



PROSTITUTION: PERSPECTIVES FROM VARIOUS SCHOOLS OF JURISPRUDENCE

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ABSTRACT

The debate surrounding legalization and decriminalization of prostitution has been a topic of discussion among legal and academic scholars alike. However, before one dives deep into the pros and cons of both sides, one has to look and analyse prostitution from a theoretical and philosophical perspective, as it exists in India. Jurisprudence is a subject and a tool that helps to analyse this kind of debate. Hence, by the means of this paper, the authors will attempt to analyse and understand what various schools of Jurisprudence have to say about the legal status of Prostitution. An attempt will be made to comprehend the stance of criminalisation of Prostitution as written by prominent contributors of four schools of Jurisprudence- Natural School, Historical School, Positivism and Feminist Theories. By understanding the works of these scholars, one can make an informed decision in regards to the legal status of prostitution. Lastly, the paper will make suggestions as to what methods have been tried and tested and can work in a country like India to reduce the exploitative nature of Prostitution.

There are vogues and fashions in jurisprudence as there are in literature art and dress.

-Benjamin Cardozo

INTRODUCTION

Prostitution is defined as the practice of engaging in relatively indiscriminate sexual activity, in general with someone who is not a spouse or a friend, in exchange for immediate payment in money or other valuables. Prostitutes may be female or male or transgender, and prostitution may entail heterosexual or homosexual activity, but historically most prostitutes have been women and most clients are men.¹ In India, Prostitution in itself is not punishable, but other related activities such as maintaining a brothel, soliciting, procuring a person for the purposes of prostitution, and the activity in the vicinity of a public place, living on the wages of a prostitute, etc. is punishable under the Immoral Traffic (Prevention) Act, 1956.² Furthermore, India's pivotal legislation, the Indian Penal Code, 1860³ punishes the selling and buying of minors for the purposes of prostitution, importation and procuring of minor girls, exploitation of a trafficked person etc. In the landmark case of Budhadev Karmaskar vs State of West Bengal,⁴ the Apex Court made the right to life and personal liberty⁵ available to a prostitute. The court further stated that prostitution is reflected in the economic conditions, and if such a woman gets an opportunity to learn

¹ Britannica Dictionary, <https://www.britannica.com/topic/prostitution> (Last visited Apr. 16 2021).

² The Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India).

³ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

⁴ [2011] 10 S.C.R. 577.

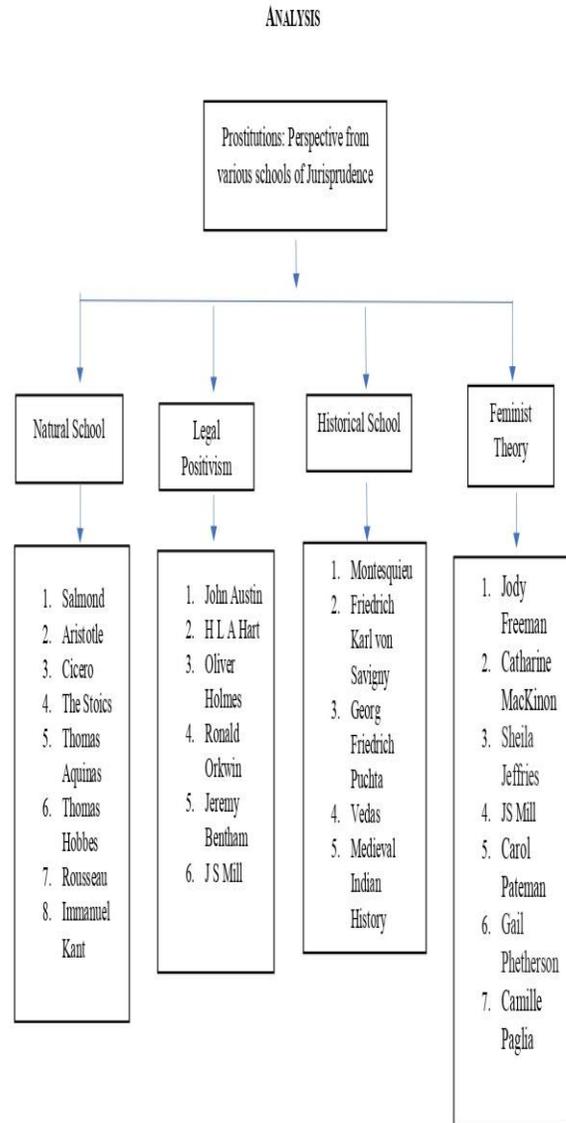
⁵ INDIA CONST. art. 21, § 1.



technical or vocational training, she can earn her basic livelihood from her skill instead of selling her body. However, there is an extensive ongoing debate on the advantages of decriminalisation and subsequent legalisation of prostitution.

