

New Zealand And India's Policy In Reference To Sex Workers: A Comparative Study**Ms. Riya Kanwar^{1*}, Dr. Kiran Raj²**

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Abstract

This paper mainly describes about the analysing of the policies and the legal system prevailing in New Zealand as compared to India. The clear picture that emerges is that the nations which have adopted a regulatory system they have done better at all fronts. By following this system these countries have adopted a practical outlook wherein they have realized that adult commercial consensual sex should be legally permissible within reasonable controls imposed by the State. Such a system helps improve the lot of sex-workers to a great extent, it brings them into the mainstream of the society, prevents their exploitation and more successfully tackles problems such as child prostitution and forced sexual work. On the other hand, India use to follow repression to repress prostitution by forbidding its blatant manifestations. This is as per the 64th report of Law Commission of India on the SITA, 1956. At that time India was following repression as a legal approach and after ITPA,1956 laws related to sex work in India is working under toleristic approach but not a total tolerance, where the act done in private by sex worker is permitted and every other thing associated to it are illegal and punishable. The intent behind this approach is to criminalise the organizers of the sex trade but not the sexworkers themselves.

Key Words: ITPA 1956, Sex Workers, New Zealand.

INTRODUCTION

Sex work and sex workers are not in any way an indigenous phenomenon. As stated earlier the profession of sex-work is a universal phenomenon to be found in all societies and all nations of the world. Different countries have adopted different models to handle this profession. Some countries follow the model of suppression wherein everything associated with sex-work along with the actual act of intercourse is declared illegal. The other model is the tolerationist model wherein some activities associated with sex-work are declared illegal while others including the actual sexual act itself is legal. Still other countries follow the regulatory model wherein the government regulates the profession mainly by way of licensing and laying down strict conditions to be followed, for carrying on or the profession off sex-work.

NEW ZEALAND

New Zealand, which is an island country located in Southern Hemisphere in the East of Australia has also revamped its laws relating to sex-work or prostitution. There used to be a long standing demand by the New Zealand prostitute's collectively for a new law on prostitution and majority of their demands were met by the Government of New Zealand when they passed the Prostitution Reform Act on 25th June, 2003. The new Act is designed to:

- (a) To safeguard the human rights of sex-workers and protecting them from exploitation.
- (b) Promoting the welfare and occupational health and safety of sex-workers.
- (c) Be responsible to public health.
- (d) Prohibit the use of prostitution of persons under 18 years of age.

(e) Implement certain other related reforms.¹

This Act in fact has replaced the old law under which the following activities associated with sex-work were illegal and punishable: (which is very much similar to Indian present law)

- (a) Soliciting for the purpose of prostitution (upto £ 200 fine)
- (b) Keeping a brothel (upto 15 years in prison)
- (c) Living on the earning of prostitution (upto 15 years in prison)
- (d) Procuring anyone for the purpose of prostitution (upto 7 years in prison)²

All these penal provisions of the old law which was based on pure tolerationist model have which now have been done away with. The new law in the form of Prostitution Reform Act, 2003 is more practical, sex-worker friendly and reform oriented. In fact, Section 3 of the Act sets out the purpose of enacting this law. The language of section 3 runs as under:

The purpose of this Act is to de-criminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that -

- (a) Safeguards the human rights of sex-workers and protects them from exploitation.
- (b) Promotes the welfare and occupational health and safety of sex-workers.
- (c) Is conducive to public health.
- (d) Prohibits the use in prostitution of person under 18 years of age.
- (e) Implements certain other related reforms.³

Important Points of the Prostitution Reform Act, 2003

A sex-worker has a right to refuse to have sex with a client for any reason or for no reason. No one including managers, receptionists, clients, other-workers, etc. can force the sexworker to have sex with a client, even if he has paid. This, of course does not take away the right of the client to sue for damages for non-performance of the contract. The relevant section which talks about this aspect is section 17 of the Prostitution Reform Act, 2003 (hereinafter referred to as the Act) which runs as under:

Section 17. Refusal to provide Commercial sexual service.

