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# LEGALIZATION OF SEX WORK IN INDIA: A COMPREHENSIVE ANALYSIS OF LAWS RELATED TO SEX WORK

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## ABSTRACT

Sex work in India is a complex and a multifaceted perplexity, characterised by ambiguities, inconsistencies and challenges that affect the lives of sex workers. This paper undertakes a comprehensive analysis of the existing legal framework governing 'Sex Work' in India, considering the intersection of human rights, public health, moral ethics and economic implications with the industry itself. The issues posed by such an ambiguous legal environment where sex work is criminalised, in that its affiliated actions are penalised and face legal consequences, are highlighted. The rights based and safety focused approach to sex work, drawing insights from international models like the Dutch system is explored and inspiration from Dutch policy have been taken, incorporating them in a comprehensive policy recommendation. This research paper seeks to offer insights with respect to the unique needs and challenges faced by sex workers in the Indian context and also seeks to provide policy recommendations for a more thorough and comprehensive legal framework so that a more equitable and a safer environment for sex workers is created, all whilst keeping the broader goals of the societal well-being and prevention of exploitation is prioritized.

**Keywords:** Sex Work, Legalization, India, Human Rights, Public Health

## **Introduction**

Sex work has been considered as the oldest profession of the world. However, that hasn't stopped the general public from stigmatizing it, the profession and specifically the people that work in it. This remains to be a complex and a contentious issue in contemporary India, where its legality is marked much by an intricate weave of societal, ethical, moral and legal consideration. In the midst of such uncertainty, a comprehensive analysis of law becomes of utmost importance so that implications of such law can be understood and actions can be taken. India's legal framework, remotely related to sex work is The Immoral Traffic (Prevention) Act, 1956 (herein referred to as ITPA), poses significant challenges, specifically with respect to definition of prostitution as well as Section which criminalises owning a brothel.

Human Rights and overall agency of women have been at the forefront of this issue. This paper contends that legalisation of sex work in India i.e., having regulations with respect to sex work would not only help in aspects of human rights and agency but also would have positive ethical and moral implications and would help in differentiate between 'prostitution' and 'sex work'

## **Research Problem**

Legalization and overall regulation of sex work remains a multifaceted problem in India, with law not being the only obstacle, but also societal and moral implications. It is contended that there is a definitional crisis with regards to the legislation Immoral Traffic (Prevention) Act, 1956 with respect to the terms 'Sex Work' and 'Prostitution'. Section 2(f) deals with the definition of the term 'prostitution', however there is no mention of the term sex work and thereby is not governed by any legislation. Similarly, there are problems with regard to owning brothels, criminalized by Section 3, which makes the upkeep of this profession difficult. This has therefore, necessitated this exploration of whether legalisation of sex work can help in regulation and thereby provide effective solutions to the challenges presented. It is necessary to analyze whether such legalization can harmonize interests, safeguard human rights, agency of women and public welfare while respecting ethical considerations.

## **Research Question**

What are the impacts of legalization of sex work in India, encompassing aspects of human rights, public health and labour laws of India?

## **Research Objective**

To conduct a multifaceted research in the area of sex work, analysing the municipal laws in India and also international frameworks with the aim of assessing the necessary implications of such laws, to provide a foundation for policy making providing for legalisation of sex work, encompassing human rights, public health and labour laws of sex worker.

## **Structure of the paper**

This paper would provide historical background and analysis of sex work and prostitution determining the scope and definition of both, while also looking into the history of sex work in India and its prevalence. A conceptual difference would be drawn between the terms sex work and prostitution, looking at its importance in the Indian context. Then a philosophical background would be given with respect to sex work, justifying it using a jurisprudential theory. An analysis would then be drawn of the legal framework pertaining to sex work which is the immoral trafficking prevention act where a few relevant sections and thereby inconsistencies would be pointed out. Some data would be given pertaining to sex work in India and the Dutch legislation pertaining to prostitution would be pointed out. This would be followed by an analysis of the data so provided in the paper pointing out the issues and challenges of legalising sex work in India and the current problems that the Indian context has. Finally, policy recommendations would be put forth so as to come out with thorough and comprehensive regulations to both, legalise sex work and regulate sexual exploitation.

