



Research Paper

Prostitution Legally Justifiable?: A Legal and Moral Analysis

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“Keep your face towards the sunshine and you cannot see a shadow”- Helen Keller

ABSTRACT

Prostitution is illegal in almost all parts of the world. Regardless of whether one considers this to be positive or negative, prostitution is still a booming business and thrives despite the legal ramifications of the practice. The pervasiveness of prostitution despite its prohibition may lead one to question the point of the legislation if enforcement is so costly and ineffective. Is prostitution illegal because it harms the well being of society as a whole and the prostitute in particular? Or perhaps it is simply distasteful or worse, immoral and must be forbidden by the law. This, however, leads to several questions. Should the law be able to regulate the behaviour of individuals in private moral matters, if so, under what conditions, and further, should prostitution be regulated by the government or even be considered immoral? By analyzing the arguments presented by various sexual ethical theories that condemn prostitution as morally impermissible and exposing their flaws, this paper then turns to consent theories that accept some forms of prostitution as morally acceptable in order to show that prostitution, while illegal in the world, is, in certain situations, morally acceptable, and should not be prohibited.

KEYWORDS: Prostitution, Crime, Legislation, Immoral, Regulation

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I. INTRODUCTION

The word ‘prostitution’ derives from a Latin word called prostituere means to expose publically. It basically means providing sexual favors in return of money. Like other forms of violence it is generally committed against women by men. Moreover, the transgender community often goes unnoticed when we pin point the wrongs of the system of prostitution in India. Prostitution in India and across the globe makes billions in profits mostly by taking advantage of socially and economically vulnerable people.

The main cause of prostitution arises due to the orthodox Indian Society which sees women as an object or a commodity. Prostitution is also prevalent in caste system where marginalized women are often sexually exploited and left to rot in the degraded system. Lack of sex education, kidnapping and abduction are some cause for prostitution.

We the human beings on this whole planet whenever we face any kind of problem the only thing that can help in that situation would be “money”. We die for money, we cry for money, we work for money, and we can do anything for money. But if the same need is of another person and he/she is doing some work to help themselves, instead of taking help from others, than we are no one to make objection regarding that.

If we talk about Prostitution it means doing some sexual work or act with an consenting adult in return the client gives money to prostitute or sex worker.

PROSTITUTION – LIBERTY AND MORALITY

Prostitution is a topic that sparks many ethical and legal debates. Should prostitution be legalized, regulated, banned, or left alone? The debates almost inevitably turn to a discussion of the —regulation of

conduct by the law.¹ To what degree should society and the government have legitimate power over the conduct of an individual? What are the rights of individuals and how are these rights incorporated into societal regulation of conduct? Much philosophical ink has been spilt on the topic; however, when writing on social issues that reference governmental restrictions that should or should not be placed on an individual, John Stuart Mill's 1859 text, *On Liberty*, is generally considered the most important required reading for contemporary thinkers. Mill's work offers significant prescriptive insight into societal control over the individual and when such control is legitimate or interferes with an individual's rights.

John Stuart Mill begins his essay on *Liberty* by pointing out that there is a grave distinction between what people say about modern western governments and the reality of such governments. When, for example, in the United States, we talk about a —government of the people, for the people, and by the people², this does not mean that each person has a say in the governing of the country, it is often the case that —the people' who exercise the power are not always the same people with those over whom it is exercised. Further, when we speak of the will of the people, it is generally the will of the most numerous, and does not express the will of all.³ Because the sentiments and opinions of the majority of people in a democracy are represented more fully than those of the minority, care must be taken to protect individuals from mob morality and suppression of individuality and ideas. Mill believes that there is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism.⁴

The inherent problem with democracies is the ease with which the majority can interpose their views, customs, and moralities on those whose opinions dissent from their own, which, in turn, can interfere with the progress and evolution of humankind, claims Mill. When a majority in a state allows custom and morality to rule the government, it prevents the ability to create discourse and debate about particular dissenting views which, such views, oftentimes lead to progress and change due to the structure of intellectual interaction. This progress and change is important because morality and the opinions of the majority tend to be based in custom and are often only half truths not always based in reason, but intuition. That custom is not based in reason but intuition and emotion, leads Mill to claim that this is the same as basing legal and governmental operations on individual preferences and opinion, which are the basest form of understanding. When individuals are not protected against the tyranny of the majority, fear of persecution, abuse, or legal ramifications prevent expression of ideas, and this in turn leads to the stagnation of the state.

The tendency to inhibit discourse on dissenting ideas often carries over into the realm of action and human behaviour. The idea that the will, opinion, or morality of the majority is infallible reflects the tendency to suppress any kind of behaviour or action that goes against culture or custom. If they do not want an individual to discuss it, they certainly do not want an individual to do it. For Mill, this suppression is unwarranted and he develops a principle in his text that he believes can serve as a test to determine whether it is justifiable for the government to interfere, not with merely the beliefs or opinions of an individual but with a person's actions. Mill's principle states —that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty or action of any of their number is self-protection. In other words, to prevent harm to oneself or on behalf of others (in the case of the government) is the only time it is acceptable, according to Mill, for the government to interfere in the lives of individuals. Each individual has the right to express his/her opinion or to perform self-regarding actions (actions that affect only the individual in question) without interference. To claim that one is able to force another against his/her will to do something that is _for his/her own good, whether physical or moral, is simply not a legitimate claim. If the actions of an individual do in fact harm another, then others (i.e. the state) should and sometimes are —absolutely require[d] to interfere. This principle, often referred to in literature as the _harm principle,' requires others to allow individuals to decide for him/herself without interference as long as no other is harmed or their rights infringed.

Mill asserts that in any case in which an individual does not affect the lives of others by his/her action, then —there should be perfect freedom, legal and social, to do the action and stand the consequences. Even in the case that the individual is in error, it is better for society, according to Mill, that he/she be left alone to act in whatever manner he/she sees fit. Those in society who are concerned for the moral well-being of the individual may offer advice or plead for a change, others who condemn the acts of the individual may choose to separate themselves from the individual, however, it is not the case that others are permitted to —make his life

¹ Richard A. Wasserstrom, ed. *Introduction to Morality and the Law* (Belmont, California: Wadsworth Publishing Company, 1971) 1.

² Abraham Lincoln, —Gettysburg Address| Speech, November 19, 1863 in *Collected Works of Abraham Lincoln*, Roy P. Basler, ed. (New Brunswick, New Jersey: Rutgers University Press, 1953).

³ John Stuart Mill, *On Liberty*, (Indianapolis: Bobbs-Merrill Educational Publishing, 1956) I: 5

⁴ *Ibid.*

uncomfortable or actively seek to control the actions of the individual. If on the other hand, harm is likely to be caused to others, then it is acceptable for the individual to be prevented from performing the act.

Mill, nevertheless, admits that many may still disagree that the aspect of an individual's life that both affect and do not affect others are indeed distinct. Critics may claim that there can be no actions that harm, affect, or involve only a single individual. The critic may claim that —it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least to his near connections, and often far beyond them. Any action performed by an individual, on this account, affects many others in various manners. For example, it could be the case that agent A decides to visit a prostitute. His visit to the prostitute affects not only himself and the prostitute (a willing, consenting, adult participant), but also perhaps his brother, child, friend, sister, mother, neighbor, etc. in many cases, it is not direct harm of others but indirect harm that critics describe. Indirect harm caused to —near connections,⁵ such as embarrassment, failure of a role model to behave accordingly, disgrace of a family, or even offense, are not enough to prevent a self-regarding action because it is not the case that the 'harm' caused in these cases is sufficient enough to infringe on an individual's liberty. To do so would have negative repercussions for liberty and individual freedom. Mill replies that while the action of an individual may affect others through sentiment or interest, hurt feelings are not a sufficient reason to allow the individual to be forcibly or compulsorily subjected to the law.

