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Legalization of Prostitution in India

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1. INTRODUCTION

According to the Immoral Traffic (Prevention) Act, 1956, 'prostitution' means the sexual exploitation or abuse of persons for commercial purposes.¹ Prostitution in India is a Rs. 40,000 crore annual business and thirty percent of the sex workers are children whose exploiters earn a whopping Rs. 11,000 crore.² According to a survey, there are approximately 10 million sex workers in India out of which 100,000 are in Mumbai alone, Asia's largest sex industry centre.³ There about 300,000 to 500,000 children in sex trade in India⁴ among which Bangalore along with five major cities together account for 80% of child prostitutes in the country.⁵ These figures are startling and point towards the importance of a genuine intervention of the State to curb this necessary evil.⁶

Prostitution has a long history in India right from the ancient times⁷ till the 19th Century⁸ in British India and a widely recognized social reality today. Indian Courts have also recognized "[P]rostitution in society has not been an unknown phenomenon... The victims of the trap are the poor, illiterate and ignorant sections of the society and are the target group in the flesh trade; rich communities exploit them and harvest at their misery and ignominy in an organized gangsterism, in particular, with police nexus..."⁹ It was also said that "[A] class of women is trapped as victims of circumstances, unfounded social sanctions, handicaps and coercive forms of flesh trade, optimised as 'prostitutes'."¹⁰

Throughout this research paper, the term 'sex worker' will be used wherever possible. The term 'prostitution or prostitute' may be referred to, however, when discussing case law or legislative text that has adopted this term. This research paper aims at exploring aspects of legalization of commercial sex work in India and whether it is a possibility in light of the various social and legal constraints that are existent in our country. The paper will start with a broad overview of the international legal framework with regard to prostitution, sexual exploitation and trafficking and the safeguards entailed within them. This international legal framework would include various

¹ § 2(f), Immoral Traffic (Prevention) Act, 1956 (hereinafter ITPA).

² S. Sridevi Goel, *Girl Child Prostitution, Society's Responsibility – Indian Scenario*, 7 CBI BULLETIN 14 (1999).

³ Robert I. Freidman, *India's Shame: Sexual Slavery and Political Corruption Are Leading to An AIDS Catastrophe*, The Nation, April 8, 1996 c.f. Donna M. Hughes et al, *Factbook on Global Sexual Exploitation*, Coalition Against Trafficking in Women (CATW), <http://www.catwinternational.org/factbook/india.php>.

⁴ Donna M. Hughes et al, *Factbook on Global Sexual Exploitation*, Coalition Against Trafficking in Women (CATW), <http://www.catwinternational.org/factbook/india.php>.

⁵ Robert I. Freidman, *Supra* note 3.

⁶ Asim Sarode, *Contesting legal positions on prostitution from a human rights perspective*, *Prostitution and beyond: an Analysis of Sex Work in India* (New Delhi: SAGE Publishers, 2008) 231.

⁷ See Sukumari Bhattacharji, *Prostitution in Ancient India*, 15 (2) SOCIAL SCIENTIST 32 (1987).

⁸ See Sumanta Banerjee, *The 'Beshya' and the 'Babu': Prostitute and Her Clientele in 19th Century Bengal*, 28 (45) ECONOMIC AND POLITICAL WEEKLY 2461 (1993).

⁹ *Gaurav Jain v. Union of India and others* AIR 1997 SC 3021 (K. Ramaswamy J.,).

¹⁰ *Id.*

conventions and treaties that India has ratified and the steps in respect of legalization that have been adopted by countries such as Netherlands, Sweden and Australia. This paper will consider such steps of legalization that could be implemented in India. After looking at the international legal framework, the picture in India with regard to the legal framework and ground realities will be considered including issues of inadequacy of the legal framework and misuse thereof. The decisions of the Supreme Court and various High Courts will be looked at where the problems of sex work have been contemplated and addressed. The directions of the National Human Rights Commission and National Commission for Women with regard to trafficking and the ITPA will also be looked into. The final chapter will include questions of legalization, decriminalization and total prohibition of commercial sex work; the effects of such legalization on our country, the policy changes to be brought in if commercial sex has to be legalized or if the current law should be strengthened leading to stricter regulation of the sector; the questions of individual rights and civil liberties of the sex workers including their right to employment, right against discrimination, voluntary prostitution *inter alia*; and analogy with other countries would be drawn where the steps of legalization and their drawbacks, backlashes will be answered. The Conclusion would contain a summary of the issues brought forth in the paper. This will be followed by a Bibliography. The paper will be limited to the question of legalization of commercial sex work and will not involve issues such as customary prostitution (the *Devadasi* system¹¹), Transgender Sex Work and Male Sex Work. The system of citation will be uniform throughout.

¹¹ See Moni Nag, *Anthropological Perspectives on Prostitution and AIDS in India*, 36 (42) ECONOMIC AND POLITICAL WEEKLY 4025, 4027 (2001).