- (i) Despite anything in a contract for the provision of commercial sexual services, a person may at any time, refuse to provide or to continue to provide, a commercial sexual service to any person.
- (ii) The fact that a person has entered into a contract to provide commercial sexual services does not of itself constitute consent for the purposes of the criminal law if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service.
- (iii) However, nothing in this section affects a right (if any) to rescind or cancel, or to recover damages for a contract for the provision of commercial sexual services that is not performed.⁴

(b) A person cannot be coerced (induced or compelled) into having sex by having money taken off from them (i.e. fined etc) or threatened in any way. The relevant provision in section 16 which runs as under:

Section 16: Inducing or compelling persons to provide commercial sexual services or earnings from prostitution:

- (i) No person may do anything described in sub-section (2) with the intent of inducing or compelling another person (person A) to provide or to continue to provide, commercial sexual services to any person or to (b) provide, or continue to provide, to any person any payment or other reward derived from commercial sexual services provided by person A.
- (ii) The acts referred to in sub-section 1 are any explicit or implied threats or promise to any person (person B) will -
 - (a) improperly use, to the detriment of any person, any power or authority out of -
 - (1) any occupational or vocational position held by person B or
 - (2) Any relationship existing between persons A and B.

¹ Comments on Prostitution Reforms Act, 2003 available at www.nzpc.org.nz.

² *Ibid.*

³ Text of the Act available at www.justice.govt.nz

⁴ Prostitution Reforms Act, 2003 available at www.nzpc.org.nz.

- (b) Commit an offence that is punishable by imprisonment.
- (c) Make an accusation or disclosure (whether true or false)
- (1) of any offence committed by any person, or
- (2) of any other misconduct that is likely to damage seriously the reputation of any person or
- (3) that any person is unlawfully in New Zealand:
- (d) supply or withhold supply, of any controlled drug within the meaning of Misuse of Drugs Act, 1975:
- (iii) Every person who contravenes sub-section (i) commits an offence and is liable on conviction to imprisonment for a term not exceeding 14 years.⁵
- (c) One does not have to register with the police, or even contact the police, if he/she wishes to be a sex-worker in New Zealand. Under the old laws, Massage Parlours were required to keep a register of names, with identifying details, which were to be given to the police for inspection upon request. In some areas, people working privately had to register with the police before they could advertise in the local newspaper. This is no longer the case.⁶
- (d) Operators, clients and sex-workers must all take reasonable steps to ensure a prophylactic sheath (condom) or other appropriate barrier is used if those services involve vaginal, and or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections. Failure to do so can mean a hefty fine. This essentially means that everyone should use a condom and/or dental dam for vaginal, oral and oral sex.⁷ The relevant section which talks about this aspect in section 9 of the Act which runs as under:
- Section 9 : Sex-workers and clients must adopt safer sex-practices-
- (i) A person must not provide or receive commercial sexual services unless he or she has taken all reasonable steps to ensure a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, and, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections.
- (ii) A person must not, for the purpose of providing or receiving commercial sexual services, state or imply that a medical examination of that person means that he or she is not infected, or likely to be infected, with a sexually transmissible infection.
- (iii) A person who provides or receives commercial sexual service must take all other reasonable steps to minimise the risk of acquiring or transmitting sexually transmitted infections.
- (iv) Every person who contravenes sub-section (1) sub-section (2) or sub-section (3) commits an offence and is liable on summary conviction to a fine not exceeding \$ 2,000.⁸
- (e) A brothel is a place that is habitually used by just one sex worker or more for commercial sex activities with clients. All brothels must display health promotion messages. Section 4(a) defines brothel as any premises kept or habitually used for the purposes of prostitution but does not include premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere.
- (f) Operators are required to have 'operator certificates'. An operator is any person who has any form of control over a sex-worker. This includes owners, directors of companies, managers and may include receptionists. Section 5 defines operator as:
- Section 5 : Definition of Operator
- (i) In this Act, 'operator' in relation to the business of prostitution means, a person who, whether alone or with others owns, operates, controls or manages the business and includes (without limitation) any person who -
- (a) is a director of a company that is an operator, or
- (b) determines -
- (1) when or where an individual sex-worker will work, or

⁵ *Ibid.*

⁶ Comments on sex work in New Zealand available at www.nzpc.org.nz.

