
PROSTITUTION IN INDIA: POLITICAL JURISPRIDENCE AND SEXUAL ACTIVISM

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ABSTRACT

Prostitution irrespective of being the oldest profession has formed a trivial and infamous notoriety to it. On one hand the society over the period of time has grown wary to the sex work as it portrays as a threat to the public morals and safety whereas on the other the activists, academicians and judicial officers are deliberating and insisting upon the rights and dignity of the female sex workers. The times where gender inclusion and bodily autonomy has become the ongoing issues of concern, it is equally important to understand why should prostitution not be criminalised and instead why must it be legalised. This paper has not delve into the view of law, rather the author has discussed the evolution of feminist point of view in relation to feminism and relevance of sex work from the lens of legal morality. Further, to give materialise the jurisprudence the global movements of Indian Civil Social Organisations are discussed briefly.

“Prostitution isn't like anything else. Rather, everything else is like prostitution because it is the model for women's condition.”¹ This statement was written by Evelina Giobbe an anti-prostitution activist. However it goes beyond the opinion of the then feminist, it portrays how the women are defined and how the society deduces its morals. A wife is distinguished from a prostitute not by the monogamous relationship she shares with her husband, as that could give rise to multiple religious debates, it is extrapolated by her role in the marriage that is, once a female is wedded she is expected to have a reproductive role, whereas a prostitute has a purely commercial non-reproductive trade with the men she engages with. This distinction created by the society many a times results in young women engaging in intercourse or who are victims of rape and sexual assault being labelled as prostitutes.

The opinions of feminists have gone through various reforms on the subject of prostitution as it has been a revisiting debate between liberalism and exploitation. Hence, the need for change in policies have been in time with the change in the view points within the contemporaneous society. Before, we further get into the discussion, it is important to consider feminism as a part of jurisprudence. As jurisprudence is the ‘philosophy of law’ and philosophy comprises of ‘fundamental ideologies’ to become a theory, we can conveniently define feminism as a part of jurisprudence as it is based on the key principle of women’s liberation.

2.1. FEMINIST THEORIES IN PROSTITUTION

Prostitution has been a topical issue for the feminists due to the nature of work. The theoretical explanation to the dispute is the sexual exploitation involved in sex work. Thereby, it is argued that people belong to either of the two groups, the liberals or the conservatives.² The liberals are said to be the people advocating legalisation of prostitution, whereas conservatives are to be anti-prostitution. Channelising ideologies into these two groups is an oversimplification of the process as feminists in the past as well as the present have been anti- prostitution or against all kind of sex for money work ,as they believe that it leads to exploitation of a female in coerced environment. These feminists are many a times called the ‘Radical Feminists’. In Feminist Political Philosophy, *Radical Feminism* primarily focuses on the uprooting the male

¹ EVELINA GIOBBE, CONFRONTING THE LIBERAL LIES ABOUT PROSTITUTION, IN THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM pg. 67, 76 (Dorchen Leidholdt & Janice Raymond, eds., 1990).

² ROGER MATTHEWS, PROSTITUTION, POLITICS AND POLICY (Routledge-Cavendish, Taylor & Francis Group, 2008).

domination of male over female³, as the radical feminists see power as a form of unidirectional force wherein the oppressors oppresses the oppressed. *Liberal feminism* on the contrary view power as a “positive social resource” that could be equally distributed among the sexes.

Radical Feminists have argued that prostitution creates a system of gender inequality and oppression due to which many women given the increasing disparity do not choose to become sex workers but are forced to do so.⁴ This is the reason many scholars as well as the international law advocates eradication of prostitution.

This form of Radical Feminism exists even today, but given the shift of many scholars and activists along with the evolving defining factors of equal rights that constitute the right to live one’s life with dignity, India has made a paradigm shift from Radicalism to Liberalism, wherein equal roles and equal distribution of power in terms of decision

making is welcomed. Due to this, there have been discussions towards decriminalisation of prostitution and criminalisation of third party solicitation. This form of decriminalisation is called Neo-abolitionism, which is applicable in Sweden, Brazil, Ethiopia, Dominic Republic of Congo, Argentina, United Kingdom, India etc., wherein prostitution is legal, however brothels and solicitation is illegal.

