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Need to Protect Sex Workers' Right to Health in India: A Comparison with New Zealand

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ABSTRACT

The research paper focuses upon the current status of sex workers in India. The paper explains the legal framework adopted in India and New Zealand for the working of sex work industry in the respective jurisdictions. The objective of the paper is to emphasize upon the status of sex worker's right to health and understand how the criminalization of sex work industry impacts this right. The paper makes a comparative analysis of the approaches adopted in India and New Zealand to better comprehend the correct practices of legalisation of the sex work. Further, the paper aims to analyze whether the decriminalisation of sex work industry be beneficial in protecting the right to health of the sex workers. The mixed approach of decriminalisation and legalisation of sex work has been highlighted in the paper. Some practical suggestions have been mentioned in the paper for the upliftment of status of sex workers' right to health.

Keywords: Decriminalization, Legalization, New Zealand, Right to Health, Sex workers.

I. INTRODUCTION

Dating back to the Vedic period, the institution of Prostitution was recognised as one of the most organized and established profession of the society.³ The profession has witnessed the downfall and the act which regulates it defines prostitution as sexual exploitation.⁴ World Health Organization defines "Sex workers are women, men and transgendered people who receive money or goods in exchange for sexual services, and who consciously define those activities as income generating even if they do not consider sex work as their occupation."

Currently, prostitution in India is not illegal per se but the activities which regulate sex work are criminalised. **Foong** emphasizes on the views of liberal feminists who consider that prostitution is not the problem rather the stereotyping and the stigmatizing sex work makes it

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³ Pranay Prakash, *Legalization of Prostitution in India-A Question on Indian Society*, 4 IJRRRA, 34, 34-37(2017).

⁴ Section 2(f) of The Immoral Trafficking Act (1956) defines "prostitution" as sexual exploitation or misuse of any persons for any business purpose.

undignified.⁵ **Misra** literature correctly describes India's position, where the group of people who view sex work as undignified, immoral, unethical work and the sex workers as undignified working professionals, prefer the forceful removal of and restrictions on the sex workers.⁶

Further, in Pudifin and Bosch's article, the moralistic approach which favors criminalisation of prostitution is incorrect in the researcher's opinion, as the sex work activities will be shifted underground post criminalisation as well.⁷ The Indian regulatory approach considers prostitution as immoral but permits an individual to opt it as an occupation which is a tolerationist approach as correctly mentioned in **Mahica Vinod's** paper.⁸

New Zealand provides for the legal framework for the sex industry through the Prostitution Reform Act, 2003. **Raymond** highlights the laws of the country which aim to protect the sex workers from the exploitation which is conducive to public health.⁹ However, it fails to address the relevant approach to be followed for efficient working of sex work industry. On the other hand, **Pudifin and Bosch** have helped to understand the humanistic approach followed by New Zealand which aims to protect the sex workers' human right to health.¹⁰

The criminalisation exposes the sex workers to vulnerable situations like abuse both physical and verbal and exploitation by the law enforcements officials itself. The study by **UNAIDS** reveals that criminalization not only makes the environment for work unsafe but also has a negative impact on the right to health of the sex workers.^{11 12}

Thus, it is essential to opt for decriminalisation of sex work industry and follow the liberal individualistic approach, discussed by **Cooper**, which in consonance with decriminalisation grants autonomy and permits humans to live with dignity by protecting their human rights.¹³ After considering the gaps in the existing literature this research article aims to make a comparative analysis of the working and status of sex work industry of New Zealand with India and mention how the former country has protected the right to health of the sex workers by

⁵ Amanda Foong, *The Prostitution Debate, breaking the barriers*, 4 Alt L.J., 205, 205-208 (2008).

⁶ Geetanjali Misra, et al. "Protecting the Rights of Sex Workers: The Indian Experience." *Health and Human Rights*, vol. 5, no. 1, 2000, pp. 88–115. *JSTOR*, www.jstor.org/stable/4065224 (Accessed 21 May, 2021, 10:00pm).

⁷ Sarah Pudifin & Shannon Bosch, *Prostituting the 2010 Soccer World cup- a more practical approach to prostitution policy in South Africa*, Int'l L.J., 272, 272-287 (2009).