RELEVANCE OF STUDY

The theoretical and political framework of prostitution and sexual exploitation is widely discussed among scholars. However, a major chunk of this discussion focuses on the macro perspective, while the perspective pertaining theory and causation remains sparse. This paper will attempt to see prostitution through the lens of four main schools of jurisprudence- Natural School, the Positivist School, Historical School and the Feminist theories and thus provide a comprehensive overview of the philosophical, legal, and political perspectives pertaining to prostitution. It is important as before determining and changing the legal status of prostitution, one needs to analyse and understand the various jurisprudential schools of prostitution to arrive at a conclusion.



NATURAL SCHOOL

According to **Sir John Salmond**, “*natural or moral law means the principles of natural rights and wrongs.*” Natural law embodies the principles of morality and natural justice.⁶ Natural law theory can be interpreted and understood as a theory which delineates the

⁶ 5 AK JAIN, JURISPRUDENCE 13, (Ascent Publications 2019). (hereinafter “JAIN”)



interrelationship between divinity, law and morality.⁷ Natural law provides for the infusion of morals into legislations of pluralistic democracies and condemns acts like prostitutions which transgress such morals.⁸

Aristotle conceptualized the ideal state as a point of equilibrium where all groups work together in harmony.⁹ He believed that harmony, balance and virtue are the ideal goals¹⁰, and the government should work to satisfy the social instincts of the governed.¹¹

Cicero said that man has been bestowed with the highest form of reason which considers certain acts as profane and certain acts sacred.¹² He wrote about 'true law' which in his opinion had a very divine origin and accordingly it was indispensable to comply with it and it cannot be altered or repealed.¹³ This can imply that profane acts such as prostitution should not be performed and a law outlawing prostitution should be obeyed and not put under scrutiny.

The Stoics trusted the divine law implying universality of the natural law. Their ideal end-state was to achieve a society where everybody lived in harmony while following the divine law.¹⁴ In alignment with this ideology of the Stoics, in order to preserve the institution of marriage and operate in communal harmony, deviant practices such

as prostitution may have to be done away with.

Saint Thomas Aquinas, who wrote quite extensively on prostitution, prescribed living according to the law of nature and acting virtuously and expressed that all antisocial or criminal acts are to be seen as deviant from the natural norms.¹⁵ He argued that a law is said to be just when it ordains a common good and carries an element of morality.¹⁶ He postulated that any law which is opposed to divine good should be disregarded.¹⁷

Thomas Hobbes pictured man with innate negative qualities such as selfish, savage, wild and aggressive and in order to ensure peace and stability, proposed complete obedience to the sovereign and propagated the concept of eternal laws which are immutable and indisputable.¹⁸ The Hobbesian theory can be interpreted to support the ban on prostitution.

Jean-Jacques Rousseau emphasized on the will of the community which is the general will. He said that the interests or will of an individual can, in no circumstance supersede the general will and must confirm to it.¹⁹ He stressed upon respect for the law which reflected the general will of the community and any disobedience towards it could be reinforced by the State even by the use of force.²⁰ If the general will considers prostitution to be immoral, every individual

⁷ JULES L. COLEMAN, KENNETH EINAR HIMMA, AND SCOTT J. SHAPIRO, *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 2*, (Oxford University Press 2004).

⁸ STEPHEN POPE, *REASON AND NATURAL LAW 157*, (Oxford University Press, 2007).

⁹ 2 L.B. CURZON, *JURISPRUDENCE 14*, (Cavenden Publishing Limited 1995). (hereinafter "CURZON")

¹⁰ *Id.* at 15.

¹¹ *Id.* at 17.

¹² *Id.* at 19.

¹³ *Id.* at 19.

¹⁴ EDGAR BODENHEIMER, *JURISPRUDENCE THE PHILOSOPHY AND METHOD OF THE LAW 13*, (Harvard University Press 1974). (hereinafter "BODENHEIMER")

¹⁵ *Id.* at 25.

¹⁶ CURZON, *supra* note 9, at 42.

¹⁷ *Id.* at 42.

¹⁸ BODENHEIMER, *supra* note 14.

¹⁹ CURZON, *supra* note 9, at 31.

²⁰ *Id.* at 32.



shall subordinate himself to it and thus, prostitution shall have to be outlawed.

