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## A PHILOSOPHICAL ANALYSIS ON THE LEGALISATION AND REGULATION OF PROSTITUTION IN INDIA

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### **ABSTRACT:**

*Prostitution can be defined as any practice or engagement in sexual activity with another person for payment of money or another form of gain in return. Prostitution is not recognized as a profession in India and is criminalized. According to the Indian Penal Code, 1860<sup>644</sup>(IPC) activities, such as soliciting, owning a brothel are punishable. Section 4 of the Immoral Traffic (Prevention) Act, 1956<sup>645</sup> provides for the punishment of any person who makes an earning from prostitution. The criminalisation of prostitution leads to a vicious cycle of segregation and marginalisation of sex workers from the rest of society.*

*The question arises on whether prostitution is recognised as a profession from a philosophical point of view and if so, whether it must be brought under the regulation of the state. This paper by analysing legal theories of philosophy aims to examine the scope of morality related concepts to understand the ambiguity in the provisions of the Immoral Traffic (Prevention) Act which criminalises prostitution in India. It also seeks to make suggestions for incorporating the legal theory of liberal feminism in an effort to demonstrate*

*that legalisation and regulation would generate better results.*

**KEYWORDS:** *Legalisation, morality, philosophy, prostitution, regulation, state*

### **INTRODUCTION**

Prostitution in common terms is the act or practise of engaging in sexual activity with someone in exchange for money. Provisions of the Immoral Traffic (Prevention) Act, 1956 puts restrictions on the practice of prostitution in India. Section 3 of the act<sup>646</sup> imposes a punishment for maintaining a brothel or allowing a property to be used as a brothel. Section 4 of the Act punishes any person who is dealing with proceeds of prostitution. Section 5 of the Act<sup>647</sup> makes it illegal to obtain, induce, or take someone for prostitution. Section 7 of the Act<sup>648</sup> penalises prostitution when it is carried out in or in the vicinity of public places. Based on these provisions, it is evident that there are strict penalties for prostitution and its related activities in India. Instead of monitoring unethical human trafficking, it appears that the ITPA is more concerned with eliminating prostitution. Such regulations have only made the life of sex workers more challenging, vulnerable, and hazardous.

The legal theory of liberal feminism considers prostitution as a desirably chosen activity. It argues that the choice to engage in prostitution is like any other employment decision. A woman who first weighs her options in order to make the most advantageous decision before choosing prostitution deserves the same rights and privileges as a person in any other occupation. To this extent, it has been observed that the Immoral Traffic (Prevention) Act does not accommodate this theory but instead criminalises prostitution which marginalises

<sup>644</sup> Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

<sup>645</sup> Immoral Traffic (Prevention) Act, 1956, § 4, No. 104, Acts of Parliament, 1956 (India).

<sup>646</sup> Immoral Traffic (Prevention) Act, 1956, § 3, No. 104, Acts of Parliament, 1956 (India).

<sup>647</sup> Immoral Traffic (Prevention) Act, 1956, § 5, No. 104, Acts of Parliament, 1956 (India).

<sup>648</sup> Immoral Traffic (Prevention) Act, 1956, § 7, No. 104, Acts of Parliament, 1956 (India).

and segregates sex workers from the rest of society. Keeping this in mind, this paper is trying to answer two main questions which are – “How can the incorporation of the legal theory of liberal feminism to the objectives of the Immoral Traffic (Prevention) Act help achieve state regulation?” and “How can bringing prostitution under state regulation, serve to protect the rights of sex workers, as against its criminalisation under the Immoral Traffic (Prevention) Act?”

This paper aims to highlight the ambiguity surrounding provisions of the Immoral Traffic (Prevention) Act and examines the extent of application of morality related concepts to these laws. It also aims to suggest ways to incorporate the legal theory of liberal feminism in an attempt to prove that regulation and decriminalisation would result in a better outcome. Since the Immoral Traffic (Prevention) Act criminalises prostitution and does not acknowledge the rights of sex workers, it is contended that the basis of legal theory of feminism must be incorporated to bring prostitution under the regulation of the state.

