

**The legality of prostitution vis-à-vis the Indian Immoral Trafficking
(Prevention) Act and sections 146 & 147 of the Zambian Penal Code:
An analysis on legal implications, and its ills on development.**

**BY
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I, **M. LWATULA**, do hereby recommend that this Directed Research prepared under my supervision by the said **Chisanga, Jay** entitled:

The legality of prostitution vis-à-vis the Indian Immoral Trafficking (Prevention) Act and Sections 146 & 147 of the Zambian Penal Code: An analysis on legal implications, and its ills on development.

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**THE UNIVERSITY ZAMBIA
GREAT EAST MAIN CAMPUS
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13th February 2009

Date

**The legality of prostitution vis-à-vis the Indian Immoral Trafficking
(Prevention) Act and sections 146 & 147 of the Zambian Penal Code:
An analysis on legal implications, and its ills on development.**

**BEING A DIRECTED RESEARCH SUBMITTED IN PARTIAL FULFILMENT
FOR THE AWARD OF A BACHELORS OF LAWS DEGREE (LLB).**

**BY
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**THE UNIVERSITY ZAMBIA
GREAT EAST MAIN CAMPUS
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**Approved by the coordinator, Miss M. Lwatula (LLB; LL.M), supervised by Miss
M. Lwatula (LLB; LL.M).**

**I, Chisanga, Jay, do hereby declare that I am the author of this Directed Research, and
that it is a creation of my own ingenuity. I therefore, remain accountable for the contents,
errors and omissions herein. Further, I depose to the best of my knowledge that this work
has not previously been presented in any University for academic purposes.**

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**January, 2009
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DEDICATION

This Directed Research is firmly dedicated to my Mum, Mrs. Isabel Mg'uni Chisanga for her unfailing love, support, care and encouragement, and to my late Dad, Mr. Vincent Chilufya Chisanga who has always wanted me to do Law. A very special tribute to my Uncle, Mr. Bwalya Ndakala as well as Mrs. Rose Banda who helped me purchase a Laptop so that I could easily type this Research work. To them I owe what I will never be able to give back. Thank you for having confidence in me in everything I do. My noble thanks also go to my sweet sisters; Karen Chisanga and Sitabile Chisanga as well as my brothers; Ian Mukuka Chisanga and Vincent Chisanga (King V). I shall forever remain grateful to you all.

May our Good LORD JESUS CHRIST be with you in everything you do. I love you all.

ACKNOWLEDGEMENTS

My sincere heartfelt acknowledgement goes to my supervisor Ms. M. Lwatula, for all the academic excellence, advice, criticism and noble guidance without which this Directed Research would not have been possible to achieve. My gratitude extends to the members of Bread of Life Church International Campus Fellowship for the lovely fellowship accorded to me during my stay at the University. I wish also to register my appreciation to all my friends like Mwila Mwaba, Prudence Siluka, Esnart Banda and many others for the assistance leading to this Research work. Finally I acknowledge the almighty God's unfailing grace, love, peace and guidance. To all the graduating class of 2009 I am grateful to them all.

ABSTRACT

It is a tacit acknowledgment that the existence of the institution of prostitution is a reality that no one can deny. Prostitution is one of the oldest professions of the world practiced since the birth of the organized society. Prostitution is practiced in almost all the countries and every type of society, and therefore Zambia and India are no exception to this practice. To this effect, the **Zambian Penal Code** which is the main statute dealing with criminal offences in Zambia has attempted to criminalize prostitution by sections 146 and 147. Similarly, India enacted the **Immoral Traffic (Prevention) Act** which is the main statute dealing with prostitution in India.

However, the current laws in both Zambia and India that govern prostitution are fairly ambiguous. This is so because the laws in both Zambia and India are such that they only punish third parties such as Brothel owners but do not criminalize the prostitute herself. Objectively speaking, since prostitution turns sexuality into a commodity, the perpetual practice results in increased disease, violence and abuse. Nonetheless, on the one hand, our culture still generally disapproves of prostitution and its legalization. But, on the other, different cultures approve of the practice of prostitution as is the case with Netherlands. Therefore, the objective of this study is to critically analyze the legality of prostitution vis-à-vis sections 146 and 147 of the Zambian Penal Code as well as the Indian Immoral Traffic (Prevention) Act. A further study will be looked at on the ills brought about by the practice of prostitution on the development sector. This research emanates against the backdrop that legislation against prostitution is fairly ambiguous and inadequate, as by legal implication, *prostitution itself* is not illegal per se. Hence, the need to modify the laws as there is a lacuna in their legislation so as to clearly make prostitution itself illegal in view of the devastating realities brought about by it when let loose taking from a case study of the Netherlands.

In the final chapter, observations, recommendations and conclusions shall be stated in light of the inadequacies of the law, and the effect of current legislation against the prostitute in Zambia.

TABLE OF CONTENTS

Front Matters

Research topic.....	i
Supervisor's Approval.....	ii
Declaration.....	iii
Dedication.....	iv
Acknowledgement.....	v
Abstract.....	vi

CHAPTER ONE:

THE LEGALITY OF PROSTITUTION VIS-A VIS SECTION 146 AND 147 OF THE ZAMBIAN PENAL CODE.

1.0. Introduction.....	1
1.1. Statement of the problem.....	2
1.2. Objectives of research.....	2
1.3. Specific Research Questions.....	3
1.4. Rationale of the Research.....	4
1.5. Research Methodology.....	4
1.6. Limiting Factors.....	5
1.7. What is Prostitution.....	5
1.8. The Legal Position of Prostitution in Zambia.....	6
1.9. Analysis of the Legal Position and its Implications.....	8
1.10 Impact of Prostitution on the Development Sector.....	11
1.11. Conclusion.....	15

CHAPTER TWO:

THE LEGALITY OF PROSTITUTION VIS-A-VIS THE INDIAN IMMORAL TRAFFIC (PREVENTION) ACT

2.0. Introduction.....	16
2.1. What is Prostitution According to the ITPA?.....	17
2.2. Analysis of the Legal Position and its Implication under the ITPA.....	18
2.3. Impact of Prostitution on the Development Sector of India	21
2.4. Conclusion.....	23

CHAPTER THREE:

LEGALIZED PROSTITUTION: A CASE STUDY OF THE NETHERLANDS

3.0. Introduction.....	24
3.1. Law Governing Prostitution in Netherlands.....	25
3.2. Arguments for Legalization: Are they Justifiable?.....	25
3.3. Implications of Legalized Prostitution on the Development Sector.....	30
3.4. Analysis of the case study of Legalized Prostitution of Netherlands.....	32

3.5. Conclusion.....34

CHAPTER FOUR:
LEGALISED AND NON-LEGALISED PROSTITUTION: A COMPARATIVE STUDY

4.0. Introduction.....36
4.1.Indian versus Zambian: The courts’ approach.37
4.2. Analysis of the Legal Position and its Implications: Netherlands and Zambia’s
Legislative Framework.....41
4. 3. Prostitution and Development: A critical analysis of the Netherlands situation as
compared to the Zambian experience.....45
4 .4. Conclusion.....48

CHAPTER FIVE:
CONCLUSION AND RECOMMENDATIONS.

5.0. Recommendations.....49
5.1. Conclusion.....54

Chapter 1

THE LEGALITY OF PROSTITUTION VIS-A VIS SECTION 146 AND 147 OF THE ZAMBIAN PENAL CODE.

1.0. Introduction

It is a tacit acknowledgment that the existence of the institution of prostitution is a reality that no one can deny. Prostitution is one of the oldest professions of the world practiced since the birth of the organized society. Prostitution is practiced in almost all the countries and every type of society, and therefore Zambia is no exception to this practice. To this effect, the **Zambian Penal Code**¹ which is the main statute dealing with criminal offences in Zambia has attempted to criminalize prostitution by **Sections 146 and 147**.

However, the current laws in Zambia that govern prostitution are fairly ambiguous. It is a system where prostitution, by implication, is legally allowed to thrive, but which attempts to hide it from the public. Objectively speaking, prostitution turns sexuality into a commodity. As a result, it spawns increased disease and violence, abuse, and even slavery.²

It is therefore, the objective of this Chapter to analyze the legality of prostitution vis-à-vis **Sections 146 and 147** of the **Zambian Penal Code**. To this effect, the chapter will adopt an analytical approach to the problem of *prostitution itself* partly caused by the inadequacy of the laws and hence non application of the Penal Code in the case of Zambia as a result of lacunae in legislation; and whether it is still justifiable to *prosecute prostitutes themselves* based on the current legislation in the light of their state. The author will cogently analyze this aspect of the

¹ CAP 87 of the Laws of Zambia

² www.legalprostitution.com visited on 18th August, 2008.

subject; primarily the legal basis of it as the issue of contention. To achieve that, the author will begin by defining Prostitution; thereafter state and analyze the legal position and also evaluate the various ills resulting from the practice of prostitution affecting the development sector.

1.1. **STATEMENT OF THE PROBLEM**

Considerable literature has been written on prostitution and its related legal aspects. Notwithstanding the above fact, there has been no literature written to address the legality of prostitution of the two legislative Acts namely the Indian Immoral Trafficking (Prevention) Act³ and sections 146 & 147 of the Zambian Penal Code⁴ as well as its (prostitution) ills on development. To this effect, this research will adopt an analytical approach to the problem of prostitution partly caused by the inadequacy of the laws and hence non application of the Penal Code in the case of Zambia and also the Indian ITP Act in the case of India as a result of lacunae in legislation; and whether it is still justifiable to prosecute prostitutes based on the current legislation in the light of their state. The research will further attempt to address this problem by a suggestion to frame the laws clearly on the subject of prostitution indicating the abolishment of *prostitution itself* for purposes of combating and alleviating the problem of prostitution as well as enhancing development.

1.2. **OBJECTIVE OF THE RESEARCH**

The main objective of this research is to analyze as well as evaluate the inadequacies (lacunae) of the two laws relating to the criminalization of prostitution in the two countries. The specific objective of the study will be to;

³ Act No. 104 of the Laws of India

⁴ CAP 87 of the Laws of Zambia

- Consider the legal implications as well as applicability of the current legislation attempting to criminalize prostitution in both Zambia and India.
- Give a brief synopsis of the rate of growth of prostitution and therefore the justification for framing up legislation that clearly makes illegal and abolishes prostitution in both Zambia and India.
- Make a comparative study with a nation(Netherlands in this case) where prostitution is legally practiced and even licensed; and taxed by the government; for purposes of justifying it to be made clearly illegal in legislation to prevent the devastating realities from the Netherlands experience where Prostitution businesses operate in a free-market situation; and the businesses and the prostitutes have to pay taxes, but prostitutes have no rights as working women and hence face severe social stigmatization as a result of the legalization.
- Evaluate the various ills resulting from the practice of prostitution in the development sector.

1.3. SPECIFIC RESEARCH QUESTIONS

2. Are the laws attempting to criminalize prostitution in both Zambia and India adequately framed to combat the vice of prostitution?
3. Is it pragmatically justifiable that the current laws in their state continue in view of the ills on development resulting from its practice?
4. Whether a comparative study with a nation (Netherlands) that has legalized prostitution justifies the continuity of the current form of the laws attempting to criminalize prostitution in view of its experience?