The general belief of **Aquinas** was to only perform such acts which are in conformity with our end-state as human beings and these actions were morally correct.²¹ He believes that all sexual intercourse should be aimed at reproduction only.²² Since the goal of engaging the services of a prostitute is not procreation, it would definitely be immoral and condemnable.²³ He believed that all acts of consummation outside the bounds of marriage whether pre-marital or extra-marital are immoral.²⁴ **Aquinas** criticized all sexual misconducts such as prostitution, homosexuality or sodomy and portrayed it as a grave sin, as these sexual offences destroy the creation of life.²⁵

Immanuel Kant considered sexuality as the prime enemy of man.²⁶ He writes that sexual desire leads to the deepest degradation for a human being and serves as a mark of extreme dishonor to the person, whose body has been observed with sexual attributes only thereby using another individual as a mere means to seek the end of sexual gratification or lust.²⁷ **Kant** not only strictly prohibited prostitution which would be a form of commodification of an individual by selling their body to

another to satisfy their libido.²⁸ Accordingly, **Kant** proposed that prostitution should be outlawed.²⁹ The synopsis of **Kant's** philosophy is that individuals should not be disrespected by treating them as mere objects and accordingly prostitution is an insult to all the individuals taking part in it.³⁰

Aquinas also agreed to the necessity of allowing the evil of prostitution to thrive so that the good along with it is not destroyed and there is no other outlet for lusts which can consequently disturb the equilibrium of the society.³¹ **Aristotle** allowed certain sexual desires as long as they were moderate, deducing that he would have approved of prostitution if performed in moderation with a willing participant.³² The **Wolfenden Committee Report** stated that the law should concern only with public wrongs which are injurious to people at large.³³ Howsoever strong is the link between marriage and procreation, scholars have settled it that prostitution should be condemned but somehow it should still be tolerated due to the fact that sudden removal of the practice shall lead humanity worse off and may also give birth to new evils.³⁴

On a reading of the natural law theorists, one can very rationally deduce that prostitution

²¹ Kathryn Alice Zawisza, *The Ins and Outs of Prostitution: A Moral Analysis*, UNIVERSITY OF ARKANSAS (Apr. 12, 2021, 12:44 PM). (hereinafter "ZAWISZA")

²² *Id.* at 32.

²³ *Id.* at 35.

²⁴ Dr. Brent L. Pickett, *Natural Law and the Regulation of Sexuality: A Critique*, *Rich. J.L. & PUB. INT.* 39,41 (2004).

²⁵ James Fieser, *Moral Issues that Divide Us*, UNIVERSITY OF TENNESSEE (Apr. 12, 2021, 13:23 PM). (hereinafter "FIESER")

²⁶ Timothy L. Madigan, *The discarded Lemon: Kant, prostitution and respect for persons*, *PHILOSOPHY NOW* (Apr. 12, 2021, 13:26 PM).

²⁷ *Id.*

²⁸ *Id.*

²⁹ EDX COURSES, https://courses.edx.org/c4x/HarvardX/ER22.1x/asset/Chapter_5_-_Immanuel_Kant__129-139_.pdf (last visited Apr. 12, 2021).

³⁰ FIESER, *supra* note 25.

³¹ Brian Tierney, *Permissive Natural Law and Property: Gratian to Kant*, 62(3) *J. HIST. IDEAS* 381,387 (2001).

³² ZAWISZA, *supra* note 21, at 37.

³³ Joseph Fletcher, *Sex Offenses: an Ethical View*, *LAW CONT PROBL* 244,251 (1960).

³⁴ Igor Primoratz, *What's Wrong with Prostitution*, 68 (264) *PHILOSOPHY* 159,169 (1993).



goes against the ideals of virtue, balance and harmony which was propagated by the ancient times thinkers such as **Plato, Aristotle, Cicero** and even **the Stoics**. Communal harmony cannot survive without the sanctity of marriages which thrives solely on virtue. Engaging in vices may be detrimental to healthy marriages which in turn can shatter social equilibrium and change the ideal state of harmony into chaos. Similarly, it definitely goes against religious tenets of Christianity, Islam and Hinduism which do not provide any room for deviant sexual behavior and only encourage sexual intercourse within the sanctity of the marriage for the purpose of procreation and propagating family values. The only reason that **Aquinas** may have perhaps overlooked the evil and allowed it to prevail in a clandestine manner is to perhaps restrain other evils from taking over. Similarly, even modern natural law thinkers have laid considerable emphasis on the general wellbeing of the society and have talked about the subordination of the individual interest to the general interest of the entire community which does not accept socially deviant practices such as prostitution. Accordingly, legalization of prostitution from a natural law perspective is far from happening.