Irrespective of these theories, there are a number of concerns that create perplexity in the course of prostitution on either sides, such as the danger of HIV/AIDS, Drug Use and the free trade of flesh (sex trafficking). Even when it might be women’s right to choose the occupation but is the exploitation and deadly disease worth it? Moreover, the society ostracises and refuses to see a sex workers as a human and treats them as a sexual object does that not amount violation of Human Rights and the right to dignified life? These are layered issues with disputing discussions. The meeting point among the two groups of feminists and their theories is their attempt to oppose women’s invisibility⁵ and ensure a dignified living for them.

³ McAfee, Noëlle and Katie B. Howard, "Feminist Political Philosophy", The Stanford Encyclopedia of Philosophy (Spring 2022 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/spr2022/entries/feminism-political/>.

⁴ Jody Freeman, The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the Impossibility of Consent, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION, pg.237, 238 (D. Kelly Weisberg ed., 1996)

⁵ Catharine A. MacKinnon, Liberalism and Death of Feminism in THE SEXUAL LIBERAL AND THE ATTACK ON FEMINISM pg.5, (Dorchen Leidholdt & Janice G. Raymond, 1990).

In striking a balance and ensuring supremacy of laws, scholars, academicians and activists have progressively deliberated on the topic and further came up with multiple theories and frameworks during the sexual revolution. These scholars have attempted to break down brands of feminism as '*Abolitionist Feminism*' also known as '*Dominance Feminism*' and '*Sex Positive Feminism*'.

Abolitionist Feminism was defined by Kathryn Abrams' "as a strand of feminist theory that locates gender oppression in the sexualized domination of women by men and the eroticization of that dominance through pornography and other elements of popular culture."⁶⁷

This strand of scholars were involved in movement for prohibiting oversexualisation of women by means of pornography and sex work as well as ending the violence towards the women caused by these platforms. The people belonging to dominance feminism were of the opinion that sex work and socially sexualising females normalises social degradation and disintegration of a female.⁸

This ideology of the dominance feminists was faced with criticism by the evolving Sex-Positive Feminists who believed that the dominance feminists were shaming the women who chose sex work as form of a liberal sexual expression. These fragmentation make it apparent that there is a huge dependence of legal frameworks on the feminist theories and even though there are agreeable details present in both there has to be a balance to be pro-choice as well as anti- exploitation.

In view of these theories, it is clear that gender exploitation and oppression at all costs is prohibited within the field of prostitution and hence in order to ensure that consent of the sex worker plays a significant role as prostitution as per the emerging feminists does not mean sexual slavery. It is a matter of choice and consent. Dr. Doezema stated; "*Sex work does not pertain to minors or children, individuals who have been deceived or threatened, individuals who are unable to refuse to work for fear of personal safety, or individuals who engage in sexual activity for a profit they are unable to keep.*"⁹He has emphasised on the importance of

⁶ Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory. Columbia Law Review, 95(2), 304, (1995).

⁷ Gabrielle Mesce, *Sex Work Decriminalisation and Feminist Theory*, (2020). Senior Theses. 365. https://scholarcommons.sc.edu/senior_theses/365.

⁸ Catherine A. Mackinnon, *Difference and Dominance: On Sex Discrimination* (2005).

⁹ Jo Doezema (2002) Who gets to choose? Coercion, consent, and the UN Trafficking Protocol, Gender & Development, 10:1, 20-27, DOI: 10.1080/13552070215897. ¹⁰ Supra note 111.

consent in sex work. Consensual sex work as per the statement comprises of autonomous boundaries, free will, personal safety and the ability to renegotiate.¹⁰ As per these discussions, criminalisation of sex work would pose a problem to the freedom of a sex worker, however fully legalising prostitution would lead to exploitation, gender based violence, coercion and sex trafficking. This friction has encouraged the feminists to look at the problem from a difference lens wherein the Radical and the Liberals look for similarities in their viewpoints. This fuelled the neo- abolitionist framework, wherein any person other than the sex worker involved in solicitation shall be punished as sex workers as believed to be ‘the victims of their circumstances’.

