

Prostitution and Public Health: Various Forms of Regulating Methods - An Analysis of Current Legal Responses to Prostitution in Nepal

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I. INTRODUCTION

Prostitution, which now a days is also termed as commercial sex work,¹ is an ancient and widespread phenomenon. Even though it is never welcomed by any society, women, men and transgenders sell sex all over the world and have done so forever.² Every society and their regulatory mechanism i.e. State has its own way of addressing prostitution. This paper will first explore on the major forms of prevailing regulating methods for controlling the impact of prostitution and will briefly discuss their appropriateness and weaknesses in addressing the real problem. The paper will then briefly highlight the existing regulatory framework on prostitution in Nepal and will discuss the existing practices in this regard. The paper argues that the current regulatory framework of Nepal seems ideal from the theoretical point of view, but the implementation of the law as against the idealistic concept is problematic and is fueling human immunodeficiency virus (HIV) epidemic.

II. BACKGROUND

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¹ "Commercial sex work is a broad term that includes street prostitution, massage parlors, brothels, escort services, strip clubs, phone sex lines, and pornography," defined at Kempner, Martha E, "From the Editor: Sex Workers: A Glimpse into Public Health Perspectives" (2005) 33:2 *SIECUS Report*, online: <http://www.findarticles.com/p/articles/mi_qa3781/is_200504> [hereinafter *SIECUS Report*]; The terms "prostitution", "commercial sex work" and "sex work" are used interchangeably in this paper.

² Network of Sex Work, *Introduction to the Issues Regarding Sex Work*, (South Africa: Network of Sex Work: Projects Promoting Health and Human Rights, 2004), online: <<http://www.nswp.org/>>.

In the past, every society condemns prostitution on moral grounds by relating it to promiscuity. From the public health dimensions, prostitutes also received attention as disease vectors – those who would spread sexually transmitted diseases (STDs). However, the gravity of STD's infections was overshadowed by the perception of promiscuity associated with the prostitution. The *moral concern* related to the issue has dominated the *public health concern* and States were more focused on abolishing or regulating it by different means than to treat the correlated health disorders.

Since large number of prostitutes constitute of women sex workers. When the women's rights groups started raising voices against their sufferings, and the recognition of women's rights got momentum around the world, the issue of prostitution also received some attention at the national and international levels. However, women's groups themselves have *differences* and were *divided* in regard to the concept of prostitution and about rights of sex workers. As a result, in front of many other priorities for women's groups to make claim for protecting women's interests and rights, prostitution doesn't received as much attention as it require to protect and promote the rights of prostitutes or sex workers.

It is only more recently - after the emergence of HIV epidemic worldwide that the issues of prostitution get alarming consideration. The rapid spread of HIV shifted the dimension of prostitution from public morality to public health. Nevertheless, moral grounds are still

playing crucial role in the public health measures. Interventions, therefore, focused not on the health of sex workers but on their role in shaping the health of society.³

III. REGULATING METHODS TO CONTROL THE IMPACT OF PROSTITUTION

Like other professions or practices, basically, there are two broad ways in which State responds to prostitution i.e. by criminalization and legalization. However, in the context of prostitution, many regulations around the world are placed in between these two extremes, and many States have incorporated both the components partially. Sometimes two approaches are combined, for example in Sweden the demand for prostitution is criminalized whereas the act of prostitution is decriminalized.⁴

The regulatory mechanisms fundamentally have two goals: first to protect the public from real and perceived negative effects (ranging from public health to public morality), and second to protect abuse and exploitation of prostitutes or sex workers. These goals are set up again on the basis of two assumptions. The first thoughts of group assumed that no one takes up prostitution as profession willingly and it is a circumstantial outcome of the vicious cycle of poverty and patriarchy. The second thoughts of group though recognized the existence of forceful prostitution, it, nonetheless claim that some women and men are willingly into the profession – so their rights and interests should to be equally protected as of other professionals. The section below will explore on the prevalent forms of regulating methods for controlling the impact of prostitution.

³ See *SIECUS Report*, *supra* note 1.

⁴ Commercial Sex Information Service, News Release, “In Sweden, a prostitute pays her taxes, but chides government for accepting the money” (April 15, 2003), online: <http://www.walnet.org/csis/news/world_2003/ap-030415.html>.