This paper uses the doctrinal method of research to examine the ambiguity in provisions of the ITPA act and its role in the criminalisation of prostitution from a philosophical perspective. The doctrinal method of research composes a descriptive analysis of rules found in statutes, books, cases and regulations and hence, this is the reasoning for choosing the aforementioned method of research. A qualitative approach is used to analyse the application of the legal theory of liberal feminism on provisions of the ITPA act in determining the rights of sex workers. The data collected is secondary in nature comprising articles from data bases which provide strong evidence to substantiate the papers claim.

## **PROSTITUTION FROM A PHILOSOPHICAL STANDPOINT**

### **(i) Prostitution and morality**

A concept widely applying to the criminalisation of prostitution and its understanding is morality. While law is a set of regulations which are enforced, morality is concerned with differentiating what is right from wrong. Morality is a subjective concept as what is socially and ethically proper to one person may be improper to another. Moral traditions were based on religion and committing adultery was considered a sin leading to belief that prostitution is immoral. The concept of morality is emphasized in the natural law theory. Philosophers like Plato, Aristotle and Kant strongly considered prostitution as morally wrong and believed that it had no rational agency. The concept of morality has led to people even in present times to consider prostitution as morally wrong. This paper aims to highlight the vagueness and misconception of most spheres of prostitution by indicating that morality has no ground. It pertains to the prostitution laws in India, a country where traditions and conventional views are still prevalent in society so the concept of morality helps in developing a study on why it is time to change this notion and move towards legalisation of prostitution.

Academic literature has identified two main types of jurisprudence within the study of legal theories: analytical and normative jurisprudence. Analytical jurisprudence refers to a broad range of ideas that attempt to provide solutions to queries about both specific legal notions and the nature of law in general. Legal theoretical concepts that concentrate on issues relating to the moral implications of law are referred to as normative jurisprudence.

Natural law theories are derived from morality and consider laws which contradict morality as invalid. Philosophers such as Aristotle and Kant, pioneers of the Natural School of jurisprudence considered prostitution as morally wrong. Many philosophers believed that engaging in sexual intercourse should be only for the purpose of procreation. Beliefs about sexual activity started

to become slightly less negative however, the general notion was that sexual pleasure had a rightful purpose and use based on the plan of God. The reason for this is that in Kant's view, sexual desire is nothing more than an appetite towards a person, which in essence objectifies him or her.<sup>649</sup> In his opinion, sexual desire and benevolence would contradict one another, as the former would result in all motives of moral relationships ceasing to function and vice versa, benevolence would deter a person from carnal enjoyment.<sup>650</sup> It is evident that Prostitution is not regarded as a desirable profession according to Natural Law theories, and it is believed that criminalising prostitution is essential to promote the development of the virtuous characters of citizens.

John Finnis, a natural law theorist argues that the only legitimate form of intercourse is marital intercourse. Unless it is practiced by people bound by wedlock, it is considered morally repugnant. He argues that it is immoral and his views align with Kant, St. Aquinas and St. Augustine who claim that sexual pleasure should be used to forward God's creative work. According to this argument, prostitution is not acceptable since it involves sex workers engaging in sexual activity with clients in exchange for money. Ipso facto, this arrangement is solely economic and not designed to strengthen commitments; it is intended only to provide for one's livelihood. Because of this, Finnis and natural law in general condemn prostitution. This condemnation reveals itself in the prohibitionist attitude toward prostitution through the phenomena of Legal Moralism.

Legal Positivism essentially forms the counterpart to Natural Law theories. Natural law looks into what the law is whereas legal positivism focuses on what the law ought to be. According to consequentialism, judgments on

the rightness or wrongness of a particular act or provision must be made in light of the consequences of that act or provision. Bentham was rooted in his beliefs on utilitarianism. The fact that Bentham recognised in his thoughts that this pleasure was not always exclusive within formal marriage is significant in relation to prostitution. In his ideas of non-conform sexual activity, he meant extramarital sexual activity for purposes other than reproduction. Bentham had nothing against prostitution and had nothing against women who worked as prostitutes, especially poor people. In this way, he was aware of their financial circumstances and made suggestions that went well beyond the norm at the time and were in accord with many feminist notions today. Bentham saw prostitution as an economic issue in this way. He explained that disadvantaged women who were unable to find other forms of employment to support themselves turned to prostitution. Bentham also believed that there was no longer a need for political sanctions against prostitution because the harms it created served as adequate moral punishment. Positivists acknowledged prostitution but opposed it because they thought it had a negative impact on society.