Neo-Abolitionism decriminalises prostitution, that is, it in part eliminates laws and legal enforcement in prostitution in order to benefit the sex workers in a regulated manner in order to destigmatise sex work.

2.2. LEGAL MORALITY AND PROSTITUTION

Public debate on prostitution has been passionate and crude. Apart from the feminists debates and theories with respect to the framework of prostitution, there is a large portion of society that is not just fighting for the dignity and living of prostitutes but deliberating over the morality of the work and the impediments that shall follow. In the area of jurisprudence what ought to be questioned is whether prostitution itself is immoral to be punishable? Does the act of soliciting and violation of prostitution sufficient to attract legal consequences?

Legal Moralism is a form of legal coercion enforced by law in order to prohibit a certain behaviour as a result of society’s’ collective judgement in terms of morality. According to Hart and Larry Alexander legal moralism implies that “*immorality is sufficient condition for criminalisation*”¹⁰ even if it does not harm others. As per Devlin and Moore there are certain defeating factors due to which a prima facie wrong cannot be criminalised under legal moralism due to the serious consequences it would have on the society. Michael Moore writes that the effect of criminalising prostitution or drugs would only encourage breaking of law systematically.¹¹

¹⁰ Larry Alexander, *The Legal Enforcement of Morality*”, in *A Companion to Applied Ethics*, R. G. Frey and Christopher Heath Wellman (eds.), Oxford, UK: Blackwell Publishing Ltd, 128–141.

¹¹ John Stanton-Ife, “The Limits of Law”, *The Stanford Encyclopedia of Philosophy* (Spring 2022 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/spr2022/entries/law-limits/>.¹³ Michael S. Moore, “Law

Further Moore stated; “Prostitution... does not go away by being legislated against, as the experience of all societies has shown. By making it criminal, however, the supply is artificially restricted to those willing to engage in criminal behaviour, so that prices and profits are such as to draw in organized criminal activity.”¹³

Further, J.S. Mill proposed the *harm principle* while setting limitation to the legal morality. In his book *On Liberty* the passage reads: “the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others.”¹² If the harm principle were to be made applicable to the area of prostitution it would give rise to multiple discussions, wherein one side might argue that prostitution is a victimless crime as it might be unlawful but it does not violate rights of another individual, whereas on the other side it could be argued that the act of prostitution shall be criminalised as it increases the risk of venereal diseases among the society encroaching the rights of other individual and their life to live a healthy life. H.L.A. Hart on the subject of ‘victimless crime’ said that these crimes are immoral but their enforcement is due to their consensual and private nature. The words of Hart do not stand to be true today especially on the subject of prostitution as it is no longer a victimless crime due to the lack of consent, which as iterated by Dr. Doezema is the main component of sex work, however the consent factor is mostly assumed in the sex industry instead of being valued. This notion of consent leads to sexual exploitation of women and sex trafficking.

Other moral argument for criminalising prostitution is degradation of the status of women. It confers that prostitution affects the chastity of a female and leads to her being treated as a sexual object and harmed for pleasure of men. The abolitionist feminists argue that prostitution is a concept based on male sexuality and their sexual desires that are inherently ‘unchangeable and ever present’¹³. Jurists like Kant and Charles Fried believe that the integrity of a human rests upon the integrity of the body and sale of body leads to alienation of moral personality, which results in moral slavery.¹⁴ Kant explained the degraded nature of prostitution in terms of sexual appetite in the words;

as a Functional Kind”, in *Natural Law Theory: Contemporary Essays*, 188– 242 (Robert P. George (ed.), Oxford: Clarendon Press)(2000).

¹² John Stuart Mill, *Mill on Liberty*, Oxford: Clarendon Press,(1980).