⁸ Mahica Vinod, "An Account of Healthcare Policies for Prostitutes in India", 10(1) IOSR Journal 69 (Jan-Feb. 2019), <http://www.iosrjournals.org/iosr-jef/papers/Vol10-Issue1/Series-1/J1001016974.pdf>.

⁹ Janice G. Raymond, "Gatekeeping Decriminalization of Prostitution: The Ubiquitous Influence of the New Zealand Prostitutes' Collective", 3(6) Dignity: A Journal on Sexual Exploitation and Violence (2018).

¹⁰ Supra note 5.

¹¹ UNAIDS, "Protecting the rights of sex workers", (accessed on May 20, 2021, 9:00pm), https://www.unaids.org/en/resources/presscentre/featurestories/2017/june/20170602_sexwork.

¹² Human Rights Watch, "Why sex work should be decriminalized", (accessed on May 20, 2021, 10:00 pm), <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>.

¹³ Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 Women's Rts. L. Rep. 99, 99-120 (1989).

decriminalising the industry. After highlighting the importance of decriminalisation of the industry as a whole, the article concludes by suggesting India to adapt New Zealand's legal framework for regulating the sex industry thereby protecting their health.

The main aim of the article is to examine the status of sex worker's right to health in India, and to understand the impact of criminalisation of sex work industry on their health right, in order to suggest ways for protecting the prostitutes' right to health through comparative analysis with the legal framework of New Zealand. The research questions aimed to answer through this article while determining the status of sex worker's right to health in India, is whether the criminalisation of organizer of sex work and/or industry affects the sex workers' right to health and can decriminalisation of the sex work industry protect the right to health of sex workers. The paper adopts a doctrinal research having a descriptive qualitative analysis. The contents are taken by secondary data from various research papers, journals and websites. A comparative analysis of healthcare of prostitutes of India and New Zealand is undertaken, by studying the current policies and examining the loopholes based on review of literature. A deductive approach is followed in the paper to critically study the problems and derive specific solutions to protect any violation of right to health of the sex workers.

II. LEGAL FRAMEWORK

There are different regulatory frameworks throughout the world for sex workers. While some follow criminalization model of prostitution, few favor the decriminalizing approach, whereas others go to the extent of legalizing it.¹⁴ The proponents of first model seek criminalizing all aspects of sex workers to eliminate and declare it as illegal. Decriminalization approach removes all prostitution related laws and only punishes third parties involved in sex-work aiming to reduce it.¹⁵ Legalization of sex workers, as in countries like New Zealand, recognize their basic human rights and involve regularized proper laws to protect them.¹⁶

In India, activities related to prostitution are made punishable, while it is not altogether illegal.¹⁷ The aim is to restrict the sex-work rather than regulating it with proper laws. There is not only

¹⁴Catherine Berus, "The Framing of Sex Work and its Impact on Health Outcomes: A Comparative Analysis of Canada, Australia and Sweden", (Jun. 28, 2012), (accessed on May 27, 2021) <https://ruor.uottawa.ca/bitstream/10393/26064/1/BERUS,%20Catherine%2020135.pdf>.

¹⁵ Lindsey H. Jemison, *Feminist Theory and Sex Work Regulation: Comparing Regulatory Models and Implementation of Theoretical Policy Notes*, 21 *Journal of Law in Society* 163 (2021), (accessed on May 27, 2021) https://heinonline.org/HOL/Page?collection=usjournals&handle=hein.journals/jls21&id=174&men_tab=srchresults.

¹⁶ Id.

