

Advocating Sex Workers' Rights by Identity-Based Associations in Nepal

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Abstract

There is no specific law in Nepal that directly criminalizes sex work. However, many sex workers have experienced arbitrary detention by law-enforcement authorities. The Human Trafficking and Transportation (Control) Act, 2007 (HTTCA) criminalizes pimps and clients, but not sex workers directly. However, the Act was overinclusive and often criminalized women engaged in voluntary sex work. The new Criminal (Code) Act 2017 criminalizes advertising and providing facilities for sex work in the section concerning crimes against the public good. These laws are used to prosecute sex workers. Two identity-based associations (IBAs) emphasize the importance of decriminalization, but do not support the legalization of sex work. A licensing system, if introduced under legalization, may exclude the most vulnerable sex workers, including housewives, migrants, and sexual minorities, who are secretly engaged in the business. I conclude that ongoing advocacy of IBAs should seek to provide safe working environments for sex workers in Nepal.

Keywords: sex work, gender, human trafficking, community-based organization, identity-based association, Nepal

1. INTRODUCTION

There is no specific law criminalizing sex work in Nepal. However, sex workers themselves incorrectly understand that sex work is illegal.¹ The lack of a clear distinction between sex trafficking and sex work confuses law-enforcement officials and encourages the arbitrary detention of sex workers.

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1. United Nations Population Fund (UNFPA) and United Nations Development Programme (UNDP) (2014), p. ii.

Worthen argues that such confusions are rooted in two distinct underlying frameworks for understanding human trafficking: the prostitution framework and the labour-exploitation framework.² According to the prostitution framework, trafficking is about prostitution and all prostitution is forced. According to the labour-exploitation framework, on the other hand, some prostitution is forced, while some is voluntary. In the latter framework, “force” implies “with violence or threat,” although “force” can be caused by poverty that strips women of their agency, as in the former framework. Thus, the constrained choice is not an actual choice and belongs to the prostitution framework. However, women are capable of engaging in prostitution for economic incentives, although some women are certainly exploited by prostitution.

In the Nepalese context, the anti-trafficking movement has primarily been led by organizations associated with the prostitution framework. However, due to strong advocacy by survivors of different forms of violence, the labour framework is gradually taking over the sex-work discourse. Identity-based associations (IBAs) are the driving force in changing perceptions from the prostitution framework to the labour-exploitation framework.

IBAs are formed exclusively by marginalized groups that: (1) suffer social stigma, social exclusion, and rights violations; and (2) struggle to regain a sense of dignity through empowerment.³ Today, IBAs broadly contribute to integrating human rights into the development sector through the promotion of rights-based approaches. IBAs can be distinguished from non-governmental organizations (NGOs) as, although both work in the interests of specific groups, NGOs may be formed by persons from outside of the target population. IBAs are an important platform for marginalized groups to raise their voices and address oppression. In Nepal, where the rights-based approach is widely applied in the development sector, oppressed populations too have become active via the formation of several IBAs.

At present, two IBAs advocate for the rights of sex workers. The Jagriti Mahila Maha Sangh (JMMS) is a national federation of 27 community-based organizations (CBOs) established in 2006 by female sex workers (FSWs) in 23 among 77 districts. It covers 42,000 FSWs throughout Nepal. As a member of the Asia Pacific Network of Sex Workers (APNSW), JMMS has been advocating for the rights of FSWs both at home and abroad.