2. INTERNATIONAL LEGAL FRAMEWORK

There are numerous international treaties and conventions that protect the interests and human rights of sex workers. Among them, the primary international treaty dealing with sex workers is the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.¹² This Convention reflects the Abolitionist¹³ view to the point that it has failed adequately to recognize the human rights of sex workers and that it is based on the promise that sex work should end and that all sex workers should be regarded as victims who must be saved from themselves and be rehabilitated.¹⁴ Under this Convention, it is an offence to procure or entice another person even with their consent into prostitution,¹⁵ to exploit the prostitution of that person even with their consent,¹⁶ state parties shall agree to punish any person who keeps or manages of finances a brothel¹⁷ or knowingly rents or lets a building or other place for purpose of prostitution.¹⁸

The most recent international instrument on the issue is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime¹⁹ but this has not yet been ratified by India and not in force so far. This Protocol criminalizes acts of receipt, transportation, harbour, recruitment, and transfer of persons; by means of use of force, abduction, threat of use of force, frauds, deception, and abuse of position of vulnerability; for purposes of prostitution, forced labour or other forms of sexual exploitation.²⁰ This protocol is still couched in language similar to the 1949 Convention and does as little to respect the rights and agency of women in the industry. It fails to draw a line between trafficking and forced prostitution on one hand and unforced prostitution on the other -- providing justification for criminalization and denial of basic rights of these workers.²¹ Similarly, the Slavery Convention of 1926²² and its Supplementary Convention of 1956²³ have some provisions relating to sex workers. Article 1 of the Supplementary Convention as including debt bondage and other forms of tied labour, under which the working conditions of sex workers may fall.

¹² 96 U.N.T.S. 271 (1949) [hereinafter 1949 Trafficking Convention].

¹³ The Abolitionist approach declares that the institution of prostitution itself constitutes a violation of human rights, akin to the institution of slavery. The Abolitionist approach requires governments to abolish prostitution through the penalisation of this 'third party', which profits from the transaction between prostitute and client. The prostitute cannot be punished, as she is the victim of a process she does not control. See Jo Bindman & J Doezema, *Redefining Prostitution as Sex Work on the International Agenda*, <http://www.walnet.org/csis/papers/redefining.html>.

¹⁴ Laya Medhini et al, *2 HIV/AIDS AND THE LAW* (New Delhi: Human Rights Law Network, 2007) 715.

¹⁵ Article 1 (1), 1949 Trafficking Convention.

¹⁶ Article 1 (2), *Id.*

¹⁷ Article 2 (1), *Id.*

¹⁸ Article 2 (2), *Id.*

¹⁹ G.A. Res. 55/25, U.N. G.A.O.R., 55th Session, U.N. Doc. A/RES/55/25, (2000) (hereinafter Trafficking Protocol).

²⁰ *Id.* Article 3 (a), Trafficking Protocol.

²¹ Laya Medhini et al, *Supra* note 14.

²² International Convention to Suppress the Slave Trade and Slavery, 60 L.N.T.S 253, 46 Stat. 2183 (September 25, 1926).

²³ Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery, 266 U.N.T.S 40 (April 30, 1956).

Apart from these, there are general international human rights instruments that are of importance for those working in the sex industry. A general overview of the respective contributions of the protections available under these instruments needs to be outlined. The fundamental international framework on human rights²⁴ protection is the Universal Declaration of Human Rights²⁵ (UDHR) and the other instruments that have become synonymous with protection of basic human rights of individuals are the International Covenant on Civil and Political Rights²⁶ (ICCPR) and the Convention on the Elimination of all forms of Discrimination against Women²⁷ (CEDAW) which is perhaps the best basis for the protection of sex workers.²⁸ The preamble of the UDHR affirms equal rights and dignities of men and women, right to life and liberty,²⁹ equal protection before law and right against all forms of slavery and servitude,³⁰ protection against arbitrary interference with privacy, family, home, or correspondence³¹ and of particular importance to sex workers is right to work, to free choice of employment and to just and favourable working conditions.³² Also significant is the right of each person to a standard of living adequate to food, clothing, housing, medical care and necessary social services.³³ Thus the UDHR outlines a series of very important rights and principles relevant to the protection of sex workers. ICCPR also reflects the similar rights with emphasis on right to freedom of association that needs to be in the interests of national security, public safety, the protection of public health and morals, or the protection of rights of others³⁴ and effective protection against discrimination to be granted.³⁵ Under CEDAW, there are provisions that deal specifically with trafficking and prostitution³⁶ and the right of free choice of profession and employment.³⁷ The Committee on Elimination of Discrimination Against Women, CEDAW acknowledged that poverty and unemployment can force many women into prostitution and that they are “especially vulnerable to violence because of their status, which may be unlawful, tends to marginalize them.”³⁸

²⁴ See generally Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action*, 13(2) HUMAN RIGHTS QUARTERLY 202 (1991).

²⁵ G.A. Res 217 A (III), U.N. G.O.A.R, U.N. Doc A/810, 171 (December 10, 1948).

²⁶ 999 U.N.T.S 171, 6 I.L.M. 368 (December 16, 1967).

²⁷ 1249 U.N.T.S 13, 19 I.L.M. 33 (December 18, 1979).

²⁸ Laya Medhini et al, *Supra* note 14 at 717.

²⁹ Article 3, UDHR.

³⁰ Article 4, UDHR.

³¹ Article 12, UDHR.

³² Article 23, UDHR.