5. How can the laws be amended in order to ensure that it adequately combats against prostitution itself?

1.4 RATIONALE OF THE RESEARCH

Considering the fact that prostitution is one of the oldest professions in this world, it is necessary to examine and analyze whether it is reasonable and justifiable for the legislatures not to criminalize *prostitution itself* in view of the devastating realities on the ground in this shrinking world. In this vein, it is therefore necessary to consider the plight of the two nations in the face of such current legislation which does not really make prostitution itself illegal per se and hence the practice continues as there is no basis upon which one would legally prosecute a prostitute by pointing to a law that clearly makes illegal the practice. In short, the profession of prostitution does not have official sanction, and little effort is made to stamp it out or to take action to impede it through clear framing of legislation. Further, that the law should be amended in order to put it in tandem with the devastating realities on the ground brought about as a result of the practice of prostitution.

1.5. RESEARCH METHODOLOGY

The method used in the research leading to this essay consists of mostly personal analysis of relevant statutes, case law, articles, paper presentations, the internet, student obligatory essays, and reports, were necessary, by mandated bodies.

1.6. LIMITING FACTORS

No statistics will give one an accurate number of prostitutes in Zambia since it is not an offence per se and therefore there are no statistics showing how many prostitutes are detained per month or per year. Needless to say, there are many people detained by police for loitering at night but there is no evidence to show that these are prostitutes. This lack of data deprives this study of statistics that should have helped the author make more empirical analysis on the subject.

1.7. WHAT IS PROSTITUTION?

The **Penal Code**,⁵ does not really define the terms Prostitute, common prostitute and prostitution despite using these terms in various Sections.⁶ However, according to **Rollin**, Prostitution may be defined as "*common lewdness of a woman for gain and also the practice of a female in offering her body to an indiscriminate intercourse with men for money or its equivalent*".⁷ Thus, it can be characterized in three elements which include payment usually of money, though gifts or pleasures may be consideration; promiscuity and indifference.⁸ Further, in the English case, **R v Munck**,⁹ the term prostitute was interpreted not necessarily confined to a woman who for gain offered her body for natural intercourse but also includes offering her body for gain for the gratification of the sexual passions of any man by any acts of indecency. Therefore, the legal implication of the instant case is that prostitution may arise where a man and a woman take part in physical acts of indecency even if there is no actual contact between them.

⁵ CAP 87 of the Laws of Zambia

⁶ Sections 140,146,147,148,149 and 178.

⁷ Rollin, M. Perkins. **Perkins on Criminal Law**. Brooklyn :The Foundation Press,1957, P335.

⁸ Geoffrey May. **International Encyclopedia of Social Sciences**. Vol.10. New York :MacMillan Company , 1972, P.553

⁹ [1918] 1KB 635

Furthermore, in the **Zambian case of R v Chipatela Ngandelan**, in which the principal witness for the prosecution, one Nyimbo, requested Chipatela to allow him the services of his wife. The averted intention of the witness was that during the ensuing twelve months, he was to share the woman equally with her husband, and upon the accused agreeing, the witness paid over \$28s; the association lasted for the stipulated period, during which from time to time the witness made small payments to the woman to buy clothes. At the end of the period, the cohabitation ceased. The accused pleaded not guilty but added that this practice was common practice in his home area. On review, it was held that prostitution means the practice by the woman of offering her body for promiscuous or indiscriminate sexual intercourse with men. The court added that the sharing of a woman equally by two men to whose exclusive use she confines herself does not per se establish that woman as a prostitute.¹⁰

1.8. THE LEGAL POSITION OF PROSTITUTION IN ZAMBIA

To begin with, **Section 146** of the **Zambian Pena Code** clearly that: (1) A person who-

- (a) knowingly lives wholly or in part on the earnings of prostitution; or*
- (b) in any public place, persistently solicits or importunes for immoral purposes; commits a felony and is liable, upon conviction, to imprisonment for a term not exceeding fifteen years;*

- (2) Where a person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such manner as to show that the person is aiding, abetting or compelling the prostitution with*

¹⁰ Vol. 1 of the Northern Rhodesia Law Reports @ p.139

any other person, or generally, that person shall, unless the person shall satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.

Further, **Section 147** states:

(1) Every person who knowingly lives wholly or in part on the earnings of the prostitution of another or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such manner as to show that such person is aiding, abetting or compelling that person's prostitution with any other person, or generally, commits a felony. In addition to the above provisions, the Penal Code in **Section 148** provides that;

If...there is reason to suspect that any house or any part of a house is used by a woman or girl for purposes of prostitution, and that any person residing in or frequenting the house is knowingly living wholly or in part on the earnings of the prostitute, or is exercising control, direction or influence over the movements of the prostitute... any police officer may enter and search the house to arrest such person.

Further, **Section 149** provides that *any person who keeps a house, room, set of rooms or place of any kind whatsoever for purposes of prostitution commits a felony.* Again, **Section 178 (a)** provides that *every common prostitute behaving in a disorderly or indecent manner in any public place; are deemed idle and disorderly person.*

From the above legal position, it can be stated that where it is proved that a person is living with or habitually in the company of prostitutes or exercises control in such a manner as to show that he is aiding or abetting or compelling her prostitution with other persons, unless he otherwise satisfies the court, he/she will be deemed to be living on the earnings of prostitution. Thus, the

above mentioned legislation makes reference to some third person, and not a prostitute or even prostitution itself. In **R v Chipatela**,¹¹ the Zambian court stated as regards prostitution that in order to obtain conviction under the penal code, it is not sufficient to prove that a male person shared his wife for a period with another man. Hence, no evidence that woman was common prostitute or any promiscuity in her relations with men generally despite the sharing of money.

1.9. ANALYSIS OF THE LEGAL POSITION AND ITS IMPLICATIONS

In the Zambian jurisprudence, the problem is one of legality of *prostitution itself* and not the moral aspect of it. It is clear as shown from the above legal position as framed by the legislature that Prostitution itself is not illegal per se. Notwithstanding, what is clear that makes prostitution appear illegal is the fact that it is surrounded by criminal prohibitions. Examples in this light include: Any person who-

(a) procures or attempts to procure any child or other person to have unlawful carnal knowledge either in Zambia or elsewhere, with an person or other persons for pornography, bestiality or any other purpose;

(b) procures or attempts to procure any child or other person to become, either in Zambia or elsewhere, a common prostitute;

(c) procures or attempts to procure any child or person to leave Zambia, with the intent that the child or person may become an inmate of or frequent a brothel elsewhere; commits a felony and

¹¹ Vol. 1 of the Northern Rhodesia Law Reports .139

*is liable, upon conviction, to imprisonment for a term of not less than twenty years and may be liable to imprisonment for life.*¹²

Further **Section 146** makes it an offence for a person who knowingly lives wholly or in part on the earnings of prostitution; or in any public place, persistently solicits or importunes for immoral purposes.

Moreover, **Section 147** makes it an offence for a person who is aiding, abetting or compelling that person's prostitution with any other person. Again, **Section 149** makes it an offence for any person who keeps a house, room, set of rooms, or place of any kind whatsoever for purposes of prostitution.

Therefore, it is the author's contention that the legislative language of the penal code on the subject of prostitution indicates that the legislature was not attempting to abolish prostitution or make it illegal in itself. Clearly, the legislature was merely criminalizing the surrounding circumstances in its conduct (that is, activities associated with prostitution such as owning a brothel, aiding a person into prostitution,) in order to preserve the moral fibre of the Zambian community. It can therefore be safely stated that such an intention explains why these offences surrounding prostitution fall under **Part III** of the penal code which outlines the offences that are injurious to the public, specifically **Chapter XV** which talks about offences against morality, and also **Chapter XVII** highlights offences against Health, convenience as well as Nuisance. Such legislative intention was further affirmed in the case of **Leco Ltd v The People** in which the court stated concerning sexual habits that "*in a country like Zambia, the importance of the*

¹² Section 140 of the Penal Code, CAP 87 of the Laws of Zambia

moral fibre of the nation, including sexual habits and the dangers in its disintegration are vital, these the court must and will protect".¹³

Thus, without even much labor on the law relating to prostitution, it is clear that laws governing prostitution are inadequate. The law is not concerned with prostitution itself but the manner in which it is conducted, that is, the activities of prostitutes and those associated with them which are considered by law as offences against public order and decency. Hence, the lacuna in the laws as they do not criminalize *prostitution itself or make it illegal*.

The legal implication therefore, is that a person cannot lawfully be criminally charged and convicted of the offence of Prostitution in itself under the penal code as to do this would amount to abrogation of the principle of rule of law which requires an offence to be charged against a party to be lawfully prescribed in a particular legislation. This is so because the problem of prostitution is a legal problem and not a moral one and thus it is the author's contention that since prostitution itself is not criminalised under the penal code, the courts, which are law interpreters and enforcers, cannot therefore charge and convict a prostitute as prostitution itself is not illegal per se.

Therefore, the author's contention is that under the provisions of Sections 146 and 147 as well as other provisions dealing with prostitution in the Zambian jurisprudence, the statute (Penal Code) does not criminalise prostitution or prostitutes per se, but mostly punishes acts by third parties facilitating prostitution like brothel keeping, living off earnings and procuring. Hence, the lacuna in the laws as they do not criminalize *prostitution itself or make it illegal in itself save for acts of third parties*.

¹³ [1975] HC reported in civil liberties cases in Zambia

1.10. IMPACT OF PROSTITUTION ON THE DEVELOPMENT SECTOR

According to **Todaro**, the term development can be conceived as a multi-dimensional process involving major changes in social structure, popular attitudes and national institutions as well as the acceleration of economic growth, the reduction of inequality, and the eradication of poverty.¹⁴ Therefore, from Todaro's perspective, development in essence must represent the whole gamut of change by which an entire social system, tuned to the diverse basic needs and desires of individuals and social groups within that system moves away from a condition of life widely perceived as unsatisfactory towards a situation or condition of life regarded as materially and spiritually better.

However, the seriousness of the food crisis in Zambia is illustrated by the crisis management of rural families. District Councilors' are now reporting that young girls from Zambian villages are *"increasingly being found in nightclubs, selling themselves for sex to earn cash to buy food."*¹⁵

Moreover, the current crisis is further exacerbated by high HIV/AIDS prevalence rates with one in five Zambians infected by the virus¹⁶. Thus, the growth of prostitution by young girls can only be another blow to the country's efforts to limit the AIDS pandemic.

Consequently, this has negatively affected the development sector as AIDS, which is mainly as a result of Prostitution is already having a strong impact on the economy. This is so because the huge amounts of money that are intended for other developmental projects are diverted so as to

¹⁴ M.P.Todaro and S.C.Smith: **Economic Development** 8th ed. New Delhi: Pearson Education Publishers 2003, P.51

¹⁵ "Growing population observed under food crisis". Afro News, 31st October, 2007

¹⁶ www.wfp.com visited on 24th August, 2008.

curb this crisis. In addition, life expectancy in Zambia has fallen to a mere 37 years while agricultural production at household level has been crippled because people are either too sick to work or families are forced to spend meager assets on medicines and funerals rather than seeds and fertilizer.¹⁷

There are now more than 1.5 million orphans in Zambia, many of whom have been absorbed by relatives, placing an ever greater burden on limited resources.¹⁸ Hence, the growing practices of prostitution.