The Blue Diamond Society (BDS) is a pioneering organization for sexual and gender minorities, formed in 2001. It reaches out to 350,000 men who have sex with men (MSM)⁴ and transgender people through its HIV and AIDS prevention programme. It has regional networks in all provinces formed by local CBOs. The BDS provides legal counselling and litigation support to the victims and families, and leads constitutional campaigns on sexual rights and policy change. Since its establishment, the BDS has made a lot of achievement in the advancement of the lesbian, gay, bi-sexual, transgender, and intersex (LGBTI) community in Nepal. For instance, the government of Nepal now issues citizenship cards, passports, and education certificates with “O” amongst the gender choices for third-gender people. The newly released Constitution of Nepal 2015 includes rights of LGBTI people in an Article 12 right to citizenship, Article 18 right to equality, and Article 42 right to social justice. The issues of LGBTI are now included in the school curriculum of health

2. Worthen (2011), p. 9.

3. Tanaka (2016), p. 183.

4. BDS (2019).

and physical education, and implemented in the Fifth Five years Human Rights Action Plan by Ministry of Women, Children and Senior Citizens.

Both organizations work on community building, awareness raising, such as health education for HIV prevention, advocate for the rights of sex workers, and document cases of human-rights violation and harassment including arbitrary arrests, attempted murder, rape, and other varieties of physical and verbal abuse and discrimination.

While some research has been conducted on the health and social aspects of sex work, little attention has been paid to the legal status of sex workers in Nepal or to the above-mentioned IBAs working for/with sex workers. Caviglia has used narrative stories to illustrate the sociocultural norms and perceptions of sex work in Nepal. However, her work pays little attention to legal issues and the movements initiated by self-formed IBAs.

This study examines the legal aspects of sex work in Nepal, particularly from the perspectives of IBAs. The paper consists of four parts. First, I review existing laws related to sex work. Second, I illustrate the variety of sex workers in Nepal. Third, I review the views of two IBAs regarding ongoing debates on the decriminalization and legalization of sex work. Finally, the paper concludes by exploring the role of IBAs in addressing the rights of sex workers.

The study is based on articles and reports relating to sex work and on interviews conducted with leaders and staff of IBAs formed by and working with sex workers. In this article, I use the words “sex work” and “sex worker.” “Prostitute” or “prostitution” is only used when quoting other documents or referring to those terms within a particular framework.

2. SEX WORK IN NEPALESE LAW

Nepal is often perceived as a country where “it is illegal to sell sex and to organise commercial sex in any place.”⁵ However, Nepal has no specific law that directly criminalizes sex work. Therefore, confusion exists over the legal status of sex work due to its conflation with human trafficking. FSWs, in particular, are perceived as victims of human trafficking. However, a certain number of sex workers voluntarily engage in the business due to a lack of other income sources and they cannot always be referred to as victims of human trafficking.

The global anti-trafficking movement, supported by Western donors, has influenced legislation in Nepal.⁶ The Human Trafficking and Transportation (Control) Act, 2007 (HTTCA) defines “victim” as “a person who is sold, transported or put into prostitution.”⁷ This Act was also influenced by the UN protocol on human trafficking, underscoring the preoccupation with sex work. The HTTCA is based on a concept of criminalization that criminalizes pimps and clients, but not sex workers directly. However, the Act is overinclusive and has often criminalized women engaged in voluntary sex work. According to the Act, human trafficking and transportation mean “(b) To lure someone into prostitution, with or

5. Sexuality, Poverty and the Law Programme (n.d.).

6. Caviglia (2018), p. 28.

7. HTTCA, Preliminary Part.

without any benefit” and “(d) To go in for prostitution.”⁸ Punishments are not only given to the person who forced an individual into prostitution, but also for the person engaged in prostitution. So, the HTTCA prescribes the punishment of “(d) One month to three months imprisonment and a fine of NR 2,000 to 5,000 for a person engaged in prostitution” and “(e) For a person who is involved in transportation of human being for the purpose of buying, selling and engaging someone in prostitution.”⁹ These provisions indicate that the Act conflates human trafficking with sex work. In other words, this Act criminalizes the victim of trafficking, through the criminalization of sex work, alongside the criminalization of the individual who forces another into prostitution.