## (ii) Prostitution - A right to bodily autonomy

It is often overlooked that the prohibition of prostitution encroaches upon the sex worker's right to bodily autonomy. Bodily autonomy is essentially the right of a person to choose how they want to use their body. Bodily integrity is protected under Article 21 of the constitution<sup>651</sup>. Moreover, in *Puttuswamy v. UOI*<sup>652</sup>, the court held that the freedom to make private decisions on personhood and autonomy, free from excessive state involvement, was safeguarded by the right to privacy. In the case of *Budhadev Karmaskar v. State of West Bengal*<sup>653</sup>, it was held that "sex workers are also entitled to live a

<sup>649</sup> IMMANUEL KANT, PETER HEATH AND J B SCHNEEWIND, LECTURES ON ETHICS (Cambridge University Press 1997).

<sup>650</sup> IMMANUEL KANT AND MARY J GREGOR, THE METAPHYSICS OF MORALS (Cambridge University Press 1996).

<sup>651</sup> INDIA CONST. art. 21.

<sup>652</sup> Justice K. S. Puttuswamy & Anr v. Union of India & Ors., (2017) 10 SCC 1.

<sup>653</sup> *Budhadev Karmaskar v. State of West Bengal*, 2011 10 S.C.R. 577.

dignified life as guaranteed under Article 21 of the constitution". In *Lawrence v. Texas*<sup>654</sup>, the court held that the right to bodily autonomy and privacy should be read widely and include adult people's decisions about how to live their private lives in relation to sex. It follows that prostitutes should likewise have access to this right as fellow human beings. The right to bodily autonomy depends on the capacity to rule oneself i.e. the notion that since sex workers are adults, they are presumed to have the mental ability to make rational decisions. Bodily autonomy also includes the factor that sex workers have the independence to choose how they want to use their body.

### (iii) Legal theory of feminist jurisprudence

Views on prostitution began to change. Theoretical approaches of the jurisprudence of prostitution laws fall under the Critical Legal Studies. Feminist jurisprudence focuses mostly on how laws have historically supported women's subordination and how this is still evident in society now. Its main goal in this process is to promote changes in women's position by modifying and adapting the law and its approach to gender in order to create a system that can be seen as equally just for people of all genders.

By challenging the association of sexual acts with acts of desire and opposing the distinction between erotic and affective activity, on the one hand, and economic life, on the other, liberal feminist views place prostitutes in the context of a civil rights movement in which they are requesting the right "to charge for what other women give for free." The description of "drag queen feminism" by Paglia draws attention to some liberal viewpoints on prostitution and sexuality. In light of this, Paglia contends that women are the universe's dominatrix. In this sense, she explains that prostitutes constitute the ruler of the sexual empire, which men can only have access to by paying. This indicates

how the liberal ideology is inclined to perceive women's freedom to rise above their inferior status by using their bodies and sexuality to gain control. Feminist viewpoints are thus criticised for "reducing prostitutes to pitiable charity cases in need of their help."<sup>655</sup> as is the case with the sexual dominance model. As a result, they are "guilty of arrogance, conceit, and prudery" for doing so. The Liberal Feminists disagree with the radical notions of prostitution and think that it may be a desirable activity.

Nussbaum aims to bring prostitution into a new era where women can be treated equally and with equal rights based on legal liberalism, not just as women but also as unique human beings. The fact that selling sexual services cannot be justified in grounds of moral dubiety is one of Nussbaum's main reasons against prostitution. As a result, when women decide to become prostitutes due to a lack of other options, the wrongdoing lies not in the prostitution itself but rather in the women's economic situations, which cause them to have few other options. She continues to be a vociferous supporter of legalising prostitution. In 2008, Nussbaum became known for her statement in relation to prostitution and abortion that "the idea that we ought to penalise women with few choices by removing one of the ones they do have is grotesque."