If, on the other hand, through this self-regarding action, agent A inflicts direct harm on others, such as passing on aids to offspring or other sexual partners, use of funds that would prevent the care of dependants, physical harm to others, or the breaking of a vow, then his behaviour may be subject to the law. For example, if agent A spends his child support money on visiting the prostitute, and is thus, unable to take care of his child, it may be the case that his behaviour should be censured and he should be held liable. Or in the case of adultery or some other act that directly harms another, he should be censured. However, in this case, Mill stresses that it is not the act of visiting the prostitute that is reprehensible, but the failure to fulfill his parental or spousal duties is the problem with the act. So, again, it is not exactly clear that even in cases of direct harm to others due to an individual's acts that the act itself is morally unacceptable because it is often corollary behaviour that makes the act wrong, not the act itself. When a society condemns certain acts, such as prostitution, then, it is often not based on the self-regarding action, but some other act that may be prohibited by law or morality.

The various ways in which moral sensibilities affect and alter society are analyzed by Joel Feinberg in his text *Social Philosophy*.⁵ Feinberg argues, as this essay previously addressed, that Mill advocates and accepts what is referred to as the 'private harm principle,' which, simply stated, is the permission of —society to restrict the liberty of some persons in order to prevent harm to others.⁶ This seems to be the only occasion in which the state is allowed to coerce an individual against his/her will, according to Mill, and seems to be widely accepted by most people as a permissible case of coercion by the state. However, Feinberg argues that Mill must also hold some form of the 'public harm principle' because if not, he would have accepted certain acts such as —tax evasion, smuggling, and contempt of court.⁷ To Feinberg, acceptance of these acts by Mill is unlikely, and thus, Mill must, on his assumption, accept the public harm principle which —justif[ies] coercion on the distinct ground that it is necessary to prevent impairment of institutional practices and regulatory systems that are in the public interest.⁸ Accepting this assumption by Feinberg for the sake of argument, he goes on to claim that while the private and public harm principles seem to be acceptable, it is not at all clear to what degree they actually are acceptable because the meaning of 'harm' must first be analyzed in order to uncover the various uses of it and related words, such as hurt and offense.

A distinction, however, must be made between harm and hurt because oftentimes, they are used interchangeably and it is not at all clear that they should. For example, when one hears the statement —A was harmed by X, often this is interpreted as —X hurt A or —A was hurt by X. The example that Feinberg uses to distinguish between the two is the popular phrase, —What a person doesn't know can't hurt him. He then looks to the sentence with the word harm replacing hurt. He claims that while it is the case that if a person does not know something there is no way for that person to be hurt, it is not the case that if a person does not have the knowledge of being harmed that the harm has not occurred. In other words, part of being hurt requires the knowledge of being hurt, whether physical or emotional (both of which are types of hurt). So, the example that Feinberg uses of the —cuckolded husband requires the husband to have knowledge of the infidelity of his wife for him to be hurt emotionally. Without the knowledge there is no hurt. However, it is not the case that the husband must know that his wife cheated to be harmed. This is because his interests are harmed whether he knows this or not. A clearer example of the relationship between harm and knowledge is Feinberg's example of the rich robbery victim. Even in the case that the victim has no idea of or does not discover the robbery for some

⁵ Joel Feinberg, *Social Philosophy*, (Englewood Cliffs, New Jersey: Prentice-Hall Inc, 1973).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

time, he is still harmed by it because his interests are compromised. The thief cannot use —He will never miss it! as an acceptable defense, it is a species of harm whether the robbed man knows it or not. However, one thing that links harm and hurt is that anytime one is hurt, they are also harmed because when one is hurt, his interests are also compromised, and he is thus harmed. This means that hurt is a type of harm, though not all harms are hurts.

Mill makes several important qualifications to the harm principle relevant to a debate on prostitution policies. First, the harm principle does not encompass all kinds of “harm” – only the violation of individual “rights.” Mill is unspecific regarding what constitutes a right, but we will assume that Mill had certain, basic rights – life, liberty, and property – in mind. The harm principle inherently promotes freedom of choice, the right to “pursue our own good in our own way.” Secondly, society can and should adopt paternalistic measures (in violation of the harm principle) in the interests of protecting children, since they have not yet reached a state of reason. Mill writes, “Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.” Finally, Mill argues that society has a right “to ward off crimes against itself by antecedent precautions”. If experience warns us that certain freedoms tend to produce certain harms, the harm principle enables society to proactively restrict those freedoms.

The many harmful aspects of prostitution – disease, rape, violence, etc. – are considered serious enough by some to warrant government interference in the sex trade. However, these reasons alone are not enough to justify regulation or prohibition based on Mill’s harm principle. It should be noted that proponents of the Dutch and Swedish approaches to prostitution both use paternalistic arguments. The Dutch argue that their approach is in the “best interest” of the prostitute, that legalization and regulation will minimize the dangers of sex work. The Swedish unsuccessfully attempt to avoid accusations of paternalism by deeming prostitution “inherently coercive,” sidestepping the fact that some women willingly choose to sell their bodies. Any law that restricts prostitution based on potential risks to consenting parties is paternalistic, and it violates the rights of women who voluntarily seek employment in the sex trade. Mill would argue that prostitution is an alternative lifestyle that should be tolerated even if society deems it immoral. In order to justify prohibition based on the harm principle, prostitution must violate the rights of a non-consenting party. This involuntary party consists of the women and children forced into sexual slavery through sex trafficking.

In *A Crime So Monstrous*, investigatory journalist E. Benjamin Skinner describes how women and children are deceived into prostitution. Most women at risk for sex trafficking live in desperate economic situations. Victims of trafficking in Western Europe come from former Soviet bloc countries like Moldova and Romania, or African and Southeast Asian countries where job opportunities for young women are extremely limited. “Recruiters” lure women into leaving their homes with the prospect of a high-paying job in a restaurant or hotel in a foreign country. In some cases, a charming, attractive, well-off young man called a “lover-boy” develops a romantic relationship with a woman over the course of several weeks, even months. He promises her a better life in his country if she would come home with him. In both cases, the woman is betrayed upon reaching her destination – the recruiter or lover-boy (trafficker) sells her into a brothel. The brothel owner or pimp informs her that he spent several thousand dollars to bring her overseas, and she must have sex with clients in order to repay her “debt.” If the woman resists, he rapes her into submission. With added “interest” to her debt and the constant threat of violence, she will never be able to escape the brothel. She has become a slave in every sense of the word.⁹

One of the most common defenses of conventional sexual morality, which has a variety of secular formulations, nevertheless, stems from natural law theory which is generally attributed to Saint Thomas Aquinas and upheld by the Catholic Church. In order to fully understand the ethical implications of natural law theory on sexual acts, it is important to understand the umbrella theory under which this sexual ethical view rests. The concept of natural law, typical in the religious tradition, considers the nature of human beings and their proper end or function. This notion of ‘proper ends’ is borrowed from the *Nicomachean Ethics* in which Aristotle claims there is a proper end or function for human beings and all other natural objects. According to Aristotle, the natural function of humans is reason, which contributes to flourishing or well-being (which is the highest human good) in the human soul. This leads to the argument that all human actions and behaviors must be conducive to the proper end of humans which then contributes to a person either leading a flourishing human life or failing to flourish.¹⁰ However, while natural law, as formulated by Aquinas, stems from Aristotelian teleology, the best place to begin the analysis of naturalistic sexual ethics is with the concepts Aquinas himself develops.¹¹

⁹ Skinner, E.B. 2008. *A Crime So Monstrous*. New York: Free Press.

¹⁰ Aristotle, *Nicomachean Ethics* in *The Basic Works of Aristotle*, trans. Richard McKeon (New York: Modern Library, 2001) book I.

¹¹ Much of Aquinas’ discussion calls on ‘the Philosopher,’ or Aristotle, as authority on this subject and frequently references pages from the works of Aristotle.