Analytically speaking therefore, the practice of prostitution in Zambia has contributed negatively in the area of development because of the many ills that come along with its practice that touch on both the social and economic sector. Also since the practice of prostitution has grown significantly in recent years, the spread of HIV/AIDS, and Sexually Transmitted Diseases has taken its toll on the country's economy as well as family units. HIV/AIDS has a very serious impact on the family structure and the support structure of children.

Parent illness not only keeps children out of school in order to provide care, but also erodes family saving as medicines are required and doctors are consulted. Once the ill family member dies, funeral expenses leave the family with no economic security net and children are either taken in by already financially stretched family members and neighbours, or abandoned.¹⁹

It has been shown and argued that in countries where prostitution has been legalized like the Netherlands and Peru, sex workers are not entitled to industrial rights such as sick pay and

¹⁷ www.afrolnews.com visited on 24th August, 2008.

¹⁸ *ibid*

¹⁹ Doreen Nawa's article in the Times of Zambia Newspaper (2005) on HIV/AIDS: Challenge to child labor elimination.

accident compensation nor protection from exploitation.²⁰ In addition, workplaces are not subject to health and safety regulations. Consequently, this lack of access to medical services often motivates sex workers to "self-medicate" which means treating illnesses with drugs purchased from unqualified vendors.²¹ Hence, it is the author's contention that in such countries, the implications are more adverse as self-medication is a source of ill health in itself and therefore, in effect, the position is not any different from a country like Zambia where the laws do not criminalize prostitution itself because of health consequences.

However, Ms Lim, an International Labor Organization (ILO) researcher and employment policy expert called for governments to cash in on the booming profits of the industry by taxing and regulating it as a legitimate job. Nonetheless, she acknowledged that *"the growing scale of prostitution raises alarming questions about public health, morality and gender discrimination....They are much more susceptible to diseases, including HIV/AIDS"*.²²

It is from that angle again that the author contends that the ILO report calling on the government to consider legitimizing prostitution cannot stand in Zambia as the laws as well as the courts themselves would not allow for such an environment, and this can be substantiated by the case earlier cited of **Leco Ltd v The People**²³ where the court clearly stated that *"in a country like Zambia, the importance of the moral fibre of the nation, including sexual habits and the dangers in its disintegration are vital, these the court must and will protect"*.

²⁰ www.legalprostitution.com visited on 18th August, 2008.

²¹ www.healthlink.com visited on 5th December, 2008.

²² ILO News Report dated 10th October, 1998, Frankfurt.

²³ [1975] HC reported in civil liberties cases in Zambia

The report emphasizes the economic bases of prostitution, highlighting the strong economic incentives that drive women to enter the sector, despite the social stigma and danger attached to the sex work. All these features of modern, export-oriented economies, combined with the pervasive lack of social safety nets and deep-rooted gender discrimination against females, probably contribute to the growth of the sex sector.²⁴

As shown above, the ILO report also acknowledges the harm that accrues to women in prostitution.²⁵ It is this harm, made visible in the violence and health consequences suffered by women in prostitution that most strongly substantiates the arguments that prostitution has a negative impact on the development sector as the harm of prostitution is evident in its health consequences forcing the government to divert funds that are meant for other development projects just to address the health issues which include ensuring more medicines in Hospitals and Clinics to protect the health of the entire nation. Thus, without much labor on this, it is clear that the public health implications of prostitution are devastating and include a myriad of serious and fatal diseases, including HIV/AIDS which touch on the development sector.

Hence, in so far as the meaning of development is concerned, and also according to the definition of development by the above renowned author, **Todaro**, which includes the '*acceleration of economic growth, the reduction of inequality, and the eradication of poverty*',²⁶ it can therefore be safely stated that as a result of prostitution, there is little development in Zambia as the practice does not allow for acceleration of economic growth, instead undermines development

²⁴ *The Sex Sector: The economic and social bases of prostitution in Southeast Asia* edited by Lin Lean Lim, International Labour Office, Geneva, 1998.

²⁵ ILO News Report dated 10th October, 1998, Frankfurt

²⁶ M.P.Todaro and S.C.Smith. Economic Development. 8th ed. New Delhi: Pearson Education Publishers, 2003, p.51

projects because of the expenses that need to be expended as a result of its practice such as ensuring that there is enough medication for those that contract HIV/AIDS for example.

1.11. CONCLUSION

In a nutshell, the chapter has demonstrated that the main statute dealing with criminal offences, the Penal Code, under the provisions of sections 146 and 147, does not criminalise prostitution or prostitutes per se, but mostly punishes acts by third parties facilitating prostitution like brothel keeping, living off earnings and procuring and not prostitution itself thereby having a lacuna in the legislation. Further, the chapter has gone a mile to show that Prostitution turns sexuality into a commodity. As a result, it spawns increased disease and abuse leading to the spread of HIV/AIDS and other related diseases which in effect have directly crippled the development sector because people are either too sick to work or families and government are forced to spend meager assets on medicines and funerals rather than seeds and fertilizer which could be used for other development projects. Thus, the author's contention that Prostitution has contributed negatively to the development of the Zambian nation.

CHAPTER TWO

THE LEGALITY OF PROSTITUTION VIS-A-VIS THE INDIAN IMMORAL TRAFFIC (PREVENTION) ACT

2.0. INTRODUCTION

Prostitution is one of the oldest professions of the world practiced since the birth of the organized society. Prostitution is practiced in almost all the countries and every type of society. To this effect, India enacted the **Immoral Traffic (Prevention) Act (ITPA)**²⁷ which is the main statute dealing with prostitution in India.

However, the laws that govern prostitution in India are fairly inadequate and ambiguous. To this effect, this chapter will adopt an analytical approach to the problem of prostitution partly caused by the inadequacy of the laws, and hence non application of the Indian ITP Act as a result of the lacunae in legislation. The chapter will further illustrate whether in the light of the current state of this Act, it is still justifiable to prosecute prostitutes based on it.

In short, the profession of prostitution does not have official sanction, and little effort is made to stamp it out or to take action to impede it through clear framing of legislation because the current legislation against prostitution is fairly ambiguous and inadequate, as by legal implication, *prostitution itself* is not illegal per se. As a result, it spawns increased disease and violence, abuse, and even slavery. Hence, the objective of this chapter to analyze and address the legality of prostitution vis-à-vis the Indian Immoral Traffic (Prevention) Act. Thereafter, a further study will be looked at on the ills brought about as a result of the practice of prostitution.

²⁷ Act No. 104 of India

2.1. WHAT IS PROSTITUTION ACCORDING TO THE ITPA?

The **Immoral Trafficking Prevention Act (ITPA)** is the main statute dealing with sex work in India. However, unlike the *Zambian Penal Code*,²⁸ which does not define prostitution, the Indian Immoral Trafficking Prevention Act (ITPA), in **Section 2(f)** defines prostitution as the '*sexual exploitation or abuse of persons for consideration in money or in any other kind, and the expression "prostitute" shall be construed accordingly*'.²⁹ Further, **Section 3** of the Act provides for punishment for keeping a brothel or allowing premises to be used as a brothel. Again **Section 4** provides for punishment for living on the earnings of Prostitution.

Also **Section 5** makes an offence the procuring, inducing or taking person for the sake of prostitution. In this light, inducing may imply surrender of her body by the woman who otherwise is unwilling to submit herself to illicit intercourse in consequence of persuasion. Thus, where a girl offers herself for intercourse for money, not casually, but in the course of her profession as a prostitute, there are scruples or reluctance to be overcome and surrender of her body by such a girl may not amount to inducing a person. Hence, in the case of **Ramesh v State of Maharashtra**³⁰, the court stated that a person who merely accompanies a woman going out to ply her profession of prostitution does not thereby commit an offence because inducement is one of the principal ingredients. Thus, to constitute prostitution, there should be no element of coercion or seduction or inducement but must be out of a free will.

²⁸ CAP 87 of the Laws of Zambia

²⁹ Immoral Trafficking (Prevention) Act No. 104 of India

³⁰ [1962] A.I.R. S.C. 645

Moreover, *Section 6* makes an offence the detaining of a person in premises where prostitution is carried on. In addition, *Section 7* makes it an offence to carry out Prostitution in or in the vicinity of public places:

2.2. ANALYSIS OF THE LEGAL POSITION AND ITS LEGAL IMPLICATION UNDER THE ITPA.

From the outset, it must be mentioned that the current laws in India that legislate sex workers are fairly ambiguous. It is a system where prostitution is legally allowed to thrive, but which attempts to hide it from the public. The primary law dealing with the status of sex workers is referred to as the Immoral Traffic (Prevention) Act. The main objectives of the Act are to punish immoral trafficking, punish traffickers, and punish persons living on the earnings of the woman.³¹

According to this law, sex work in India is neither legal nor illegal. Of course the Indian policy is that Prostitution is Illegal. However, what is obtaining on the ground is different. The author contends thus because though there is a plethora of laws against the sex trade, prostitution is tolerated since prostitutes can practice their trade privately but cannot legally solicit customers in public. Hence, this Act's emphasis is *not* on the Prostitute herself but is targeted against surrounding third parties who include pimps and brothel owners among others. Furthermore, organized networks for buying and selling women and girls exist despite the legislation.³² Again, this Act apart from defining what Prostitution is, does not go further to include the circumstances

³¹ www.altlawforum.com visited on 17th June, 2008.
³² K. Jaishankar and D.H: Prostitution in India. New Delhi: Pearson Education Press, 1970, P.56

under which a person could be criminalized is she wishes to engage into sexual activities or even clearly placing a provision that prohibits the practice by the individual other than third parties. Hence, it is because of these grey areas in this Act that makes the practice of prostitution in India neither legal nor illegal.

As shown above, **Section 5**, of the Immoral Traffic Prevention Act punishes procuring, inducing or taking persons for the purpose of prostitution. Further, **Section 6**, provides punishment for detaining a person in premises where prostitution is carried out, and **Section 7** makes it an offence to carry out Prostitution in or in the vicinity of public places. Interestingly, one is more inclined to ask whether prostitution itself is legal or not under Immoral Traffic (Prevention) Act. This is so because there is nowhere in the act where mention is made as to the status of prostitution itself. One is further tempted to find out whether prostitution is legal if, for example, a prostitute works for herself and not for a pimp or a brothel; and/or uses her own premises to entertain clients .This would probably depend on whether a lone sex worker working for herself is considered as a brothel under law .Furthermore, it must be stated that such an arrangement would also not violate the provisions under **Section 7** of the Act regarding prostitution in or in the vicinity of public places.