POSITIVISM

Positivism is a movement that represents the reactionary body of work against the a priori methods of thinking which had departed from

the actualities of law in order to discover the principles of universal validity.³⁵ As a school of jurisprudential theory, positivism is a tool of analysis wherein laws are commands by a sovereign.³⁶ Essentially, they look at law as a fact.³⁷

John Austin writes that any given rule can be called as a law only if it has been commanded by a sovereign to its subjects, which are accompanied by a kind of sanction.³⁸ Laws are formed out of reason and not out of a social rule or norm.³⁹

Herbert Lionel Adolphus Hart⁴⁰, another leading legal positivist believes that judges should adopt the positivist approach in their judicial decisions merely because when law is a command, separate from morals, the decision would be intelligent and purposive. This means that 'intelligent and purposive' does not equate to morality. His analysis separates the written rules from sociological and historical inquiries. Positivism, therefore entails that legislative and judicial decisions have to be deduced inductively from pre-determined rules, and should not find their way to social aims or morality.⁴¹

Oliver Wendell Holmes, another prominent British Positivist has insisted on separating the law from morals as he believes that such a separation only strengthens it.⁴² Lawyers, who are the main actors in any legal system should serve bad men on the same footing as good men and, instead of treating the law as

³⁵ Gray, Hamish R., *Jurisprudence by R. W. M. Dias; A Bibliography*, 28 THE MOD. LAW REV. 368-288 (1965).

³⁶ HANS KELSEN, PURE THEORY OF LAW 219 (University of California Press 1978).

³⁷ JOSEPH RAZ, THE AUTHORITY OF LAW 135 (Oxford University Press 2009).

³⁸ JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (John Murray 1861).

³⁹ *Id.*

⁴⁰ H. L. A. Hart, *Positivism and the Separation of Law and Morals*, HARV. LAW REV. 593-629 (1958).

⁴¹ V. D. MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 502 (Eastern Book Company 2013).

⁴² Stephen Wexler, *The Moral Confusions in Positivism, Utilitarianism and Liberalism*, 30 AM. J. JURIS. 121 (1985).



a technique for achieving morality, they treat it as a technique for avoiding morality.⁴³ When we look at prostitution from a positivist perspective, one should keep in mind that law is not affected by the morals. They are indifferent to moral concerns. This philosophy also extends to the belief normative considerations are not required in order to determine the validity of laws.⁴⁴ However, this does not mean that morals have no standing in laws as they play a very important role in the emergence of law and theories relating to its explanations and causes. It merely means that moral concerns will merely be regarded as facts without any normative value.⁴⁵

Consequentialist theories are a major part of positivism that explains that human goods are commensurable in a way which permits greater good.⁴⁶ This stance explains that the ends justify the means.⁴⁷ If a person performs an act and the outcome is morally significant, his methods can be justified.⁴⁸ This means that if a type of behaviour has negative effects on the society, which in this case is prostitution, it may become important to restrict the liberties of individuals.⁴⁹ Prostitution, under positivism is regarded immoral because they are seen as contributors to sexual deviancy and spread of

sexually transmitted diseases.⁵⁰ Prostitution can be legalised and provisions can be made for regular health and safety check-ups (questionable means) for a morally significant output (reduce the spread of STDs).

Another significant sub-category of Positivism is the jurisprudential concept of **Utilitarianism**. The *ratio legis* of Utilitarianism school of jurisprudence is the concept of the Greatest Good, for the Greatest Number.⁵¹ This essentially means that legal rules should exist in such a way that they will maximise the utility.⁵²

Jeremy Bentham⁵³ has extensive work on the philosophical issues of prostitution and prostitution laws. Bentham believed that any philosophical question relating to spiritual life or physical love has to come under the purview of personal and individual choice.⁵⁴ This decision cannot and should not be made by the government for all the citizens.⁵⁵ This school also considers an economic analysis of prostitution. It explains that women, especially those in distressing economic situations do not have any other means to avail for themselves.⁵⁶ This is precisely why the morality concept of prostitution must be separated from the reality.

⁴³ *Id.*

⁴⁴ KENNETH EINAR HIMMA, LAW, MORALITY, AND LEGAL POSITIVISM (F. Steiner Verlag 2004)

⁴⁵ *Id.*

⁴⁶ Germain Grisez, *Against Consequentialism*, 23 AM J JURISPRUD., 130, 2 (1978).

⁴⁷ JOHN MIZZONI, ETHICS 104 (Wiley-Blackwell 2010).

⁴⁸ TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES (Oxford University Press 2000).

⁴⁹ ROHNN B SANDERSON AND MARC A PUGLIESE, BEYOND NAÏVETÉ 160 (University Press of America 2012).