## **Sex Work and Prostitution: Determination of Scope and Definition**

### **History of Sex work in India**

Prostitution as a profession has appeared in Hindu literature a few centuries after the Vedas, although it is contended that in society it has been existing much before. The process of prostitution must have been slow, varying from region to region. By a later time, prostitution was recognised as a social institution, a necessary evil it was called. Even early Buddhist literature, specifically the Jatakas, indicate the different categories of prostitutes and also provides information on their fees and their financial position in general. <sup>1</sup>The financial position simply has been explained as a simple matter of trade and commerce, of supply and

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<sup>1</sup> Sukumari Bhattacharji, Prostitution in Ancient India, Vol. 2, No. 15, Social Scientist, 32-61 (1987)

demand. In classical Sanskrit literature, references to courtesans have been made to be an indispensable part of city life. Courtesans performed different functions, vital to the state and were potential sources of political information, through the roles of spies and such.<sup>2</sup> For such institutionalized prostitution, old age pensions were offered once a courtesans passed a certain age and it was to be given by the state.

As for their social status, prostitution was recognised as a profession with laws in place regulating it. Since the profession had a specific purpose (as patriarchal it may be) and was also the state's mode to get revenue, laws had to be put in force for the same. Records have shown that some women, through their own modes of earning financed her own education, provided that she remitted some part of her revenue to the state.

Since the profession was regarded as a necessary evil, evil more magnified, the society ostracized the women but not their customers. Such double standard induced such women to live in uncertainty and fear regarding their payments and of torture, mutilation, molestation and death.

The Madras Legislative Assembly banned prostitution in 1929 and ultimately it was banned all over India in 1947, it still persists in pockets, some very large pockets, all over the country.

Currently, sex work is still rampant, and although it is not explicitly legal in the language of the act, it is done. As will be explained in later sections, there are definitional crisis in the ITPA and certain sections prevent sex work by affecting ancillary activities, such as owning brothels etc. Such gaps in laws itself and also between law and enforcement of such, has not helped in the betterment of the trafficking situation, as was promised by the objective of the act itself.

### **The 'conceptual' difference between Sex work and Prostitution**

At this point in the paper, it is pertinent to mention the difference between the terms 'prostitution' and 'sex work'. Although used interchangeably, in India, the definition of prostitution in the current legislation is "the sexual exploitation or abuse of persons for commercial purposes". It makes it clear that prostitution is the exploitation for sexual purposes and not consensual sex work. Prostitution in other parts of the world would mean consensual

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<sup>2</sup> Id, pg 49

sex work, for a consideration, as a proper contract. Hence for the purposes of this paper, and for a better understanding the term “prostitution” would mean exploited sex work, as per section 2(f) of the Act<sup>3</sup> and term “sex work” would be used in the context of voluntary entry to the profession.

Another very pertinent notion to mention here is that sex work here is taken as a female phenomenon. Although other sexes and genders do participate in such a work, it is largely seen conventionally as one where female participation is large. Despite the existence of male and transgender sex work, female sex work is so due to cultural and structural factors which account for gender roles and gender trait stereotypes.<sup>4</sup> Thereby, as mentioned male sex work is perhaps more limited and lesser institutionalized, as compared to female sex work.

### **Data on Sex Workers**

Majority of the existing data on sex workers, including their population size and their living conditions generally come from the point of view of AIDS, where the transmission of this disease is being discussed. A resident of Delhi, Ved Pal, had filed an RTI in 2009 to the central government which sought to ask what steps the central government were taking to rehabilitate them. The government in the reply, had given data on the number of “registered” sex workers in the country under the Ministry of Health. The reply states that there were 6,88,751 “registered” sex workers in India, with the southern part of the country leading the numbers. Andhra Pradesh had the highest, with more than 1 Lakh sex workers. Karnataka was second, subsequently followed by Tamil Nadu, Maharashtra and West Bengal. The Ministry also revealed that it was not mandatory for them to have a health certificate, which raised high concerns. Ved Pal did not ultimately get a satisfactory reply to his question, indicating that not a lot is being done by the government for the rehabilitation of sex workers.