To that extent, the profession of prostitution does not therefore have official sanction as the emphasis of the Act is not on the sex worker but the pimps or brothel owners (third parties). The author further contends that the above definition of prostitution is inadequate to curb the vice of prostitution because it does not embody in its definition the constituent elements of prostitution required to be shown in evidence in order to successfully criminalise and prosecute the prostitution itself. Hence, the argument that the Immoral Trafficking Prevention Act ("ITPA"), which is the main statute dealing with sex work in India, does not criminalise prostitution or

prostitutes per se, but mostly punishes acts by third parties facilitating prostitution like brothel keeping, living off earnings and procuring. Therefore, the Indian legislation on prostitution has created grey areas which have led to corruption and a certain tolerance of human rights abuses because prostitution itself is not forbidden in India but public soliciting and pimping are criminal offences. Thus, the author's contention that prostitution itself has not been criminalized per se but the laws concerning prostitution only attack third parties and not the prostitutes or prostitution itself.

In the light of the above analysis, the legal implication therefore of prostitution are not far to seek. One of the legal implications to this legal problem is that a prostitute cannot lawfully be criminally charged and convicted of the offence of Prostitution in itself under the Immoral Trafficking Prevention Act as Prostitution is not an offence per se under this Act save for the acts of third parties. This is so because in the author's view, the problem of prostitution under this Act is a legal problem and not a moral one and thus it is the author's contention that since prostitution itself is not criminalised under this Act, the courts, which are responsible for interpretation of the law as well as enforcing the law cannot therefore charge and convict a prostitute as prostitution itself is not illegal per se nor are the constituent ingredient of prostitution properly so prescribed under this Act.

The author contends thus because the text and spirit of the existing law, (ITPA), does not allow anyone or rather a third party to take advantage of the helplessness and vulnerability of a woman and therefore it makes brothel keeping, procuration of person for prostitution, living on earning

of other person's prostitution, giving one's premises for the business of prostitution, and detaining anyone in brothel illegal and punishable, and not Prostitution itself.

2.3. IMPACT OF PROSTITUTION ON THE DEVELOPMENT SECTOR OF INDIA

The more prostitution is allowed to thrive, the more likely that there would be an increase in disease and also injuries resulting from violence. Consequently, consistent high HIV infection rates among sex workers have been recorded (50% or more among Mumbai's female sex worker population).³³ Further, this industry is coupled with lack of information, failure to use protection, and the migrancy of their clients³⁴ which may contribute to the spread of AIDS in the region and the country. In addition, the largest district in India, perhaps in the world, is the Bombay district. Here, it has been reported that 60% of commercial sex workers in Bombay's red-light district areas are infected with STDs and AIDS.³⁵ More than half of Bombay's 100,000 prostitutes are infected with HIV. Again, it has been reported that about 200 clients were being infected with HIV everyday, 6,000 each month.³⁶ It is further estimated that more than 50% of the sex workers in other parts are HIV-positive³⁷

Dr. Jana cited her visit to the STD clinic as reason to dedicate project resources to helping

³³ Monitoring the AIDS Pandemic (MAP) Network report, 2004, P. 21

³⁴ Galwankar S. *Sexual behaviors in migrant male workers from Mumbai: A need for sex education for the uneducated*: International Conference on AIDS. 2002.

³⁵ www.catw.com visited on 16th December, 2008.

³⁶ Robert. F. **India's Shame**: *Sexual Slavery and Political Corruption Are Leading to an AIDS Catastrophe*: *The Nation*, 8th April, 1996.

³⁷ www.who.com visited on 16th December, 2008.

women to stop working in the sex industry. A project manager with a different perspective might have viewed conditions at the STD clinic as a violation of the woman's right to proper treatment and argued for improvements at the clinic.³⁸ Without even much labor, it can be seen from the above sentiments that as a result of prostitution, there is increased disease and other related ills. As a result, there is a call on the government to pump in more and more health resources in order to treat patients. It is from this angle that the author contends that prostitution has a direct impact on the development of a country because its existence forces the government to have less diversity in terms of the development projects they can carry out because the health of a nation is critical to the proper and stable existence of a nation and hence cannot go overlooked.

However, the author is alive to the contention that if prostitution were to be legalized, women would be free to use protection. In 1992; a project study showed that 27% of sex workers reported condom use. By 1995 this had risen to 82%, and in 2001 it was 86%.³⁹ Despite the use of protection being encouraged, reaching women who are working in brothels has proven to be quite difficult due to the sheltered and secluded nature of the work, where pimps and brothel-keepers often control access to the women and prevent their access to education, resulting in a low to modest literacy rate for many sex workers.⁴⁰ Hence, prostitution would still lead to the above mentioned illnesses thereby having a direct negative impact on the economy of the country.

³⁸ Smarajit Jana. Developing a Policy Framework and Making Sex Work Safe. New Delhi: Pearson Education Press, 2006, p. 19.

³⁹ Ibid

⁴⁰ www.wikipedia.com visited on 10th November, 2008.

2.4. CONCLUSION

In India, despite the existence of the Immoral Trafficking Prevention Act ("ITPA"), which is the law attempting to criminalize prostitution, prostitution is still common. The chapter has however shown that the Immoral Trafficking Prevention Act is a little ambiguous, inadequate and hence the lacuna in it when it comes to the issue of defining prostitution and also the necessary ingredients that constitute prostitution. The chapter has further demonstrated that the sale of one's own bodily sex to a customer by an adult woman on her own free will in her private premises is not illegal and hence not punishable as per the Immoral Trafficking Prevention Act. At the same time, the Act does not give a special recognition by way of documentation or license for the sale of one's own bodily sex to a male customer in her private premises or in public premises on her own free will.

Hence, the grey area in the law attempting to criminalize prostitution. Consequently, it spawns increased disease and abuse leading to the spread of HIV/AIDS and other related diseases which in effect have directly crippled the development sector because the government is forced to spend meager resources on medicines which could obviously be used for other development projects. Thus, the author's contention that Prostitution has contributed negatively to the development of the Indian nation.

LEGALIZED PROSTITUTION: A CASE STUDY OF THE NETHERLANDS

3.0. INTRODUCTION

Prostitution is practiced in almost all the countries and every type of society. Nonetheless, on the one hand, our culture still generally disapproves of prostitution and its legalization. But, on the other hand, the different cultures approve of the practice of prostitution as is the case with Netherlands⁴¹. Thus, given this inconsistent standard on prostitution, the question whether to legalize or not to legalize prostitution is critical especially looking at it from an angle of the impact it brings with it on the development sector and most importantly public policy views. It is therefore, the objective of this chapter to make a study of the Netherlands where prostitution is legally practiced and even licensed; and taxed by the government for purposes of analyzing whether legalized prostitution justifies the continuity of the current form of the laws attempting to criminalize prostitution discussed in chapters one and two, in view of its experience. The author's concern is to provide a foundation upon which prostitution discussion, research, and policy as well as legislative development may transcend the general debate about the rights and wrongs of prostitution to a significant extent. The chapter reflects an important resolution between deeply divided views regarding the acceptability of the so called commercial sex industry especially when viewed from the light of its impacts on development. A conclusion will be drawn based on the study.

⁴¹ www.healthlink.org.uk visited on 16th December, 2008.

3.1. LAW GOVERNING PROSTITUTION IN NETHERLANDS

The Netherlands has a specific criminal provision against trafficking in persons only when it relates to prostitution. **Article 250a** of the **Penal Code** was introduced on 1st October, 2000. **Article 250(1) (a)** considers trafficking in prostitution as *"using force, threats of violence, abuse of authority or deception to induce another person to engage in prostitution"*. Under **Section 1(2) of Article 250 (a)**, the movement of persons to another country for the purpose of prostitution does not require force, deception or coercion. Thus, the simple abduction and/or recruitment of people to a different country, in the knowledge that they will enter into prostitution there, is sufficient to make it a case of prostitution, even if this takes place with the free will of the party who is taken or recruited.

Further, **Article 273a** of the criminal code makes it an offence to exploit another person for the purpose of prostitution and outlaws other forms of sexual exploitation. It also prohibits forced or compulsory labor or slavery practices comparable with slavery or servitude trafficking in organs. Again, Brothels that fail to observe the regulations are liable to administrative sanctions such as a penalty payment, withdrawal of their license and closure. They can also be prosecuted for the offences covered by **Article 273a** of the Criminal Code in the event of prohibited forms of prostitution or sexual services.

3.2. ARGUMENTS FOR LEGALIZATION: ARE THEY JUSTIFIABLE?

Donna Hughes observed that;

*“prostitution is an extreme form of gender discrimination. Legalization of this violence to women restricts women's freedom and citizenship rights. If women are allowed to become a legitimate commodity, they are consigned to a second-class citizenship. Democracy is subverted.”*⁴²

There is intense debate surrounding the legalization of prostitution. Full legalization involves prostitution taking the same status as any other occupation, that is, giving sex workers access to social security and healthcare, regulating their places and terms of employment. In the Netherlands, the use of prostituted persons has never been punishable by law and both pimping and brothel-keeping are now legal as well.⁴³ In doing so, the Government of the Netherlands in its laws aimed to establish a clear separation between the legal prostitution sector on the one hand and illegal activities, involving sexual exploitation on the other. However, it is the author's contention that there is good reason to question whether it is possible in practice to maintain such a distinction taking into account the nature of prostitution. Moreover, while criminalization does not guarantee that an activity will cease to exist, it can still be contended that there is no doubt that criminalization serves as a clear and effective means of discouraging the activity. To discourage in this context should be taken to mean to *“deprive of courage, confidence, or moral energy”*.⁴⁴

It is equally true that legalization of prostitution has the effect of making human rights abuses appear as if they were simply legitimate work, thereby “hiding” such abuses in plain view. This dynamic view was noted by the *Coalition Against Trafficking in Women* when it observed that:

⁴² Hughes, D.M. **The Use of New Communication and Information Technologies for Sexual Exploitation of Women and Children**. London: Sweet and Maxwell, 2002, P.45

⁴³ www.wikipedia.com visited on 10th November, 2008.

⁴⁴ [2003] U.S. Pub. L. No.108.

*“prostitution being legal, the authorities do not keep an eye on the sex industry so more and more victims are drawn into providing sexual services against their willLegalized prostitution gives new generations of men and boys the moral and social permission to engage in the exploitation of prostitution with a clear conscience. They say, ‘if it’s legal, it must be OK’.”*⁴⁵

In that light, it is a well known fact that Prostitution is legal in the Netherlands, and has therefore been defined as a form of work. Hence, the operation of the sex industry is such that Prostitutes/sex workers must be at least 18 years old to work in the sex industry.⁴⁶ Brothels are also licensed legal businesses which are allowed to advertise. The precise license requirements are set by the various municipalities and since prostitution is considered as profession, sex workers pay taxes. The sex industry now accounts for 5 percent of the Netherlands economy.⁴⁷

Not surprisingly, such policies increase and embolden the commercial sex industry within the jurisdiction, thereby increasing the demand for commercial sex and fuelling the sex-trafficking market. In the Netherlands, it has been argued that legalization has failed to protect the women in prostitution, control the enormous expansion of the sex industry, decrease child prostitution and trafficking from other countries, and prevent HIV/AIDS.⁴⁸

In addition, it is sometimes claimed that legalizing prostitution will create a healthy transparency in the sex industry, which will in turn lead to less corruption and abuse. However, lifting prohibitions of brothels has up till now not made the branch all that transparent as

⁴⁵ Ann Jordan of the Coalition Against Trafficking in Women (CATW) 2000.