⁵⁰ *Id.*

⁵¹ JOHN TROYER, THE CLASSICAL UTILITIARIANS 92 (Hackett Publishing Company 2003).

⁵² J. J CHAMBLISS, PHILOSOPHY OF EDUCATION 556 (Credo Reference Ltd 2008).

⁵³ A. Taylor Milne, *Catalogue of the Manuscripts of Jeremy Bentham in the Library of University College*, (1962), <http://www.ucl.ac.uk/Bentham-Project>.

⁵⁴ JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 42 (Theclassics Us 2013).

⁵⁵ *Id.*

⁵⁶ BRIDGET HILL, WOMEN ALONE 110 (Yale University Press 2001).



John Stuart Mill, another utilitarian, believed that it is an individual choice to pursue a way in which he/she derives pleasure and the absence of pain.⁵⁷ Furthermore, he associates prostitution with negative harms, that affect both the client and the prostitute. However, merely because the work is unpleasant, doesn't mean it should be ruled out as work is seen to be unpleasant for most employees.⁵⁸

In conclusion, legal positivism often debates around the idea of prostitution from the perspective that merely because it is considered to be morally and ethically degrading, the law should not measure its validity along the same levels. By separating morals and law, the command of law is strengthened and therefore policy-makers need not concern themselves with such normative questions.

HISTORICAL SCHOOL

Historical school of law disregarded the role of legislation and focused on the law which arises from deep-rooted traditions of the past.⁵⁹ This school asks the lawmakers to look into the rich history of the nation and find out the solutions to problems, answers to complex questions and accordingly frame the law governing the citizens of the country.

Montesquieu, postulated that law may arise due to climate, local situations or by accident or imposture. He laid considerable emphasis on the fact that law has to be in consonance with the changing needs of people and the

society.⁶⁰ He thought that instead of talking about whether a law is right or wrong, it should be evaluated considering various environmental, social and political factors.⁶¹ **Sir Friedrich Karl von Savigny** wrote that law originates a result of long-term conditioning by internal silently operating forces.⁶² He thought that law had to be extracted from historical roots of the nation and popular sources of law as per **Savigny** would be customs and usages, popular faith or belief, and common consciousness of the people.⁶³ **Georg Friedrich Puchta** considered legislations appropriate only when they conformed to the national customary law or usages which represented in his opinion, the common conviction of the people.⁶⁴

Thus, this highlights a pertinent reader to look into the history of India with reference to prevalence and validity of prostitution which has to be seen from the time of Vedas to the medieval Indian rulers to the Mughals and the British rulers to gain a full picture.

The origin of prostitution in the world can be attributed to the rise in brothels all over which were open for travellers and strangers and led to the concept of hospitable pleasure driven by the idea of free love.⁶⁵ Even though temple prostitution existed in India, there still existed laws punishing irregular sexual activities examples of which are the laws of **Manu** or the **Hammurabi Code**.⁶⁶ The development from temple to commercial prostitution

⁵⁷ JOHN STUART MILL, JEREMY BENTHAM AND ALAN RYAN, *UTILITARIANISM AND OTHER ESSAYS* 272 (Penguin Books 1987).

⁵⁸ *Id.*

⁵⁹ BODENHEIMER, *supra* note 14, at 73.

⁶⁰ NITI MANTHAN, <https://nitimanthan.in/blog-posts/blog-niti-manthan/2020/04/19/historical-school-jurisprudence/> (last visited Apr. 12, 2021).

⁶¹ IPLEADERS BLOG, <https://blog.ipleaders.in/historical-school-of-jurisprudence/> (last visited Apr. 12, 2021).

⁶² BODENHEIMER, *supra* note 14.

⁶³ *Id.* at 71.

⁶⁴ JAIN, *supra* note 6, at 18.

⁶⁵ Arnold Clarkson, *History of Prostitution*, 41(3) CAN MED ASSOC J. 296, 296 (1939).

⁶⁶ *Id.* at 297.



might have occurred due to modernization and emergence of new cities.⁶⁷

Vedic literature implies the prevalence of prostitution. Atharvaveda mentions *pumscali*, a lady who walks among men and the *mahanagni* who bares herself naked in front of many.⁶⁸ The Vedas, the epics such as Mahabharata and Ramayana, as well as Manusmriti and Yajnavalkya discuss about sexuality and prostitution.⁶⁹ Mention of high-class prostitution by celestial demigods has been found in Vedas in the form of *Menaka*, *Rambha*, *Urvashi*, and *Thilothamma*.⁷⁰ Even the Kauravas and Pandavas engaged in prostitution.⁷¹