According to the National AIDS Control Programme III (NACP III)<sup>5</sup>, a study launched in India to oversee the epidemic of AIDS in India by the Ministry of Health, there are 12.63 lakh Female Sex workers in India. This study was done by having 1691 Targeted Interventions by the NACP III, to have a coverage of the population to gather the data. Out of these more than 6000 sex

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<sup>3</sup> The Immoral Traffic (Prevention) Act, 1956, § 2(f), No. 104, Acts of Parliament, 1956 (India).

<sup>4</sup> JEAN D’CUNHA, THE LEGALIZATION OF PROSTITUTION 12 (Wordmakers 1990)

<sup>5</sup> Bal Rakshase, Priyanka Dixit, P. Saravanamurthy, Vinita Verma Shobini Rajan, Identifying Changing Trends In The Sex Work Dynamics Among Female Sex Workers (Fsws) In India, NACO 2013, Ministry of Health and Welfare

workers have been subject to violence, physical or otherwise (National Crime records Bureau Report 2020-21). According to a recent study involving 3000 sex workers, it has been found that a substantial number have opted for sex work for better income and for a livelihood opportunity.

### **Analysis of Legal Framework Pertaining to Sex Work**

India's law with respect to sex work is as ambiguous and weak as it can be. This section of the paper highlights the problem in the ITPA, which includes the definitional inconsistencies as well as sections that make sex work very difficult as a profession.

Section 2(f) of the ITPA<sup>6</sup>, defines what prostitution is. It very clearly states that prostitution is the "sexual exploitation" or the "abuse of persons" strictly for "commercial purposes". This becomes the first line of contention outlined in this paper. This is the reason the differentiation between prostitution was made clear at the beginning of the paper. Although around the world, the terms "prostitution" and "sex work" are used interchangeably, it is impertinent that this is not the case here. Hence the definitional crisis. The terms "sex work" and thereby "sex workers" are not construed in the definitions, therefore exclusion is noticeable here. Sex work in a very technical sense, is thereby not included in the act and leaves ambiguity in terms of the governance of the same. Although not related to sex work, but the inconsistency of the act also goes so far as the act isn't clear as to what it penalises, the engagement in prostitution or the trafficking of persons for prostitution.

Section 2(a) defines what a brothel<sup>7</sup> is, and is in line with what prostitution is, in that it mentions that a brothel is a place "used for the purposes of sexual exploitation or abuse". No definition of a term is construed for a place wherein voluntary sex work can take place. The act is amiss in the sense that it only limits the happening of prostitution, or in this paper's argument sex work, to only one place, namely brothel. Then, technically according to the act, prostitution cannot take place outside of a brothel.

Section 4 of the ITPA<sup>8</sup> provides for "punishment for living on the earnings of prostitution." A distinction here between the words "on" the earnings and "off" the earnings is pertinent to be

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<sup>6</sup> The Immoral Traffic (Prevention) Act, 1956, § 2(f), No. 104, Acts of Parliament, 1956 (India).

<sup>7</sup> The Immoral Traffic (Prevention) Act, 1956, § 2(a), No. 104, Acts of Parliament, 1956 (India).

<sup>8</sup> The Immoral Traffic (Prevention) Act, 1956, § 4, No. 104, Acts of Parliament, 1956 (India).

made. Because of this section, there is punishment for all the people living off of the earnings of a prostitute (this applies to a sex worker), without an exclusion for the legal heirs or children of the sex worker. This section questions the sheer fact of the sex worker being the sole breadwinner of the house.

Section 8 penalizes<sup>9</sup> “seducing or soliciting for the purposes of prostitution”, be it from a house or a window of one. This is a glaring deficiency in the act, as will be analyzed later on.

The ITPA also punishes female offenders by “detention in a corrective institution”, which also goes against the right to profession.

### **Analysis of International Legislation: The Legislation of Netherlands**

For an international territorial jurisdiction example, this paper looks into the law of the Netherlands with respect to prostitution. The reason that Netherlands is chosen for the comparison is largely two-fold. Firstly, Netherland’s laws related to prostitution (here prostitution is used as the international accepted definition of prostitution i.e., voluntary sex work) has gone through the same trajectory as the Indian law has, but one step further. Prostitution in the Netherlands was considered to be illegal and abolished by law. Then, during the second of the 20th century, a lot of local governments, although condoned, were tolerated and there was police intervention only when public order was at stake or there were cases of human trafficking.