⁴⁶ Jenifer Chao, *"Dutch Prostitutes May Soon Be Taxed"* Associated Press, 4th October, 1997

⁴⁷ Daley Suzanne. (2001, August 12). *"New Rights for Dutch Prostitutes, but No Gain"*. New York Times, pp. A1 and 4.

⁴⁸ www.wikipedia.com visited on 10th November, 2008.

expected and although prostitution is registered and under the control of the Government, women live in slavery like conditions.

Furthermore, in the Netherlands, the argument for legalization is that this helps decrease trafficking. However, more research is needed to inquire into the link between legalization of prostitution and trafficking, because it is my contention that legalization of prostitution contributes to the problem of trafficking and does not solve it at all. This is so because for the most part, prostitution as actually practiced in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution or even a person's experiences within prostitution do not involve, at the very least, an abuse of power or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, and poverty.⁴⁹ Put simply, it is the author's contention that the road to prostitution does involve trafficking which in fact is recognized in **Article 250(1) (a)** which considers trafficking in prostitution as *"using force, threats of violence, abuse of authority or deception to induce another person to engage in prostitution"*.⁵⁰ Hence, this provision demonstrates that there is a link between Prostitution and Trafficking persons.

The well known **Andrea Dworkin** stated *"When men use women in prostitution, they are expressing a pure hatred for the female body. It is as pure as anything on this earth ever is or ever has been. It is a contempt so deep, so deep, that a whole human life is reduced to a few sexual orifices, and he can do anything he wants."*⁵¹ Dworkin further defined prostitution and

⁴⁹ Sigma Huda: *A Report of the Special Rapporteur of the Human Rights Aspects of the Victims of Trafficking in Persons Especially Women and Children*. 20th February, 2006.

⁵⁰ Article 250 (1) (a) of the Netherlands Penal Code

⁵¹ A. Dworkin. Intercourse. London: Free Press Paperbacks. 1997, P.13

she provides an answer that "*Prostitution is not an idea. It is the mouth, the vagina, the rectum, penetrated usually by a penis, sometimes hands, sometimes objects, by one man and then another and then another and then another and then another. That's what it is.*"⁵²

In Netherlands, prostitution is consuming thousands of girls and women and reaping enormous profits for organized crime in post-communist countries .In addition, each year, several hundred thousand women are trafficked for prostitution in sex industry centers all over the world. The practices are extremely oppressive and incompatible with universal standards of human rights. The sex trade is a form of contemporary slavery and all indications predict its growth and expansion into the 21st century."⁵³

The perception of the prostitute as a victim is one which resounds through the literature against legalization of sex work. *Catharine MacKinnon* puts prostitution in a wider context. She states that in prostitution, women are tortured through repeated rape and in all the more conventionally recognized ways. Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits; it is the opportunity to do this that is exchanged when women are bought and sold for sex.⁵⁴ Of course the author is alive to the fact that if prostitution is regulated, chances are that abuse of women in prostitution would be lessened. This duty of regulation rests on the authorities such as the council. However as noted above "*prostitution being legal, the authorities do not keep an eye on the sex industry so more and more victims are drawn into providing sexual services against their will*"⁵⁵ Therefore, it because of this ineffectiveness by the authorities to keep an eye on the profession that increases abuses in

⁵² ibid

⁵³ Andrew Cockayne. Prostitution and Sexual Exploitation in the European Union. London: University of Exeter Press, 2001, P15.

⁵⁴ Catharine A. MacKinnon. *Pornography as Trafficking* .26 Mich. J. Intl. L. 993 (2005).

⁵⁵ ibid.

prostitution practice. Besides, there is no evidence that regulation of legalized prostitution through introduction of medical check-ups and also granting of licenses makes things better for women in prostitution as there is no mechanism put in place to address the core problem of abuse and violence that has direct sanctions against those that abuse prostitutes.

3.3. IMPLICATIONS OF LEGALIZED PROSTITUTION ON THE DEVELOPMENT SECTOR

Ms Lim, an *International Labor Organization (ILO)* researcher and employment policy expert called for governments to cash in on the booming profits of the industry by taxing and regulating it as a legitimate job.⁵⁶ This is one more argument advanced by the Netherlands government that legalized prostitution would add to the revenue of the country thereby booming the economy of the country leading to development. Nonetheless, it must not go unnoticed that Ms Lim herself acknowledged the devastating impact of prostitution when she stated that "*the growing scale of prostitution raises alarming questions about public health, morality and gender discrimination....They are much more susceptible to diseases, including HIV/AIDS*".⁵⁷ Therefore, the economic basis for legalizing prostitution are watered down by the fact that since prostitution spawns increased diseases, it means that the same government which has a duty to take care of the health of its citizens would be obliged to spend the money on medication in order to address the situation.

In addition, few activities are as brutal and damaging to people as prostitution. Field research in nine countries concluded that 60-75 percent of women in prostitution were raped, 70-95 percent

⁵⁶ ILO News Report dated 10th October, 1998, Frankfurt.
⁵⁷ *ibid*

were physically assaulted, and 68 percent met the criteria for post traumatic stress disorder in the same range as treatment-seeking combat veterans and victims of state-organized torture.⁵⁸ Beyond this shocking abuse, the public health implications of prostitution are devastating and include a myriad of serious and fatal diseases, including HIV/AIDS.⁵⁹ Medical checkups are not compulsory. Hence, health and working conditions are primarily the responsibility of the prostitutes themselves and their employers. Moreover, clients use medical checkups as an excuse to ask for unsafe sex.⁶⁰

Further, a path-breaking, five-country academic study concluded that research on prostitution has overlooked *“the burden of physical injuries and illnesses that women in the sex industry sustain from the violence inflicted on them, or from their significantly higher rates of hepatitis B, higher risks of cervical cancer, fertility complications, and psychological trauma.”*⁶¹

Hence, Netherlands’ attempts to regulate prostitution by introducing medical check-ups or licenses don’t address the core problem namely the routine abuse and violence that form the prostitution experience and the brutal victimization those caught in the Netherlands world face. However, others have argued that once legalized prostitution is regulated, it would be much easier for prostitutes to report abuses. The fact that prostitution is regulated and legalized would indeed give the standing to a prostitute to report abuses. It is however the author’s view that in as much as that would be the case, the nature of the profession of prostitution is very different from the other types of professions as it involves selling of sex. Consequently, they carry with them

⁵⁸ Farley Melissa. **Prostitution, Trafficking, and Traumatic Stress**. New York: Haworth Press, 2003, pp.33-74

⁵⁹ Ramsay, R. *Psychiatric morbidity in survivors of organized state violence including torture*. London: Sweet and Maxwell, 1993, pp.55-59

⁶⁰ Ministry of Foreign Affairs [2005]: *Dutch Policy on Prostitution Paper*, p.3

⁶¹ Raymond, J. ***A Comparative Study of Women Trafficked in the Migration Process***. New York: Ford Foundation Press, 2002, P.28

the stigma of being called 'whores' which to some extent makes them not to be so free to report abuses due to that social stigma. Moreover, sex workers are under the control of brothel owners or pimps who may further restrain them from reporting such abuses for fear of loss of business because to them it is the profits that matter at the end of the day and not the interests of the sex worker.

Furthermore, sex workers are not entitled to industrial rights such as sick pay and accident compensation nor protection from exploitation.⁶² It is this harm, made visible in the violence and health consequences suffered by women in prostitution that most strongly substantiates the arguments that prostitution has a negative impact on the development sector as the harm of prostitution is evident in its health consequences forcing the government to divert funds that are meant for other development projects just to address the health issues which include ensuring more medicines in Hospitals and Clinics to protect the health of the entire nation. Hence, the dire consequences because of legalized prostitution.

3.4 ANALYSIS OF THE CASE STUDY OF LEGALIZED PROSTITUTION OF NETHERLANDS

Article 273a makes it an offence to exploit another person for the purpose of prostitution and outlaws other forms of sexual exploitation. It also prohibits use of force. Thus, it can be observed that most arguments in favor of legalization are based on trying to distinguish between 'free' and 'forced' prostitution and trafficking. Considering the extreme conditions of exploitation in the sex industry, those distinctions are however, meaningless to women under the control of pimps or traffickers.

⁶² www.wikipedia.com visited on 10th November, 2008.

The unquantifiable benefits, coupled with strong public opposition to promoting the sex industry may prove sufficient to keep prostitutes and prostitution marginalized and subject to negative stigma. Ultimately the only solution to the stigma is providing a legal platform from which to fight it that criminalizes prostitution. Criminalizing prostitution may provide a solution because legalized prostitution in effect means calling on governments to realize that women's bodies and emotions belong to them. Hughes says that if a state permits prostitution to flourish, a certain portion of each generation of young women will be lost. Prostitution should not be legalized. Legalization means that the state imposes regulations under which women can be prostituted. In effect, regulation means that under certain conditions it is permissible to exploit and abuse women.⁶³

Therefore, advocating for the legalization of prostitution, proponents of prostitution are mainly requesting that prostitution be subject to government regulations and statutory laws. The proponents in effect are actually saying, *"make it clean, see to it that the women have mandatory medical check-ups, set up brothels, and impose government control."*⁶⁴

To do this would in the opinion of the author to allow the legislator to authorize everything from labor to taxation which simply in effect is requesting that prostitution be with any other profession. But is it, and would it be possible to view and equate prostitution like any other profession? Of course not because of the nature of prostitution.

Therefore, there is no evidence taking from the Netherlands' situation that legalization of prostitution makes things better for women in prostitution. It certainly makes things better for

⁶³ Hughes, D.M. **The Use of New Communication and Information Technologies for Sexual Exploitation of Women and Children**. London: Sweet and Maxwell, 2002, P.45

⁶⁴ *ibid*

governments who legalize prostitution and of course, for the sex industry, both of whom enjoy increased revenues and not prostitutes themselves who apparently are the victims.⁶⁵

In a nutshell, what are the moral consequences of legalizing prostitution for there is no way we can exclude morality out of our critical and fundamental decision making as well as the implications of legalizing prostitution. To dissect the above question, it is important to look at the definition of **Andrea Dworkin** that "*prostitution is not an idea (or even a fantasy), it is the female vagina penetrated by the male phallus, by one man, and then another man, and then another man and then another man... That's what it is*".⁶⁶

This means prostitution is sexual exploitation, possible rape and violence against women. Women prostitutes do not have any form of power; they are subject to their client's demands.⁶⁷

3.5. CONCLUSION

In the Netherlands, both pimping and brothel-keeping are now legal. The Government of the Netherlands noted that its laws aim to establish a clear separation between the legal prostitution sector on the one hand and illegal activities, involving sexual exploitation, on the other. While criminalization does not guarantee that an activity will cease to exist, there is no doubt that criminalization serves as a clear and effective means of discouraging the activity. Since expressive condemnation of harmful conduct is one of the central functions of the criminal legal

⁶⁵ www.newsweek.com visited on 26th November, 2008.