¹⁷The Immoral Traffic (Prevention) Act, 1956 punishes running brothels, pimping, soliciting, trafficking and when carried out in public.

punishing of sex-work related acts but also protection of the victims who are coerced for it.¹⁸ The human rights of sex workers like health are not protected in India rather they suffer from discrimination and exploitation to access healthcare services. The National Health Policy of 2017 which aims to reduce diseases and promote good health through strategies, fails to give specific consideration to health of sex workers.¹⁹ However there have been initiatives taken by NACO to prevent HIV and STD for sex workers as well.²⁰

The international legal framework stresses on legal enforcement of rights of sex workers and need for access to right of health. **The Special Rapporteur on the Right to Health submitted a report to the UN General Assembly** and argued that migrant sex workers are forced to undergo HIV testing and face barriers to health services such as the threat of arrest. It also mentions the negative impact of criminalization of sex work and HIV transmission on realization of right to health. **International Covenant on Economic, Social and Cultural Rights** provides for recognizing the right of everyone to enjoy the highest standard of health, i.e., both physical and mental.²¹ **Further, the UDHR, 1948** provides that everyone has the right to have adequate standard of living for health and well-being,²²

Due consideration has been given by ILO and the UNDP in this regard incorporating recommendations concerning HIV and sex workers, giving them same protections as other workers.²³ The laws in New Zealand, protect health of sex workers by “certification of brothel operators” and its regular inspection by medical officers. The act requires operators, clients and sex workers to ensure safe sex practice by providing health related information especially sexually transmissible diseases.²⁴ It allows legal contracts with workers, including rescission of such contracts on refusal to give sexual services.²⁵ For health and safety of all employers including sex workers for all other issues are ensured by the general law.²⁶

¹⁸ The Immoral Traffic (Prevention) Act, 1956.

¹⁹ Supra note 8.

²⁰ Framework on rights of sex workers and CEDAW, (accessed on May 25, 2021, 8:00 pm) https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17395_E.pdf.

²¹ ICCPR, Article 12, “the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”

²² UDHR, Article 25, “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”

²³ Id.

²⁴ The Prostitution Reform Act, 2003.

²⁵ Cheryl Overs & Bebe Loff, “*Toward a legal framework that promotes and protects sex workers’ health and human rights*”, HHR Journal (June 2013), (accessed on May 27, 2021) <https://www.hhrjournal.org/2013/10/toward-a-legal-framework-that-promotes-and-protects-sex-workers-health-and-human-rights/>.

²⁶ Health and Safety in Employment Act 1992.

III. FINDINGS AND ANALYSIS

The UDHR declares the right to health as a basic human right.²⁷ It includes physical, mental and social well-being and not merely the absence of disease.²⁸ Right to health has been held to be a basic fundamental right under the Constitution.²⁹ This right has been recognized to be implicitly a part of Article 21 of the Indian Constitution.³⁰ The Court has held it to be a fundamental factor and important to protect the right to health of workers.³¹ Article 47 of the Indian Constitution has the provision for improving the health of the public as an obligation of the State. There is a special protection of health of workers providing for humane working conditions and maternity relief under Article 42 of the Constitution. Article 47 also has been interpreted in light of Article 21 being an equal obligation of state.³²

Part III of the Constitution is applicable to all citizens and the state under Part IV has obligations to protect its citizens irrespective of their profession including the sex workers. There is a need to treat every citizen as equal before the law and give equal protection of laws to all the citizens of India who are guaranteed a right to equality under Article 14. The Supreme Court has recognized that it is an obligation of the Government to preserve the life of all persons.³³ Article 12 of CEDAW also recognizes the right to health without any discrimination. Non-discrimination and equality are fundamental human rights principles and critical components of the right to health and the article 2.2 of the **ICESCR** also supports the same.³⁴ The States must prohibit and eliminate racial discrimination and guarantee the right of everyone to public health and medical care.³⁵ However, sex workers' fail to enjoy their right to health due to criminalization and legal oppression of the industry in India.

The legislation in India criminalizes soliciting³⁶ and living off the income of sex work,³⁷ not distinguishing between trafficking and sex work. Raiding of brothels because of criminalization³⁸ results in street-based sex work and their risk of exploitation increases. The

²⁷ The Universal Declaration of Human Rights, Art. 25.

²⁸ The World Health Organization gave this meaning to health.

²⁹ *Bandhua Mukti Morcha v. Union of India and Others*, (1997) 10 SCC 549.

³⁰ *State of Punjab v. M.S. Chawla*, AIR 1997 SC 1225.

³¹ *Consumer Education and Research Centre v. Union of India*, (1995) AIR 922, 1995 SCC (3) 42.