In short, the HTTCA is based on the decriminalization of sex workers, but the criminalization of pimps and clients, as promoted by the so-called Swedish model.¹⁰ Both the JMMS and the BDS are also sceptical of the Swedish model that criminalizes not the sex worker, but the client and the pimp. Members of the JMMS argue that they cannot run their businesses without clients and others who facilitate their businesses, including pimps. They claim their rights to security, as they want to protect themselves from clients and pimps. However, this does not necessarily mean that sex workers support the criminalization of clients and pimps. Instead, they demand the protection of their own rights, an effective response to rights violations, improvements in knowledge, and access to justice and other services.

There are some supportive laws that ensure the rights of sex workers from human rights. For instance, the Supreme Court prepared the procedural guidelines for the prevention of sexual harassment against working women in the workplace, including dance bars and restaurants, in 2008.¹¹ It aimed at enabling safe working conditions to individuals, although their rights as workers are often denied.

In 2009, a sex worker was detained in Kathmandu.¹² Law-enforcement officials released the sex-work clients, while detaining the sex worker under the 1970 Public Offence and Penalties Act. The state recognizes that religious provisions were used to prosecute women who sell sex. For instance, the Public Offences and Penalties Act 1970 seeks to maintain public safety across the country. However, it has been used to harass and arrest sex workers, even though the Act contains no specific clause about sex work. Sex workers are often punished with fines and, in some cases, imprisonment if they use “obscene words, speeches or signs and disturbing the peace thereby, or engaging in obscene acts at a public places.” The Act does not perceive of sex work as a profession and criminalizes sex workers either as involved in human trafficking or as involved in obscene acts. As a result, sex workers are unprotected and vulnerable.

Problems related to sex work are to do with not only criminalization, but also discrimination. Until it was replaced by the new Criminal Code in 2017, a rape clause in Chapter 14 of the former National Code, *Muluki Ain*, suggested a lesser punishment where

8. HTTCA Part 2, Provision of Offence and Investigation.

9. HTTCA, Part 4, Provision of Punishment and Compensation.

10. About the Swedish model, see <https://nordicmodelnow.org/what-is-the-nordic-model/> (accessed 24 January 2020).

11. UNFPA and UNDP, *supra* note 1, p. 67.

12. Forum for Women, Law and Development (FWLD) (2014), p. 30.

rape victims were sex workers.¹³ “One who commits rape should be imprisoned for six up to ten years if the woman raped is under 14 years of age, and for three up to five years if the woman is 14 or above 14 years of age” while “If someone has sexual intercourse with a prostitute without her consent, the one who commits it will either be fined an amount of 500 Nepalese Rupees or imprisoned for up to one year.” This clause clearly reflected discrimination against sex workers and such rules were stigmatizing even though sex workers themselves were not criminalized in this law.

The newly introduced Criminal (Code) Act, 2017, criminalizes the advertising of sex work and the provision of facilities for sex work in the section about crimes against the public good, as shown below.¹⁴ Laws, such as public disorder, vagrancy, loitering, and state-recognized religious provisions, are used to prosecute women who sell sex:

119. *Prostitution should not be advertised:*

1. No one should be involved in publicity for or advertisement of prostitution.
2. A person who conducts or makes others do the misdeed mentioned in subdivision (1) will be sentenced to jail for three years with a penalty of NRs. 30,000.

120. *House and land should not be provided for the purpose of whoredom or prostitution:*

1. No one should knowingly provide their house, land or vehicle for the purpose of prostitution.
2. A person who conduct misdeeds mentioned in subdivision (1) shall be either sentenced to jail for six months or shall pay NRs.5,000 or be penalised with both.

While this does not directly criminalize sex work, the penalty discourages sex workers and demotivates hotel owners and customers from being involved in sex work. Therefore, the Act indirectly affects people who make a living by selling sex.

3. SEX WORKERS AND THEIR ORGANIZATIONS IN NEPAL

In 2016, the number of sex workers in Nepal was estimated at 67,300. This included both cisgender and transgender women and men,¹⁵ ranging in age from 15 to 60 years old, and working in both urban and rural contexts.¹⁶

13. Shukla (2010), p. 24.

14. No official English translation is available. The translation was done by the author in assistance with a Nepali native speaker. For the original, see Nepal Law Commission (2017).