¹³ Joyce Outshoorn, *The Political Debates on Prostitution and Trafficking of Women*, Social Politics: International Studies in Gender, State and Society, pg. 146, (2005)

¹⁴ DAVID A. J. Richards, *Commercial Sex And The Rights Of The Person:A Moral Argument For The Decriminalization Of Prostitution*, 127 UPENN L.R., 1254-1256, (1979).

“Sexual love makes of the loved person an object of appetite; as soon as that appetite has been stilled, the person is cast aside as one casts away a lemon which has been sucked dry.”¹⁵ However, all these debates mostly speak of the moral rationale.

The sex work rationale on the other hand advances that prostitution is a legitimate profession and instead of implementing legal moralism and criminalising such acts, states should enforce laws to protect the safety of sex workers, as sex work is also a form of service work¹⁶ enabling the women to seek their appropriate socio-economic opportunities for creating a safe living environment for themselves.

Thereby, the traditionally acceptable legal moralism is no longer acceptable or justified given the rights and freedoms of a person, hence morality is not a *sufficient ground* for criminalisation of prostitution. The interferences are justified for the protection of the prostitutes and others engaging in intercourse with them. The conventional arguments do not provide justification required for a prompt legal framework and hence now the evolving activists and feminists deal with the issues of sex workers rights after intrinsically looking at the flaws in the idea of legal morality.

With the evolving jurisprudence, sexual autonomy and human rights are weighed over the moral ideals. The upcoming scholars view sexual autonomy as a right of a female over her body and sexuality which gives way to the phenomena of sexual equality. They also analyse the conditions of sex workers and differentiate between the voluntary and involuntary sex workers which enables them to segregate the victims from the other lot. It is believed legalising sex work also gives more rights to the sex worker as it increases their visibility among the society due to the regulations and legal framework, as observed by the American Lawyer Michael Moore criminalising prostitution would only lead to organised crimes, instead it is a better idea to implement law and order contain it.

2.3. GLOBAL MOVEMENTS BY CSOs IN ATTAINING SEX WORKERS' RIGHTS

Prostitution is violence against women¹⁷; sexual exploitation equals to sexual assault; any act done under force even under force of circumstances amounts to exploitation and hence the act

¹⁵ Id.

¹⁶ Supra note 119.

¹⁷ RACHEL MORAN, PAID FOR: MY JOURNEY THROUGH PROSTITUTION, 127, (New York, N.Y: W. W. Norton & Com, 1 ed. 2015).

should be eradicated. But then sex workers also have the right to work and live, however this would lead us to expansion of sex industry and emulsified exploitation of prostitutes.

It is safe to say either ways in the global society there is no straight forward solution to the problem that is posed in the lives of sex workers. The dichotomy around the debate of human right in sex work could only be embraced by appropriate legal and policy responses. Where there is a vacuum or ambiguity in legal frameworks around the ongoing issues the NGOs and activist group come into play to voice the needs of the minority and vulnerable sect. In India, there are a number of women rights groups and NGOs working towards filling the gap between the rights promised to females via IHRL and the rights embodied among the FSW.

To begin with, **International Women’s Rights Against Watch Asia Pacific (IWRAP)** is an international women’s rights organisation that works on providing justice and access to females and looks through the lens of CEDAW in order to combat gendered discrimination in South and South East Asia. The organisation has persistently worked on the rights of sex workers by advocating the protection of their rights, drawing a line between sex trafficking and sex work as well as supporting the intention of decriminalising sex work for the safety and dignity of the FSW.¹⁸ The organisation aims to ensure the implementation of universal human rights all across South Asia that are focus on women and children rights.

Similarly, **National Network of Sex Workers (NNSW)** is a network of organisations that works on promoting the rights of sex workers in India. The network is an alliance of several community based organisations (CBO) and NGO spread across seven states in India comprising of Gujrat, Maharashtra, Karnataka, Kerela, Tamil Nadu , Andhra Pradesh,



¹⁸ Decriminalise Sex Work, IWRAP, (March 2021), https://www.iwrawap.org/resources/decriminalise-sex-work/?sf_data=all&_sf_resource_theme=sw&sf_paged=2.