Under the **Mauryan dynasty** (250 BC), there existed accomplished courtesans, referred to as *ganikas*. Kautilya's *Arthashastra* laid down a code regulating this profession,⁷² but Manu and Brihaspati outright wished to curb this practice completely.⁷³ *Kamasutra*, a book written in 200 AD eloquently deals with prostitution.⁷⁴ Reference to dancing girls has also been found in Kalidas' *Meghadhoot*.⁷⁵

It is then in the 6th century AD that the *Puranas* first talk about the concept of temple

prostitution and devdasi system.⁷⁶ This system started with the **Keshari dynasty** in South India and flourished for years and subsequently diminished due to Mughal and British invasions who attacked Indian temples and thus these women lost their patronage and had to opt for private and public entertainment as a last resort which led to proliferation of prostitution and dancing.⁷⁷

In the **Mughal Empire**, prostitution flourished but were never considered as a part of society due to Islamic values. **Akbar** made reforms which did not make prostitutes widely accessible to the general public; prostitutes were made to live in quarters called *Shahstanpura* outside the city and a register containing the names of their visitors was presented to the Emperor frequently.⁷⁸ **Aurangzeb** also focused his public policies on curbing prostitution but rest of the Mughal rulers remained liberal towards it.⁷⁹ During the reign of Shahjahan, it was a fashion to pay visits to brothels.⁸⁰ Mughals patronized prostitution and the *mujra* became pretty common.⁸¹

⁶⁷ David Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127(5) U. PA. L. REV. 1195, 1207 (1979).

⁶⁸ Sukumari Bhattacharji, *Prostitution in Ancient India*, 15(2) SOC. SCI. (NEW DELHI) 32,36 (1987).

⁶⁹ Mary Rita Rozario, *The Role of Caste in Prostitution*, THE OPEN UNIVERSITY (Apr. 1997) <http://oro.open.ac.uk/65233/1/27696842.pdf>.

⁷⁰ Tulsing Sonwani, *Prostitution in Indian Society: Issues, Trends and Rehabilitation*, UNIVERSITY GRANTS COMMISSION (2013) <https://www.ugc.ac.in/mrp/paper/MRP-MAJOR-SOCI-2013-25158-PAPER.pdf> (hereinafter "SONWANI")

⁷¹ *Id* at 2.

⁷² Karuna Sharma, *The Social World of Prostitutes and Devadasis: A Study of the Social Structure and Its*

Politics in Early Modern India, 9(1) J. INT. WOMEN'S STUD 297,300 (2007).

⁷³ Haveripeth Prakash, *Prostitution and Its Impact on Society-A Criminological Perspective*, 2(3) INT. RES. J. SOCIAL SCI. 31,32 (2013).

⁷⁴ Anil Chawla, *Devadasis – Sinners or Sinned Against*, SAMARTH BHARAT (Apr. 12, 2021, 10:32 AM), <http://samarthbharat.com/files/devadasihistory.pdf>.

⁷⁵ *Id* at 10.

⁷⁶ *Id* at 10.

⁷⁷ Ankur Shingal, *The Devadasi System: Temple Prostitution in India*, 22(1) UCLA WOMEN'S L.J. 107,109 (2015).

⁷⁸ ACHARYA, *supra* note 14, at 97.

⁷⁹ *Id* at 97.

⁸⁰ *Id* at 240.

⁸¹ SONWANI, *supra* note 70, paper 3.



During the **British rule**, prostitution flourished as well. The British soldiers could easily find prostitutes at Lai Bazaars near their army camps and engage in sexual encounters.⁸² The only problem was of sexually transmitted diseases which were resolved by a brilliant medical system where elderly women took care of these prostitutes and they were not allowed to visit the soldiers until their illnesses were cured.⁸³ The British were intolerant towards sexual violence and did not allow it to take place.⁸⁴ The Umbrella Cantonments Act, 1864 organized sex trade within military cantonments and Indian Contagious Diseases Act, 1868 provided for supervision, regulation and inspection of prostitute women in major Indian cities and seaports.⁸⁵