1. Criminalization: Criminalization of sex work is founded on the policy of abolitionism; which condemns prostitution on all grounds and enact legislation to completely abolish prostitution from the society. However, criminalization takes many different forms to achieve its purpose, which are as mentioned below:

A. Criminalization of the sale of sexual services

It criminalizes the ‘profession’ or practice of prostitution. This means that sex worker are consider criminal under the law. This is based on the ideology that prostitution is “incompatible with the dignity and worth of a person”⁵ and an immoral practice that should not be allowed or endorsed by society.⁶

B. Criminalization of solicitation

Anti-solicitations laws include prohibitions on the owning, running and transporting of brothels, on pimping, and/or on all communication for the purposes of prostitution.⁷ Though it may or may not specifically declare the act of selling sexual services as a crime or sex workers as criminals, in practice such prohibitions often also function to penalize sex workers, subjecting them to the risk of prosecution and victimization by the police.

C. Criminalization of the purchase of sexual services

It is based on the ideology that the people (mostly women) who are into prostitution are victim of vicious cycle of lack of choice and should not be victimized further by the law

⁵ *UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, Preamble.

⁶ For example: Japan.

⁷ For example: Canada.

as criminals. Therefore, to abolish prostitution, it attempts to control the demand side and therefore criminalizes clients for purchasing sexual services.⁸

In the criminalization approach, the above-mentioned forms could stand individually in its own or could be a combination of one with another or a combination of all forms. Being based on the moral outrage against prostitution, this approach is widely criticized on the public health grounds. It is argued that the generalized use of criminal law is unlikely to become an effective tool for public health. It discourages exactly those behaviours necessary for the collective good – testing, disclosure, and participation in clinical and public health programs and invites intrusive surveillance, selective enforcement, and discrimination.⁹ This approach gives excessive power and authority to the police, which they generally misuse to harass, torture, blackmail and abuse sex workers. It is prone to severe police corruption and can contribute towards the hidden practice of prostitution where police become a means in keeping prostitution “invisible” from the society and thus impede the necessary actions required from public health dimensions.

The criminalization approach further treat sex workers as a separate class and categorized them as “deviant women”, to which separate rules apply. For example: till May 2002, there exists a law in Nepal which prescribe different punishment for rape against female prostitutes.¹⁰ The discriminatory laws, practices and attitude reinforce stigma against sex

⁸ For example: Sweden.

⁹ Lawrence O. Gostin, *The AIDS Pandemic: Complacency, Injustice, and Unfulfilled Expectations* (Chapel Hill and London: The University of North Carolina Press, 2004) at 197-198.

¹⁰ There was a provision that if a female prostitute is raped, the maximum penalty for the rapist on conviction shall be a fine up to NRs. 500.00 or imprisonment not exceeding one year. The provision was discriminatory against female prostitutes in comparison to a maximum penalty of 10 years imprisonment

workers, and thus make them more vulnerable to violence and deprive them of their basic rights.

2. Legalization: Legalization approach does not put criminal sanctions on acts related to prostitution, but like criminalization, this approach also has various forms, which is based on the level of State's interventions in regulating it in a society.

A. Regulating Approach

This approach considers prostitution inevitable, and therefore prescribes it legal in order to control and regulate it. Under the law it is treated as a type of occupation and is regulated by a specific regulatory framework that applies only to prostitution. This approach allows for the legal performance of sex work under certain conditions and typically includes zoning regulations, registration of sex workers, mandatory health check-ups and licensing of brothels. Any sex work performed outside these conditions is treated as a criminal offence. This approach is justified as a public health measure to control the spread of STDs and HIV, and also for protecting human rights of prostitutes.

By protecting and promoting the rights and interests of sex workers, it is claimed that the regulating approach provides conducive environment for sex workers to practice their profession and get regular access to health care services and thus contribute towards the achievement of public health goals. However, this approach is been criticized for stigmatizing sex workers. Due to the stigma associated with sex and sexuality,

and a one-half share of the rapist's property to the rape victim, if the victim is not a prostitute. On May 2, 2002, this provision was declared null and void by Supreme Court of Nepal in *Sapana P. Malla for FWLD v. HMG/Nepal*, Publication of Judgments relating to Human Rights: Special Issue (Kathmandu: Supreme Court, 2002) at 144-151.

prostitution is not perceived as a decent profession; and in this context this approach inappropriately creates zone for sex workers and therefore makes it practically difficult for them to live a dignified life. Further, it is also argued that by regulating prostitution, State is promoting something that many people (mostly women) have chosen out of lack of choice and as a last resort. It is claimed that given a choice sex workers are willing to give up this profession and thus State should think carefully before considering for regulating approach. Also, many legalized places use trafficked victims (mostly women and children). Once regulated, there will be always demand for more sex workers to be in this business, which consequently fuel trafficking and other forms of violence. Thus, instead of sex workers, brothel-owners and pimps will be benefited by the regulating approach.