³³ Article 25, UDHR.

³⁴ Article 22 (2), ICCPR.

³⁵ Article 26, ICCPR.

³⁶ Article 6, CEDAW.

³⁷ Article 11 (1) (f), CEDAW.

³⁸ United Nations Committee on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/47/3B (1992).

The International Labour Organization has addressed the issues of discrimination in employment and occupation³⁹, forced labour⁴⁰, occupational safety and health⁴¹ and protection of workers' health.⁴²

United Nations has come out with a handbook of guidelines⁴³ to provide examples of best practices of legislation in relation to prostitution and it contains many progressive provisions of relevance to the issue of sex work and also HIV. It says that regulation short of criminalization can also stigmatize the sex workers leading to human rights violations, by imposing restrictions on forced detention in rehabilitation *inter alia*. The handbook also criticizes prostitution laws as being founded on nineteenth century notions of morality, which were as ineffective as they are now in suppressing the industry. It recommends that an alternative approach of treating sex work as a personal service industry, which is neither condemned nor condoned and also removal of a range of offences in fear of prosecution and harassment by the police.⁴⁴

The above instruments if incorporated into domestic law could be a very strong weapon for the legislature, the courts as well as the concerned groups and individuals to ensure that all rights are upheld.⁴⁵

Regionally, India has ratified the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution⁴⁶ which acts as a combatant in prevention of trafficking and sexual exploitation but this has also been criticized.⁴⁷

Legal Framework of Other Countries:

1. Netherlands:

The current law regarding prostitution in Netherlands⁴⁸ legalizes brothels as long as they do not disrupt the public life and they will operate like any other commercial establishment. The law aims

³⁹ See Discrimination (Occupation and Employment) Convention, No. 111 (1958)

<http://www.ilo.org/ilolex/english/convdisp1.htm>.

⁴⁰ See Forced Labour Convention, No. 29 (1930) <http://www.ilo.org/ilolex/english/convdisp1.htm>.

⁴¹ See Occupational Safety and Health Convention, C155 (1981) <http://www.ilo.org/ilolex/english/convdisp1.htm>.

⁴² See Protection of Workers' Health Recommendation, R97 (1953) <http://www.ilo.org/ilolex/english/recdisp1.htm>.

⁴³ *Handbook for Legislators on HIV/AIDS, Law and Human Right: Action to combat HIV/AIDS in view of its devastating Human, Economic and Social Impact*, UNAIDS Best Practice Collection, UNAIDS/99.48E (November 1999)

http://www.ipu.org/PDF/publications/aids_en.pdf.

⁴⁴ *Id.*

⁴⁵ Laya Medhini et al, *Supra* note 14 at 719.

⁴⁶ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002, http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking___Prostitution.pdf.

⁴⁷ The main criticism levied against the SAARC Convention is its narrow definition of trafficking, which is limited to prostitution; also that it makes no distinction between women and children. Trafficking has been defined to include the moving, selling or buying of a person, but does not include recruitment, labour, transfer or receipt that does not essentially constitute buying or selling, See NHRC-UNIFEM-ISS Project, *A Report on Trafficking in Women and Children in India 2002-2003*, Volume 1, 248, <http://nhrc.nic.in/Documents/ReportonTrafficking.pdf>.

⁴⁸ Jo Visser, *The Dutch Law Proposal on Prostitution: Text and Explanation*, http://www.mrgraaf.nl/2_ef.htm; Ministry of Justice, *Press Release: Heavier Penalties for Abuse of Prostitution*, http://www.minjust.nl/8080/c_actual/persber/pb0121.htm.

to legalize the organization of voluntary prostitution and penalize involuntary prostitution characterized by coercion, exploitation and fraud for which imprisonment is guaranteed. Powers are vested with local authorities to control and regulate the conditions under which prostitution is permitted.⁴⁹ Sex work is organized in a variety of ways in Netherlands, for e.g. window prostitution, street sex work both of which work independently.⁵⁰ The tolerant nature of Netherlands portrays that sex workers have good working conditions which are similar to other industries – but reality is far from it. Even though public policy has taken a pragmatic approach towards sex work, they are victims of stigma, marginalization and bereft of human rights protection.⁵¹

2. Sweden:

The new legislation in Sweden criminalizes buying of sexual services. Its main aim is to reduce the numbers of sex workers and encourages them to retrain.⁵² It targets men as clients, that the sex workers and penalizes them with imprisonment. This approach has lead to collaboration of social services and law enforcement officials in sensitive treatment of the sex workers.⁵³ The aim is to contain socially unacceptable behaviour and to encourage the sex workers back into the mainstream of the society.⁵⁴

3. Victoria, Australia:

The Victorian government has continued to criminalize all forms of prostitution except for prostitution through escort services or licensed brothels (zoning and licensing requirements for brothels to be determined by the proper municipal authorities).⁵⁵ The Victoria experiment has failed for two reasons: firstly, because municipal authorities have control over issuance and revocation of licenses and due to community pressure legal brothels have existed in very small numbers.⁵⁶ This results in an increase in illegal prostitution as there is a limited opportunity to work at the legal brothels.⁵⁷ Secondly, because legal brothels are so limited, the brothel owners have substantial power in their hands to exploit sex workers who want to work legally (there is

⁴⁹ *Id.*

⁵⁰ Jo Bindman & J Doezema, *Supra* note 13.