³² *State of Punjab v. Ram Lubhaya Bagga*, (1998)

³³ *Pt. Parmanand Katara v. Union of India and Others*, (1989) 4 SCC 286.

³⁴ ICESCR, Article 2.2 states: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

³⁵ International Convention on the Elimination of All Forms of Racial Discrimination, Article 5.

³⁶ The Immoral Traffic (Prevention) Act, 1956, S. 8.

³⁷ The Immoral Traffic (Prevention) Act, 1956, S. 4.

³⁸ The Immoral Traffic (Prevention) Act, 1956, S. 3.

definition of prostitution in the act is itself giving the idea of sexual exploitation.³⁹ Forcibly placing them in protection homes⁴⁰, the sex workers are exposed to HIV. While the National AIDS Control Programme provides for voluntary testing of HIV,⁴¹ in case of sex workers, subjecting them to discrimination, a mandatory testing for STDs is carried out.⁴² In this regard, there have been studies which have argued that migrant sex workers face a lot of hindrances in accessing health services in the country such as forced testing of HIV, confiscation of condoms and threats of arrest and detention.⁴³

The act in New Zealand by decriminalising the commercial sexual services has made recognition of sex workers' health rights even more relevant.⁴⁴ The mixed approach of decriminalisation and legalisation has shouldered the operators of sex work along with clients and sex workers with the responsibility of practising safe sex work.⁴⁵ Further, the act by providing certification to and inspection and enforcement of the brothels have increased the access of safe health for the sex workers.⁴⁶ The operators are also required to take reasonable steps as the safety measures like ensuring the use of the prophylactic sheath or other appropriate barrier while the commercial sexual services take place.⁴⁷ Even though the sex workers enter into contracts with their client but this fact does not restrict their right to withdraw their consent from providing their services and rather bestows with the right to refuse from providing any commercial sexual service to any person. The fact that the person has entered into a contract to provide commercial sexual services does not limit the sex worker's ability to withdraw his or her services or consent.⁴⁸

Study reveals that despite existence of fundamental right to health, criminalizing the sex work results in higher risk of HIV, limited access to healthcare services, discrimination and exploitation at every level.⁴⁹ Literature mentions the recommendation of the Indian National Commission of Women of regulating prostitution which would involve the state control on

³⁹ The Immoral Traffic (Prevention) Act, 1956, S. 2(f).

⁴⁰ The Immoral Traffic (Prevention) Act, 1956, S. 17.

⁴¹ National Human Rights Commission, "*Status of human rights in the context of Sexual Health and Reproductive Health Rights in India*" (accessed on May 21, 2021, 8:00pm), https://nhrc.nic.in/sites/default/files/sexual_health_reproductive_health_rights_SAMA_PLD_2018_01012019_1.pdf

⁴² The Immoral Traffic (Prevention) Act, 1956, S. 15(5A).

⁴³ United Nations Human Rights, *Special Rapporteur on the Right to Physical and Mental Health* (2002), (accessed on May 21, 2021, 9:00pm), <https://www.ohchr.org/en/issues/health/pages/srrihealthindex.aspx>

⁴⁴ Prostitution Reform Act 2003.

⁴⁵ Prostitution Reform Act 2003, S.8.

⁴⁶ *Supra*.

⁴⁷ Prostitution Reform Act 2003, S.9

⁴⁸ Prostitution Reform Act 2003, S.17.

⁴⁹ Lucy Platt et al., "*Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies*", 15(12) PLoS Med. (Dec. 2018), (accessed on May 20, 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6289426/>.

granting licenses to sex workers, inspections, regulating safety measures etc. this is what India currently requires.⁵⁰ According to the report by the Ministry of health of India it has been reported that female sex workers have 6 to 13 times higher prevalence of HIV than others.⁵¹ There are other health issues of sex workers, which are rarely addressed, like them being more prone to cervical cancer because of engaging in sexual activities more often than other women.⁵² The Indian judiciary has also recognized the problems of sex workers, and directed government under article 21 to build rehabilitation centres to protect sex workers' right to live with dignity.⁵³ The need to impart training to prevent forced prostitution and their right to livelihood has been interpreted by the court. It is due to these directions by the apex court that the laws have been amended to include protective homes for them.⁵⁴

The right to occupational health and safety has been emphasised by the ILO and UNDP and the legally enforceable rights to occupational health and safety for sex workers ensures development of workplace health and standards of health. The Occupational Safety and Health Service (OSH) of the New Zealand Department of Labour provides for the sex worker's rights.⁵⁵ The Ministry of health ensures the formal compliance to OSH and promotes health by providing information concerning health and safety of the sex workers.