⁷ *Ibid.*

⁸ Prostitution Reforms Act, 2003 available at www.nzpc.org.nz. ¹¹ *Ibid.*

(2) the conditions in which sex-workers in the business work, or
(3) the amount of money, or proportion of an amount of money, that a sexworker receives as payment for prostitution or

(c) is a person who employs, supervises, or directs any person who does any of the things referred to in paragraph (b)

(ii) Despite anything in sub-section (i) a sex-worker who works at a small owner operated brothel is not an operator of that business of prostitution and for the purposes of this Act, a small owner-operated brothel does not have an operator.⁹

Section 34 makes it clear that every operator of a business of prostitution (other than a company) must hold a certificate issued under section 35. Sub-section 2 of section 34 makes it a penal offence with a fine up to \$ 10,000 for every person who is required by sub-section (1) of section 34 to hold a certificate, does not hold that certificate.¹⁰

(g) Up to four sex-workers can work together and do not need an operator's certificate, so long as no one is in charge of anyone else, or working as a boss. If there are more than four sexworkers working together, as equals, one will have to apply for an operator's certificate.¹¹

(h) There are restrictions imposed by this Act on advertising by the operators or by the sexworkers themselves. Section 11 talks in detail about the said restrictions.

Section 11 : Advertising Restrictions.

(i) Advertisements for commercial sexual services may not be -

(a) broadcast on radio or television, or

(b) published in a newspaper or periodical, except in the classified section of the newspaper or periodical, or

(c) screened at a public cinema.

(ii) A person who does any of the things described in sub-section (1) or who authorises any of the things described in that sub-section to be done, commits an offence and is liable on summary conviction to -

(a) in the case of a body corporate, a fine not exceeding \$ 50,000 and (b) in any other case, a fine not exceeding \$ 10,000.

(iii) In this section advertisement means any words, or any pictorial or other representation, used to notify the availability of or promote the sale of commercial sexual services, either generally or specifically.¹²

(i) Councils have the right to make by-laws affecting the signage and location of brothels, but cannot ban brothels outright. Some councils have zoned brothels to certain areas. Some councils also have home based-occupation rules affecting anyone who works from home. Awareness of the by-laws in a particular area before thinking of establishing a brothel or practising prostitution in that area is a must.¹³ It is sections 12, 13 and 14 of the Act which discuss the various aspects of making bye-laws regulating signage and location of brothel.

(j) Section 18 of the Act says that a person's benefit; or entitlement to benefit, under the Social Security Act, 1964 may not be cancelled or affected in any other way by his or her refusal to work, or to continue to work as a sex-worker. Sub-section (2) says that a person's entitlements under the Injury Prevention Rehabilitation and Compensation Act, 2001 may not be lost or affected in any other way by his or her being capable of working as a sex-worker, if he or she refused to do, or to continue to do, that kind of work. Sub-section (3) says that refusal under this section means a refusal to do this kind of work in general, rather than refusal for particular job or at a particular time.¹⁴

(k) Medical Officers of Health Department have been designated as Inspectors for the purposes of this Act. Section 24 of the Act says that the purpose inspection of an Inspector will be for determining whether or not

⁹ Available at sexinz.co.nz

¹⁰ Prostitution Reforms Act, 2003 available at www.nzpc.org.nz.

¹¹ *Ibid*

¹² *Ibid*

¹³ *Ibid*

¹⁴ Prostitution Reforms Act, 2003 available at www.nzpc.org.nz.

a person is complying, or has complied, with section 8 or 9. Section 26 gives power to Inspectors to enter and inspect compliance with health and safety standards. It runs as under:

Section 26

(i) An Inspector may, at any reasonable time, enter premises for the purpose of carrying out an inspection if he or she has reasonable grounds to believe that a business of prostitution is being carried out in the premises.

(ii) For the purposes of the inspection, the Inspector may-

(a) conduct reasonable inspections.

(b) take photographs and measurements and make sketches.

(c) Require any of the following persons to provide information or assistance reasonably required by the Inspector :

(1) a person who operates the business of prostitution, or an employee or agent of that person

(2) a sex worker or client of the business of prostitution.

(d) take copies of the information referred to in paragraph (c).

(iii) An Inspector may seize and retain anything in premises entered under this section which the Inspector has reasonable grounds to believe will be evidence of the commission of an offence against section 8 and 9.

(iv) Nothing in this section limits or affects the privilege against self-incrimination.