Since humans are naturally inclined to act in a manner that promotes their good, they share certain things—which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth.¹² All actions that a human performs are supposed to be aimed toward his/her good. Aquinas, then, depends upon natural law to understand what is natural and unnatural for a human to do to determine whether such acts are a fulfillment of the human good. So, when Aquinas turns his analysis to sexual ethics, he concludes that the sex act must be guided by reason and performed only when it fulfills its proper human function. To understand the proper function of sex, he investigates the male body and semen specifically looking for how it contributes to the good of men and claims that though the male semen is superfluous in regard to the preservation of the individual, it is nevertheless necessary in regard to the propagation of the species. Other superfluous things, such as excrement, urine, sweat, and such things, are not at all necessary; hence, their emission contributes to man's good. Now, this is not what is sought in the case of semen, but, rather, to emit it for the purpose of generation, to which purpose the sexual act is directed.¹³

Since Aquinas concludes that preservation of the species is a natural inclination in humans that is governed by natural law, he argues that the purpose of emitting semen is for propagation of the species, and thus the natural end of that action. Since the natural end of the action is to produce offspring, and performing this act for any other reason would be going against this natural end, sexual intercourse for any other purpose would be bad or unnatural. However, this seems to be begging the question. Aquinas is essentially arguing that everything has a function and emitting semen produces offspring and thus propagates the species, therefore the sex act in which semen is emitted should only and always be done to propagate the species. However, simply because semen is essential in the propagation of the species, does not necessarily mean that it is the only function of sex. Sex is and can be done for other reasons. Additionally, there is no reason to suppose each act only has one function. The function of the nose can be said to breathe, but it is also used to smell and aids in taste. So, which is the 'proper' function of the nose and if one uses the nose to smell, is the agent using the nose immorally or badly? It seems unlikely.

Nevertheless, the arguments against naturalistic theories focus on what seems to be the central issue of such theories, namely, what exactly do the proponents mean by —natural and is there really a single case of —natural sex? So, while it is being argued that the argument ultimately fails to link natural functions and morality in any meaningful way, how does prostitution fare under its dictates? If we recall that the sole criteria of a sexual encounter being morally acceptable according to the socio-biological view is its potential for the procreation, on this view, prostitution, as such, cannot be condemned as being morally wrong because it can lead to reproduction, though, admittedly, it typically does not. However, if birth control or a sterile partner is involved, prostitution can become morally unacceptable. But as it stands, prostitution in itself is not impermissible when understood in these socio-biological terms. Yet, under the natural law theory of Thomas, if a sexual act is not done for reproduction and there is no marriage involved, it is immoral. Nevertheless, the actual argument that Thomas sets up is problematic and his link to the proper function of sex and immorality is strained and unconvincing. Simply because prostitution does not fulfill the function of sex, does not mean it is immoral. Additionally, the link between the function of sex and marriage for the purpose of raising offspring is extraneous and is not adequately defended.

DECRIMINALISING PROSTITUTION: LIBERATION OR DEHUMANISATION?

"... we live in a culture where many of us must pay people both to take care of our bodies and to listen to our feelings.' The prostitute is really at the extreme end of a continuum few women ever escape... Exploited by a society that treats women as second class citizens fit to be recipients of men's domination and exploitation. If anybody should feel guilt or shame," says Lena, "It's certainly not me! The greedy landlords who've exploited the immigrants and the fools in the government who don't know or care what's happening, they should feel guilty." Lena, a Russian-Israeli wife, mother, and prostitute.¹⁴

We would call it: criminalizing prostitution - feminist program or prop to patriarchy? For to me, the issue is not what decriminalization would do, but what criminalization and hyper-regulation of prostitution have done historically and continue to do, not merely to individual women victims of police, pimps, prosecutors, mobsters and "johns", but to women as a whole. There are currently three major systems used to handle prostitution: criminalization, decriminalization, and regulation. Criminalization typically defines as illegal the exchange of sex for money, as well as a variety of associated acts such as public solicitation, pimping, and transporting women for the purpose of prostitution. Laws typically make the act of trading sex for money per se

¹² Thomas Aquinas, *Summa Theologica*, volume 6, Fathers of the English Dominican Province, eds. (London: R&T Washbourne, LTD, 1915) 94;2.

¹³ Aquinas, *Summa Contra Gentiles*, Book III, —Providence, Part II, 122:4

¹⁴ Lena, a married Russian woman working as a prostitute in Israel's Upper Nazareth, quoted in Anne Zeto Kaye, *New Workers, Old Profession*, Jerusalem Post, Apr. 26, 1991.

illegal¹⁵; several jurisdictions criminalize patronizing as well, though enforcement is rare. Criminalization generally removes prostitutes from the protection of wage and hour laws, social security, insurance and pension laws, safety and health protections and collective bargaining rights.

Decriminalization of the individual sale of sex is the norm in the majority of developed nations today, although most continue to criminalize public solicitation, pimping, and brothel owning - that is, most still attempt to limit prostitution's visibility and to reduce third party profiteering from the sale of sex. In some countries, prostitutes have organized to lobby for health insurance, old age pensions, and other benefits. Decriminalization is often accompanied by extensive regulation.

Regulation generally aims at preventing the spread of sexually transmitted diseases (STD's) - venereal disease and more recently AIDS - as well as at imposing what might be called time, place and manner restrictions on the practice or advertisement of prostitution. Licensing of prostitutes, brothels and bars is currently practiced, for example, in the Philippines.¹⁶ Many other jurisdictions regulate and limit street solicitation, or use zoning to confine brothels to certain neighborhoods.¹⁷ Where regulation prevails, police often closely govern the daily life activities of prostitutes. In Nevada, where brothel prostitution is legal in six counties, prostitutes are often confined to their brothels; prohibited - along with their families - from residing or vacationing in the community where they work, forbidden to have visitors who are not clients, and restricted from leaving their brothels except to go to such places as beauty parlours and doctor's offices." Nevada law mandates AIDS testing and publication of names and photos of prostitutes who test HIV positive. Similarly oppressive confinement has characterized other regulatory systems, from the highly regulated nineteenth century French system of *Maisons de Close* to that of contemporary West Germany.

We advocate decriminalization of the act of prostitution and the activities of prostitutes, and would countenance only such regulation as is aimed directly at empowering prostitutes to gain adequate wages, protection from disease and abuse, and employment benefits. To that end, regulatory schemes should be - like most others - voluntary in the sense that prostitutes choose whether to avail themselves of benefits ranging from AIDS screening to overtime pay. (Prostitutes should be subject to, like the rest of us, mandatory income tax and social security laws.) And while we favour efforts to eradicate mobs and middlemen, we believe this should be accomplished within the framework of general criminal laws, not laws directed at prostitution per se. Even with this limitation, caution is necessary: history demonstrates that most such efforts have ultimately harmed women. For instance, England's 1885 Criminal Law Amendment Act which held landlords responsible for renting to brothels, resulted in denial of housing to all women living alone, since all were potentially prostitutes. The ironic result was to force prostitutes into the arms of pimps.

When society regulates prostitutes, it ideologizes and enforces a pervasive system of control of women's bodies, not merely through direct control of "bad girls", but by establishing indirect and rigid codes for "good girls". It is no accident that in cultures which most prize virginity - such as the Philippines - prostitution flourishes. Women who cross the sexual divide - from pure to sullied; from private to public - can seldom return. And women cross that divide not merely by selling sex, but by giving it improperly away in youthful indiscretion or adultery, by having it taken from them by incest and rape¹⁸, by defying societal sexual and reproductive norms.

Criminalizing prostitution helps legitimize marital rape and battery by suggesting that sexploitation is usually confined to the world of marginalized public sex exchange, whereas sex within private so-called consensual marriage - traded for the right to clean house and raise children on a permanent basis (or for its prelude, dinner at Lutece or Bouley) - is generally non-exploitative. Criminalization suggests that while in prostitution, degradation is the norm, within marriage and long-term liaisons, it is unusual. It is odd that many feminists assume -despite our vehement opposition to spousal abuse - that marital privacy necessarily offers women greater potential for equality and control than does the public market. For however exploitative the relations of the market, most of us seem to believe them an improvement on slavery and indenture.