Telangana & Jharkhand. See Fig. 3.1.

Figure 3.1

NNSW is focused on effectuating and recognising sex work as a legitimate form of work under the right to work and life embodied in the Indian Constitution as per Article 41 and Article 21¹⁹ respectively. The organisation advocates policies in favour of sex workers at the national as well as international level. It provides the sex workers with a forum to voice their concerns and also attempt to debunk the stigma and myths around sex work. In 2018 NNSW along with other CSOs namely, SANGRAM, SAHELI SANGH, MASUM VAMP and many others came together to be a part of the 'Inter Movement Open Forum' for discussion on The Trafficking Bill (Prevention, Protection and Rehabilitation) 2018. This organisation held training workshops for sex workers to raise issues in regards to trafficking laws and drafted recommendations that should be kept in mind while passing the bill.

It is not news that sex workers fall prey to the police violence during raids as many a times they are seen as criminals and the others are determined under the category of victims and forcefully sent to rehabilitation homes and rescue shelters against their will.

NNSW along with the other NGOs approached the National Human Rights Commission (NHRC) to draft a petition elucidating their concerns, demands and suggestion against the bill.²⁰ One of the recommendations made by NNSW was to exclude sex workers from the victims of sex trafficking in order to enable them to profess their occupation in an ordinary manner.

Apne Aap Women's Collective (AAWC) NGO is an organisation that majorly focuses on the anti-trafficking norms. It is a local NGO based out of Kamathipura, that is a redlight are in the city of Mumbai. The NGO serves to all age group of women and children by their age inclusive programs *Umeed, Udaan and Umang*. The members of the organisation provide the brothel based sex workers with resources that would ameliorate their lives and prevent the intergenerational prostitution or hereditary prostitution among their children.²¹ The team of

¹⁹ Art.41, The Constitution of India [India], 26 January 1950, available at: <https://www.refworld.org/docid/3ae6b5e20.html>.

²⁰ Aarthi Pai, *Inter-Movement Open Forum on Trafficking bill 2018*, NNSW (Apr.2018), <http://nnswindia.org/upload/Inter-Movement-Open-Forum%20-on-Trafficking-bill-2018-Pune-16-18April-2018-Brief-report.pdf>.

²¹ *Apne Aap Womens's Collective*, AAWC, <https://aawc.in/>.

AAWC has helped multiple victims of sex trafficking and sex workers in obtaining identification documents, getting HIV treatments and exploring alternative employment opportunities. The organisation also has aided the children of brothel sex workers to attain access to education and a better future that also helps other children who become part of Udaan to have access to better opportunities due to their alumni.²²

There are many other NGO that have contributed to the sex workers rights by issuing global movements that purveyed call-to-action in order to address the discrimination faced by the FSW and achieve the same human rights for them that are available to other citizens. In terms of global movements among the renowned sex worker NGO in India is the **Durbar Mahila Samanwaya Committee (DMSC)** based in Kolkata. The organisation is devoted to fight for the sex workers and their rights and dignity, including women, men and transgender. The NGO was started in 1995 by Dr.Smarajit

Jana after he visited the red light area of *Sonagachi* for his HIV research study which lead into formation of a team of sex workers for addressing issues among the FSW. The organisation is a collective of 65,000 sex workers in the West of Bengal.²³ The organisation since then has launched and managed a number of movements and projects for obtaining accessibility to health care, education and most recently right to government identification in the ongoing matter of *Budhadev Karmaskar v. The State of West Bengal*. The DMSC also approached the court in 2020 during the COVID-19 pandemic for providing preventive tools like masks, soap, sanitiser and medicines to the sex workers as part of the Targeted Intervention Project as the sex workers are prone to the virus.

Further, in the past the DMSC had approached Life Insurance Corporation (LIC) to provide life insurance to the sex workers as they are a legitimate part of the society too.