Thus, the history of prostitution in India entails and explains that irrespective of the moral dissatisfaction with the practice that has existed in cultures and societies since time immemorial, the practice has continued to thrive whether legally or illegally and accordingly the general consciousness of the people as always propounded by **Savigny** has directly or indirectly accepted the place of prostitution in the society. Since **Montesquieu** and **Puchta** also advocate for laws based on relevant political and social factors and favour customs they would also in the Indian context, allow prostitution to thrive. Another logic for justifying prostitution to prevail in the society would be to ensure proper health of the citizens which can be deteriorated due to various sexually transmitted diseases if the practice of prostitution keeps going on in a secret

manner characterized by lack of sanitization and hygiene. India can possibly not criminalize prostitution but instead allow it to happen in the way it does by injecting various monitoring mechanisms such as those adopted by Akbar or by the British colonizers. The business of prostitution can be monitored closely by the government to ensure that no activities of violence are committed against women, to ensure that child pornography or child trafficking even women trafficking do not happen and the women engaging in the business of prostitution do not suffer from unwanted diseases and are not thrown out without any rights of subsistence. Women in this industry require sufficient labor laws to ensure that they are paid by their clients or agents and receive social security benefits. Children born out of prostitution should have proper access to education and health facilities. History has proved that prostitution will not disrupt the social order and can be regulated, checked or monitored very efficiently by the government if proper mechanisms for the same are adopted.

FEMINIST THEORY

Feminist Jurisprudence focuses on the institutions and legal obligations that are significant in the systematic oppression and subjugation of women, through history. This impact is not long gone- but is still reflected in today's world.⁸⁶ The main discourse within feminist theory is the encouragement of new changes in policies to ensure that all people are treated equally, irrespective of their

⁸² NILS JOHAN RINGDAL, *LOVE FOR SALE A WORLD HISTORY OF PROSTITUTION*, 293 (Grove Press, 1997).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Philippa Levine, *Venereal Disease, Prostitution, and the Politics of Empire: The Case of British India*, 4(4) J. HIST. SEX 579,581 (1994).

⁸⁶ CAROLE PATEMAN, *THE SEXUAL CONTRACT* (Polity Press 1988).



genders.⁸⁷ Prostitution can be approached in the feminist legal discourse through two parts- the ideas of Radical feminism and Liberal Feminism.

Radical Feminism

Radical Feminism highlights the idea that prostitution within itself is morally undesirable, the reason being that it includes a very graphic account of patriarchal domination of men over women in the society.⁸⁸ Prostitutes are the representation of sexual dominance by men as well as representative of women's social and economic subordination in society.⁸⁹

Jody Freeman⁹⁰ writes that when prostitutes sell their sexuality as a commodity in the market, they reduce to just another fungible good. This commodification leads to what is called the domino effect- the inclination of the society to completely commodify something in all aspects and for all its purposes if it is commodified even a little.

Catharine MacKinnon⁹¹ argues that since prostitution and sex work is a manifestation of the violence meted out to women, prostitutes and any other type of sex workers cannot and will not be able to exhibit agency in a system of male subordination of women.

Sheila Jeffries delivers a very significant perspective of radical feminism and states that prostitution results in the complete

reduction of women to sexual objects and commodities that are freely bought and sold in a market. This, in turn forms the foundation of sexual slavery in marriages.⁹²

Radical feminism, therefore believes that prostitution is a contributor to women's oppression. Their main aim is to classify all types of prostitution as a human rights violation.⁹³ However, this view is often misdirected anger wherein the actual problem lies not when women exercising their agency but in the unequal sexual construction present in the society. They say that it is wrong to charge money for sexual acts but also leave no viable option for women who legitimately have the same aim. Our society is constructed in such a way that the unequal sexual class system frustrates the legitimate ambitions of half the population regarding sexual, social and economic freedom. It creates a demand for prostitution, then punishes the suppliers.

Liberal Feminism

The liberal view of feminism has its foundations in the works of **John Stuart Mill**⁹⁴ who believed that law has no place function in denying the right to choose or practise the lifestyle of prostitution.⁹⁵ Liberal feminists believe in the reasoning that that every woman has independent agency and can freely choose the occupation she desires.

⁸⁷ *Id.*

⁸⁸ Carole Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 ETHICS 561, 3 (1983). (hereinafter "PATEMAN")

⁸⁹ E. GIOBBE, CONFRONTING THE LIBERAL LIES ABOUT PROSTITUTION, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 77 (Elsevier Science 1990).

⁹⁰ Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY J. GENDER L. & JUST. 237, 238 (1996). (hereinafter "FREEMAN")

⁹¹ Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 Mich. J. Gender & L. 13 (1993).

⁹² SHEILA JEFFRIES, THE IDEA OF PROSTITUTION 2 (Spinifex Press 1997).

⁹³ GAIL PHETERSON, THE SOCIAL CONSEQUENCES OF UNCHASTITY, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 215 (Cleis Press 1987).

⁹⁴ JS MILL, ON LIBERTY 13 (Oxford University Press 1859).

⁹⁵ C. McGlynn, C., *John Stuart Mill on prostitution: Radical sentiments, liberal proscriptions*, 8 NINETEENTH-CENTURY GENDER STUDIES 2 (2012).