(v) An Inspector may take any person acting under the Inspector's direct supervision into the premises to assist him or her with the inspection.¹⁵

(k) Only New Zealand citizens are entitled to choose the profession of sex-work or become sex-workers. If an outsider wants to come to New Zealand to work as a sex-worker; or to own, open or invest in a brothel or other business of prostitution, his/her visa can be refused. If he holds a temporary visa, or if his permanent residency carried a special condition, he/she can be deported if he owns a brothel or other business of prostitution, or if he/she is working in the sex-industry.¹⁶

(l) If a person is a brothel operator, or a client, he can be fined or imprisoned if he hires a sex-worker who is under 18. It is also illegal to receive money from a sex-worker under the age of 18. It is not illegal to be a sex-worker if a person is younger than eighteen. However, if a person hires a sex-worker under 18 to work in his brothel, or if a client hires a sex-worker under eighteen to provide sexual services to him, they are breaking the law. Relevant sections on the point are sections 20, 21, 22 and 23 of the Prostitution Reforms Act, 2003.²⁰

INDIA

Prostitution or 'Sex-work' as it is generally referred to these days is not a new enterprise as it has flourished throughout history. Though as a trade which has continued since time immemorial, still it has neither been given its due in society nor legal recognition. The society and its respected persons have sustained this trade for the satisfaction of their sexual urges, without any legal recognition or protection to those who are engaged in sex-trade. In the absence of legal protection, women in the sex industry are in vulnerable positions, subject to sexual abuse and exploitation. As their work is not recognised they are commonly excluded from mainstream society. They are thereby denied whatever national and international protection from abuse is available to others as ordinary citizen, women or workers.

India has adopted the system of abolition/toleration to deal with sex-work. Having analysed in the pages gone by the working of the abolitionist model, the picture becomes clearer that our leaders while framing this policy were more concerned with moralistic attitudes of what is good and what is bad rather than adopting a rationale and practical attitude towards this 'oldest profession'.

The present policy ensures that the sex-trade is accessible but not offensively public and that sex-workers are allowed to work but without legal protection. No other profession suffers from such a confusion about what

¹⁵ *Ibid.*

¹⁶ Prostitution Reforms Act, 2003 available at www.nzpc.org.nz. ²⁰ *Ibid.*

is legal and what is illegal, nor is any other worker punished only when her/his profession is visible to the public. The impact of these laws on sexworkers themselves is considered of secondary importance to maintaining society's sexual double standards.¹⁷ India follows the tolerationist approach which criminalizes the organisers of the sex-trade but not the sex-workers themselves. As seen earlier, this approach intends to suppress prostitution gradually by tackling the exploitative elements without harming the sexworkers. An important United Nations Convention in 1994¹⁸ promoted the tolerationist approach, which was later adopted by many countries including India.

The policy of prostitution in our country is reflected in its legal approach towards prostitution. As a result of being signatory to the 1949 United Nations Convention, the Suppression of Immoral Traffic Act (SITA) was passed in the year 1956. This was later amended in 1986 in the form of Immoral Traffic (Prevention) Act, 1956. The Indian approach is one of tolerance, where being a sex-worker per se is not an offence and practising sex-work privately and independently is not a crime.

Although the intention of the Immoral Traffic (Prevention) Act, 1956 was to decriminalize sexwork and hit hardest at the traffickers, pimps and brothel keepers, in practice just the opposite has happened. Furthermore another problem with the enforcement of Immoral Traffic (Prevention) Act is that rehabilitation homes set-up under the Act are, on the whole a failure. The homes are ill equipped to deal with the number of women who are convicted under the Immoral Traffic (Prevention) Act, 1956. Moreover, women in the homes live in sub-human conditions with severe restrictions on their freedom. For example, they cannot wear certain kind of clothes and are prohibited from wearing any form of make-up or jewellery etc. The system was adopted primarily because India was a signatory to 1949 U. N. Convention which asked the signatory nations to adopt such a system. The tolerationist policy adopted by our country to tackle with the profession of sexwork has been found wanting in many aspects. The policy with its manifestation in the form of Immoral Traffic (Prevention) Act, 1956 has failed to achieve the desired results. The only category that it has targeted is the sex-workers conveniently ignoring the ill elements like pimps, brothel keepers, traffickers, etc.