The legal theory of liberal feminism hence perceive prostitution as "legitimate work." The notion behind this view is that greater public respect towards prostitution will improve the social security of prostitutes and reduce the experience of harm, violence and discrimination towards them.

### LAWS PROHIBITING PROSTITUTION IN INDIA

#### (i) The Immoral Traffic (Prevention) Act, 1956

<sup>655</sup> Alicia Danielsson, *Legal philosophical considerations of prostitution: A roadmap to undertaking diverse approaches to prostitution in Europe*, Volume 3, Issue 1, (2017), <https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/documents/studentlawreview/thirdeditionpapers/Danielsson.pdf>.

The natural law position overlooks the fact that practicing the profession of prostitution should be a personal choice. The Immoral Traffic (Prevention) Act, 1956 takes the same position as natural law and connects sex work as equivalent to trafficking – this is a wrong approach. Section 2 (f) of the ITPA<sup>656</sup> relates 'prostitution' to "sexual exploitation or abuse of persons for commercial purposes". The problem with this is terms like 'exploitation' and 'abuse' denote compulsion, force or coercion. These provisions consider sex workers as victims instead of considering them as normal people who desire to carry out sex work as their profession. The aim of law should be to provide an exit for coerced prostitutes from sex work. But instead, no variation is made between voluntary sex workers and trafficked sex workers. Section 4 of the ITPA imposes punishment for living on the earnings of prostitution. This way, the ITPA fails to recognise that sex workers have the right to carry out the profession of their choice. Article 19(1)(g) provides all citizens with the right to practice any profession or to carry on any occupation, trade or business.<sup>657</sup> Instead, the ITPA curbs this freedom of citizens by imposing punishment for engaging in prostitution.

Section 3 of the Act forbids persons from operating or working in brothels and imposes punishment for allowing premises to be used as a brothel or keeping a brothel. These provisions of the ITPA aim to essentially make sex work in India as an impossible profession to be carried out. These laws are rooted in concepts of public morality and makes it seem as though they were coerced into the vice of prostitution. In *Rajendra Nath Das v. Abdul Hakim Khan*<sup>658</sup>, the High Court held that "If a property is given on rent to a prostitute, knowing that she will use that property for the purpose of carrying on her profession, the rental agreement will be considered immoral and rent cannot be recovered as the agreement is

unenforceable."<sup>659</sup> Section 3 inclines sex workers to practice their profession privately. Prostitution is not allowed to be performed close to any public location, according to Section 7 of the Act. This in turn makes the working environment very dangerous as they have no recourse to safety. Section 20 of the Act<sup>660</sup>, gives the district magistrate the authority to expel any prostitute from her residence. Again, this forces sex workers to live and work in remote, hazardous regions. The life and safety of sex workers would be greatly improved by working in fixed indoor places, but the government makes this impossible by outlawing the operating of brothels. In fact, research has revealed that the most harmful job for women is prostitution. Therefore, steps must be taken to prevent this, and regulation of prostitution is the only solution.

The notion that women can never choose to undertake sex work goes against the principle of agency as a women's choice is rejected. Denial of agency is a violation of a women's right to dignity. According to Dworkin, dignity has two limbs: (i) self-respect – the capacity to recognise the immeasurable value of one's life and (ii) authenticity – the capacity to establish one's own standards for happiness and success. Authenticity is an extremely important concept applying here as to a sex worker, dignity would include the capacity to decide whether or not selling their body would fall under the category of fulfilment. The fact that the legal system categorically rejects the idea that someone might voluntarily engage in sex work reflects its paternalistic attitude and prevents sex workers from realising their own definitions of success. It violates the dignity and agency of an adult woman by undermining the significance of her permission and willpower.