B. Deregulating Approach or Decriminalization Approach

In this approach law remain silent in regard to prostitution.¹¹ All provisions that impose criminal sanctions for the commercial performance of sexual services are removed and no regulatory measures are enacted. General legal provisions are employed to address potentially undesirable aspects of sex work, such as the commercial sexual exploitation of children.¹² Although theoretically this system should impose no regulations onto the practice of prostitution, practically there exist few 'pure' systems of decriminalization.¹³

¹¹ According to the legal principles, acts not specifically prohibited or declared as a crime by law is interpreted as legal.

¹² *Supra* note 2.

¹³ *Ibid.*

The core difference between the regulating and deregulating approach is the different status of prostitutes. While the first approach *specifically acknowledges* and *legally recognizes* the act of prostitution through regulation, in the later approach prostitution is neither outlawed, nor is it strictly controlled by State mechanism; it may not even be specifically acknowledged to exist within the law.¹⁴

Until now, the decriminalization approach is considered best of all the approaches in dealing with prostitution and in promoting public health. In one hand, this approach does not put criminal sanctions against sex workers and therefore protect them from regular police harassment and from violation of their basic rights, on the other hand, by not regulating prostitution *per se* this approach does not create stigma and discriminatory practices against sex workers. This approach protects the rights and interests of prostitutes as equally as of general population and provide favorable environment to seek health care and other services. Meanwhile, various forms of violence and exploitation (like: trafficking, sexual abuse, child prostitution etc.) are dealt under the criminal law, which if implemented effectively prevent forced prostitution or sexual exploitation.

However, this approach has also been criticized for not providing complete recognition and protection to those prostitutes who are willfully in the profession. Few feminists see decriminalisation to be no solution, as it recognizes only the harm that flows from

¹⁴ For example: Nepal.

criminal laws against prostitution which put women at risk of arbitrary arrest, yet fail to recognize the harm against women that arises from prostitution itself.¹⁵

IV. PROSTITUTION IN NEPAL

In Nepal, there are both female and male sex workers, however, number of female sex workers (FSWs) are much higher than their male counterparts. All groups cater for the needs of male clients. There are both street-based as well as established based sex workers. According to the government's data, there are around 60,000 commercial sex workers in the country¹⁶ and studies estimated up to 25,000 sex workers in the capital - Kathmandu Valley only.¹⁷ In addition, in mid and far western Nepal, there exist a community called *badi community* who has been practicing prostitution from many generations. Further, prostitution of Nepalese women is not contained within the borders of Nepal. Many Nepalese women are trafficked into the brothels of India, specifically Mumbai and Kolkata. According to the Study conducted by ILO around 12,000 Nepalese women are trafficked out of Nepal every year.¹⁸ Out of these 5,000 to 7,000 of them being trafficked to India annually.¹⁹ In 1995, Nepalese social workers estimate the

¹⁵ Catharine MacKinnon, "Prostitution and Civil Rights" (1993) 1 *Michigan Journal of Gender & Law* 13-31.

¹⁶ IRIN/PLUS NEWS, News Release, "NEPAL: The growing threat of HIV/AIDS" (16 February 2006), online: <<http://www.irinnews.org/report.asp?ReportID=50591&SelectRegion=Asia&SelectCountry=NEPAL>>.

¹⁷ CREHPA, *A Situation Assessment of Sex Workers in Kathmandu Valley*, (Kathmandu: CREHPA, 2001) at iv.

¹⁸ Xinhuanet, New Release, "12,000 Nepalese Women Trafficked Abroad Annually: ILO" (30 June 2002), online: <http://news.xinhuanet.com/english/2002-06/30/content_463256.htm>.