CONCLUSION

Decriminalisation in New Zealand is a useful model for legal reform in India as it is rooted in an empowerment framework which guarantees the human rights of sex trade workers while concurrently addressing trafficking through a victims' rights based model. Jordan argues that the shifts in perspectives on sex work throughout New Zealand's history are not due to changes in the growth or size of the sex industry but can instead be attributed to social context. Leading up to the legal reform of 2003, there was a social and political discourse that viewed the current laws as ineffective and contradictory as they marginalized sex workers, reinforced stigma and impeded public health initiatives. Support for the Reform Act came from a diverse group of politicians and organizations,¹⁹ with a prominent voice for reform from the NZPC. A significant difference between the New Zealand and Indian contexts is their socioeconomic and demographic contexts. As a poorer nation with a large population, India another has a significantly larger sex trade than New Zealand.²⁰

¹⁷ Carolyn Sleighthome and Indrani Sinha, *Guilty Without Trial*, 52-53 (1996, 1st ed.)

¹⁸ Suppression of the traffic in person and of the exploitation of the prostitution of others, (1949)

¹⁹ Nevertheless, the bill passed in the New Zealand Parliament only by a narrow margin due to sizable conservative and religious political factions which formed the opposition. Since its institution, there have been several efforts to repeal the act by conservative and anti-prostitution groups which have failed (New Zealand Justice and Electoral Committee, 7-8).

²⁰ It is very difficult to provide an accurate estimate of both nations' sex trade worker populations. An estimate of the New

Zealand sex trade puts the figure at around 8 000, while India's is estimated at over two million. Both numbers are considered to be underestimates because of the role of stigma that prevents sex workers from disclosing their occupations (Jordan 11; Eberstadt 28).

Increasing the efficacy of Indian anti-trafficking initiatives

As trafficking is a highly politicized issue in India, it may be necessary to define prostitution and trafficking in two separate pieces of legislation, which demonstrates that a commitment to anti-trafficking is not mutually exclusive with a commitment to uphold sex trade workers' human rights. An amended ITPA would thus recognize sex work as labour and refer to a separate bill dealing with its decriminalisation. The amended ITPA could redefine sex trafficking as an illegal offence that occurs under coercion or force. In addition, the amended ITPA should reference other forms of trafficking within the labour market as illegal offences. Concurrently, the clauses in the ITPA around the penalties for trafficking should be strengthened. Suggestions for reforms based on the New Zealand model include adopting amendments which address children as a separate category under the law and position the client as entirely responsible for ensuring that the sex trade worker is not a minor.

Decriminalising prostitution as a means to uphold the human and labour rights of sex workers

A separate reform bill that addresses the decriminalisation of prostitution would need to be introduced. This legislation would shift all third party and other clauses relating to sex work from the ITPA as part of criminal law into the realm of civil law. This would involve creating clauses that outline the validity of contracts made between sex trade workers and clients. Sex workers would be afforded all the rights of workers under both central and state labour laws, which legally entrenches sex work as a legitimate form of labour. In addition, the definition of a brothel would need to be amended in the ITPA and newly defined in the decriminalisation bill. Currently, the definition of a brothel in the ITPA is very ambiguous and could be interpreted to include a single commercial sex act performed by one sex trade worker in her own home. New Zealand's Prostitution Reform Act of 2003 defines a brothel as "any premises kept or habitually used for the purposes of prostitution but does not include premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere" (New Zealand Parliamentary Government Office clause 4). This definition clearly distinguishes brothels from places of residence, thus protecting sex workers' homes from inspection by the Ministry of Health without a warrant. It is an appropriate model for which India could amend the definition of a brothel under the law. The Government of New Zealand has made a comprehensive central legislation in the form of Prostitution Reform Act, 2003 and moved over from the antiquated tolerationist model to the regulatory model wherein right of sex-workers are of paramount importance. The Act has certainly helped sex-workers to become a part of mainstream society with minimal chances of them being exploited. The Act has also made good provisions for health check-ups and the Act is also strict on forced prostitution and prostitution being forced upon minors. The Act is certainly a positive step in the right direction and worthy of emulation by other countries around the world. Whereas India till today the main act regulating sex work in India has not been amended and it follows pure moralistic approach which in reality criminalize the workers themselves rather the pimps and traffickers, so India should amend the laws and make more stringent laws for trafficking in India and should work more like New Zealand's regulations. Indeed, if the law is reformed so that consensual sex work is recognized as legitimate labour, then the state is no longer an adversary but an ally for sex workers who are already committed and involved in the long standing struggle to combat injustice and exploitation within their field of work.

On 27th of May 2022 a huge historical judgement has been given in favour of sex workers by the supreme court which talked about their rights, dignity, restricted police interference, and all facilities to be provide to them and their children's too etc. But still India needs to have more than a judgement that's a need of huge amendment in the present act for the sex workers.

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