There were however some groups or organizations which supported prostitution had started advocating for it, such as The Red Thread, and they also worked against the stigmatization of prostitutes. However, such rules like banning entry in brothels made the profession very difficult.

In the 1990s, the Dutch government had conducted a survey in which 73% of the Dutch population was in favor of legalization of brothels and in a 1999 poll 78% of the population felt that “prostitution is a job like any other job”.

The Dutch government legalized prostitution in 2000, and gave women “work permits” for the same. The Dutch cabinet lifted bans on brothels, and more importantly made all forms of

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<sup>9</sup> The Immoral Traffic (Prevention) Act, 1956, § 8, No. 104, Acts of Parliament, 1956 (India).

exploitation within prostitution punishable by law. Minors under no circumstances were allowed in the profession, and involuntary prostitution, i.e., exploitation in the field was made a punishable offense and the penalisation was made highly severe.

A very interesting aspect of Netherland's policy is that each municipality is given some freedom to contribute to the prostitution policy, even if there is no prostitution within their municipality. There is a "model bye-law" given by the Association of Dutch Municipality, to which a specific municipality can give form to their local policy.<sup>10</sup>

### **Analysis: Issues and Challenges**

The most glaring deficiency in the ITPA is that 'sex work' and 'prostitution' is not defined. As mentioned previously, it is absolutely impertinent to make this distinction. This is because, in the absence of such a definition, there is no law that deals with voluntary sex work and thereby no regulations for the same. With no regulations for sex work, it makes the exploitation much easier in the field. When sex work is banned, only ethical sex work is banned. With no regulations for sex work, the problems in the field goes undetected and when prostitution is banned, there is still a large number of exploitations, not only commercial, goes absolutely undetected.

In line with the same argument, there needs to be a clear-cut definition of the terms "sex workers" and "trafficked victims" in order to distinguish between the two, so there is a difference between who is a victim and who isn't.

This difference is needed to also distinguish between living off of earnings and living on the earnings of a sex worker. The financial exploitation that is or can be done by a manager or a pimp is what should be penalized under this section. However, the legal heirs, children or relatives living on the earnings of the sex worker is something that shouldn't be penalized because it includes situations wherein the sex worker is the sole earning person of the family, and that makes the being in the profession difficult.

As seen in the Netherland's policies in the way they shaped their policies, legalisation of sex work has been done gradually, i.e., they went from an abolitionist system to a tolerationist

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<sup>10</sup> A.L. Daalder, Prostitution in the Netherlands since Lifting of the Brothel Ban, WODC (2007)



system and then finally to accepting and legalization of it. India, currently is in its tolerationist stage and requires a few steps additionally in order to legalize and thereby regulate it.

Multiple obstacles stand in the way of legalising sex work in India. These problems range all the way from social stigma to health concerns to economic problems, and only a comprehensive framework can solve these problems. The problems that may rise in the legalisation of sex work are firstly, human trafficking. Legalising sex work would have to result in more stringent measures to combat sexual exploitation, commercial or otherwise and this can only be done with proper implementation of the ITPA act. Secondly, social stigma and morality play huge role in the acceptance of sex work as a profession. Sex work is seen as immoral in the Indian society and there is a strong stigma associated with it, which may result in resistance from conservative segments of society who may consider it incompatible with traditional values. Thirdly public health concerns would be on a rise. Fourthly there might be economic vulnerability or sex workers. These problems would be addressed in the policy recommendation section of this paper.

### **Comparison between Indian and Dutch Jurisdiction: Lessons Learnt**

While comparing these two territorial jurisdictions, India and Netherlands, there are a few lessons that India can take while shaping laws on sex work and thereby regulating it. Firstly, removing penal measures against brothel operators, clients and most importantly against sex workers what facilitate voluntary sex work. This would help reduce the vulnerability of sex workers in exploitation and would actually encourage how there are no penal measures against them. Secondly, the health and safety of sex workers should be prioritized. This can be done by implementing regular health check-ups, mandatory condom uses and access to healthcare services. Thirdly recognising sex work as a legitimate form of employment by providing its employees employment rights such as social security benefits would Not only advance the rights of sex workers that also encourage them to participate whenever they want to voluntarily, without fear of arbitrary executive actions. Fourthly, brothels should be regulated and should be considered as an establishment with licence and regulations where sex work can be conducted in a safe and transparent environment and the licensing process should be strict. Fifthly, collaboration with stakeholders in order to be sensitive to the needs of sex workers and the broader community should be something that is to be encouraged so that one sided opinion isn't taken and there can be holistic development and approach to policy making.

