



**NEED AND POSSIBLE
CONSEQUENCES OF
LEGALISATION OF
PROSTITUTION: AN INDIAN AND
GLOBAL PERSPECTIVE**

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ABSTRACT

The current laws governing prostitution is 'The Prevention of Immoral Trafficking Act, 1956' which was made in pursuance of the 'International Convention signed at New York', for the prevention of immoral traffic. The Act intends to combat trafficking and sexual exploitation for commercial purposes. While prostitution is not an offence, practicing it in a brothel or within 200 m of any public place is illegal. A woman soliciting for the purpose of prostitution can also be punished.

There are flaws and many loopholes in the current legislation that goes on to defeat the very purpose of the act and that is the protection of women from sanctions. The social, economic and physical condition of the sex workers is still poor and thus the paper aims to discuss and highlight the need to amend the current central legislation on the subject.

Today many countries in the world have legalised or regulated prostitution and they recognize it as any other profession. Legalisation of prostitution may refer to a system of criminal regulation and government control of prostitutes.¹ The paper discusses the need of legalisation of prostitution in India with reference to some particular problems associated with it being criminalised. It discusses that what is the rationale behind the legalisation of the same and will the legalisation bring about a change in the social stigma attached to the profession of a sex worker.

INTRODUCTION

The Current Central Legislation: THE PREVENTION OF IMMORAL TRAFFICKING ACT, 1956

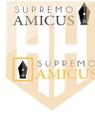
In 1950 the Government of India ratified an International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of Others.

Preamble: Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.² Keeping in line with the ratification of the same, Immoral Traffic Prevention Act, 1956 came into force.

¹<http://prostitution.procon.org/view.answers.php?questionID=000114>, last updated on: 2/15/2008 8:37:00 AM PST

²Convention for the Suppression of the Traffic in Persons and of the Exploitation of the

Prostitution of Others, approved by General Assembly resolution 317 (IV) of 2 December 1949, entry into force: 25 July 1951, in accordance with article 24



THE ACT AND THE INTENTION OF THE LEGISLATURE: This Act was passed in the year 1956, long after the advent of the constitution of India, with the avowed object of suppressing immoral traffic in women and girls. A perusal of the various sections the Act would show that apart from suppression of immoral traffic in women and girls, they have for their object prevention of prostitution from becoming a danger to social decencies, by reducing the opportunities for such women of contacting the members of public and also helping the women who have already taken to that life to rehabilitate themselves by disassociating them from the previous environments.³ The act is not aimed at abolition of prostitutes and prostitution as such and make it per se a criminal offence or punish a woman because she prostitutes herself; and the purpose of the enactment is to inhibit or abolish commercialised vice namely the traffic in women and girls for purpose of prostitution as an organised means of living. Various provisions of the act tend to strengthen such a view.⁴

THE NATURE AND SCOPE OF THE ACT: The Immoral Traffic (Prevention) Act is a penal statute. Penal statutes affect the liberty of the subject, if two possible and reasonable constructions

can be put upon a penal provision, the court must lean towards that provision which exempts the subject from penalty rather than which imposes a penalty.⁵ Moreover, the act is a social welfare legislation to abolish the commercial sex activity carried on by the brothel keepers by using innocent and illiterate women and also to remove the social evil for the good of the society.⁶

Prostitution as defined in the Prevention of Immoral Trafficking Act, 1956 means the sexual exploitation or abuse of persons for commercial purposes, and the expression “prostitute” shall be construed accordingly.⁷ In order to constitute an act of prostitution the following ingredients have/had to be present:

After Amendment Act 44 of 1986 –

- (i) there must be sexual exploitation or abuse of any person;
- (ii) it must be for commercial person.⁸

LOOPHOLES IN THE ITPA, 1956

1. *The title of the Act suggest three things:*

1.1: *That the Indian legislator is addressing trafficking as a moral issue:*

³R.P. Kataria and Manzar Saeed ,Laws Relating to Prevention of Immoral Traffic In India, Second Edition(Orient Publishing Company, Allahabad, 2016)

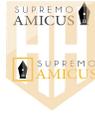
⁴ Bai Shanta v State of Gujarat, AIR 1967 Guj. 211 at 213: 1967 Cr. L.J. 1140(Guj)

⁵ Tolaram Relumal v The State, AIR 1953 Bom. 347 at 357: 1953 Ct. L.J. 1445

⁶ P.N Swamy, Labour Liberation Front, Mahaboobnagar v. S.H.O. Hyderabad, 1998 (1) ALD 755

⁷ Section 2(f) of the ITPA, 1956

⁸R.P. Kataria and Manzar Saeed ,Laws Relating to Prevention of Immoral Traffic In India, Second Edition(Orient Publishing Company, Allahabad, 2016)



Does the Act address trafficking as a moral issue? The title suggest that there is moral trafficking and that there is immoral trafficking. However, the intent of the Act as it has been interpreted by the Indian courts is "to inhibit or abolish commercialized vice namely the trafficking in women and girls for the purpose of prostitution."