⁵¹ *Id.*

⁵² Judith Kilvington et al, *Prostitution Policy in Europe: A Time for Change*, 67 FEMINIST REVIEW 78, 83 (2001).

⁵³ *Id.* at 85.

⁵⁴ *Id.* at 89.

⁵⁵ Martha Shaffer & Sylvia Davis, *Prostitution in Canada: The Invisible Menace or the Menace of Invisibility?*, <http://www.walnet.org/csis/papers/sdavis.html>.

⁵⁶ M. Neave, *The Failure of Prostitution Law Reform*, 21 AUSTRALIAN AND NEW ZEALAND JOURNAL OF CRIMINOLOGY 202, 203 (1988) c.f. Martha Shaffer and Sylvia Davis, *Prostitution in Canada: The Invisible Menace or the Menace of Invisibility?*, <http://www.walnet.org/csis/papers/sdavis.html>.

⁵⁷ Martha Shaffer & Sylvia Davis, *Supra* note 55.

a huge employment demand by such sex workers) and this has led to nefarious and horrible working conditions for these sex workers.⁵⁸

These three countries may be far advanced than India in terms of social structures and public moral definitions, but the cases for legalization have been considered purely for the basis of an analogical comparison and whether such systems could work in India.

⁵⁸*Id*; See also Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalization of Prostitution in Australia*, <http://action.web.ca/home/catw/readingroom.shtml?x=84641>.

3. INDIAN LEGAL FRAMEWORK

The laws governing sex work in India are entailed in the Constitution of India, 1950; the Indian Penal Code, 1860 and the Immoral Traffic (Prevention) Act, 1956. The Constitution apart from the equality provisions⁵⁹ and provisions of freedom of association,⁶⁰ right to life and personal liberty,⁶¹ guarantees prohibition of trafficking of human beings and forced labour.⁶² Under Part IV of Directive Principles of State Policy: the State is required to direct its policies towards securing, *inter alia*, that both men and women have an equal right to an adequate means of livelihood,⁶³ that health and strength of workers not be abused, and that citizens are not forced by necessity to enter avocations unsuited for their age and strength,⁶⁴ promotion of the educational and economic interests of weaker sections of the society, ensuring their protection from *social injustice and exploitation*(emphasis supplied),⁶⁵ requirement of fostering respect for international law and treaty obligations,⁶⁶ obligation on the state to raise the levels of standard of living⁶⁷ and the renunciation of practices by citizens that are derogatory to the dignity of women.⁶⁸ The Andhra Pradesh High Court has also affirmed that these combined duties are placed on the state and a corresponding right is placed on citizens including sex workers.⁶⁹

The Indian Penal Code has at least 20 provisions⁷⁰ that make trafficking punishable. Most of them deal with abduction for illicit intercourse,⁷¹ wrongful confinement after abduction⁷² *inter alia*.

The primary piece of legislation dealing with sex work is the Immoral Traffic (Prevention) Act, 1956 (hereinafter ITPA). The Act mainly makes pimping and other activities punishable, which gives a commercial aspect to prostitution that is likely to exploit the person of the prostitute.⁷³ The Act does not prohibit prostitution per se but it does prohibit commercial activities of the flesh trade.⁷⁴ It has been held that all that is necessary to in order to prove prostitution is that a woman or girl has offered

⁵⁹ The equality provisions are Articles 14 and 15 in Part III dealing with Fundamental Rights of the Constitution of India, 1950. Article 14 provides for equality before the law and equal protection of the laws; Article 15 prohibits the state from discriminating on the grounds of religion, race, caste, sex or place of birth, though it can make special provisions for women, children, “socially and educationally backward” classes, scheduled castes and scheduled tribes.

⁶⁰ Article 19(1), Constitution of India, 1950.

⁶¹ Article 21, Constitution of India, 1950.

⁶² Article 23, Constitution of India, 1950.

⁶³ Article 39 (a), Constitution of India, 1950.

⁶⁴ Article 39 (e), Constitution of India, 1950.

⁶⁵ Article 46, Constitution of India, 1950.

⁶⁶ Article 51, Constitution of India, 1950.

⁶⁷ Article 47, Constitution of India, 1950.

⁶⁸ Article 51 A (e), Constitution of India, 1950.

⁶⁹ *P.N.Swamy, Labour Liberation Front, Mahaboobnagar v. Station House Officer, Hyderabad* 1998 (1) ALD 755.

⁷⁰ §293, 294, 317, 339, 340, 341, 342, 354, 359, 361, 362, 363, 365, and 366, 370, 371, 372, 373, 375, 376, 496, 498, 506, 509, 511, Indian Penal Code, 1860.

⁷¹ §366B, Indian Penal Code, 1860.

⁷² §368, Indian Penal Code, 1860.

⁷³ Manoj Wad and Sharayu Yadav, *The legal framework of prostitution in India, Prostitution and beyond: an Analysis of Sex Work in India* (New Delhi: SAGE Publishers, 2008) 212.