15. United Nations Programme on HIV/AIDS (UNAIDS) (2018).

16. In western Nepal, a Dalit community called Badi originally played music for rulers, but impoverishment forced them to turn to sex work to support their families. Today, they are not necessarily engaged in the same business as their elders, following the emancipation movement by Badi activists in 2007. Therefore, these figures do not include the entire population of Badi, with the exception of those currently engaged in the business.

Sex workers are categorized into five groups:¹⁷

1. street-based sex worker;
2. hotel-based sex worker;
3. home-based sex worker;
4. call girl/escort girl;
5. hidden sex worker.

The five types differ with regard to earnings, relationships with customers, and security. Street-based sex workers are the most vulnerable, as they often lack shelter and a secure work environment. In addition, they do not have regular customers and are paid less. Some of them call themselves “mobile sex workers,” since they do not have a fixed workplace and move around in search of customers. They are frequently harassed and prone to arrest by police under the Public Offences and Penalties Act. The following case documented by a member CBO of the JMMS illustrates how street-based sex workers are treated by the police and their vulnerability:

On 18 July, five street-based sex workers were arrested in Ratna Park as they were waiting for clients. The police made statements like, “Don’t you have some shame? Why are you doing this work? Why are you creating a havoc in a public park? You are doing such bad work.” Two out of these five sex workers were living with HIV, and they begged the police to release them, so that they could get ART.¹⁸ They were released at 6 pm with the intervention of an organisation. They had to reiterate to the police that the sex workers had small kids at home, and were responsible for their well-being.¹⁹

Hotel-based sex workers include others working for massage parlours, dance bars, cabin restaurants, or discos. Some are organized as entertainers’ groups and professional workers.²⁰ They are usually found in urban areas, as the majority of their customers are tourists. Their incomes vary depending on their customers, which may be either domestic or international tourists, or the facilities in their workplaces. They have a strong link with the owners, managers, and staff at their workplaces and with the taxi drivers who solicit clients. They are visible, so easily harassed by police under the HTTCA together with staff at their workplace. Under the new Criminal Code, many have difficulty in finding a place to work, as the code prohibits providing houses and land for sex work. The case documented by the JMMS presents a typical arrested case and unsafe situation of sex workers afterwards:

On 4 July 2018, Chakrapath police of Kathmandu raided a hotel and arrested four sex workers after finding condoms in the room. The police also arrested the hotel owner who was a woman. The JMMS team was in touch with the police, and after discussions with the team, the police released the sex workers on the condition that they would not conduct sex work anymore. The hotel owner was kept in custody the entire night, and was released the next day also on condition of not engaging in sex work. Since the raid, the concerned sex workers are doing sex work in unsafe spaces.²¹

17. The interview was conducted with a founder member and staff of the JMMS on 30 October 2018.

18. This refers to medicine for anti-retroviral therapy.

19. JMMS (2018) *CEDAW Report* (unpublished).

20. Caviglia, *supra* note 6, p. 200.

21. JMMS, *supra* note 19, p. 3.

Male and transgender sex workers are found only among the first two categories: street-based and hotel-based sex workers. Police physically abuse them due to their gender identity and homosexuality. The testimony below shows the overlap of emotional and physical violence based on discrimination against sexual and gender minorities:

Four police opened my clothes, asking, "Are you a boy or a girl?", and beat me with a long bamboo stick Some of them slapped my face with their hand. Then they called me "hijira"²² and "chhakka." One policeman kicked me on my chest, saying, "Why are you behaving like a girl? You don't have breasts or a hole or anything."²³

Home-based sex workers are found in both rural and urban areas. They usually have a fixed, but not necessarily single, location and have multiple regular customers. Their customers are often married men who treat the workers as paid girlfriends or second wives. They are less at risk of criminalization, but they suffer from stigma, as they cannot openly discuss their livelihoods. They often face problems when their children require certificates of citizenship.²⁴ They have less contact with other FSWs and very few of them join CBOs. A FSW who does not have their own citizenship certificate faces problems, not only in getting the certificate for her child, but also in sending the children to school:

My name is XX and I am a home-based sex worker in Kathmandu. I did not have citizenship before marriage, and I married a Bhutanise man. Even from his side, I did not get citizenship and the marriage ended. I have two daughters from this marriage, who also have no citizenship and that is the reason why they are not being able to access education. The only way to get access to citizenship is to get married again. I think children of sex workers should be allowed to get citizenship through their mother.²⁵

There is no rule to deny children's rights to education even for children without citizenship certificates. However, the mother engaged in sex work may not be able to negotiate with school authorities. As a result, not only the sex worker, but also her children suffer from social stigma.

Call girls and escort girls work individually and tend to not be organized. They are relatively well educated and can usually protect themselves through negotiation with their customers, such as in the use of condoms. They do not join groups such as the JMMS, as they do not face the serious problems of other groups of sex workers.

Hidden sex workers are the most invisible, as they never expose themselves as sex workers and do not contact customers proactively and regularly. Some may not recognize themselves as FSWs. As with home-based sex workers, hidden sex workers are less likely to be harassed or arrested under the Public Offence and Ordinance Act. However, they also experience psychological trauma, as they know they are doing something against the social norm.

Members of the JMMS are mostly from the first two groups, as these are particularly vulnerable and in need, due to their lack of education and the need for mutual support through group activities. However, some sex workers move from one category to another.

22. This refers to Eunuchs and transgender people in Hindi who make a living as street singers or dancers.

23. UNFPA and UNDP, *supra* note 1, p. 40.

24. The new Constitution allows "a person whose father or mother was a citizen of Nepal at his or her birth" to get citizenship certificate (No. 11, Part 2—Citizenship, The Constitution of Nepal 2015). However, local government officials harass children who submit application forms without their father's signature. Government officials often refuse to provide official documents to FSWs, but harass them or ask them for free sex. JMMS, *supra* note 19, p. 5.

25. *Ibid.*, p. 8.

Maya's story demonstrates the struggle and pathway of FSWs in Nepal.²⁶ Maya got married at the age of 15 in a small village and lost her husband two years later. As a widow with two children, she started receiving vegetable and other food items from a neighbour, in exchange for sex. She did not recognize herself as a FSW until she started receiving other customers at home. She remained a home-based sex worker until she migrated to Kathmandu. In the capital, she started working as a hotel-based sex worker, providing services upon request at tourist hotels. She learned how to negotiate with customers, including foreign tourists, and how to avoid risks. At the same time, she added to her professional value by wearing fashionable clothing, learning table manners, and so on. At one point, she left sex work, but resumed in order to send her children to higher education. Following a four-to-five-year break, she started to work independently and became a call girl, finding well-off customers, including a medical doctor, army personnel, and a rich businessman. At present, she has been with the same fixed customer for ten years. Now, she is dedicated to organizing FSWs and leading their movement.

Maya is an exceptional FSW who has worked for 25 years without being arrested. However, a large majority of FSWs and transgender sex workers, particularly in street-based and hotel-based categories, are vulnerable and often face serious violence.

