communities of sex workers was critical in identifying those women who were trafficked and agencies should look at constructive partnerships.

The Verma Commission report introduces a chapter on trafficking and recommends amongst others 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 amended section is open to interpretation that the prostitution in of itself will now be seen as exploitative and thereby criminalizing all acts and activities related to it.

We sought a clarification from the commission (See below –*Clarification sought from the Justice Verma Committee*). stating that the amended section could be interpreted by law enforcement to further abuse adult consenting sex workers.

The Committee responded clarifying that the thrust of the amended Section 370 IPC is to protect women and children from being trafficked. The committee has not intended to bring within the ambit of Section 370 IPC sex workers who practice of their own volition. Further that the recast 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. (Reference below – *Clarification issued by Justice Verma ... 370 IPC*).

For the first time, a government appointed commission has recognised that there is a distinction between women who are trafficked for the purpose of commercial sexual exploitation and adult consenting women who are in sex work of their own volition.

The language used in the note is extremely positive. Specifically the terms “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.

Clarification Issued by Justice Verma Commission on intent of Section 370, IPC

8 February 2013

From: **Gopal Subramaniam** <gs.jsvo@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

Clarification sought from the Justice Verma Committee

By The National Network of Sex workers

This is to express our concern at the ambiguous manner in which the term “prostitution” has been used in Section 370 IPC of the Verma Committee Report. In this section, which deals with the offence of Trafficking of Persons, the term "**exploitation**" includes "prostitution" itself. This in essence means that "**prostitution**" **will now be interpreted as exploitation**. This problematic formulation has now been incorporated into the recently passed Ordinance.

Section 370 IPC criminalizes people in sex work since it does not differentiate between "coercive prostitution" and prostitution; nor does it talk about the "**exploitation of prostitution**".

Section 370 IPC was introduced to criminalize trafficking in persons and by and large uses the language of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000). However, comparing the language under both reveals a highly significant difference in the definition of “exploitation”.

- While The **UN Protocol** which India ratified in 2011 defines “exploitation: as: *“Exploitation shall include, at a minimum, the exploitation of the prostitution **of others** or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;...”*;

- Under **Section 370 IPC** “exploitation” is defined as: *“The expression “exploitation” shall include, prostitution **or** other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the forced removal of organs.”*

This significant difference potentially criminalizes the practices around sex work. By introducing the language of **prostitution itself as exploitation**, the amendment endangers sex workers instead of protecting them from sexual exploitation.

The learned members of the Verma Committee will concur that legislative framework that criminalizes prostitution as exploitation, drives the practice underground and renders the already vulnerable sex worker more vulnerable to violence, exposure to HIV and deepens the lack of legal remedy to redress violence. We also draw your attention to the decision of the Hon'ble Supreme Court (*Cr Ap. 135/2010, 14 February 2011*), where the right to dignity of women in prostitution was upheld.

The formulation in the Ordinance 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. Instead, criminalization, which is the fallout of the Ordinance, will create conditions for increased abuse of sex workers, especially the police and others in positions of power and authority.

We request you to clarify that your intention was not to criminalize the lives of sex-workers but rather to criminalize only those who ‘exploit the prostitution of others’ i.e. traffickers in persons. We hope that this crucial clarification by the Committee will aid Parliament in bringing about the necessary changes in the provision so that the vulnerable sex worker is protected and not made the subject of criminal sanctions.

Meena Seshu, General Secretary, SANGRAM. Contact +91-9011660444 (On behalf of National Network of Sex Workers. 5 February 2013