New Zealand's Prostitutes' Collective (NZPC) also plays an active role in promoting the health and it receives the fund from the ministry for providing confidential sexual health services and free sex worker packs which consists of health promotion material, condoms, lube and dental dams. NZPC aims to promote the sexual and reproductive health of the sex workers for which it contracts along with the health ministry and conducts community-based peer education programs.⁵⁶ The operators who provide commercial sexual services are obligated to ensure the safety of any premises or equipment they operate.⁵⁷ Also, the spread of infectious diseases is an offence.⁵⁸ The employers are obliged to provide safe access to and maintain the safety of the workplaces to avoid risk to health of sex workers.⁵⁹ **Occupational safety and Health**

⁵⁰ Shukla, *Sex Workers: Repositories of the "bad"?*, 12 Int. J. Appl. Psychoanal. Studies, 181, 181-185(2015).

⁵¹ Annual Health Report of 2020-21, Ministry of Health, India

⁵² Supra note 40.

⁵³ Budhadev Karmaskar v. State of West Bengal, AIR 2011 SC 2636.

⁵⁴ The Immoral Traffic (Prevention) Act, 1956, S. 21.

⁵⁵ Fraser Crichton, "Perspectives on Public health and sex work in New Zealand", (accessed on May 22, 2021, 9:00 pm) <https://medium.com/@fraser.crichton/faces-behind-the-voices-health-b022a0e4c8ff#:~:text=New%20Zealand%20is%20one%20of,sex%20work%20is%20fully%20decriminalised.&text=The%20Ministry%20provides%20formal%20health,Operators%20of%20Businesses%20of%20Prostitution.>

⁵⁶ Id.

⁵⁷ Health and Safety Act.

⁵⁸ Health and Safety Act, S. 80.

⁵⁹ Health and Safety Act, S. 6.

Service, a Service of the Department of Labour acts as a catalyst and assists the workplaces for improving the standard of health and safety of the workers. It monitors to check whether the application of the act.⁶⁰

From the above comparison of provisions of two jurisdictions it can be analyzed that criminalization and stigma of sex work or its related activities has a negative impact on the sex workers' health, working environment, exposing them to vulnerabilities like violence, HIV and STIs, verbal abuse, social exclusion and also shifts the work underground.⁶¹ Researchers have also shown how unplanned pregnancy and unsafe abortions leads to not only physical harm but a toll on their mental health also.⁶² This is due to deprivation of health checkups or not using condom because of criminalization of sex work.

An exaggerated effect of threat to the health was noticed during the pandemic, when the sex workers have reported lack of basic necessities of water, masks, hand sanitizers and sanitary pads.⁶³ They could not follow social distancing measures due to overcrowded living conditions.⁶⁴ While in New Zealand, sex workers experience during COVID-19 pandemic has been consistent as decriminalisation of sex work has proved to improve sex workers' human rights accessibility by reducing harms. The restrictions to alert the sex workers in Covid-19 were laid down by the collective of the sex workers in New Zealand so that could return back to the work under the Covid-19 pandemic. Some sex workers could also apply for accommodations and government wage subsidies as correctly mentioned in **Eurydice's paper**.⁶⁵

Thus, decriminalisation of sex work is a pre-requisite to ensure the sex workers' right to health. Decriminalization is an approach which addresses the stigma that is associated with sex work due to its criminalization and thereby aims to reduce the harm.

⁶⁰ Supra note 55.

⁶¹ Supra Note 8.