1.2: That the Indian legislator is enacting a law on trafficking:

'The Immoral Traffic Prevention Act' is not an anti-trafficking law depending on the definition of an anti-trafficking statute. The Act does not recognize trafficking in persons as a specific or separate crime. The Act does not define for us trafficking in persons. Instead, trafficking defined in under the act⁹ is addressed merely as a prostitution-related activity. Trafficking under Section 5 is procuring, inducing or taking a person for the purpose of prostitution. The Act limits the crime of procurement to prostitution. The Act defines prostitution under Section 2(F) as "the sexual exploitation or abuse of persons for commercial purposes." Exporting and importing of girls for prostitution is part of the penal code, sections 366A and 366 B and not the Immoral Traffic Prevention Act. The Immoral Traffic Prevention Act is basically an anti-prostitution law. It is not an anti-trafficking law.

1.3: That the India legislator is adopting a preventive approach to trafficking:

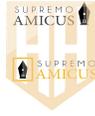
It is submitted to it for the purpose of examining the adequacy of the Act in combating trafficking. The Act focuses on criminalization and punishment. But it does not say anything about preventing prostitution or preventing trafficking. Nowhere in the Act is there any mention of addressing the root cause of the trafficking infrastructure or the appropriate preventive measures that must be taken to warn about the dangers of prostitution or the dangers of trafficking.¹⁰

2. Forms of Trafficking But limiting trafficking for the purpose of prostitution, as the case under the Immoral Traffic Prevention Act, ignores other forms of trafficking that must be confronted:

Sex trafficking is not limited to trafficking for a commercial sex act and commercial sex is not limited to prostitution. Trafficking of children for the purpose of sex tourism should also be recognized as a crime. Non-commercial sex may constitute as a form of exploitation that gives rise to trafficking. A broad definition of trafficking should be considered by the Indian legislator to include: Trafficking of girls for the purpose of marriage to avoid the payment of a dowry, especially in cases of child marriages, despite the fact that the Child Marriage Restraint Act of 1929 prohibits marriages in which the female is under 18 and the male is under 21 years, trafficking of girls for religious

⁹The Protocol to Prevent, Suppress and Punish Trafficking in Persons (November 15, 2000)

¹⁰: <http://www.protectionproject.org/wp-content/uploads/2010/09/vz4.pdf> (last visited on March 18, 2017)



purposes to serve in temples as a "female slave of God" etc. While trafficking for the purpose of forced labour may be recognized as a crime under Section 374 of the Penal Code that prohibits unlawful compulsory labour, the punishment for such offense is limited to one-year imprisonment. While the Bonded Labour System Abolishment Act of 1976 prohibits bonded labour, unfortunately, the Child Labour [Prohibition and Regulation] Act of 1986 merely sets conditions of employment of children under the age of 14. The Act must explicitly recognize trafficking for domestic service, begging and camel jockeys as forms of trafficking.¹¹

3. Unfortunately, *the Act does not provide for the forfeiture of the assets of the trafficker* the Dominican Republic law that Assistant Attorney General Acosta helped put together. The assets can also be used to initiate programs of assistance and protection along with providing incentives to police officers who investigated cases of trafficking in persons.

something that was previously illegal permissible by law.¹³

The difference between 'Legalisation' and 'Decriminalisation' in context of Prostitution:

"Legalization would mean the regulation of prostitution with laws regarding where, when, and how prostitution could take place. Decriminalization eliminates all laws and prohibits the state and law-enforcement officials from intervening in any prostitution-related activities or transactions, unless other laws apply."¹⁴ Under *legalisation*, sex work is controlled by the government and is legal only under certain state-specified conditions. *Decriminalisation* involves the removal of all prostitution-specific laws, although sex workers and sex work businesses must still operate within the laws of the land, as must any businesses.¹⁵

WHAT IS LEGALISATION?

Legalise means to make legal or to give legal validity or sanction to something.¹² and legalisation is the action of making

SHOULD PROSTITUTION BE LEGAL?