⁷⁴ *Id.*

her body for promiscuous sexual intercourse for hire, and that sexual intercourse is not an essential ingredient.⁷⁵ Section 3 of the ITPA provides for the punishment of any person in charge of the premises who uses or knowingly allows someone else to use it as a brothel. From case law, it seems that even a single incident of prostitution, with surrounding circumstances, is sufficient to prove the offence of keeping a brothel.⁷⁶ Offences under the ITPA are under Sections 3 to 9.⁷⁷ It has been held in a couple of judgments that the ITPA did not aim to abolish prostitutes and prostitution as such, and did not make it per se a criminal offence for a woman to prostitute herself, but was rather intended to inhibit or abolish the commercialized vice of trafficking in women.⁷⁸ The Gujarat High Court in another case refused to recognize prostitution as a legitimate means of livelihood, as that would give an open invitation for women to be trafficked and also that the right to prostitution is not a fundamental right of women or girls.⁷⁹ The restrictions imposed under Section 7 of the ITPA were held to be legitimate and not discriminatory.⁸⁰ Under the ITPA, a Magistrate, if he deems it to be necessary, can order the removal of a prostitute from any place in the interest of the general public.⁸¹ The ITPA also allows for reformation of female offenders by detaining them in established corrective institutions⁸² and for the enforcement of which Special Police Officers can be appointed.⁸³ It is interesting to note that the client faces no punishment whatsoever.⁸⁴

The 2006 Bill⁸⁵ omits §8 of the original Act, thus removing the offence of soliciting or seducing for the purpose of prostitution, it also omits §20 of the Act regarding the removal of the prostitute from any place. However, the responsibility, on the flipside, and severity of punishment of traffickers and clients is increased. The newly proposed §5(c) provides for punishment of any person visiting a brothel for the purpose of sexual exploitation of any person. These proposals have been criticized as the livelihoods of the workers would be stifled by the increased punishments of the clients.⁸⁶

⁷⁵ *Gaurav Jain*, *Supra* note 9 at ¶ 16.

⁷⁶ *Id.*

⁷⁷ §3 provides for punishment for keeping a brothel or allowing premises to be used as a brothel, §4 provides for punishment for living on the earnings of prostitution, §5 provides for offences in procuring, inducing or taking persons for the sake of prostitution, §6 provides for detaining a person in premises where prostitution is carried on, §7 provides for offences regarding prostitution in or the vicinity of public places, §8 provides for seducing or soliciting for the purpose of prostitution, §9 provides for seduction of a person in custody: Immoral Traffic (Prevention) Act, 1956.

⁷⁸ *In Re: Ratnamala and Another v. Respondent* AIR 1962 Madras 31 ¶ 5; *Bai Shanta v. State of Gujarat* AIR 1967 Gujarat 211 ¶ 8.

⁷⁹ *Sahyog Mahila Mandal v. State of Gujarat* (2004) 2 GLR 1764.

⁸⁰ *Id.* at ¶ 9.5.

⁸¹ §20, ITPA, 1956; *See also* Prabha Kotishwaran, *Preparing for Civil Disobedience: Indian Sex Workers and the Law*, 21(2) BOSTON COLLEGE THIRD WORLD JOURNAL 161(2001).

⁸² §10A, ITPA, 1956.

⁸³ § 13, ITPA, 1956.

⁸⁴ Prabha Kotishwaran, *Preparing for Civil Disobedience: Indian Sex Workers and the Law*, 21(2) BOSTON COLLEGE THIRD WORLD JOURNAL 161, 170 (2001).

⁸⁵ The Immoral Traffic (Prevention) Bill, 2006.

⁸⁶ Laya Medhini et al, *Supra* note 14 at 734; --, Indian Sex Workers rally over law, BBC News, March 8, 2006, http://news.bbc.co.uk/2/hi/south_asia/4787580.stm.

PROBLEMS WITH LAW ENFORCEMENT AND INADEQUACY OF THE *ITPA*:

The core of the problem lies not in the loopholes of the ITPA, but in its corruption-riddled implementation.⁸⁷ The legislation meant to protect the exploitation of sex workers operates against them because the customer, without whom the act of prostitution cannot be committed, also goes scot-free.⁸⁸ This is the reason for the limited impact and the outreach of the legislation is very evident where the attitude of the police and even the judiciary has not been any different.⁸⁹ And as a result through raids the police frequently rounds up the female sex workers rather than the pimps, procurers, brother owners (“madam”).⁹⁰

The uneven enforcement of the ITPA against prostitute women is attributed to various causes: first that there is a strong collusion between elected representatives, law enforcement agencies and the brothel-keepers that impedes the strict implementation of the provisions of the Act⁹¹ and this collusion has to be busted and decimated.⁹² Corrupt officials in the law enforcement agencies are widespread.⁹³ An overhaul of the prevalent police procedures involved in ITPA cases and the scrutiny of their corrupt practices might bring about a more desirable effect.⁹⁴ For this purpose the sensitization of the police is a must.⁹⁵

The second persistent problem with the enforcement of the ITPA has been uncovered during field studies⁹⁶ and one such study confirms the complexity of collection of sufficient proof to make a conviction absolute.⁹⁷ Some police officers have said that there is an immense gap between the number of crimes committed in reality and the registration of crimes in the police records as many crimes that are reported are not registered (around 60 percent).⁹⁸

The third problem is with the reformatory (corrective and rehabilitative) homes that are set up under the Act and their inadequacy.⁹⁹ Such homes are overburdened and cannot accommodate the large number of sex workers who are convicted under the ITPA.¹⁰⁰ The rules for protective homes must compulsorily

⁸⁷ Harshad Barde, *(Mis)Reading through the lines, Prostitution and beyond: an Analysis of Sex Work in India* (New Delhi: SAGE Publishers, 2008) 227.