Carol Pateman states that prostitution is comparable to other forms of occupations like manual labour wherein the worker is selling his skill and work, and not his body. Therefore, there is nothing wrong with prostitution that is not also wrong with other forms of work.⁹⁶

Gail Pheterson⁹⁷ writes that prostitutes must be placed in the dominion of civil rights movement wherein they simply demand the right to be paid for the work that other women do for free.⁹⁸

Camille Paglia believes that prostitutes are the embodiments of freedom where women are able to separate themselves from their subordinate position by using their bodies and their sexuality to gain power.⁹⁹ This is in direct attack to the radical feminist idea of sexual dominance where they see prostitutes as a damsel in distress that need to be rescued.¹⁰⁰ Therefore, liberal feminists believe that prostitution can be a desirably chosen activity.¹⁰¹

Just as basic utilities such as food, comfort, shelter etc. are universal and natural, so are sexual and should be freely available.¹⁰² This perspective is the reiteration of liberal ideals of individualism, equality of opportunity, and the free market, applied to sexual life.¹⁰³ Sexual activity is presumed to be consensual and in turn allows sex to take on a liberating and empowering role for individual women should they choose to pursue that avenue.¹⁰⁴ Prostitutes are often seen as strong,

independent women who make their own choices.

Both these views have significant in their own spheres. Liberal feminism, with its stress on the conditions of women's individual consent, has had principal influence in rape law reform, especially in respect to the sex-with-strangers variety. Radical feminism, with its stress on the conditions of women's coercion in "private" intimacy with men, has had principal influence in domestic violence intervention.

CONCLUSION

Past analysis and related theories have proven that prostitution is and will always remain a fact in the modern society. At the same time, prostitution has its own victims—trafficked women from foreign countries, minor girls who are tortured and coerced into brutal acts of sexual abuse. Regulation of prostitution, therefore, is the need of the hour. This regulation will help in creating a set of rules that will delimit the age of prostitution so as to help minors, provide the sex workers with the necessary health care facilities. They will be able to exercise their legal and constitutional rights, get opportunities to educate their sons and daughters, complain and protect themselves against exploitation, violence, and rape. Thenceforth a set of rules and regulations should be established in order to regulate this industry.

⁹⁶ Caroline Pateman, *What's wrong with prostitution*, 27 WOMEN'S STUD. QUART. 53-64 (1999).

⁹⁷ GAIL PHETERSON, *A VINDICATION OF THE RIGHTS OF WHORES* (Seal Press 1989).

⁹⁸ FRÉDÉRIQUE DELACOSTE & PRISCILLA ALEXANDER, *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 273 (Virago Press 1989).

⁹⁹ CAMILLE PAGLIA, *VAMPS & TRAMPS: NEW ESSAYS* (Viking Press 1994).

¹⁰⁰ *Id.*

¹⁰¹ SHANNON BELL, *READING, WRITING AND RE-WRITING THE PROSTITUTE BODY 1* (Indiana University Press 1994).

¹⁰² MARY WELEK ATWELL, *EQUAL PROTECTION OF THE LAW?: GENDER AND JUSTICE IN THE UNITED STATES* 100 (Peter Lang Publishers Incorporated 2002).

¹⁰³ PATEMAN, *supra* note 88, at 89.

¹⁰⁴ FREEMAN, *supra* note 90, at 237.



SUGGESTIONS

If we compare a few countries that have perhaps regulated or decriminalised prostitution, the three best examples are represented in Netherlands, New Zealand and the State of Nevada (United States of America). Netherland has done a brilliant job when it comes to regularizing prostitution as it issues licenses to control businesses such as brothels and in doing so, it eradicated all the illegal and unlicensed activities. It also promoted better health conditions for the sex worker such as usage of contraceptive methods, regular testing and full health benefits from the government. In Nevada, prostitution was legalised in order to boost the tourism industry. However, it must be noted that they only legalised brothels and bawdy-houses but criminalised all forms of street prostitution. All businesses are strictly licensed and health and safety standards have to be complied with strictly. While Netherlands and Nevada have taken this approach, New Zealand has focused on decriminalisation. Instead of regulation governed by Criminal Code, prostitution will be dealt within the parameters provincial (labour) standards legislation; occupational, health, and safety codes. In India, morals and the ethics regarding extra-marital sexual deviance and prostitution are deeply fabricated within the society. Steps such as legalisation might be considered extreme in a conservative society such as ours. It is therefore suggested that by regulating the profession and taking inspiration from the aforementioned countries, India should adopt a process of licensing, labour codes and healthcare services to improve the condition of prostitutes and their families.