Proponents of legalizing prostitution believe it would reduce crime, improve public health, increase tax revenue, help

¹¹ Ibid

¹² Merriam Webster Dictionary ,Available at : <https://www.merriam-webster.com/dictionary/legalize> (last visited on March 18, 2017)

¹³ Oxford Dictionary, Available at : <https://en.oxforddictionaries.com/definition/legalization> (last visited on March 18, 2017)

¹⁴ Donna M. Hughes, "Women's Wrong", National Review, Oct 20, 2004.

¹⁵ Editorial, "The difference between legalisation and decriminalisation", The Economist, July 19, 2014



people out of poverty, get prostitutes off the streets, and allow consenting adults to make their own choices. They contend that prostitution is a victimless crime, especially in the 11 Nevada counties where it remains legal. Opponents believe that legalizing prostitution would lead to increases in sexually transmitted diseases such as AIDS, global human trafficking, and violent crime including rape and homicide. They contend that prostitution is inherently immoral, commercially exploitative, empowers the criminal underworld, and promotes the repression of women by men.

5. Workers in the sex industry deserve the same rights as workers in any other trade, including the right to legal protection from crimes such as sexual harassment, sexual abuse and rape.
6. There are some unscrupulous people in all walks of life -government, law, journalism, banking, law enforcement, the stock exchange, medicine, the clergy, prostitution, etc. If every profession were criminalised when some of its members broke the law, there would be few legally sanctioned professions. Unscrupulous people should be summarily dealt with by the law, regardless of which profession they corrupt."¹⁶

GENERAL ARGUMENTS IN FAVOUR OF LEGALISATION:-

1. "No person's human or civil rights should be violated on the basis of their trade, occupation, work, calling or profession.
2. No law has ever succeeded in stopping prostitution.
3. Prostitution is the provision of sexual services for negotiated payment between consenting adults. So defined, prostitution is a service industry like any other in which people exchange skills for money or other reward...
4. Non-consenting adults and all children forced into sexual activity (commercial or otherwise) deserve the full protection of the law and perpetrators deserve full punishment by the law.

GLOBAL SCENARIO REGARDING THE LEGALITY OF PROSTITUTION:

Some countries and their prostitution policies:

Argentina: Article 19 of the Constitution states, "The private actions of people that do not offend in any way the public order and morality, nor damage a third person, are only reserved to God, and are exempt from the authority of the magistrates."¹⁷

Denmark: The act of prostitution was legalized March 17, 1999.

French: Prostitution is legal but they must pay taxes. Laws against soliciting in public places.

Germany: Prostitution, brothel ownership and pimping was legalized

¹⁶Prostitution Act of 1996, Available at: <http://www.bayswan.org/> (last visited at: March 18, 2017)

¹⁷100 Countries And Their Prostitution Policies, Available at: <http://prostitution.procon.org/view.resource.php?resourceID=000772> (last visited at: March 18, 2017)



in 1927 though exploitive behaviour of pimps is considered criminal. It was mainly to offer prostitutes protection from violence and exploitation that two years ago - against the opposition of conservative politicians - the German government legalized prostitution. Now, legal contracts between prostitutes and clients can be established. The government withholds a portion of their earnings to pay social benefits like pensions and health insurance and to guarantee a regular 40-hour-workweek. Sex workers can now even unionize. When it comes to taxation and regulation of the industry, legalization has been beneficial in some places, advocates say.¹⁸

New Zealand: Since 2003 prostitution has been decriminalized. It is legal for citizens over 18 years old. It decriminalises prostitution and establishes a legal framework around the sex industry, with licensed brothels, operating under public health and employment laws.¹⁹

Portugal: Prostitution is legal here. Prostitutes sell their services for as little as €20 and many times must settle for less as the interested parties haggle and the harsh competition forces them to accept the cheaper price.

Singapore: Prostitution is legal. There are legal red-light districts, mandatory health checks, and must be 18 years or older.

Venezuela: Prostitution and brothel keeping is legal. Legislation on prostitution in Venezuela aims to regulate rather than outlaw the commercial sex industry and the operation of these brothels is legal, providing that the women working in them are over the age of 18 and undergo regular health checks.²⁰

Netherlands: "To end abuses in the sex industry, the Netherlands decided to change the law to reflect everyday reality. It is now legal to employ prostitutes who are over the age of consent, and do the work voluntarily, but stricter measures have been introduced under criminal law to prevent exploitation.