⁸⁸ Poonam Pradhan Saxena, *Immoral Traffic in Women and Girls: Need for Tougher Laws and Sincere Implementation*, 44 JILI 504, 523 (2002).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ P. Kotishwaran, *Supra* note 84 at 171

⁹² Poonam Pradhan Saxena, *Supra* note 88 at 527.

⁹³ P. Kotishwaran, *Supra* note 91.

⁹⁴ H. Barde, *Supra* note 87 at 227.

⁹⁵ P. P. Saxena, *Supra* note 92.

⁹⁶ P. Kotishwaran, *Supra* note 91.

⁹⁷ NHRC-UNIFEM-ISS Project, *Supra* note 47 at 249; Jean D’Cunha, *Prostitution in a Patriarchal Society: A Critical Review of the SIT Act*, 22 (45) ECONOMIC AND POLITICAL WEEKLY 1919, 1921 (1987); The ground realities of the legal framework have also been discussed in: Anil Awachat, *Prostitution in Pune and Bombay: A Report*, 21 (12) ECONOMIC AND POLITICAL WEEKLY 478 (1986) and Puja Yadav, *Ground realities of the legal framework, Prostitution and beyond: an Analysis of Sex Work in India* (New Delhi: SAGE Publishers, 2008) 229.

⁹⁸ NHRC-UNIFEM-ISS Project, *Supra* note 47 at 363.

⁹⁹ Jean D’Cunha, *Supra* note 97 at 1924; P. Kotishwaran, *Supra* note 91.

¹⁰⁰ NHRC-UNIFEM-ISS Project, *Supra* note 47 at 27.

provide for literacy and a range of vocational and occupational training based on the woman's aptitude and market value of the job; counselling which helps in redefining inmates as surviving human beings must be provided; and subsidised hostels and care homes must also be set up to house inmates discharged from homes.¹⁰¹

As opined by Justice Ramaswamy in the case of *Gaurav Jain v. Union of India and others*¹⁰² that “women found in flesh trade should be viewed more as victims of socio-economic circumstances and not offender of the society, some police authorities have already set out the process of sensitization towards the sex workers and their treatment.”¹⁰³

¹⁰¹ Jean D’Cunha, *Supra* note 97 at 1925.

¹⁰² *Gaurav Jain*, *Supra* note 9.

¹⁰³ Police IGP Circular (Bangalore, Mysore, Dharwad in Karnataka) under the ITPA, 1956, November 22, 2005. <http://altlawforum.org/Resources/sexwork/DG%20and%20IG%20Karnataka.pdf>.

4. ASPECTS OF LEGALIZATION

Three systems of prostitution-related laws have been formulated and applied¹⁰⁴ in legal strategies and these vary considerably both in effectiveness and appropriateness.¹⁰⁵ These systems are classified as: Criminalization, Decriminalization and Legalization¹⁰⁶ also known as Prohibitionist system, Tolerationist system and Legalized Prostitution.¹⁰⁷

The Criminalization or Prohibitionist system aims at changing criminal sanctions in order to control the social evil of prostitution and to countenance it by amending the criminal law.¹⁰⁸ It perceives prostitution as immoral and aims at its eradication for which it bans prostitution per se, by criminalising the activities of all categories of people involved in prostitution: brothel-keepers, pimps, procurers, clients and prostitutes.¹⁰⁹

Under Decriminalization or Tolerationist system, prostitution is not regarded as either a crime or a licensable activity; it is based on voluntariness and considered an act between two consenting adults where the role of the State is limited to eradicate coercive prostitution.¹¹⁰ The state can only bring in certain measures to curb excessive exploitation and preserve public health. This system does not seek to abolish prostitution per se but is only targeted at trafficking in women and girls for prostitution, brothel-keeping, pimping, procuring and renting premises for prostitution; here prostitutes are not criminalized for their work and they have more or less the same rights as other citizens in the society.¹¹¹

Decriminalization will enable sex workers to practice their work without police harassment; this is seen as a major issue with many sex workers in India.¹¹² It is at least a partial solution to some of the problems suffered by men and women within prostitution.¹¹³ Decriminalization is a way to protect workers' rights and to make the brothel owners responsible criminally.¹¹⁴ This approach of penalizing everyone involved in prostitution except for the sex worker works against her interest.¹¹⁵ Along with

¹⁰⁴ Jean D' Cunha, *Prostitution Laws: Ideological Dimensions and Enforcement Practices*, 27(17) ECONOMIC AND POLITICAL WEEKLY WS-34 (1992); For a general understanding of the USA policy on Prostitution, See B. J. George, Jr., *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*, 60(6) MICHIGAN LAW REVIEW 717 (1962).