⁶⁶ A. Dworkin. **Intercourse**. London: Free Press Paperbacks. 1997, P.13

⁶⁷ Malebogo kgalemang: '*A Woman's perspective on prostitution*.' New York: Drew University Press, 2007-2008, p.24

system, it stands to reason that States parties should be encouraged to criminalize the use of prostituted persons. This is should be so because as shown from the case of Netherlands where prostitution is legalized that legalization of prostitution does not make things better for women in prostitution and even for the government itself despite the revenue collected from it as the government still bears the burden of providing the necessary medication stemming from the practice of prostitution which of course require huge sums of money.

Chapter Four

Legalized and Non-Legalized Prostitution: A Comparative Study

4.0.Introduction

Donna Hughes observed that;

“Prostitution is an extreme form of gender discrimination. Legalization of this violence to women restricts women's freedom and citizenship rights. If women are allowed to become a legitimate commodity, they are consigned to a second-class citizenship. Democracy is subverted.”⁶⁸

On the one hand, our culture still generally disapproves of prostitution and its legalization. But, on the other, different cultures approve of the practice of prostitution as is the case with Netherlands⁶⁹. Given this inconsistent standard, the existent cultural disparagement of prostitution and its legalization is bound to wear thin very quickly. The preceding chapters have considered the legal positions, implications as well as applicability of their current legislation attempting to criminalize prostitution in the cases of Zambia and India, and have gone further to give a brief synopsis of the rate of growth of prostitution affecting the development sector. Furthermore, a case study of the Netherlands where prostitution is legally practiced and even licensed; and taxed by the government has been looked at.

This chapter will therefore cogently and unequivocally analyze the laws relating to prostitution as espoused in both Zambian and Indian legislation and make a comparative study with the case in Netherlands where prostitution is legally practiced for purposes of illustrating the dangers of

⁶⁸ Hughes, D.M. The Use of New Communication and Information Technologies for Sexual Exploitation of Women and Children .London: Sweet and Maxwell, 2002, P.45

⁶⁹ www.legalprostitution.com visited on 18th August,2008.

the practice if let loose in an effort to make a justification for the need to amend the laws so as to clearly make prostitution itself illegal and abolished. The chapter will first give a brief comparative study between Zambia and India. Thereafter, a detailed analysis in terms of comparisons between Zambia and Netherlands will be addressed. A conclusion will then be drawn.

4.1. Indian versus Zambian: The Courts' Approach

The **Immoral Trafficking Prevention Act (ITPA)** is the main statute dealing with sex work in India while in Zambia it is the **Zambian Penal Code**⁷⁰ which is the main statute dealing with criminal offences in Zambia that has attempted to criminalize prostitution by **Sections 146 and 147**. Unlike the **Zambian Penal Code**,⁷¹ which does not define prostitution, the Indian Immoral Trafficking Prevention Act (ITPA), in **Section 2(f)** defines prostitution as the '*sexual exploitation or abuse of persons for consideration in money or in any other kind, and the expression "prostitute" shall be construed accordingly*'.⁷²

However, in the Zambian case of **R v Chipatela Ngandelan**, the court stated that prostitution means the practice by the woman of offering her body for promiscuous or indiscriminate sexual intercourse with men. The court added that the sharing of a woman equally by two men to whose exclusive use she confines herself does not per se establish that woman as a prostitute.⁷³ Besides that, one observable feature about the two legislation is that the laws are framed in such a way that the profession of prostitution does not have official sanction as the emphasis of the two Acts is not on the sex worker but the pimps or brothel owners (third parties).

⁷⁰ CAP 87 of the Laws of Zambia

⁷¹ *ibid*

⁷² Immoral Trafficking (Prevention) Act No. 104 of India

⁷³ Vol. 1 of the Northern Rhodesia Law Reports, 139

the practice if let loose in an effort to make a justification for the need to amend the laws so as to clearly make prostitution itself illegal and abolished. The chapter will first give a brief comparative study between Zambia and India. Thereafter, a detailed analysis in terms of comparisons between Zambia and Netherlands will be addressed. A conclusion will then be drawn.

4.1. Indian versus Zambian: The Courts' Approach

The **Immoral Trafficking Prevention Act (ITPA)** is the main statute dealing with sex work in India while in Zambia it is the **Zambian Penal Code**⁷⁰ which is the main statute dealing with criminal offences in Zambia that has attempted to criminalize prostitution by **Sections 146 and 147**. Unlike the Zambian Penal Code,⁷¹ which does not define prostitution, the Indian Immoral Trafficking Prevention Act (ITPA), in **Section 2(f)** defines prostitution as the '*sexual exploitation or abuse of persons for consideration in money or in any other kind, and the expression "prostitute" shall be construed accordingly*'.⁷²

However, in the Zambian case of **R v Chipatela Ngandelan**, the court stated that prostitution means the practice by the woman of offering her body for promiscuous or indiscriminate sexual intercourse with men. The court added that the sharing of a woman equally by two men to whose exclusive use she confines herself does not per se establish that woman as a prostitute.⁷³ Besides that, one observable feature about the two legislation is that the laws are framed in such a way that the profession of prostitution does not have official sanction as the emphasis of the two Acts is not on the sex worker but the pimps or brothel owners (third parties).

⁷⁰ CAP 87 of the Laws of Zambia

⁷¹ ibid

⁷² Immoral Trafficking (Prevention) Act No. 104 of India

⁷³ Vol. 1 of the Northern Rhodesia Law Reports, 139

Also **Section 5** makes an offence the procuring, inducing or taking person for the sake of prostitution. In this light, inducing may imply surrender of her body by the woman who otherwise is unwilling to submit herself to illicit intercourse in consequence of persuasion. Thus, where a girl offers herself for intercourse for money, not casually, but in the course of her profession as a prostitute, there are scruples or reluctance to be overcome and surrender of her body by such a girl may not amount to inducing a person. Hence, in the case of **Ramesh v State of Maharashtra**⁷⁴, the court stated that a person who merely accompanies a woman going out to ply her profession of prostitution does not thereby commit an offence because inducement is one of the principal ingredients. Thus, to constitute prostitution, there should be no element of coercion or seduction or inducement but must be out of a free will. On the other hand, in the **Zambian case of Leco Ltd v The People** the court stated concerning sexual habits that *"in a country like Zambia, the importance of the moral fibre of the nation, including sexual habits and the dangers in its disintegration are vital, these the court must and will protect"*.⁷⁵

Therefore, in light of these cases, one is able to draw a line as to the difference in approach taken by the courts which in the author's view emanates from the way society views or perceives prostitution. In the **Zambian case**, the legislative language of the Penal Code on the subject of prostitution indicates that the legislature was not attempting to abolish prostitution or make it illegal in itself. Clearly, the legislature was merely criminalizing the surrounding circumstances in its conduct (that is, activities associated with prostitution such as owning a brothel, aiding a person into prostitution,) in order to preserve the moral fibre of the **Zambian community**. Thus, in the **Zambian case**, though the problem of prostitution is a legal problem, morality is the chief concern of this society. This explains why these offences surrounding prostitution fall under **Part**

⁷⁴ [1962] A.I.R. S.C. 645

⁷⁵ [1975] HC reported in civil liberties cases in Zambia

III of the Penal Code which outlines the offences that are injurious to the public, specifically **Chapter XV** which talks about offences against morality, and also **Chapter XVII** highlights offences against Health, convenience as well as Nuisance. Such legislative intention was further affirmed in the case of **Leco Ltd v The People** in which the court stated concerning sexual habits that “ *in a country like Zambia, the importance of the moral fibre of the nation, including sexual habits and the dangers in its disintegration are vital, these the court must and will protect*”.⁷⁶

However, in the Indian case, though there is a plethora of laws against the sex trade including the Immoral Traffic (Prevention) Act itself, it (prostitution) is tolerated to the extent that the prostitute could show that though she is practicing prostitution, it is not out of coercion but her own free will. In that way, she would be able to escape liability under the offence of prostitution. Furthermore, organized networks for buying and selling women and girls exist despite the legislation.⁷⁷ This clearly explains **Section 5** of the **Immoral Traffic (Prevention) Act** and also the decision in **Ramesh v State of Maharashtra**⁷⁸ where the court stated that “*a person who merely accompanies a woman going out to ply her profession of prostitution does not thereby commit an offence because inducement is one of the principal ingredients. Thus, to constitute prostitution, there should be no element of coercion or seduction or inducement but must be out of a free will*”. To that effect it can be stated that according to the ITPA, the moral fibre of the community is not really taken into account because if prostitution is only an offence to the extent that it is practiced out of a free will, that is, *without coercion*, it means therefore that one can argue that they are legally free to practice prostitution provided they show that they are doing it

⁷⁶ [1975] HC reported in civil liberties cases in Zambia

⁷⁷ K. Jaishankar and D.H: **Prostitution in India**. New Delhi: Pearson Education Press, 1970, P.56

⁷⁸ [1962] A.I.R. S.C. 645

out of a free will without any form of coercion because following the decision in **Ramesh v State of Maharashtra**⁷⁹, coercion is one more ingredient to prove the existence of prostitution taking from the wording of the court when it stated that “*to constitute prostitution, there should be no element of coercion or seduction or inducement but must be out of a free will*”. In this light therefore, one is more inclined to argue that the moral aspect of prostitution in terms of the courts’ approach is not pronounced in the Indian case as it is in the Zambian case as illustrated above. To further substantiate that, **Section 146** makes it an offence for a person who knowingly lives on the earnings of prostitution; or in any public place, persistently solicits or importunes for *immoral purposes*. Hence, the section does not make any reference to the principal ingredients or elements that constitute prostitution as does the ITPA which highlights coercion to be an element that constitutes prostitution as clearly shown by the decision in the case of **Ramesh v State of Maharashtra**⁸⁰ and also the provision under **Section 5**. It is the author’s opinion here that the issue of coercion comes in as a principal ingredient of prostitution on the reliance of the above case because even the ITPA itself seeks to protect prostitutes against third parties like pimps who in most instances control some prostitutes and therefore in this way they easily coerce them to continue plying the profession regardless of the conditions of work because to them (pimps) it is business and therefore profits is what matters by the end of the day.

⁷⁹ [1962] A.I.R. S.C. 645

⁸⁰ *ibid*

4.2. ANALYSIS OF THE LEGAL POSITION AND ITS IMPLICATIONS:

NETHERLANDS AND ZAMBIA'S LEGISLATIVE FRAMEWORK

In the Zambian jurisprudence, the problem is one of legality of *prostitution itself* and not the moral aspect of it. Notwithstanding, what is clear that makes prostitution appear illegal is the fact that it is surrounded by criminal prohibitions. Examples in this light include: Any person who-

*(a) procures or attempts to procure any child or other person to have unlawful carnal knowledge either in Zambia or elsewhere, with an person or other persons for pornography, bestiality or any other purpose commits an offence.*⁸¹

Further **Section 146** makes it an offence for a person who knowingly lives wholly or in part on the earnings of prostitution; or in any public place, persistently solicits or importunes for immoral purposes. Moreover, **Section 147** makes it an offence for a person who is aiding, abetting or compelling that person's prostitution with any other person. Again, **Section 149** makes it an offence for any person who keeps a house, room, set of rooms, or place of any kind whatsoever for purposes of prostitution.