The legalisation of brothels enables the government to exercise more control over the sex industry and counter abuses. The police conduct frequent controls of brothels and are thus in a position to pick up signs of human trafficking. This approach is in the interests of prostitutes themselves, and it facilitates action against sexual violence and abuse and human trafficking.

An important spin-off of the policy is that it prevents human trafficking, which is characterised by exploitation, coercion and violence. The lifting of the ban on brothels makes prostitution a legitimate occupation and gives prostitutes the same rights and protection as other professionals.

¹⁸Isabelle de Pommereau, "Rethinking a Legal Sex Trade", Christian Science Monitor, May 11, 2005

¹⁹ Prostitution Decriminalised, Brothels to be Licensed, <http://www.nzherald.co.nz/nz/news/arti>

[acle.cfm?c_id=1&objectid=3509357](http://www.acle.cfm?c_id=1&objectid=3509357) (last visited on March 18, 2017)

²⁰Julia O'Connell and Jacqueline Sanchez Taylor, "Child Prostitution and Sex Tourism," childtrafficking.com, 1995



The labour laws offer the most effective protection against exploitation, violence and coercion. The policy is based on the conviction that strengthening the position of women is the best way to combat sexual violence. Moreover, abuses are easier to detect when prostitutes operate publicly and legally rather than in a clandestine subculture."²¹

WHY PROSTITUTION SHOULD BE LEGALISED IN INDIA?

On November 8, 2014, a proposal to legalise prostitution in India was put before a Supreme Court constituted panel. The panel was set up on a public interest litigation filed by the *Bachpan Bachao Andolan* in 2010 seeking a curb on large scale child trafficking. A Supreme Court bench of Justice Dalveer Bhandari and Justice AK Patnaik asked the Solicitor General: “When you say it is the world’s oldest profession and when you are not able to curb it by laws, why don’t you legalise it?”²²The court, presided over by a bench of two judges, said no legislation

anywhere in the world had successfully managed to stop the sex trade, and legalising it would allow authorities to “monitor the trade, rehabilitate and provide medical aid to those involved”²³

1. *HIV/ AIDS*: India has the third largest HIV epidemic in the world. In 2015, HIV prevalence in India was an estimated 0.26%.²⁴This figure is small compared to most other middle-income countries but because of India's huge population (1.2 billion) this equates to 2.1 million people living with HIV. In the same year, an estimated 68,000 people died from AIDS-related illnesses.²⁵

SEX WORKERS AND HIV/AIDS:

An estimated 2.2% of female sex workers in India are living with HIV, although this figure varies between states.²⁶

For example, one 2013 study cited HIV prevalence among sex workers in Maharashtra at 17.9%, Manipur at 13.1%, Andhra Pradesh at 9.7% and Karnataka at 5.3%.²⁷ Although sex work is not strictly illegal

²¹"Dutch Policy on Prostitution" Available at: <http://prostitution.procon.org/view.source.php?sourceID=003653> (last visited on March 18, 2017)

²²Prostitution Legal Debate, Available at: <http://www.dailypioneer.com/sunday-edition/sunday-pioneer/special/prostitution-legal-debate.html> (last visited on: March 18, 2017)

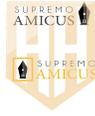
²³Supreme Court Proposes legalising prostitution, Available at: <http://www.livemint.com/Politics/1F4DWYUTdopzL2pwV8IhoK/Supreme-Court-proposes-legalising-prostitution.html> (last visited on: March 18, 2017)

²⁴Government of India, Report of the NACO,(Ministry of Health and Family Affairs,2015-16

²⁵ UNAIDS (2016) Prevention Gap Report, Available at: <http://www.unaids.org/en/resources/document/s/2016/prevention-gap> (last visited on: March 18,2017)

²⁶Government of India, Report of the NACO,(Ministry of Health and Family Affairs,2015-16

²⁷Apoorva, J. et al (2013) [‘Risky Behaviors among HIV-Positive Female Sex Workers in](#)



in India, associated activities such as running a brothel are. This means authorities can justify police hostility and brothel raids. [Stigma and discrimination](#) against sex workers restrict their access to healthcare. A 2011 study in Andhra Pradesh indicated a significant association between police abuse and increased risk of HIV transmission and inconsistent condom use.²⁸

1.2 TRUCK DRIVERS PAYING FOR SEX AND SPREAD OF HIV/AIDS:

A number of studies from India have reported high vulnerability of truckers to HIV transmission. NACO estimates that 2.59% of the two million truckers in India are living with HIV.²⁹ NACO also categorises truck drivers as a bridge population because truck drivers often have unprotected sex with high-risk groups such as female sex workers as well as their regular sexual partners, which increases the risk of transmitting HIV into the general population.