¹⁰⁵ Frances M. Shaver, *Prostitution: A Critical Analysis of Three Policy Approaches*, 11(3) CANADIAN PUBLIC POLICY 493 (1985).

¹⁰⁶ *Id.*

¹⁰⁷ Jean D' Cunha, *Supra* note 104.

¹⁰⁸ Frances M. Shaver, *Supra* note 105 at 494.

¹⁰⁹ Jean D' Cunha, *Supra* note 107.

¹¹⁰ Frances M. Shaver, *Supra* note 108.

¹¹¹ Jean D' Cunha, *Supra* note 107.

¹¹² Geetanjali Gangoli, *Prostitution, Legalisation and Decriminalisation: Recent Debates*, 33(10) ECONOMIC AND POLITICAL WEEKLY 504,505 (1998).

¹¹³ *Id.*

¹¹⁴ Mellissa Farley, "Bad for the Body, Bad for the Heart": *Prostitution Harms Women Even if Legalized or Decriminalized*, 10(10) VIOLENCE AGAINST WOMEN 1087, 1090 (2004).

¹¹⁵ P. Kotishwaran, *Supra* note 84 at 184.

changes in maintenance of rehabilitative homes, the corrupt police and judicial authorities who demand sexual favours from sex workers have to be dealt with severely punished heavily.¹¹⁶

Finally coming to Legalization or regulation as it is sometimes called, attempts are made to license or register prostitutes and brothels and to require that prostitutes be monitored and checked for venereal diseases. The underlying assumption being that prostitution serves the different sexual needs of men and women and must be regulated so as to regulate its worst side-effects.¹¹⁷ “It permits for prostitution especially in 'closed houses', this system requires prostitutes to mandatorily register themselves with local authorities and submit them-selves to periodic health check-ups and receive a police clearance to work professionally, generally in officially designated areas. Legalisation is thus perceived as a means of ensuring 'public health' through regulation and control of prostitutes and their health, while permitting unfettered male access to women.”¹¹⁸ Prostitution as good economic development policy means prostitution on demand.¹¹⁹ The ILO suggests that by including prostitution as an economic sector, poor countries of South East Asia can benefit economically through the revenues generated by the industry.¹²⁰ Legalization makes more prostituted women available to more men.¹²¹

There is a lot of criticism of the system of legalization. “It has been suggested by some feminists that licensing and monitoring may not help sex workers to live and work with dignity. They feel that regulation leads to a division between legal and illegal sex workers, leading to further marginalisation of the latter. Many sex workers would not desire regulation as it may mean they will be publicly seen as prostitutes and an increase in control over the lives of these prostitutes would be demeaning to them and also the aspect of compulsory medical testing.”¹²² Many feel that legalizing prostitution is akin to legalizing child labour¹²³ and tantamount to slavery.¹²⁴ Some suggest that the social stigma regarding prostitution will fade away after legalization or decriminalization, yet the shame of those in prostitution remains after legalization or decriminalization.¹²⁵ “If brothels are to be legalized, the employees should be protected like any other workers under the appropriate provincial labour standards legislation. Regulation going beyond this minimum is likely to contribute to the continued stigmatization of prostitutes and to the institutionalization of yet another working ghetto for women.”¹²⁶

¹¹⁶ *Id.*

¹¹⁷ Frances M. Shaver, *Supra* note 108.

¹¹⁸ Jean D' Cunha, *Supra* note 104 at WS-35.

¹¹⁹ Janice C. Raymond, *Prostitution on Demand: Legalizing Buyers as Sexual Consumers*, 10(10) VIOLENCE AGAINST WOMEN 1156, 1162 (2004).

¹²⁰ *Id.*

¹²¹ *Id.* at 1163.

¹²² Geetanjali Gangoli, *Supra* note 112.

¹²³ P. Kotishwaran, *Supra* note 115.

¹²⁴ Frances M. Shaver, *Supra* note 105 at 497.

¹²⁵ Mellissa Farley, *Supra* note 114 at 1092.

¹²⁶ Frances M. Shaver, *Supra* note 124.

According to Janice G. Raymond of the Convention Against Trafficking in Women (CATW), in her article,¹²⁷ there are ten reasons for not legalizing prostitution have been mentioned. These ten reasons are:

1. *Legalization of prostitution is a gift to pimps, traffickers and the sex industry* because it will give legitimacy to the consumers (including third-party businessmen, brothel owners and pimps) of sex who would buy sex and would not be beneficial to the sex worker herself. Legalization will dignify only the industry but not the sex worker.¹²⁸
2. *Legalization of prostitution and the sex industry promotes sex trafficking* as there would be no method to ensure that immigrant sex-workers from other countries would voluntarily consent to their being a part of the sex industry. There is no definite mean to identify coercion or forced sex work.¹²⁹
3. *Legalization of prostitution does not control the sex industry.* It expands it. Prostitution as an industry would flourish with private entrants coming into the business. This would in turn increase the atrocities against which sex work was legalized in the first place. It could open doors for other forms of sexual exploitation such as phone sex, table-top dancing, peep shows, pornography, beer bars and so on.¹³⁰
4. *Legalization of prostitution increases clandestine, illegal and street prostitution* because many sex workers would not be eligible to register with the local authorities. Some could be minors, some could be illegal migrants, and some could have diseases such as HIV or other venereal diseases which would lead them to stay away from legalization. Many sex workers would therefore move underground and in turn contribute to illegal sex work and street prostitution.¹³¹ There are many dangers of working on the street which include rape, police abuse, and substance abuse also known as occupational hazards.¹³²
5. *Legalization of prostitution increases child prostitution* as research shows that after sex work was legalized in Netherlands and Victoria, Australia, child prostitution has grown exorbitantly and this leads to various forms of commercial sexual exploitation of children.¹³³
6. *Legalization of prostitution does not protect the women in prostitution* as there would be no safeguards against abuse during sexual contact. Legalization would instead benefit the client rather than the sex worker herself.¹³⁴