Therefore, it is the author's contention that the legislative language of the penal code on the subject of prostitution indicates that the legislature was not attempting to abolish prostitution or make it illegal in itself. Clearly, the legislature was merely criminalizing the surrounding circumstances in its conduct (that is, activities associated with prostitution such as owning a brothel, aiding a person into prostitution,) in order to preserve the moral fibre of the Zambian community. It can therefore be safely stated that such an intention explains why these offences surrounding prostitution fall under **Part III** of the penal code which outlines the offences that are

⁸¹ Section 140 of the Penal Code, CAP 87 of the Laws of Zambia

injurious to the public, specifically **Chapter XV** which talks about offences against morality, and also **Chapter XVII** highlights offences against Health, convenience as well as Nuisance. Such legislative intention was further affirmed in the case of **Leco Ltd v The People** in which the court stated concerning sexual habits that “ *in a country like Zambia, the importance of the moral fibre of the nation, including sexual habits and the dangers in its disintegration are vital, these the court must and will protect* ”.⁸²

Thus, without even much labor on the law relating to prostitution, it is clear that laws governing prostitution are inadequate. The law is not concerned with prostitution itself but the manner in which it is conducted, that is, the activities of prostitutes and those associated with them which are considered by law as offences against public order and decency. Hence, the lacuna in the laws as they do not criminalize *prostitution itself or make it illegal*.

The legal implication therefore, is that a person cannot lawfully be criminally charged and convicted of the offence of Prostitution in itself under the penal code as to do this would amount to abrogation of the principle of rule of law which requires an offence to be charged against a party to be lawfully prescribed in a particular legislation. This is so because the problem of prostitution is a legal problem and not a moral one and thus it is the author's contention that since prostitution itself is not criminalised under the penal code, the courts, which are law interpreters and enforcers, cannot therefore charge and convict a prostitute as prostitution itself is not illegal per se.

Therefore, the author's contention is that under the provisions of **Sections 146 and 147** as well as other provisions dealing with prostitution in the Zambian jurisprudence, the statute (Penal Code)

⁸² [1975] HC reported in civil liberties cases in Zambia

does not criminalise prostitution or prostitutes per se, but mostly punishes acts by third parties facilitating prostitution like brothel keeping, living off earnings and procuring. Hence, the lacuna in the laws as they do not criminalize *prostitution itself* or make it illegal in itself save for acts of third parties.

On the other hand, the distinction is not far to seek in terms of the law between Zambian legislation as discussed above and the law in the Netherlands. Prostitution is legal in the Netherlands. Brothels, however, were illegal until the ban was lifted on 1 October 2000. It is now legal to run a business where men or women over the age of consent are voluntarily employed as prostitutes. The person running the business must satisfy certain conditions and obtain a license from the local authorities. It has been left to local authorities to formulate and implement policies tailored to the circumstances prevailing in their area. Hence, the local authorities lay down the rules for brothels operating within their jurisdiction. They are also responsible for issuing licenses. Brothels must be licensed and must therefore satisfy the conditions Sex clubs, brothels and escort services may therefore operate as legal businesses. The Netherlands is one of the first countries in the world to recognize voluntary adult prostitution as a normal occupation.⁸³

To end abuses in the sex industry, the Netherlands decided to change the law to reflect everyday reality. It is now legal to employ prostitutes who are over the age of consent, and do the work voluntarily, but stricter measures have been introduced under criminal law to prevent exploitation. The legalization of brothels enables the government to exercise more control over the sex industry and counter abuses. The police conduct frequent controls of brothels and are thus in a position to pick up signs of prostitution. This approach is in the interests of prostitutes themselves, and it facilitates action against sexual violence and abuse.

⁸³ www.allthingsamsterdam.com visited on 6th January, 2009.

The new legislation aims to:

- control and regulate the employment of prostitutes through a municipal licensing system
- protect the position of prostitutes
- protect people from being coerced into prostitution
- protect minors against sexual abuse
- reduce prostitution by foreign nationals residing illegally in the Netherlands
- sever the links between prostitution and crime

In this vein, **Article 250a** makes it legal to operate a brothel or solicit clients for a prostitute.⁸⁴ This in effect makes it clear that Prostitution in the Netherlands is a legitimate profession which clearly is not the case in the Zambian situation. To illustrate this point, in the case between **Polish and Czech Women v Netherlands**, the European court held that “*the activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration*,”⁸⁵ the judgment said. This is a case where a group of Polish and Czech women have won a ruling in the European Court of Justice, granting them the right to work as prostitutes in the Netherlands. The four women took their case to court when they rented "window rooms" in Amsterdam's red-light district but were refused work permits on the grounds that prostitution was not a regular job.

Thus, it can be seen that the profession of prostitution has been given legal recognition even by the courts themselves. It must however be noted that such a decision is alien to the Zambian courts taking from the decision mentioned above in **Leco Ltd v The People** in which the court stated concerning sexual habits that “*in a country like Zambia, the importance of the moral fibre*

⁸⁴ Netherlands Criminal code

⁸⁵ “Euro Court Grants Rights to Prostitutes”. BBC News of Tuesday 20 November, 2001.

of the nation, including sexual habits and the dangers in its disintegration are vital, these the court must and will protect".⁸⁶

Therefore, a brief synopsis of the law relating to prostitution in terms of comparison between Netherlands and Zambia reveals that in the case of Netherlands, the law encompasses the prostitute herself taking from the decision above between Czech and Polish women and the Netherlands government while in the Zambian case the laws are framed by the legislature in a way that they seek not to cover the interest of the prostitute herself but have consideration for the public good as pointed out above.

4.3. PROSTITUTION AND DEVELOPMENT: A CRITICAL ANALYSIS OF THE NETHERLANDS' SITUATION AS COMPARED TO THE ZAMBIAN EXPERIENCE

The nexus between prostitution and development cannot go overlooked. In this vein, **Todaro** explained that the term development should be conceived as a multi-dimensional process involving major changes in social structure, popular attitudes and national institutions as well as the acceleration of economic growth, the reduction of inequality, and the eradication of poverty.⁸⁷ Therefore, from **Todaro's** perspective, development in essence must represent the whole gamut of change by which an entire social system, tuned to the diverse basic needs and desires of individuals and social groups within that system moves away from a condition of life widely perceived as unsatisfactory towards a situation or condition of life regarded as materially and spiritually better.

⁸⁶ [1975] HC reported in civil liberties cases in Zambia

⁸⁷ M. P. Todaro and S. C. Smith. **Economic Development**. 8th ed. New Delhi: Pearson Education Publishers, 2003 p.51

In light of that, it has been argued in the case of the Netherlands that legalized prostitution would add to the revenue of the country thereby booming the economy of the country leading to development through collection of taxes from the practice. Of course it is not in dispute that this would add to the revenue of the country. Nonetheless, it must be noted that the basis upon which prostitution was legalized concerned the economic factor of it only. This means that the government of the Netherlands in legalizing prostitution only limited themselves to economic factors of it overlooking the social factors of it. Furthermore, the author contends that it cannot go unnoticed that prostitution has devastating impact on society as *"the growing scale of prostitution raises alarming questions about public health, morality and gender discrimination....They are much more susceptible to diseases, including HIV/AIDS"*.⁸⁸ Therefore, the economic basis for legalizing prostitution are watered down by the fact that since prostitution increases diseases, it means that the same government which has a duty to take care of the health of its citizens would be obliged to spend the money on medication in order to address the situation. Besides, the public health implications of prostitution are devastating and include a myriad of serious and fatal diseases, including HIV/AIDS.⁸⁹

Hence, Netherlands' attempts to regulate prostitution by introducing medical check-ups or licenses do not address the core problem namely the routine abuse and violence that form the prostitution experience and the brutal victimization those caught in the Netherlands world face because of the nature of the profession itself as earlier alluded to in the previous chapter as it carries with it the social stigma. Further, sex workers are not entitled to industrial rights such as

⁸⁸ ILO News Report dated 10th October, 1998, Frankfurt.

⁸⁹ Ramsay, R. et. al. *"Psychiatric morbidity in survivors of organized state violence including torture."* **British Journal of Psychiatry**. (1993). 162:55-59

sick pay and accident compensation nor protection from exploitation.⁹⁰ It is this harm, made visible in the violence and health consequences suffered by women in prostitution that most strongly substantiates the arguments that prostitution has a negative impact on the development sector as the harm of prostitution is evident in its health consequences forcing the government to divert funds that are meant for other development projects just to address the health issues which include ensuring more medicines in Hospitals and Clinics to protect the health of the entire nation. Hence, the consequences of legalizing prostitution are dire.

On the other hand, Prostitution in Zambia has also continued to grow. However, from the outset, it must be noted that prostitution in Netherlands is conducted on a much wider scale when compared to that practiced in Zambia for the sole reason that in the Netherlands, Prostitution is legalized and therefore anyone is free to join this institution of prostitution. It follows therefore that prostitutes in the Netherlands are more prone to the socio stigmas and dangers that are associated with the practice of prostitution.

Hence it can be stated that where there is legalized prostitution, development both in the socio and economic sector is crippled because of the many responsibilities that the government has to undertake in order to address the illnesses that are brought about by the practice of prostitution such as the buying of medicines so as to protect the health of the entire nation which projects in the author's opinion could be used for other development projects beneficial to the entire nation and not only a limited sector of the population that is affected by the illnesses brought about by prostitution. It is in this sense that that author contends that making the laws clear so as to legalize prostitution is not an option but the laws should be made in such a way as to criminalize prostitution itself because as shown above, the position of legalized prostitution as seen from the

⁹⁰ www.legalprostitution.com visited on 18th August, 2008.

Netherlands perspective brings worse results impacting the development sector more on the negative side when compared to the Zambian situation where prostitution is not so pronounced.

4.4. Conclusion

The chapter has demonstrated in terms of comparisons by first looking at the courts' approach towards prostitution in the Indian and Zambian jurisprudence. Thereafter, detailed approach has been taken by the author in terms of the overview of prostitution in Netherlands and Zambian Jurisprudence. In that fashion, it has been shown and argued that in countries where prostitution has been legalized like the Netherlands, sex workers are not entitled to industrial rights such as sick pay and accident compensation nor protection from exploitation.⁹¹ Consequently, this lack of access to medical services often motivates sex workers to "self-medicate" which means treating illnesses with drugs purchased from unqualified vendors.⁹² Hence, from a comparative angle between Netherlands and Zambia, it is the author's contention that in such countries, the implications are more adverse as they even involve such things as self-medication which is a source of ill health in itself and therefore, in effect, the position is quite different from a country like Zambia where the laws do not criminalize prostitution itself.

⁹¹ *ibid*

⁹² www.healthlink.org.uk visited on 6th January, 2009.