⁶² Ine Vanwesenbeeck, *Sex Workers' Rights and Health the Case of The Netherlands*, Global Perspectives on Prostitution and Sex Trafficking 3 (R. L. Dalla, et.al. ed., Jan. 2011), (accessed on May 21, 2021) https://www.researchgate.net/publication/289533336_Sex_Workers'_Rights_and_Health_The_Case_of_The_Netherlands.

⁶³ Priyadarshie Mukhopadhyay, "*Human Rights Violations of Sex Workers: Probing India's Russian Roulette Approach towards COVID-19 Response*", The Promise Human Rights Blog (Sep. 7, 2020), (accessed on May 25, 2021, 6:00 pm) <https://www.promisehumanrights.blog/blog/2020/9/human-rights-violations-of-sex-workers-probing-indias-russian-roulette-approach-towards-covid-19-response#:~:text=In%20India%2C%20although%20sex%20work,a%20sex%20worker%2C%20are%20penalized>.

⁶⁴ Neeraja Seshadri & Prathiksha Chandrashekar, "*Indian Government Fails to protect Sex Workers during Covid-19 Crisis*", Oxford Human Rights Hub (Jun. 12, 2020), (accessed on May 27, 2021, 7:00 pm) <https://ohrh.law.ox.ac.uk/indian-government-fails-to-protect-sex-workers-during-covid-19-crisis/>.

⁶⁵ Eurydice Aroney, "*Changing Minds and Changing Laws: How New Zealand Sex Workers and Their Allies Shaped Decriminalisation in New Zealand*", Sexuality Research and Social Policy, <https://link.springer.com/article/10.1007/s13178-021-00564-z>.

IV. CONCLUSION AND SUGGESTIONS

Right to health is the most essential human right. Sex workers' right to health, particularly, is more than a set of policies and necessitates the availability of range of health services, specifically occupational health services. It also indicates that the right to health extends to access of health services without any discrimination to all humans, which includes sex workers as well which is stated in the Preamble of the WHO as well. Criminalization also stigmatizes sex work and is a barrier to both healthy working environment and access to health services. It necessitates for India to adapt the mixed approach of legalisation and decriminalisation of overall sex work industry. It will ensure reduction of violence thereby protecting both physical and mental health. Thus, removal of legal oppression is suggested along with decriminalisation which grants autonomy to sex workers to protect their health.

Decriminalizing the sex industry and accepting prostitution as profession in India by its legalization is a way forward to prevent any violation of rights of sex workers. Like New Zealand, the sex workers and their clients can enter into legally enforceable contracts. These contracts could contain clauses based on which the government could grant or reject licenses. Strict licensing laws could be enforced to prevent trafficking. Maintaining a proper procedure for registration will help in reducing forced prostitution and give sex workers a professional status. Legalization will be able to keep a proper check on HIV/AIDS by providing regular health checkups and promoting the use of condoms.

It is also suggested to conduct campaigns on a regular basis concerning health awareness amongst the sex workers. Making the health services affordable and accessible by way of health insurance policies at the subsidized rates for sex workers by the government can be another possible measure. Also, training of healthcare providers is important to be sensitive to access to healthcare faced by sex workers. It is also suggested to work on the soft skills of individuals by conducting awareness programs and campaigns to educate and sensitize people and doctors for normalizing sex work and the right of sex workers to healthy working environment and proper access to healthcare facilities.

Further, the announcement by the collective of the Sex Workers in New Zealand on its website led the brothel, street-based and private sex workers return to their work with safety even under Covid 19 likewise India can also adapt their approach to make the conditions of sex workers better. The Covid-19 pandemic and the increase in corona virus cases has affected the mental health and livelihood of the sex workers. However, Government of Maharashtra has made provisions for assistance and relief to sex workers during covid and **NGOs like Kat Katha,**

Shakti Vahini have reported major concerns for sex workers' human rights violation.

The situation of pandemic has added to the vulnerable conditions of the sex workers. Looking at the overall situation of sex workers, it can be concluded that despite the availability of constitutional provisions, there is lack of proper implementation and a lack of statutory provisions in India to protect sex workers' rights. Thus, India should in consonance of Article 253 of the constitution shall lay emphasis on widening the ambit of sex workers protection by adhering to international provisions as well.

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