¹⁹ UNICEF India, Richard Young, "Understanding Underlying Factors", *Child Workers in Asia*, (January-June 1996), cited at Indian NGOs, "Statistical Dimension of Sexual Exploitation of Children", online: <<http://www.indiangos.com/issue/child/sexual/statistics/statistics18.htm>>.

number of Nepalese girls and women working in Indian brothels are at about 200,000.²⁰ Thus, Nepalese women are practicing prostitution within and outside Nepal, and after the spread of HIV epidemic many HIV-positive prostitutes are sent back to Nepal by Indian brothels.

i. Causes of prostitution in Nepal

As in most of the South Asian countries, Nepal has a dominant patriarchal culture. Women face discrimination from cradle to coffin. The birth of a female child is not generally an occasion to celebrate. This is because sons are expected to continue the family line and according to *Hindu* culture,²¹ they are the one who will take care of the parents in their old age and perform all religious rites for them after their death.²² Therefore, women possess secondary status in every sphere of their lives. The low status of women and girls in Nepal coupled with the lack of education and employment opportunities have led to a large number of young women from rural areas of Nepal being sold into prostitution by their relatives, friends or acquaintances, or being trafficked to other countries for prostitution. Further, from last decade, Nepal is facing a situation of armed conflict. The conflict causes either migration (to other districts or to other countries) or death of the male members of the family, leaving women with no choice to take up this profession for the survival of themselves and their children. All FSWs, interviewed in two studies carried out by women's groups in 2003 expressed that poverty,

²⁰ Human Rights Watch/Asia, Rape and Profit, June 1995, cited at Indian NGOs, "Statistical Dimension of Sexual Exploitation of Children", online: <<http://www.indiangos.com/issue/child/sexual/statistics/statistics18.htm>>.

²¹ Nepal is an only Hindu country in the world.

²² Sapana Pradhan Malla, *Inheritance Rights of Nepali Women: Journey Towards Equality* (Kathmandu: FWLD & IWRAW-AP, 2003) at 2.

often coupled with illiteracy and the need to earn the livelihood for a family and raising children, were the core reason for their prostitution.²³

Few men, who practice sex work, are in this profession also due to the existing social discrimination and prejudices against them.²⁴ Sexual behaviour like man having sex with men (MSM) is ostracized by the society on moral grounds considering it unnatural. As a result, MSMs face stigma and discrimination, which deprive them from education and employment opportunities leading them to

Nepal's HIV epidemic is largely concentrated in high-risk groups, especially FSWs and intra-venous drug users. Out of the official figures, 616 FSWs are reported HIV-positive and 3,181 HIV-positive people are reported to be clients of sex workers. According to the World Bank, nationally, HIV prevalence among FSWs is four percent, and infection rates among street-based sex workers in the Kathmandu valley are between 15 and 17 percent. Nationally, clients of FSWs have an estimated HIV prevalence rate of two percent.²⁷

The prostitutes of Nepal received attention only after the emergence of HIV epidemic. Before that sex work was an 'open secret' practice existed in the society, but neither have received any attention from the human rights groups nor from the public health officials. A major challenge to HIV control in the country is the trafficking of Nepalese girls and women into commercial sex work in India, and their return to Nepal. About 50 percent of Nepal's FSWs previously worked in Mumbai, and according to a women's right group, namely Women Acting Together for Change (WATCH), around 70 percent of the sex workers who returned to Nepal were HIV positive.²⁸

V. NEPAL'S APPROACH FOR REGULATING PROSTITUTION

There is no definition of prostitution in Nepal. The law neither prohibits prostitution nor does it in any way attempt to regulate the activities of prostitutes or sex workers. Therefore, in Nepal, the very act of voluntarily selling sex is not a crime, however, law does prohibit and punish those who forcefully cause women to get engaged in

²⁷ Rajib Upadhyaya & Benjamin Crow, *HIV/AIDS in Nepal* (Nepal and Washington: The World Bank, March 2006) at 2, online: <<http://siteresources.worldbank.org/INTSAREGTOPHIVAIDS/Resources/HIV-AIDS-brief-March06-NPA.pdf>>.

²⁸ *Supra* note 16.

prostitution. The section below describes the existing laws, proposed amendments and policy in relation to prostitution in Nepal.