Criminalization of prostitution helps not only to construct gender relations and sexual relations, but race and, especially, class relations as well. In New York, in the Philippines, in Korea and throughout Southeast Asia, indeed, throughout recent history in industrial and industrializing societies, the targets of state surveillance and control have always been the lowest caste of sex-sellers, the street walkers: poor, immigrant and minority.

¹⁵ Black's Law Dictionary defines prostitution as an "act of performing, or offering, or agreeing to perform a sexual act for hire," BLACK'S LAW DICTIONARY 1222 (6th ed. 1990)

¹⁶ Susan Marquez Owen, *Men and Women of 'Sun City'*, S.F. CHRoN., Aug. 5, 1990, at 8/Z.

¹⁷ See generally, John F. Decker, *Prostitution: Regulation And Control* (chapter 4) (1979).

¹⁸ See Martha Chamallas, *Consent, Equality, And The Legal Control Of Sexual Conduct*, 61 S. CAL. L. Rev. 777, 827 (1988); Nancy Erbe, *Prostitutes: Victims Of Men' Exploitation And Abuse*, 2 Law & INEQ.J. 609, 614 (1984); Edwin O. Wenck, *Sexual Child Abuse: An American Shame That Can Be Changed*, 12 CAL. U. Rev. 355, 356 (1983).

When the Paris police raid the Bois de Boulogne, they jail poor Brazilian immigrants; when the Philippine authorities haul in young girls for their bi-weekly medical exams, they take the rural poor, the victims of incest and rape, pariahs because, unlike those from families who can provide bedroom doors to lock, they are no longer virgin “cherry girls” when New York or Milwaukee cops round up their “girls”, they are the disproportionately black streetwalkers; when Israeli police arrest street women, they arrest Soviet immigrants, many of whose husbands have encouraged them to sell their bodies to pay for rent and food. The vast majority of prostitutes are poor, single mothers of multiple children - fathered by absent “johns”. (Criminalization renders these men virtually immune from child support enforcement.)

Let us assume a situation in which prostitution is entirely illegal in a country and those engaging in prostitution – i.e., sex workers, their pimps and clients – are prosecuted, if caught. As with other illegal markets, e.g., the market for classified drugs or endangered species, illegality does not eradicate the market, given that there is strong demand from clients on the one hand, and the willingness to supply prostitution services on the other hand. The equilibrium quantity of prostitution will be a function of supply and demand, just as in any other market. A commonly recognized stylized fact is that despite working conditions that many would regard as exploitative, wages earned by prostitutes tend to be high relative to their human capital endowments such as education and skills, and therefore relative to the wages they could earn outside prostitution. This has been explained by factors such as compensation for social stigma and exclusion, risky and unattractive working conditions, and forgone marriage benefits.¹⁹ Another reason, we suggest, is the compensation for allowing random and often previously unknown clients to infiltrate private and intimate spheres. Importantly, there will be a wage premium, all other things being equal, if prostitution is illegal compared to a situation in which prostitution is legal, since sex workers (and their pimps) need to be additionally compensated for the risk of prosecution. This is similar to the price premium for banned goods like drugs.²⁰

What will be the effect of legalizing prostitution on the demand, supply, and thus equilibrium quantity of prostitution? Starting with the demand effect, some clients will be deterred from consuming commercial sex services if prostitution is illegal and they expect that there is a reasonable probability of being prosecuted, as this raises the costs of engaging in such activities. Legalizing prostitution will therefore almost invariably increase demand for prostitution. Concerning supply, legalizing prostitution will induce some potential sex workers (or their pimps) to enter the market, namely those who were deterred from offering such services by the threat of prosecution and for whom the pay premium that arose from the illegality of prostitution represented insufficient compensation – i.e., the risk of prosecution creates costs that are not easily expressed in monetary terms and can therefore not be compensated for with a higher wage. One might conjecture that supply could also decrease given that the state will want to raise taxes from legalized prostitution, whereas illegal prostitution, by definition, does not entail payment of taxes. However, this is not the case. Those unwilling or unable to operate legally (including meeting the legal obligation to pay taxes), can continue to operate illegally. Before, their business was illegal because prostitution was illegal; now their business is illegal due to their tax evasion in the shadow economy. Supply could only decrease under the assumption that the state prosecutes tax evasion more vigorously than it prosecuted illegal prostitution before, which, we believe, will not be the case. As is the case with demand, supply will therefore increase as well. With demand and supply both increasing, the equilibrium quantity of prostitution will be higher in the legalized regime compared to the situation where prostitution is illegal.

If the scale of prostitution becomes larger once it is rendered legal, will the incidence of human trafficking also increase? The increased equilibrium quantity of prostitution will, for a constant share of trafficked prostitutes among all prostitutes, exert an increasing scale effect on the incidence of international trafficking for prostitution purposes. It is only part of the whole story, however. The full answer to the question depends on what happens to the composition of prostitutes and whether any substitution effect away from trafficked prostitutes (towards domestic prostitutes or foreign prostitutes legally residing and working in the country) is stronger than the scale effect. Under conditions of illegality, a certain share of prostitutes will consist of trafficked individuals, given the difficulties in recruiting individuals willing to voluntarily work in such an illegal market. This share of trafficked prostitutes is likely to fall after legalization. Sex businesses wishing to take advantage of the legality of prostitution (instead of remaining illegal) would want to recruit more national citizens or foreigners legally residing with a work permit in the country since employing trafficked foreign

¹⁹ Cameron, S., (2002). *Economics of Sin: Rational Choice or no Choice at all?*. Cheltenham: Edward Elgar; Edlund, L. & Korn, E. (2002). A Theory of Prostitution. *Journal of Political Economy*, 110 (1), 181-213; Giusta, M. D., Di Tommaso, M. L. & Strøm, S. (2009). Who is watching? The Market for Prostitution Services. *Journal of Population Economics*, 22, 501-516.

²⁰ Miron, J. A. & Zwiebel, J. (1991). Alcohol Consumption during Prohibition. *The American Economic Review*, 81 (2), 242-247.; Miron, J. A. (2003). The Effect of Drug Prohibition on Drug Prices: Evidence from the Markets for Cocaine and Heroin. *The Review of Economics and Statistics*, 85 (3), 522-530.

prostitutes (or, for that matter, illegally residing foreign prostitutes that were not trafficked) endangers their newly achieved legal status.

However, the legalization of prostitution will not reduce the share of trafficked prostitutes to zero. First, there may be insufficient supply among domestic or legally residing foreign individuals, given the risky and unattractive nature of prostitution which persists even after legalization. Second, trafficked individuals are significantly more vulnerable and exposed to the demands of their pimps, which makes their continued employment attractive to some extent. For example, a greater portion of their earnings can be extracted, making their pimps' business more lucrative than operating with legal prostitutes. Third, clients might have preferences for "exotic" sex workers from geographically remote places whose nationals are unlikely to have legal rights to reside in the country. There is consequently a substitution effect away from illegally trafficked prostitutes (as well as illegally residing non-trafficked prostitutes) to legally residing prostitutes, but just how strong this substitution effect is remains an empirical matter. In sum, the effect of legalization of prostitution on the international trafficking of human beings is theoretically indeterminate as the two effects, with unknown magnitudes, work in opposite directions. We therefore now turn to our empirical analysis to shed light on whether, on average, the substitution effect or the scale (quantity) effect dominates.

LEGALISING PROSTITUTION IN INDIA?

While dealing with a PIL filed by Bachpan Bachao Andolan about large scale child trafficking in the country, a Supreme Court bench of Justice Dalveer Bhandari and Justice AK Pattnaik are reported to have advised the Solicitor General, "When you say it is the world's oldest profession and when you are not able to curb it by laws, why don't you legalise it?"

It is noteworthy that the judges were not dealing with those women who take to this profession as a choice but children who are abducted, trapped, bought and sold by criminal mafias to be inducted into the flesh trade. We are left wondering whether the Hon'ble Judges of the Supreme Court intend to legalise child trafficking as well—all because our government agencies are unable and unwilling to curb the criminal mafias who are pushing vulnerable children from impoverished families into the flesh trade.