A 2012 study found 47% of truckers reported paying for sex, of whom only 40% had used a condom. Of those surveyed, 47% were unaware that HIV

could be transmitted through heterosexual sex.³⁰

1.3 There are enormous health benefits of Legalisation. Legalisation will reduce the transmission of sexually transmitted diseases. Giving sex workers more rights, and the tools they need to protect themselves, is a theory that has proven to work when put into practice.³¹ In the brothels of strict Singapore, every customer is provided with condoms as well as the facility to shower before and after the 'session'. Legalisation may also ensure that the prostitutes are also required to maintain health cards. Countries like Sweden and Norway have given prostitutes off the streets with new laws.³²

2. *Legalising prostitution will reduce violence against prostitutes:* "There is no doubt that deadly violence against sex workers is a recurring social pattern. Nor is there any doubt that serial killers know sex workers are afraid to seek protection from police; or that the public believe violence is part of a prostitute's job description. Until prostitution is legalized, these women will continue to toil down on the ocean

[Northern Karnataka, India](#)' AIDS Research and Treatment, Volume 2013.

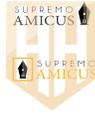
²⁸Erausquin JT., Reed E., Blankenship KM. (2011) '[Police-related experiences and HIV risk among female sex workers in Andhra Pradesh, India](#)' Journal of Infectious Diseases, Dec 1;204 Suppl 5:S1223-8

²⁹NACO, July 27, 2016, NACO (2015) '[Annual report 2015 -16](#)', (March 20.2017). Retrieved from: <http://naco.gov.in/documents/annual-reports>

³⁰ Nasir J. et al (2015) '[HIV/aids awareness; long distance truck drivers](#)' Professional Medical Journal 22(12):1580-1585.

³¹ Legalising prostitution will reduce HIV infections nearly in half, Available at: http://www.huffingtonpost.in/entry/legalizing-prostitution-hiv_n_5618887 (Last visited on: 18.06.2017)

³² Debabrata Roy, "Prostitution-A case for legalisation in India" 2 IJETST 3203-3207(2015)



floor, miles away from the light, in constant fear of predators."³³

It cannot be denied that there are sex workers who get physically abused or become victims of violence from their pimps and even clients. Women prostitutes in countries or states wherein it is considered illegal are less likely to report to the authorities when they get hurt. Therefore, **prostitution legalization will protect women for abuse and violence.**³⁴

3. *Basic labour rights can be granted to sex workers:* Legalisation would also translate into better work conditions and better wages for workers. Pimps and middlemen will gradually be eliminated. The job of the police will be to protect rather than extract 'protection money' from sex workers. The police can also then spend its time and resources tackling more serious issues than people having paid sex.
4. *Taxing of the billion dollar industry:* In countries like the Netherlands, prostitutes have been brought under the tax net. They pay their taxes like any other working citizen. In India, prostitution is estimated to be an 8.4 billion dollar industry. Taxing it would also enable the government to channel money back into the

profession, thus enabling it to protect the rights of sex workers better.³⁵

CONCLUSION:

Women are desired to be protected in the society but the sex workers are not treated at par with them. There is a social stigma attached to the labour of a sex worker. Legalisation can be asserted as a way to tackle the many problems that the prostitutes face in the sex industry. At last it should be questioned that what is more permissible in your basket of morals — two people consensually engaging in sex, or a large group of people suffering violence and death because of diseases?³⁶

³³Melanie Reid, former Columnist and Senior Assistant Editor of the *The Herald*, wrote in the Dec. 12, 2006 *The Herald* article, "Why are prostitutes allowed to be easy prey?"

³⁴ Legalisation of prostitution in India-Pros and Cons, <http://womennow.in/legalisation-of-prostitution-in-india-pros-and-cons/> (last visited on: March 18, 2017)

³⁵International Journal of Emerging Trends in Science and Technology, September 2015,

Prostitution-A case for legalisation in India,(March 18,2017),Retrieved from: <http://ijetst.in/article/v2-i9/11%20ijetst.pdf>

³⁶Prostitution as a Profession, <http://punemirror.indiatimes.com/columns/columnists/dushyant/prostitution-as-a-profession/articleshow/55881316.cms?> (last visited on : March 18, 2017)