A. The Legal Framework

i. The Constitution of the Kingdom of Nepal, 2047 B.S. (1990)

The Constitution of the Kingdom of Nepal, 1990 confers the freedom to practice “any profession or carry on any occupation, industry, or trade,”²⁹ except in a situation in which the law imposes restrictions on any act that may be contrary to public health or morality.³⁰

Furthermore in 2002, while declaring the discriminatory rape law provision that prescribed lower punishment for rape against female prostitutes *ultra vires*,³¹ the Supreme Court of Nepal expressed its view that “*prostitution is a profession or occupation irrespective of whether or not it is legal*” and given the Constitutional right to choose one’s own profession and the Constitutional guarantee of equality,³² sex workers should not be discriminated against in the criminal law with respect to rape.

Therefore, in Nepal people have the right take up prostitution until it is explicitly prohibited and after the Supreme Court’s decision it has been interpreted by some as a legal acknowledgment of the existence and rights of sex works.

²⁹ *The Constitution of the Kingdom of Nepal, 1990*, His Majesty’s Government of Nepal, Art. 12(2)(e).

³⁰ *Ibid.* Art. 12 (2)(5).

³¹ *Supra* note 10.

³² *Supra* note 29, Art. 11.

ii. Trafficking in Human Beings (Control) Act, 2043B. S. [1986]

This Act does not define or prohibit prostitution, however the offence of 'human trafficking' include “to involve any woman in prostitution by way of persuasion, allurement or misrepresentation, fraud or threat or coercion or by any other way whatsoever,”³³ or “to abet, assist, conspire or attempt to such acts.”³⁴ This implies that the voluntary sex work is not a crime *per se* in Nepal, whereas, pimps and/or brothel-owners are liable for prosecution under the law. However, as this law is meant to be enacted for “controlling the traffic in human beings,”³⁵ it does not intend specifically to address the prostitution and prosecute and punish the pimp and brothel-owner. Further, the law has a limited scope as it assumes only *women's* involvement in the prostitution; the prostitution of children and men is not addressed.

iii. Proposed Traffic in Persons (Prevention) Bill, 2058 B.S. (2001)

The proposed Traffic in Persons (Prevention) Bill, 2001, which has not yet been passed by the Parliament, proposes to criminalize both voluntary and forced prostitution as well as the act of facilitating prostitution under the broad umbrella of “human trafficking”. The proposed Bill targets to stop the inhumane acts of human trafficking and immoral sex work, to rehabilitate the victims of such activity and to maintain the morality and proper conduct of the general public.³⁶ According to the proposed Bill the act of human trafficking constitutes of: to work as a prostitute or make others work as a prostitute; to perform sexual acts on a child or make a child perform any kind of sexual act; to traffic a

³³ *Trafficking in Human Beings (Control) Act, 1986*, His Majesty's Government of Nepal, s. 4 (c).

³⁴ *Ibid.* s. 4(d).

³⁵ *Ibid.* Preamble.

³⁶ *The proposed Traffic in Persons (Prevention) Bill, 2001*, Preamble.

child or mentally incapacitated person for the purposes of prostitution; to engage in prostitution; and to attempt any of the activities mentioned above or assist others in carrying out any of these activities.³⁷

The proposed Bill defined prostitution as “the activity of selling, buying, renting and using someone’s body for sexual exploitation or to cause the sexual exploitation by others with or without profit.”³⁸ The definition of prostitution, however, does not make any distinction between the prostitutes, and those who causes others to engage in prostitution (like: pimps, people traffickers, or pornographers). The only distinction is made in the sentencing provisions, which proposed to punish the act of ‘voluntary’ prostitution by 1-3 months imprisonment and/or NRs. 50,000 fine,³⁹ whereas ‘forced’ prostitution is punishable by 5-10 years imprisonment, and/or NRs. 200,000 fine.⁴⁰ Also, the Bill proposed to prohibit and punish operation of brothel.⁴¹

Therefore, in Nepal though the existing law is as such silent in regard to the legal status of prostitution, steps have been initiated to criminalize it.

B. Policy Framework

Prevention of sexually transmitted infections (STIs) and HIV infection among vulnerable groups, including sex workers and their clients, is one of the priority agenda of the National HIV/AIDS Strategy. The Strategy recognizes the increased vulnerability of sex

³⁷ *Ibid.* s. 4(2).

³⁸ *Ibid.* s. 3.

³⁹ *Ibid.* s. 11 (b), (e).

⁴⁰ *Ibid.* s. 11 (b).