It is extremely misleading to describe prostitution as one of the "oldest professions" in history. Even today there are numerous communities world over, including in India, which have no history of prostitution. Many do not even have a word to describe it. This demeaning form of transaction between men and women is characteristic of those societies which take a very perverse view of male sexuality. The assumption is that men being men, they are unable to control their sexual urges and therefore they need all kinds of avenues for satisfying their insatiable hunger for sex with multiple partners. It also assumes that men should not be expected to take responsibility for out of wedlock progeny. Women have to bear the brunt of "illegitimate" births. This perverse mindset that takes a very lowly view of male sexuality and moral fibre and expects society at large and women in particular to be indulgent towards their irresponsible behaviour. Using this logic even rape is often justified on grounds that the man concerned was unable to control his sexual urge or that a woman asked for it. We are convinced no self respecting man will use such a cynical view of male sexuality which amounts to declaring men unfit for socially responsible behaviour. Most self respecting men view sex trade being more demeaning for men than for women. That is why some of the strongest voices against prostitution in literature, cinema and in social reform movements have come from men.

There are compelling reasons to decriminalize prostitution for the following categories of persons:

- (a) Those that enter the sex trade voluntarily—as do many high society call girls—simply because if a person wishes to enter into a demeaning relationship with another for monetary or other favours, there is no way the government can stop the practice because it is enacted in private;
- (b) Those that gravitate towards this profession due to poverty related reasons or abusive family circumstances because such victims of circumstances ought not to be treated as criminals.

It is well acknowledged that arrests and rescue operations by the police are mostly a theatrical exercise to keep the terror alive so that the sex workers and pimps dare not resist paying bribes. Therefore, draconian laws put in the hands of the police add to the problem instead of curbing prostitution.

The term of prostitution is not new in India as we move back in our past we can see many examples of prostitutes present at that time. The biggest example is of Draupadi in Mahabharat how she is distributed between the five pandvas and become only wife of five husband's. As from the heard stories from our ancestors they used to say that Draupadi after sleeping with one of her husband at night after that on another night before sleeping with other husband she used to take **fire bath** to become pure again and she can do this purification activity because she was yajnasenia gift given by God to king Drupad of Panchal.

In late India the concept of **Devdasi**²¹ has also contributed to the profession of prostitution in India. During **Mughal period** they bring *tawaif* to fulfill their sexual desire and from that time the Prostitutions society begin to develop. As the king go at the particular palace where all the tawaif were situated that could also be the reason due to which today in India According to the 2016-18 report by UNAIDS there are about 6,57,800 prostitutes residing in India. The cities where most of these prostitutes resides are the Metropolitan cities namely Mumbai, Delhi, Kolkata and another where most of the prostitutes resides.

SEX WORK AND IMMORALITY

Indian courts continue to consider sex work an “immoral activity”, where the object of concern is the well-being of social morals rather than social beings. Sex work as a socio-legal issue is understood through an interconnected system of typecasts, connotations and an overarching lens of deviance that views sex work as a desperate means of livelihood that is only resorted by a certain class, caste and gendered groups.

“There is no substance in the submission that the victim is not likely to indulge into such immoral activities, being financially sound, looking to the factual matrix, as prima facie apparent from the FIR, whereby the victim is said to have agreed to indulge into prostitution at the particular moment, by accepting Rs. 1,00,000/,” said paragraph 8 of the judgment.

Such a narrow viewing of realities concerning sex work produces exclusionary grey spaces in jurisprudence that impairs the judicial system’s ability to navigate sex, capital and pleasure together in a consensual and non-distressed plane. Even the Supreme Court of India, in its *Budhadev Karmaskar v. State of West Bengal* judgment, 2011, observed sex workers as dignified persons on the pretence that their choices were driven by abject poverty and not pleasure.

This conditionality creates counterproductive stereotypes that subvert the idea of equal citizenship for numerous sex workers who do not fit such legal archetypes. Hence, it becomes crucial for the judiciary to go beyond its typecast image of a “victim” and imbibe an empathetic potential to understand the liminal possibilities of sex as desire and work as pleasure.

This judgment reflects more on the dangers posed by an uninformed legal system than the individuals it seeks to provide justice to. The judgment acquaints us with the unfortunate ways through which the HIV status of a person is seen as a “disability” and consequently becomes a beam balance to measure the extent of “danger” that a person might pose to society.

Further, the “normal life” envisioned for women by such a protectionist legal system exhibits everything except a life that puts the reins of a woman’s sexuality and sexual agency in her/their hands. Therefore, it is an important reminder for us to not view judgments as a timeless piece of objective truth but as a momentary manifestation of a constitutional vision at any given time in history.

LAWS IN INDIA REGARDING PROSTITUTION

The period following World War II has been notable for the international consensus that has emerged on human rights. The idea that human beings have certain basic or inalienable rights is, of course, not unique to this period. The distinguishing feature, however, is the much broader international consensus on these issues, as demonstrated by the near-unanimous passage of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948, recognizing every human being's right to life, liberty, and security. More than 20 international human rights agreements have been forged since then, including the twin International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).

The Indian government has ratified, signed, or acceded to 13 of these thus far, including the Women's Convention, albeit with reservations to many.²² Moreover, the Preamble of the 1949 Constitution of India promises to the citizens of India justice, liberty, equality, and “the dignity of the individual.”²³ These rights are made more concrete in Articles 12 through 32 of the Constitution, which comprise the main body of fundamental rights and are modeled on the Bill of Rights in the U.S. Constitution. Article 15 provides for non-discriminatory treatment of all individuals irrespective of sex, religion, and other characteristics; Article 23 prohibits traffic in human beings and slavery; and Article 24 prohibits the employment of children in hazardous

²¹ A Temple dancer devoted to the practice of spiritual dancing. In which the girl was gifted to the priests of the temple by her own parents.

²² See Ministry of Home Affairs, "Human Rights in India" (1999), available from the Ministry of Home Affairs at <http://mha.nic.in/scena.htm>, and I. Landsberg-Lewis (ed.), *Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* (New York: United Nations Development Fund for Women, 1998).

²³ Constitution of India, Preamble.

employment. The fundamental rights of the Indian Constitution are positive rights in that they are legally enforceable. The Constitution also lists a set of desirable objectives for the state. Although not legally enforceable, these objectives include the right to an adequate means of livelihood for all citizens; a clean environment; protection of citizens, including children, against abuse; the right to work; and just and humane conditions for work.²⁴ Recent court judgments suggest that the Indian legal system is becoming sympathetic to some of these objectives, primarily by means of a new element in the judicial process: public interest litigation (PIL).

Despite the existence of a plethora of laws that seek to prevent human rights violations, the poor implementation of these laws in India has meant that several overlapping groups—women, lower castes, and tribal populations—have been unable to fully enjoy the gains in well-being realized by other groups, whether in the form of better education, health, or other indicators of freedom and happiness. Indian women in particular appear to suffer from a range of discrimination and violations of rights in the areas of health, education, and work. This fact is clearly reflected in aggregate province-level statistics, which show that, with few exceptions, women have significantly lower literacy rates and hourly earnings rates than the men.²⁵

Within this vulnerable group, sex workers stand out as being particularly vulnerable. Many sex workers enter the profession when they are minors, often without their consent, and thereby become vulnerable to sexual violence and economic exploitation.²⁶ A recent survey conducted by one of the authors among 300 brothel sex workers in Sangli district found that nearly half had entered the profession at an age of 16 years or less and about one-tenth had entered at 13 years or less.¹⁸ Another study estimated that nearly 40% of sex workers of Nepali origin in Mumbai's brothels had been either abducted or sold by their own family members and or men from their village.¹⁹ Moreover, even though child sex work is illegal in India, it clearly thrives; some studies estimate that child sex workers make up about one-third of all sex workers currently in India.²⁷