## **Policy Recommendations**

As for policy recommendations, a more comprehensive, extensive, thorough and unambiguous legislation is necessary. The following are a few policy recommendations that are adequate and conscientious so far as legalisation and regulation of sex work.

The first and foremost policy recommendation would be a clear-cut definition and differentiation between sex work and prostitution. The term prostitution has already been defined as "commercial sexual exploitation", the term sex work should be defined as voluntary engagement in sexual conduct for a consideration, agreed upon by both parties. Such an unambiguous definition would lead to not only legalisation of sex work but also would lead to navigating through trafficking victims and cases in a consonant manner, since now there is a thorough definition.

As far as definitions go, having another term and a definition for the term brothel would clarify the difference between a place where commercial sexual exploitation is happening and a place where voluntary sexual exchange is happening.

Regulating and licensing the sex work industry would not only lead to all the places following similar directives, but would also lead to authorities having full information on such places where sex work is being carried out. These details can be used in tracking down such places in case illegal activities do take place.

Secondly, recognising sex work as a legitimate form of employment in granting sex workers employment rights such as access to social security benefits, minimum wage, minimum working hours and right to labour unions so that their grievances can be heard is something that can empower sex worker in carrying out their profession without uncertainty.

Thirdly, giving licenses to sex workers would ensure involuntary participation does not take place and only adults are involved. This would also ensure that minors aren't exploited and there by child trafficking is reduced

Fourthly, providing health services such as regular health check-ups and mandatory testing for STDs, STIs and AIDS, to be done by recognised health clinics and health services so that the health of sex workers and their clients are protected. It is however of utmost importance that

these health check-ups are done in recognised institutions so that there is no illegal checking that takes place. Checking for accidental pregnancies should also be done. Promoting safe sex practices and condom use should be a priority for such an industry and penal actions for not following so should be established with strict penalties.

Sex workers should be given the legal rights and the recognition to be able to complain about any exploitation done by their clients, or any action done by their clients which was either involuntary or not agreed by the sex worker. This would not only empower sex workers but also would help in reducing stigma related to their profession.

Adequate social services should be provided for rehabilitation, in case a sex worker wants to leave the industry, have access to education vocational training and job opportunities.

Lastly, public awareness and education to reduce stigma and discrimination against sex workers should be conducted so that there is a better understanding of the challenges that sex workers face and the rights and well-being is known to the public and the workers themselves.

## **Conclusion**

A comprehensive study of the laws relating to sex work in India thereby reveals a complex landscape which is marked by ambiguities inconsistencies and challenges that continue to impact the lives of sex workers. The issues surrounding sex work intersect human rights, public health, law and morality, which makes it imperative to consider the implications of legalising sex work in India. since challenges are multitudinous, there is a growing need for a more rights based and transparent model to approach the legalisation of sex work in India. Learning from the Dutch model, there is a strong emphasis on the rights and the safety of sex workers, including labour protections while prevention of exploitation and human trafficking and health services are given priority.

The complexity in legalising sex work in India is deeply rotate in cultural societal and historical factors however with thoughtful and comprehensive policy changes it is possible to strike a balance between safeguarding rights and wellbeing of sex workers and addressing the broader concerns of the society, including public health and exploitation.

As mentioned above, with a growing debate of legalising of sex work in India, It is absolutely

essential that lessons are learnt from other countries which have similarly legalised prostitution all whilst engaging with the stakeholders in developing a regulatory framework that respects the unique needs and challenges in the Indian context. In doing so, a more effective solution of sex workers while upholding the values of society would be done and just society will stay its course.

The journey towards legalising sex work in India is undoubtedly complex one, however it holds the potential to create a more equitable and safer environment for sex workers in India and upholds their rights which is the ultimate goal of welfare society such as this country.