⁴¹ *Ibid.* s. 5.

workers to HIV/AIDS due to a low level of education, which restricts access to information and health care services. It also acknowledges the prevalence of violence against sex workers and the fact that they have little control over the risk in sexual encounters because the client often determines whether or not to use a condom.⁴²

Creating a supportive environment for behaviour change among sex workers and their clients; ensuring that sex workers and their clients know how to avoid HIV and STIs and have the power and means to act on their knowledge; building capacity of NGOs and sex worker organizations to address the needs of sex worker and empower them to protect their health and personal safety; and improving knowledge about behaviour, practice and networks of sex workers and their clients in order to monitor effectiveness of existing interventions and to guide development/modification of potential interventions are the objectives of the Strategy.⁴³ To achieve the goal, following strategies are adopted by the Strategy:

- Increase awareness among decision-makers of the risks confronting sex workers and clients and the factors impacting on efforts to reduce these risks.
- Advocacy focusing on policy makers and communities with regards to the needs of harm reduction through behaviour change for sex workers and their clients.
- Enhance collaborative relations with the police, local authorities/communities to support prevention interventions among sex workers and their clients.
- Design and implement appropriate STI services for sex workers and their clients with active participation of the target group.

⁴² *Supra* note 26 at 14.

⁴³ *Ibid.* at 14-16.

- Scaling up of behaviour change communication, including IEC materials for sex workers and clients on safe practices and occupational safety.
- Promotion of “100%” condom use.
- Condom (including female condom) social marketing programmes linked with high-risk areas.
- Development and gradual implementation of VCT capacity in prioritised locations.
- Strengthen the self-organizational capacity of sex workers through capacity building, leadership training, legal support and networking.
- Capacity building of NGOs and sex worker-organizations to develop and implement interventions, which address environment, risk behaviours and service needs of sex worker and clients.
- Peer education programmes for sex workers including negotiating skills and self-protection.
- Educate pimps and madams about the importance of the using condoms in commercial sex and support an informal “no condom, no service, no refund” policy.
- Sustain and expand behavioural surveillance systems (including clients).
- Develop and maintain a database of interventions with sex workers and clients including relevant activities and research reports.
- Conduct qualitative research about sex workers and their clients’ behaviour determinants.

VI. EXISTING PRACTICES IN NEPAL

Even though prostitution is not a crime in Nepal, prostitutes or sex workers, both female and male, repeatedly faced harassment, abuse and torture from the law enforcement agencies, especially by police and quasi-judicial bodies. A study revealed that 89 percent of FSWs have been harassed by the police, either in their place of working or at police stations.⁴⁴ Police routinely arrest and prosecute sex workers on charges of disturbing the peace or demonstrating obscenity, and then physically, mentally and/or sexually abuse them whilst in police custody. This harassment involves anything from unjustified arrest to physical, mental or psychological abuse or extortion, and in many cases involves sexual abuse and/or rape.⁴⁵

Police prosecute both male and female sex workers under the Some Public (Offence and Punishment) Act, 2027 B.S. (1970) which prohibits acts of violating the peace by using obscene words, language, gestures, or acts of demonstrating obscenity in public places.⁴⁶ Although law does not intend to restrict sexual activities in private places and controls sex work only in public places, police are nevertheless found to raid private homes and rooms, and FSWs were arrested from massage parlors, hotels, lodges and restaurants. These actions against sex workers are justified on the grounds of maintaining peace in the public places.⁴⁷

Furthermore, male sex workers are under regular threat of prosecution on the basis of Section 1 and 4 of the Chapter on Bestiality in the Country Code, 2020 B.S. (1963),

⁴⁴ See *Report on the Abuse of Commercial Sex Workers and Homosexuals*, *supra* note 23.

⁴⁵ *Ibid.*

⁴⁶ *The Some Public (Offence and Punishment) Act, 1970*, ss. 2 and 3.