During their working life, sex workers in India are subject to frequent harassment and detention by the police, even though, according to the Immoral Trafficking Prevention Act of 1986, sex work is in itself not illegal if it is practiced privately and independently. In an intensive study on the implementation of the laws of sex work, Jean D'Cunha found that between 1980 and 1987, more than 9000 women in sex work were arrested in Mumbai alone.²⁸ Typically, arrested women and girls are released later in return for money. However, this type of transaction and other forms of police harassment are hardly ever revealed in statistics. Sex workers also face discrimination and exploitation in areas of special concern to them such as health care, earnings for their services, and obtaining financial credit. This situation has only been exacerbated by the HIV/AIDS epidemic. For the general population, health care professionals recommend HIV tests whenever recurrent fever, symptoms of tuberculosis, diarrhea, or an STD is present. For sex workers, however, HIV tests are recommended even for a single episode of illness, making them feel stigmatized, further marginalized, and discriminated against on the basis of their health status. As one said, "Even before asking me what health problem I had, the doctor asked me, 'Do you have AIDS? Go for an HIV test first'."²⁹ In a women's hospital frequented by sex workers in Mumbai, health workers take a blood sample from every woman seeking treatment without explaining to her the purpose and nature of the test, which can be seen as a violation of her rights to information, to privacy, and to security of person. There is no post-test counseling, and the manner of revealing test results lacks discretion, which can be seen as a violation of the right to privacy. Doctors often tell women in sex work that they are the "scourge" of society. One woman doctor working in a hospital in a red light area said, "As more and more prostitutes are becoming HIV-positive, more and more men are getting infected and dying of AIDS."³⁰

In India, sex workers has not given legal status under Indian law, but still there are some provisions which clarifies their act to be illegal under some special circumstances.

There are certain laws governing sex work in India which are present in the Constitution of India, 1950 as follows; Under article 21 right to life and personal liberty, guarantees, under article 23 provides prohibition of trafficking of human beings and forced labour, under Part 4 article 39(a) of Directive Principles of state policy:

²⁴ Constitution of India, Articles 36-51.

²⁵ J. Dreze and A. Sen, *India: Economic Development and Social Opportunity* (New Delhi: Oxford University Press, 1995)

²⁶ See K. Mukherjee, *Flesh Trade: A Report* (Ghaziabad, India: Gram Niyojan Kendra, 1989), and Darbar Mahila Samanwaya Committee, *The "Fallen" Learn to Rise: The Social Impact of STD-HIV Intervention Programme* (Calcutta: DMSC, 1998).

²⁷ "The Fear of AIDS from Adult Sex Workers," *The Times of India*, 15 November 1998.

²⁸ J. D'Cunha, *The Legalization of Prostitution: A Sociological Inquiry into the Laws Relating to Prostitution in India and the West* (Bangalore, India: Wordmakers, 1991).

²⁹ Quoted in S. Bharat, *HIV/AIDS Related Discrimination, Stigmatisation and Denial in India: A Study in Mumbai and Bangalore* (Mumbai: Tata Institute of Social Sciences, 1999), p. 89.

³⁰ *Ibid.*

the state is required to direct its policies towards securing the same that both men and woman have an equal right to an adequate means of livelihood. Under Article 46 provides promotion of the educational and economic interests of weaker sections of the society, ensuring their protection from *social injustice and exploitation*. Article 47 obligation on the state to raise the levels of standard of living. Under **Article 51A(e)** Renunciation of practices by citizens that are derogatory to the dignity of woman.

Whereas, the Indian Penal Code, 1860, has at least 20 provisions³¹ that make trafficking Punishable. Under section 366B Deal with abduction for illicit intercourse, Section 368 wrongful confinement after abduction.

The **Immoral Traffic (Prevention) Act, 1956, Or(ITPA Act 1956)** has been defined as the primary act of dealing with sex work offences are given accordingly; under **section 3**: provides for punishment for keeping a brothel or allowing premises to be used as a brothel. **Section 4** provides for punishment for living on the earnings of prostitution. **Section 5** provides for offences in procuring, inducing or taking person's for the sake of Prostitution. **Section 6** provides for detaining a person in premises where prostitution is carried on. **Section 7** provides for offences regarding prostitution in or the vicinity of public places. **Section 8** provides for the purpose of prostitution. **Section 9** provides for seduction of a person in custody.

Under **Section 10A**:- Reformation of female offenders by detaining them in established corrective institutions. And under **section 13** for the enforcement of which special police officers can be appointed. In the Immoral traffic prevention bill 2006, under **section 5(c)** provides for punishment of any person visiting a brothel for the purpose of sexual exploitation of any person. Under **section 18 and 20 of ITPA Act 1956**, Magistrates are authorised to close brothels and expel persons from premises where sex work is being carried out, including their residence, under **section 13 and 15**: police can remove any person found on the premises where sex work is carried out, irrespective of their age and consent. Under **section 370A** of Indian Penal Code 1860, Clients of sex workers are also criminalized and can be held liable with 3 to 5 years of imprisonment or with fine or both.

- **Case law:-**

*Budhadev Karmasakar vs. State of West Bengal*³²

Facts: On 17th September 1999, at about 9:15 Pm in a red light area of calcutta. The deceased *Chayay rani pal* was a sex worker and after coming to her room no.8 where other public witnesses (PW) were also present namely Abida, Maya, Asha and Parvati have seen the accused Budhadev after having oral argument with chayay rani pal kicked her with fists and legs, and when she fell down on the floor. The accused Budhadev then caught her by her hair and banged her head against the floor and the wall several times, which left chayay rani pal bleeding from her ear, nose and head and she died due to this injuries.

Judgement: The Supreme Court dismissed the appeal and observed that sex workers are entitled to the right to life and must be accorded the protection guaranteed to every citizen. It instructed the state to provide recommendations on the "rehabilitation of sex workers who wish to leave sex work of their own choice and to provide helpful conditions for sex workers who wish to continue working as sex workers". In accordance with Article 21 of the Constitution of India, 1950.

- **Case law:-**

*ShahyogMahila Mandal vs. State of Gujarat*³³

Facts: On 25 January 2002 supposing a organization of 214 women in Prostitution/sex work. According to the petitioner/organization, the area known as "chakla bazar" was initially at the outskirts of city Surat where women of sex work given house to live in, situated outside the main town and they have been working from many years in that area but on 5th January 2003, the Deputy Commissioner of police(DCP) & Senior Inspector (SI) of police station chaklabazar, along with their subordinates entered *noorjahan&sangeeta* buildings and damaged the home and beat them forcing them to leave the place(chakla bazar). As it comes under the public place and according to section 7 the prostitution in vicinity or in public places is an offence. So, due to which they arrested 584 people in which 547 were women & 37 were men. The arrest were made without following the proper procedure. The petitioner makes allegation that the expansion of the city of surat, over the area of chakla bazar on which the police are taking advantage of extension of such city limits which is violating their rights.

³¹Sections of Indian penal code 1860; 293, 294, 317, 339, 340, 341, 342, 354, 359, 361, 362, 363, 365, and 366, 370, 371, 372, 373, 375, 376, 496, 498, 506, 511. All these sections deals with trafficking.

³²(2011), 11SCC 538.

³³(2004) 2 GLR 1764.

Judgement: The Gujarat High Court refused to recognize prostitution as a legitimate means of livelihood, as that would give an open invitation for women to be trafficked and also that the right to prostitution is not a fundamental right of women or girls.

And various kind of reformative approach have been given by this court to change the status of the sex workers in India.