In 2008, LIC accepted the proposition of collaboration and offered an insurance cover to the sex worker, which was a huge step towards financial autonomy for the FSW. The corporation provided insurance to the sex workers under the *Jeevan Madhur Policy*, wherein the sex workers had to pay a weekly or monthly a premium amount of Rs.25 and Rs.100 minimum

²² Case Studies, AAWC, <https://aawc.in/impact/case-studies.html>.

²³ *Durbar Mahila Samanwaya Committee*, Global Network of Sex Work Projects, NSWP, <https://www.nswp.org/members/asia-and-the-pacific/durbar-mahila-samanwaya-committee>.

respectively.²⁴ To access the insurance the sex workers only have to undergo a medical test funded by LIC. This policy was significant to the right of sex workers as these policy holders were provided the policy under the profession of sex workers which was previously signed up as 'house wife'. It was a breakthrough moment as sex work was legally accepted as profession in India.

There are more organisations like SEWA, VAMP and SANGRAM that collaborate with the State AIDS Control Society in course of the Targeted Intervention Project by NACO in order to reach the HRGs and protect them from the risk of HIV/AIDS and STDs. Firstly speaking of **SEWA**, the organisation targets the core HRGs that is the

FSW and the Male & Transgenders. SEWA essentially provides services to the HRG in the form of interpersonal communication behavioural change, providing contraceptives such as condoms and other commodities like lubricants, clean syringes. Further, it also attempts to substitute syringes with oral therapy for IDUs and also provides integrated counselling and testing centres.²⁵ The organisation also actively works at training the sex workers and creating an enabling environment for them by educating them about their legal rights and remedies and collectivising their communities and bring about a community based environment to make them feel included in the society. The community apart from promoting legal rights of sex workers affirms the principle of '*voluntary entry and exit from sex work*²⁶' as SEWA has incessantly noted that most of the people in sex work are compelled to engage in the sex industry due to the structural detriments such as lack of opportunities, poverty, gender inequality or are the victims of forced and fraudulent act of sex trafficking. However, it is pivotal to inscribe that irrespective of the Targeted Intervention, the organisation does not interfere with the rights of those who choose to remain in the sex work.

Along SEWA, **Sampada Grameen Mahila Sansatha** (SANGRAM) and **Veshya Anyay Mukti Parishad** (VAMP) are collective organisations that work in collaboration with the MoHFW as well as International Organisation such SR-VAW and other CEDAW related organisations to research, report and recommend on the status of sex workers in India. The organisations have noted that the Supreme Court has recognised the sex workers right to life²⁷

²⁴ Gopalan, *Insurance Cover Sex Workers in India*, MEDINDIA (May. 2008), <https://www.medindia.net/news/insurance-cover-sex-workers-in-india-36703-1.htm>.

²⁵ Targeted Intervention Project on HIV/AIDS, SEWA, <https://www.sewango.org/tip>.

²⁶ Id.

²⁷ *Budhadev Karmaskar v. State of West Bengal* (2011) 11 SCC 538.

and hence it continues to focus on attainment of the same in every way possible, including health care, reproductive care, spreading awareness about violence against women as well as their rights to work.

VAMP assists the sex workers in accessing legal aid, as it observed that sex workers who approached the District Legal Services Authority (DLSA) for free legal aid were told by the advocates that prostitution is illegal. Further, SANGRAM also did a number of Pan India surveys and found that many sex workers that are involved in sex work have a prior experience of menial labour work , however they chose the sex labour market as it offers a significantly better pay, making it economically rewarding, however many a times the sex workers do not realise it is intensive work for very low income at the cost of exploiting their bodies.

The collectively persistently conducted movements for the officialization and legitimisation of 'sex work as work' and the right to have labour rights as any other worker. Further these organisation along with the sex workers have rallied on streets for their sexual rights as human rights and on many occasion asked for decriminalisation of sex work to prevent sex trafficking. All these collective organisations are interconnected and their vision and mission is the same to attain legal and human rights for the sex workers in order to ward off the exploitation upon the sex workers.