4. ADVOCATING FOR THE RIGHTS OF SEX WORKERS

A survey, jointly conducted by the JMMS and the BDS, found that sex workers in Nepal face multiple forms of violence. Police officers are the most commonly mentioned perpetrators of violence against sex workers, indicating a problem with law-enforcement practices in Nepal. Clear gender differences exist in terms of the forms of violence experienced.²⁷ Of the 75 FSW respondents to the survey, 89% reported that they faced violence, including verbal insults (88%), physical abuse (55%), sexual abuse (19%), arbitrary detention (14%), extortion (12%), and rape (7%). Male and transgender sex workers face more frequent violence. Approximately 79% of 75 of male and transgender respondents reported that they faced different types of violence at the hands of law-enforcement officials, including verbal insults (85%), beatings (73%), arbitrary detention (64%), extortion (64%), sexual abuse (51%), and rape (44%). Police officers frequently raid establishments and areas frequented by sex workers, bringing them into custody for a couple of hours or longer without any particular legal basis. Reported experiences of arbitrary detention indicate the seriousness of such problems. Police often detain sex workers simply because they carry condoms. The condoms they carry have been advised by health professionals for the prevention of sexually transmitted diseases. However, the police perceive condoms as evidence of sex work. Unfortunately, this conscious safe behaviour increases the risk of detention, even though sex work itself is not prohibited.

In 2013, Sex Workers and Allies, South Asia (SWASA), a regional network of sex workers' groups from Bangladesh, India, Nepal, and Sri Lanka, was formed.²⁸ Leaders

26. The interview was conducted with a member of the JMMS on 3 November 2018. The name is changed as anonymous in order to protect the identity of the interviewee.

27. UNDP (2012), p. 78.

28. SWASA (2016), p. 1.

of the JMMS contributed to a regional meeting of the SWASA on the theme of sex workers' rights, held in Kathmandu in July 2016. The SWASA aims to empower sex workers, in order to advocate against discriminatory laws and policies and to improve health services and access to justice for sex workers. As part of a global movement for the rights of sex workers, participants at the meeting jointly claimed a right to a safe working environment and demanded the full decriminalization of sex work, which included not only sex work itself, but everything associated with sex work. Sex workers are at risk of criminalization when "anything associated with sex work, such as soliciting, brothel keeping or living on the earnings of sex workers" is criminalized.

Regarding sex-work legalization, participants from different countries who attended the meeting expressed concerns over this call for complete decriminalization, as global experience shows that licensing systems force certain groups of sex workers underground. Licences will only be granted to individuals working in particular places and will exclude migrants, housewives, and others who are secretly engaged in the business, such as home-based and hidden sex workers. Such a system may also encourage corruption among authorities and lead to bribes, which, ultimately, do not benefit sex workers.

The SWASA encourages its member organizations to utilize the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) for monitoring human-rights violations against FSW. Therefore, since 2018, the JMMS has started to submit a monitoring report to the CEDAW.

At present, the JMMS demands decriminalization of sex work, but not legalization, as it has many members who would not be able to get licences if legalization was introduced. At present, the JMMS is focused on demanding the reformation of punitive laws, policies, and law-enforcement practices, in order to protect the rights of sex workers²⁹:

1. Decriminalize sex work and activities associated with it, including laws and penalties for the purchase of sex, management of sex workers, and other activities related to sex work.
2. Public order laws or regulations should not be applied in ways that violate sex workers' rights.
3. Ensure the maintenance of confidentiality, especially where identity cards and other identifiers are used by law-enforcement agencies and health authorities to "track" sex workers.
4. Eliminate the practice of confiscating condoms and using possession of condoms as evidence of sex work.
5. Ensure that national laws differentiate between sex work and human trafficking; train law-enforcement officials to understand and respect this distinction in order to ensure that anti-trafficking initiatives do not impinge on the rights of sex workers.

5. CONCLUSION

As presented in an earlier chapter, both cisgender and transgender female and male sex workers have addressed the decriminalization of sex work. They also demand the

29. JMMS, *supra* note 19, p. 6.

accountability of police personnel and seek the assurance of immediate legal action against law-enforcement personnel who commit acts of violence and abuse against sex workers.

Two IBAs, namely the JMMS and the BDS, are playing a vital role in proving injustice against sex workers through the documenting of cases of violence faced by these individuals. IBAs advocate for the decriminalization of sex work but not its legalization, assuming that the latter implies providing licences to those who provide sex work in particular places, thus excluding home-based workers and others who do not have fixed places of business. In addition, these IBAs fear the corruption of authorities who provide licences. Such a legalization scenario may not be of benefit to their members working at the grassroots level.

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