Society:-

1. The society just don't see the reasons or problems of the prostitutes or sex workers why they are doing this kind of work. Instead of that they are ever ready to put lot's of allegations on this vulnerable sections of people. And they keep on teasing, abusing them whenever they get time to do so.
2. If a husband of a wife goes to the prostitute and she is knowingly accepting the truth of his husband act and after that act whenever she saw any other prostitute whether in some locality or whether if they gone to buy some vegetables or market wife started blaming prostitute for her husband behaviour. Wife taunts the prostitute that "you had changed our lovely lifestyle, you have started ashes within our married life" and all.
3. No one in this world would tell you their weakness and acts which they cannot said. But still by any how some people managed to get to know what profession other is doing and after finiding the person of the sex work it becomes difficult for that womeb/prostitute to live or reside in that society.
4. Every society just want that there children should remain good and healthy and pure from their heart and have pure character and if the lady who work at a massage parlour resides in the society. First action, No one will talk to her for many reason and if she has children than they would also be get neglected from other society children's due to their parents issue.
5. Society after knowing there member to be a sex worker or prostitute would never allowed to reiseid in their society. They all have pre defined mindset regarding the character of prostitute/sex worker.

However, no self respecting society can afford to "legalise" the dehumanisation of millions of those who have been coerced into flesh trade through force, fraud, abduction or violence.

Till the early 1990s defence of the right of prostitutes came mainly from feminist groups and those gender sensitive men who argued that laws penalizing prostitutes amounted to punishing the victims while letting off their male clients who exploited their poverty and vulnerability. Many of them demanded laws that punished men who trafficked in women as well as men who live off prostitutes as pimps and those who visit them as clients.

However, in recent years the discourse on the subject has undergone a sea-change due to the scare of AIDs in first world countries. This has led billions of dollars, pounds and Euros as well as other resources being directed towards "safe sex practices", with special focus on condom use among sex workers. From Prince Charles to Bill Gates to Hollywood stars as well as some western governments and major donor agencies have all joined the campaign to legalise prostitution because they feel that is the only way condom use, regular health checkups including HIV tests can be promoted among sex workers and their customers.

Earlier, sleazy lawyers helped sex workers get bail when arrested. Today, with the availability of massive international grants for this work, some of the best lawyers in India have emerged as defenders of the rights of prostitutes. While some still stay with the old-fashioned view that sex workers are trapped in the profession due to poverty related circumstances, many argue that renting out one's body to a customer for a few hours is no different from a doctor, teacher or an architect renting out his intellectual skills to an employer for a monthly salary. Therefore, they demand that sex work should be legalised and treated with the same dignity and respect as any other profession.

However, those who demand that prostitution should be "legalised" and treated with "respect and dignity" at par with all other professions and occupations need to answer a few basic questions:

What does the term "legalise" actually imply? Does it mean that a prostitute can open a sex-shop anywhere she likes and advertise her services? Does it mean men or women supplying call girls should be able to set up an office in any neighbourhood they like, just as doctors set up their clinics, proclaiming that call girls are available between such and such hours? How many of us are willing to let our young children grow up amidst an atmosphere where renting a woman's body for sex is considered a perfectly legitimate activity?

If people come to know that a mafia don has set up a call-girl racket in their neighbourhood, do they have the right to seek its removal or does it mean other citizens have to suffer the presence of such activities in the name of “respecting” the rights of sex workers to an occupation of their choice and thereby endanger their own lives?

Those who demand that sex work be given the same “respect” as any other profession, need to explain whose duty it is to give or ensure “respect” for prostitutes and pimps? Is the government expected to enact a law requiring people not to shun prostitutes, as for instance it did to ban the practice of untouchability? One can prove that one does not practice untouchability by freely intermixing and inter-dining with castes condemned as untouchables. How does one prove one’s “respect” for a prostitute? Do we have to send our children to brothels to intermix with the children of sex workers or do we hold special functions to socially honour the most successful among them? If prostitutes cannot win the respect of the clients they service, how can the rest of society be made to respect them?

We are told that at least feminists have a duty to respect women for making this choice. If feminism is about respecting each and every choice women make, then why are we not willing to respect women who choose to worship at sati shrines or those who abort female foetuses because they prefer being mothers of sons rather than daughters?

Countries where sex work is legal are not free from dehumanising forms of sex slavery and prostitutes do not command social respect. Therefore, copycat solutions will not work. While there is need to decriminalise this activity and free sex workers from the terror and extortionist grip of the police, to make it respectable and socially acceptable would mean turning a blind eye to the dehumanising circumstances through which the vast majority of children and women are trapped into trading their bodies.

FOR AND AGAINST LEGALIZING PROSTITUTION IN INDIA

There exists some people in our society who believes that prostitution is an evil in itself while on the contrary there are people who express endorsement for its presence in the society. Therefore, it can be seen in either way. However something which cannot be debated is that in this field of prostitution there are sex workers who are being sexually tortured or become survivors of viciousness from their procurers and even customers. Thenceforth there’s no doubt that legalizing prostitution will safeguard women from exploitation and brutality. Dissimilar to illegal prostitution in which the sex workers may be compelled to do sexual intercourse without the use of condom or any other precaution and thereby decriminalizing it can permit the state to put an obligation on the part of the sex workers and its clients to make use of condom or any other form of protection as sex work is prone to several occupational health risks.

Also legalization of the prostitution will help the state in generating a set of rules and regulations in regard to the age limit of the prostitutes, requisite earning and necessary clinical facilities to the sex workers. And with the help of this the sex workers will be able to exercise some of their rights, for example, they will get an equal opportunity to educate their children, right to medical treatment, they will be entitled to protest against exploitation, violence, rape and so forth. It has also been seen that in a country like India which has immense population and limited job opportunities, there are some women who enters into the dark world of prostitution for the sake of their livelihood. Also lack of education and awareness is responsible for the rapid growth of this industry. Thereby licensing prostitution will help the state in giving the sex workers basic education and also necessary training which will help them in developing income-generation skills like weaving, sewing, knitting, painting etc. Another major help that will be served by legalizing it is that the government will be able to keep a track record of the number of sex workers in our country. So that the government can device new ways for the protection of the sex workers and welfare the society.

However earning made by selling the dignity and esteem of a woman is something that is not at all admirable. And if prostitution is made legal in Indian society then people will start viewing it as a profession and therefore more women will be motivated to engage in this industry as easy way to earn money. As a result it will cause the massive growth of this industry. A subsequent concern centres around the hazard that sanctioning prostitution will lead to the increase of human trafficking. In India more than 84 million people are poor and for their survival many times people sell their female child to the sexual predators in exchange of money. And with the decriminalization of prostitution more children will be forced to become sex workers. Also there will be a rapid increase in the number of scams.

POLICY CHALLENGES

Because of the difficult circumstances for sex workers in India, even relative to that of other women, it is important to explore ways to improve their economic and social well-being. One popular method is to “rescue” sex workers by force, thus reducing the exploitation said to be characteristic of the sex industry, and then to offer the rescued workers alternative sources of employment or relocation to place of origin. Methods to restrict entry, such as a ban on trafficking women and girls, would be a natural accompaniment of this approach. In practice, groups that consider sex work as immoral are likely to favour both forcible removal of sex workers

and restraints on entry into sex work, so that it is not always clear whether the policy stems from the desire to impose a particular moral perspective or to improve the well-being of sex workers. A second method is to reduce the level of exploitation in the sex industry itself-by legalizing sex work or by protecting the civil liberties and political rights of sex workers-and to place restrictions on trafficking and address exploitation by brothel owners.

The Indian policy approach, at least in the statutes, has been to try to achieve a mix of the different methods, with a careful balance between the views that sex work is immoral, that the sex trade is exploitative, and that sex worker rights need to be protected. As the very name of the major legislation relating to trafficking and sex work in India-the Immoral Trafficking (Prevention) Act of 1986- makes clear, social attitudes about sex work as immoral have influenced government policy towards sex work. The various provincial Devadasi Acts that seek to prevent the entry of women into sex work were, in part, the result of a backlash against what the mainstream society considered immoral practices. Moreover, the Immoral Trafficking (Prevention) Act of 1986 is severe on trafficking and brothel owners, and it supports rescue and rehabilitation schemes for sex workers. At the same time, it is silent about the legality of sex work itself, if not its outward manifestations such as soliciting and “public disturbance”. Constitutional safeguards and other statutes that protect the civil liberties and political rights of all individuals ostensibly protect the rights of sex workers. The Contagious Diseases Act of 1864, which legislated mandatory testing of sex workers for venereal disease and restricted their movement and practice to specifically allocated areas, offers one example of conferring a “legal” status on sex work.³⁴

As is clear from the circumstances of sex workers, the Indian government's approach has not been very successful in protecting the rights of sex workers or improving their well being. Yet ineffective policies of long standing, such as rehabilitation, and a legal framework that is ambiguous in its approach towards sex work but seeks to restrict entry into it, continue to remain popular. This is unfortunate because it means that decision-making with respect to sex workers in India is less than fully informed about competing intervention alternatives, particularly those that emphasize explicit social and legal recognition of sex workers and an activist stance toward enjoying their human rights. A human rights approach focuses on the legal rights of sex workers to address abuses that they face and emphasizes recognition of their civil liberties, such as custody of children, social security, minimum pay, and soliciting for clients. Its proponents include many nongovernmental organizations (NGOs), and its hallmark is the active participation of sex workers in the struggle for rights.