⁴⁷ NCASC, POLICY Project/Nepal and FWLD, *HIV/AIDS and Human Rights: A Legislative Audit* (Kathmandu: NCASC, POLICY Project/Nepal and FWLD, 2004) at 36.

which prohibits acts of “unnatural sex,” with a provision for punishment of up to one-year imprisonment. It is assumed that the mentioned term “unnatural sex” also covers same sex relationship and can be used to prosecute MSMs. Further, in 2004, a writ petition has been filed in the Supreme Court of Nepal demanding effective measures to control homosexual activities in Nepal.⁴⁸

The majority of sex workers are unaware of the legal fact that prostitution is not illegal in Nepal. In two studies conducted by human rights groups in Kathmandu, the overwhelming majority of FSWs interviewed wanted sex work to be legalized or decriminalized, unaware that prostitution is not illegal in Nepal.⁴⁹ However, the reason behind demanding legalization was not because they saw prostitution as a desirable and enjoyable profession that a woman decides upon freely and willingly – rather, legalization was seen as a means through which sex workers would be provided with effective legal protection against police harassment, client abuse and other forms of discrimination. In the first national gathering of Nepalese sex workers held in 2005, voice were raised to legalize “sex professionals” on the assumption that it would protect them against frequent police mistreatment and abuse.⁵⁰

⁴⁸ *Achute Krishna Kharel v. HMG/Nepal*, Date of file: June 18, 2004. The hearing of the case is pending in the Court.

⁴⁹ See *Report on the Abuse of Commercial Sex Workers and Homosexuals*, *supra* note 23: In this study of 27 people, 74% supported legalisation and 26% supported decriminalization; See *Sharing Meeting on Harassment of Commercial Sex Workers*, *supra* note 23: In this study of 17 people, 88% supported legalisation and 12% supported decriminalisation.

⁵⁰ The Himalayan Times, New Release, “Sex workers want their trade legalized” (9 June 2005).

Furthermore, sexuality is a taboo in Nepal; discussing sex and sexuality is beyond the social morality. Sex work is considered “deviant” behaviour and is unacceptable. As a result, sex workers retain highly marginalized status in the society and have much limited access to proper information about reproductive health and safe sex practices. Cultural, social, and economic constraints bar them from negotiating condom use with their clients or obtaining legal protection and medical services.⁵¹ According to the World Bank, almost 60 percent of FSW’s clients, who are mainly transport workers, members of the police or military, wage earners, and migrant workers, do not use condoms.

Moreover, due to the lack of infrastructures, resources, and political commitment, the National HIV/AIDS Strategy, which target for reducing HIV prevalence rate among sex workers and their clients, is completely dysfunctional. There are only countable number of projects run by NGOs, which is attempting to address the vulnerability of sex workers and their client to HIV/AIDS. Whatsoever, sex workers have no other employment choice and skills to leave this profession; rather numbers of sex workers are increasing day-by-day due to political crisis and conflict situation in the country.

The widespread stigma related to sex work and repeated harassment from the law enforcement agencies not only creates obstacles for sex workers to openly discuss their problems and seek access to essential public services, but also discourages them to seek the benefit of limited HIV prevention and care programs targeted towards them and their clients.

⁵¹ *Supra* note 27.

VII. CONCLUSION

Prostitution is a means of survival for sex workers in Nepal. As sex workers, prostitutes are ostracized by society, abused by the police and often their clients, and are deprived of many essential services because of their occupation. Even though there is no specific laws that penalize voluntary sex work in Nepal and the Supreme Court of Nepal has interpreted sex work as a profession, in the absence of special protection to sex workers, law dealing with public order and obscenity is being misused by police time and again to arrest, harass and prosecute sex workers in Nepal. This conflicting approaches to sex work under laws and practice are based and justified on the moral grounds.

The impressive policy framework developed for educating sex workers, building their capacity, and for reducing HIV prevalence among them and their clients are not adequately implemented. Thus, even if Nepal has “ideal” legal and policy frameworks in regard to prostitution, in the absence of its adequate and effective implementation and due to the misuse of other prevailing laws by the law enforcement agencies, the situation of sex workers and their “work places” are deteriorating day-by-day. Numbers of sex workers as well as the HIV infections among and via them are rising rapidly, whereas adequate measures are yet to be implemented by the public health agencies as well as by the other regulatory mechanisms of the State to address their vulnerability.

Combating HIV/AIDS certainly demands interventions beyond controlling sex work, but it should not and cannot be ignored. The problem not only demands educating and

empowering sex workers about their rights and duties to protect themselves and thereby to public from deadly HIV infections, but also requires effective interventions to educate community at large, including police, about the rights of sex workers. Special institutional framework is required to address discrimination and violence against this community. Sex workers should be provided with viable alternatives and interventions are required to eliminate all kinds of social, cultural and legal barriers that sex workers faced in accessing appropriate information and public utility, including health care facilities.