¹²⁷ Janice G. Raymond, *10 Reasons for Not Legalizing Prostitution*, [http://action.web.ca/home/catw/attach/10_Reasons_9-15-03_FINAL_\[1\].doc](http://action.web.ca/home/catw/attach/10_Reasons_9-15-03_FINAL_[1].doc); See also Janice G. Raymond, *Prostitution, Trafficking and Traumatic Stress* (Mellissa Farley ed., Binghamton: Haworth Press, 2003).

¹²⁸ *Id* at 1.

¹²⁹ *Id* at 2.

¹³⁰ *Id* at 4.

¹³¹ *Id* at 7.

¹³² Ilse Pauw and Loren Brener, *Naming the Dangers of Working on the Street*, 36 AGENDA 80 (1997).

¹³³ Janice G. Raymond, *Supra* note 127 at 8.

7. *Legalization of prostitution increases the demand for prostitution.* It encourages men to buy women for sex in a wider and more permissible range of socially acceptable settings. When such legal barriers disappear, the men forget their social and ethical barriers and view women as just sexual merchandise and this leads to commoditisation of women.¹³⁵
8. *Legalization of prostitution does not promote women's health* as it is necessary that the clients also need to be monitored for Sexually Transmitted Diseases such as HIV/AIDS. With such mandatory health check-ups in place only for the sex workers, there is no guarantee that they will be safe from contracting any disease during their work. The enforcement of a condom policy has also failed as it is left to the sex worker herself to decide whether she wants to practice safe-sex or not.¹³⁶
9. *Legalization of prostitution does not enhance women's choice* in terms of wages earned for their sex work. Most women do not make a rational choice of sex work to be their profession. Many are victims of trafficking and illegal pathways and land up in prostitution beyond their will. So, legalization would in turn deny them their freedom.¹³⁷
10. *Women in systems of prostitution do not want the sex industry legalized* as this would increase the risks and humiliation that is faced by the sex workers. They are definite that this would increase violence against them and they do not consider this to be their rightful profession as it destroys their life and health.¹³⁸

¹³⁴ *Id* at 9.

¹³⁵ *Id* at 10.

¹³⁶ *Id* at 11.

¹³⁷ *Id* at 13.

¹³⁸ *Id* at 15.

CONCLUSION

Legalization of Prostitution is not the best way to go forward in tackling the problem of human trafficking and the necessary social evil of prostitution. In India, with such diverse societal ingredients, sex work has survived in parallel with the society where it is looked down upon due to the degrading aspects of the profession. Sex Workers across the country, especially in major cities, have been largely limited to a particular area where thousands of sex workers live as a community. Provisions such as licensing, registration with local police and local municipal bodies will not be possible until the stigma attached with sex work is done away with. For this, the police need to be further sensitized to the field of sex work and they need to respect the human rights of such sex workers. The legislature first needs to provide all the basic human rights of these sex workers that are guaranteed under international law and municipal law. Their social conditions need to be uplifted; they have to be rehabilitated and trained to transfer to better paying jobs where they are given dignity and reasonable support. With legalization, the sex workers' problems will just worsen and prostitution will be further entrenched into our society without a way of getting out of it. A distinction needs to be made between sex workers who have taken up the profession voluntarily and sex workers who have been or are being forced into this profession. Both sections are to be looked after with the latter requiring immediate proactive support. They need to be given life insurance¹³⁹ and voter's rights.¹⁴⁰ Only when the complicity of the policemen and the brothel owners is broken off and the nexus between them is annihilated, will the sex workers have a say in their own matters.¹⁴¹ The best way to go ahead for India will be decriminalization of prostitutes and criminalization of brothel-owners along with penalizing demand in form of the consumer of sexual services.¹⁴² The sex worker needs to be rehabilitated with State protection and care and has to be relocated to another sector of the industry with proper training.

¹³⁹ --, India Sex Workers get life cover, BBC News, May 1, 2008, http://news.bbc.co.uk/2/hi/south_asia/7376762.stm.

¹⁴⁰ National Commission for Women has suggested that sex workers in red-light areas should be included in the voter's list as a proposal to amend the Immoral Traffic (Prevention) Act, 1956. <http://ncw.nic.in/page3.htm>.

¹⁴¹ P. Kotishwaran, *Supra* note 91; P. P. Saxena, *Supra* note 92.

¹⁴² Janice G. Raymond, *Supra* note 127 at 16.

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