II. CONCLUSION:-

The central concept – prostitution – is the subject of intense debate. People define prostitution in different ways and include different types of sex work and sexual activity in the statistics. For example, are women who offer web cam/telephone sex or erotic massages subsumed under prostitution? What about actors in pornographic films? Or young, vulnerable girls from broken homes whose need for emotional support is sexually exploited by callous men in their environment? Does there have to be a certain degree of continuity and regularity for such activities to be called prostitution, or is it enough – as is the case in Austria – to take a financial/material reward once to be defined as a sex worker? The problem is that all of these images of prostitution are available ‘out there’ in the ‘real world’. The problem is compounded when it comes to categories such as ‘pimping’, ‘forced prostitution’ or ‘victims of trafficking’. In these cases the definition of the category is itself highly contested. Policy categories merge fact, moral belief and calls for action, and their adherents hold on to them with sincere conviction. Yet, the choice of what image of ‘prostitution’ or ‘pimping, or ‘forced prostitution’ or ‘victims of trafficking’, prevails has significant consequences for the nature and extent of the issue that is the subject of public policy, as well as the type of policy instruments that are required for its solution.

Prostitution is not a homogeneous phenomenon. It comprises different work types such as street, window, club, home and escort prostitution, each of which presents its own challenges to counting. Moreover prostitution forms a world that is closed to outsiders and, particularly in countries where it is prohibited, operates in the shadows. When prostitution is mixed with criminal intent, such as in trafficking and brute exploitation, these problems of visibility are augmented. Moreover, the level of mobility in prostitution can be extremely high. As a result most data sources are problematic. Police records generally only register sex workers who have been involved in, or are victims of, some kind of criminal activity, mostly violations of visa requirements or as alleged victims of trafficking or pimping. Tax records are rarely updated and contain many expired files, while an unknown number of sex workers work outside the tax system or are not accessible. It is not surprising then that most countries do not have centralised data banks that keep track of basic statistics on prostitution. And even where such data registers exist they are often based on unreliable sources.

³⁴ Center for Feminist Legal Research, Memorandum on Reform of Laws Related to Prostitution in India (New Delhi: CFLR, 1999).

While international treaties and national law are obviously important in framing prostitution policy, we will argue that the local exerts sufficient autonomy to decisively shape the sex trade as it manifests itself 'on the ground'. While this is in itself not surprising, much public debate and academic analysis concerns national policymaking. The current acrimonious public debate about prostitution is almost exclusively focused on the moral differences of various policy regimes (for example, legalisation versus client criminalisation). Similarly, one of the most famous, or notorious, academic studies of prostitution policy is wholly concerned with establishing the statistical relationship between legalisation and the extent of trafficking. The focus on national policy has two deplorable effects on understanding prostitution policy. First, it deflects attention from the everyday business of policy design and implementation that is crucial to the impact of prostitution policy on the target groups and on (urban) society. This can easily lead to the denial of the impact of policy on the sex trade in general. The earlier mentioned argument that large-scale economic or cultural transformations are the main drivers of the changes in prostitution, to the point that diametrically opposed policies are seen as ineffective in shaping its societal manifestation, is one manifestation of this neglect of local policymaking. Second, the lack of attention to local policymaking prevents the analyst from understanding the complex relationship between the national and the local in shaping prostitution policy.

In our opinion people have to change their pre defined thinking about prostitution or sex workers because we think no one would like to do this kind of activity intentionally in place of having monetary purpose.

The obvious answer would be no. As there would be so many reasons due to which woman becomes prostitute like; due to poverty, to give family support, some family member head is serious and they have to get money urgently for their treatment. Prostitute also does this activity as they wanted to change their Children's life. To give their Children's better education, they are following this profession from their ancestors (example:- Tawaif). Many do this sex work to fulfil their other need for buying costly addicting products. Another reason would be that the women have become habitual to perform sex with 20-15 man per day and which gives her a very good monetary profit.

The sex workers had used many intoxicating materials while performing their sex work and without that products now they cannot live so, that's why they do this act to get extra amount of money easily to buy this costly products.

In the case of Chayayrani Pal Brutal Murder Case by Budhadev 2011, in which accused Budhadev held liable. But Supreme Court also provides various suggestions for the reformation or rehabilitation of the prostitutes or sex workers. As it suggested the prostitutes should be given opportunity to get technical as vocational training, by which she would be able to earn her livelihood by such vocational training and skill Instead of selling her body.

Before all of that the rehabilitation the mindset of the society and people at large should be changes first regarding prostitution. As the prostitutes are also the human beings like us and we should have sympathy regarding them, as there must be some extra-extra ordinary condition in which a person cannot decide or can't find help from anywhere than the last option of using themselves comes into mind. And we all know that no one in this whole world would willingly comes into this profession whether we talk about the prostitutes or sex workers they all came to this profession due to some problem where they find any hope and get easily some money in this profession.

Besides the society, the executive also disturb the sex workers as whenever under section 10A of ITPA Act 1956, they were taken into reformatory home (Nari Suraksha Grahah) by under section 13 by appointing special police officer. The police officer demands sexual pleasure from the prostitutes to make them live freely & comfortably and promised the prostitutes to free them after they given them what they want. The section 370A which makes client's held liable would make difficulties for the sex workers to perform their work as after getting arrested the customer get afraid to not to go back at that place again.

In my thinking as there are so many laws relating to the rape victim like section 224 in Indian Penal Code 1860, in which no one can disclose the identity of any rape victim. Not the same provision but that kind of act should be made to protect the identity of the prostitutes to get exposed. And provide safeguards for their working environment,(as in the case of Chayay Rani Pal Murder Case. No other victim should get died like this again) proper healthcheck up at hospitals without any restrictions at a reasonable price. Proper health check up is must to reduce the tendency of having HIV/AIDS related diseases. In India prostitution is a 40,000 crore net annual income organization so, we can assume by the estimates that very vast majority of peoples of India used these prostitute so it should be mandatory for the central and state governments to collect and check the health reports of the prostitution or sex workers in India.

Policy implementation is crucial because it determines the outcome of a policy initiative. No matter how lofty, important or urgent a policy initiative is, if it cannot be translated into effective policy measures, the policy will fail, or worse, result in negative, unintended outcomes. But perhaps even more important in the case of prostitution policy is that policy implementation has a profound influence on the position and rights of a vulnerable group – sex workers.

Given that the inherent tendency in prostitution towards this is fuelled by background social conditions feeding into expectations about the form of prostitution transactions, it would seem that legislation would have to be directed towards changing both these background social conditions and affecting the attitudes of those who participate in prostitution. Not only this, but it would also be important to ensure that the industry remain stable by not feeding back into problematic social attitudes towards gender and sex relations.

Until we can develop equality strategies and a theory of citizenship that do not depend on a concept of worthiness, prostitution as a paradigmatic model of unworthiness and as a practice of inequality will continue to mark the degeneracy/respectability divide and reinforce social hierarchies. The analysis of degeneracy and respectability transforms the meaning of prostitution and demands that each of us attend to the words of W.H. Auden, who wrote, “All we are not stares back at what we are.”