Chapter five

Recommendations and Conclusion

The previous chapters have discussed the incidence of prostitution in Zambia, India as well the Netherlands. This chapter will relate the research findings to the objective of the essay namely to analyze as well as evaluate the inadequacies (lacunae) of Sections 146 and 147 and the Indian ITPA relating to the criminalization of prostitution in the two countries. Later suggestions and recommendations shall be given.

5.1. Recommendations

Section 146 and 147 Penal Code in the case of Zambia and also the provisions of the Indian ITP Act in the case of India discussed in the first and second chapters brought out the view that as a result of the lacunae in legislation, it is not justifiable to prosecute prostitutes based on the current legislation in the light of their state. The author is aware of the fact that the criminal law should not go far as to interfere with the individual private life. It is only reasonable and just that members of the society must be left to conduct their private life style without interference from the legislature. However, it must be borne in mind that STDs are prevalent due to the practice of prostitution as clearly shown in the previous chapters that ultimately have a negative impact on the development sector. It is for this reason that the author recommends that the prostitute should also be made an offender as she is part and parcel of the commission of the crime and hence should not be an exception.

In the wake of the AIDS epidemic discussed, it should no longer be said that private morality should not be the concern of the law. It is one of the functions of the law to protect citizens from what is offensive or injurious. The current legislation in Zambia and India is inadequate to deal with the social problem of prostitution because the prostitute is herself not an offender per se. She may only be charged a fee for disorderly behavior or for being a vagabond. This does not discourage her continuation in the practice in any substantial way because there is clearly more financial gain in it than what she loses by way of a fine. Thus, the more reason why the legislature should enact legislation that makes the prostitute a part and parcel of the offence of prostitution.

The projects taken by non-governmental organizations to create job opportunities for prostitutes should be welcome. While these projects are important and necessary, they must be complemented by targeted projects that discourage demand. By and large, anti-prostitution policy must be directed towards detecting, preventing and punishing the conduct of prostitutes themselves and also other third parties involved in the practice through educational campaigns or the like.

Further, it may be argued that quite a number of prostitutes are in this profession not because they cannot find employment but because they can make more money with less effort through promiscuous means. Some young ladies abandon school in order to engage in prostitution. The reason for that are a myriad but it is the author's opinion that one reason for this is that the existing punitive measures do not do enough to deter prospective prostitutes. If it was unlawful for one to be a prostitute then it would even be easy for the police to patrol bars and night clubs and arrest countless numbers of prostitutes whose disorderly behavior is clearly a major factor in

the spread of AIDS as demonstrated in the previous chapters. Hence, the recommendation that the prostitute should be brought within the ambit of the law clearly making it illegal for her to practice the profession.

It is necessary to recognize the existence of prostitution and provide for its regulation and repression of its attendant evils as far as possible. For example, with the passing of the **Contagious Diseases Act of England of 1864**, it was reported that prostitution appears to have diminished, and its worst features to have softened and its physical ills abated.⁹³ Thus, a similar piece of legislation could possibly have the same effect in our day just to serve as an effort to curb the effects brought about by the practice of prostitution. There is clearly nothing in the nature of prostitution to exclude it from legislative action.

Opposition to legislative interference can be based mainly on the injustice of curtailing individual freedom. However, as the provisions for human rights in the constitutions of many countries have shown, the individual should only be allowed to exercise his/her freedom to the extent that his/her conduct does not endanger society. The author's argument here is that prostitution endangers society and therefore she should have her freedom curtailed.

An example of how this can be dealt with may be taken from the United States of America where the laws of the state of Iowa it is provided;

"if a person for the purpose of prostitution or lewdness, resorts to, issues, occupies or inhabits any house of ill fame, or place kept for such purpose, or if any person be found at any hotel,

⁹³ W. Acton (1972): Prostitution Considered in its Moral, Social and Sanitary Aspects. London: Forcuk Cass, p. Vi.

boarding house, cigar store or other place shall be imprisoned in the penitentiary for not more than five years."⁹⁴

Such law portrays a positive measure against prostitution than the law currently obtaining in Zambia. However, it cannot go unnoticed that the provisions relating to brothels are adequate and clearly give way for the police's interference. This is appreciable. Nonetheless, it is doubtful that the police have ever ventured in these compounds to arrest people who operate brothels. Also those who live on the earnings of prostitution are condemned. This measure is in the right direction.

In the Netherlands, both pimping and brothel-keeping are now legal. In this regard, the Government of the Netherlands noted that its laws aim to establish a clear separation between the legal Netherlands sector on the one hand and illegal activities, involving sexual exploitation, on the other. For the reasons explained above in chapter three of this dissertation, there is good reason to question whether it is possible in practice to maintain such a distinction.

Therefore, the legislature in Zambia need to emulate what their counterparts did in England, for example, in realization of the problems of the AIDS epidemic that are brought forth by the practice of prostitution. Thus, a committee should be set up to examine the extent to which prostitution should come under the condemnation of the criminal law. Such a committee can be set up at the Ministry of Legal Affairs. A body of this nature should ensure that it accurately determines the Zambian society's attitudes towards prostitution, and possibly look into enacting adequate legislation that will define prostitution, and also give the necessary constituent elements

⁹⁴ Iowa Code, Section 724(1)

of the offence of prostitution as this is lacking in the Penal Code⁹⁵. In this way, the legislatures would be seen to be taking part in the fight against AIDS and prostitution. While criminalization does not guarantee that an activity will cease to exist, there is no doubt that criminalization serves as a clear and effective means of discouraging the activity. Since expressive condemnation of harmful conduct is one of the central functions of the criminal legal system, it stands to reason the State and other stake holders should be encouraged to criminalize prostitution.

Further, it is recommended that information; education and advocacy campaigns should be conducted. A variety of information, education and advocacy campaigns aimed at discouraging prostitution should be undertaken by the Government, Non-Governmental and Community-Based organizations. This may have to involve law enforcement agencies and social services representatives and policymakers. This programme educates key players on the root causes of prostitution, and is also aimed at targeting the demand for sexual exploitation.

In addition, to discourage prostitution, educational programmes must be implemented, whereby persons engaged in prostitution are required to attend classes in which they are educated about the harms of prostitution.

In the same vein of discouraging prostitution, the author further recommends that there must be projects to raise awareness about prostitution. Efforts must also be made to cooperate with multinational companies to identify ways in which the private sector and authorities can cooperate to combat prostitution. In Madrid, Spain, for instance, city officials have embarked on

⁹⁵ CAP 87 of the Laws of Zambia

an educational poster campaign, displaying signs which read, *“Prostitution exists because you pay for it. Don’t contribute to the exploitation of human beings.”*⁹⁶

AIDS campaigns to be done on an interpersonal level as much as possible. The church, the club, NGOs should share their manpower to discourage promiscuity.

5.2. Conclusions

In a nutshell, the essay has shown has sought to provide an insight into the problem of prostitution in the light of the ills brought about by it that negatively affect development. The central focus has been to examine the adequacy of the law relating to prostitution and findings have indicated that prostitution has been an issue of increasing concern to society. Both the Government and NGOs have sought to curtail its incidence through legislative means like sexual education campaigns and plans to create job opportunities .However, the most determined efforts have been largely unsuccessful hence the necessity of more legislative measures against prostitution which have been recommended in this chapter that are purely aimed at criminalizing Prostitution itself and also the major players of this practice who apparently include brothel owners. It is hoped that future legislation will take into account the recommendations suggested above in an effort to ameliorate the vice of prostitution.

⁹⁶ Sigma Huda: *A Report of the Special Rapporteur of the Human Rights Aspects of the Victims of Trafficking in Persons Especially Women and Children*. 20th February, 2006.

LIST OF AUTHORITIES

TABLE OF STATUTES REFERRED TO.

Criminal Code of Netherlands Act No.

Immoral Trafficking (Prevention) Act No. 104 of India

Zambian Penal Code CAP 87 of the Laws of Zambia

TABLE OF CASES CITED.

Leco Ltd v The People [1975] HC reported in civil liberties cases in Zambia

Ramesh v State of Maharashtra [1962] A.I.R. S.C. 645

R v Chipatela Ngandelan Vol. 1 of the Northern Rhodesia Law Reports.139

R v Munck [1918] 1KB @635

BIBLIOGRAPHY

BOOKS CONSULTED.

Cockayne, Andrew. **Prostitution and Sexual Exploitation in the European Union.** London: University of Exeter Press, 2001.

Dworkin, A. **Intercourse.** London: Free Press Paperbacks.1997.

Farley Melissa. **Prostitution, Trafficking, and Traumatic Stress.** New York: Haworth Press, 2003.

Hughes, D.M. **The Use of New Communication and Information Technologies for Sexual Exploitation of Women and Children** .London: Sweet and Maxwell, 2002.

Jaishankar, J. and D.H: Prostitution in India. New Delhi: Pearson Education Press, 1970.

May, Geoffrey :International Encyclopedia of Social Sciences.MacMillan Company, New York,1972.

Perkins, Rollin, M. Perkins on Criminal Law. The Foundation Press, Brooklyn,1957.

Raymond, J. A Comparative Study of Women Trafficked in the Migration Process. New York: Ford Foundation Press, 2002.

Smarajit Jana. Developing a Policy Framework and Making Sex Work Safe. New Delhi: Pearson Education Press , 2006.

Todaro M.P and Smith S.C:Economic Development.8th ed. Delhi: Pearson Education Publishers, 2003.

OTHER LITERATURE CONSULTED.

- Catharine A. MacKinnon. *Pornography as Trafficking* .26 Mich. J. Intl. L. 993 (2005).
- Farley, Melissa et al. (2003). "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder." Journal of Trauma Practice, Vol. 2, No. 3/4.
- Freidman, Robert. India's Shame: Sexual Slavery and Political Corruption Are Leading to An AIDS Catastrophe, *The Nation*, 8th April, 1996.
- Lin Lean Lim,(ed.).*The Sex Sector: The economic and social bases of prostitution in Southeast Asia* International Labour Office, Geneva, 1998
- MacKinnon, Catharine A. "Pornography as Trafficking" 26 Mich. J. Intl. L. 993 (2005)
- Malebogo, kgalemang. 'A Woman's perspective on prostitution.' Drew University, NY. [2007-2008]:Vol.24.No. 154

- Ramsay, R. "*Psychiatric morbidity in survivors of organized state violence including torture.*" **British Journal of Psychiatry**. (1993)162:55-59
- Sigma, Huda: *A Report of the Special Rapporteur of the Human Rights Aspects of the Victims of Trafficking in Persons Especially Women and Children.* 20th February, 2006.

PAPERS REFERRED TO.

- Afro news- '*Growing population observed under food crisis*'. 31st October, 2007
- Daley Suzanne. "*New Rights for Dutch Prostitutes, but No Gain*". New York Times. . (2001, August 12).
- ILO News Report dated 10th October, 1998, Frankfurt
- Jenifer Chao, "*Dutch Prostitutes May Soon Be Taxed*" Associated Press, 4th October, 1997
- *Dutch Policy on Prostitution Paper: Ministry of Foreign Affairs [2005]*

WEBSITES VISITED.

www.altlawforum.com

www.ashanet.com

www.wikipedia.com