The position taken to prohibit prostitution on moral grounds is one that is untenable – Rights must be considered in a Dworkian sense and

<sup>656</sup> Immoral Traffic (Prevention) Act, 1956, § 2, cl. f, No. 104, Acts of Parliament, 1956 (India).

<sup>657</sup> INDIA CONST. art. 19, § 1, cl. g.

<sup>658</sup> *Rajendra Nath Das v. Abdul Hakim Khan*, 39 Ind Cas 767.

<sup>659</sup> Khyati Mehrotra, *Immoral agreements in a contract*, IPLEADERS (Oct. 28, 2022, 9:30 PM), <https://blog.ipleaders.in/immoral-agreements-contract/>.

<sup>660</sup> Immoral Traffic (Prevention) Act, 1956, § 20, No. 104, Acts of Parliament, 1956 (India).

must override societal and utilitarian considerations. "Public decency and morality" fall within the ambit of societal concerns and the significance of right to bodily autonomy and dignity must outweigh these considerations. Therefore, from this standpoint, it can be concluded that a sex worker's voluntary decision to engage in prostitution for money is a part of their right to bodily autonomy and dignity.

Another way wherein the natural law outlook is immaterial is outlined by Finnis' principles of morality. His stance on prostitution is inconsistent with his stance on rights. It is vital to emphasise that natural law's rejection of prostitution is a major basis of Indian law's established viewpoint. The ITPA is rooted in this outlook. It is widely accepted that morality serves to lead people toward complete human fulfilment. Therefore, it is necessary to evaluate their effects in order to establish whether such moral standards are suitable. According to Finnis in his master principle of morality, he claims that these requirements establish a person's rights, which protect their access to necessities of life. Finnis stated - "Do not do evil—choose to destroy, damage, or impede some instance of a basic human good—that good may come."<sup>661</sup> Essentially, this principle states that inflicting injury on innocent people cannot be justified on the basis that it was done to further personal or public goals. By applying this standard, it can be claimed that the prostitution laws do not adhere to the principle of morality. This is due to the harm that the ITPA's implementation causes to sex workers. Finnis asserts that the first fundamental human right that is guaranteed to all people is life. For the concept of "life" to have any significance, the protection of health and safety must necessarily be included in this basic good. The legal prohibition of prostitution prevents sex workers from enjoying this fundamental human

right. Sex workers are denied the right to enforce their rights and seek remedies.

## (ii) **Arguments in favour of bringing prostitution under state regulation**

The need of the hour is regulating of prostitution. Prostitution must be brought under the regulation of the state. The government should take control over brothels as this will help regulate supply and demand. Allowing brothels to operate legally and publicly generates substantial revenue for the state as well. Taxing it like any other business will be an incentive for the government. Another aspect is if prostitution is decriminalised, it will be easier to identify and differentiate those sex workers who are willingly engaging in the profession and those who are forced into it. The existing laws make it difficult to determine whether the consent of sex workers are considered in certain cases as there are no laws to take measures against it if prostitution is criminalised in the first place.

Child prostitutes exist in all countries. By legalising prostitution, measures can be taken to remove children from the profession by taking strict action to ensure their safety.. Many sex workers are subjected to sexual assault and because of the criminalisation of prostitution, these sex workers have no forum for relief from this kind of violence. Rights of sex workers will be protected if prostitution is regulated as they will have redressal mechanisms available to them. Government control will help in curbing such atrocities committed against sex workers.

## **CONCLUSION**

India has adopted the natural law's moral objections to prostitution and has a prohibitionist view on the same. The provisions of the Immoral Traffic (Prevention) Act, 1956 is proof of this. This moral perspective violates the rights of sex workers and puts their lives and freedoms in peril. It encroaches upon the rights of bodily autonomy and dignity of sex workers.

<sup>661</sup> Debmalya Biswas, Sex workers: Undeserving of Morality? LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (Oct. 29, 2022, 8:45 PM), <https://lawschoolpolicyreview.com/2022/06/04/sex-workers-undeserving-of-morality/>.



Criminalizing prostitution can be more detrimental than beneficial to the health and living situations of sex workers. Regulation of prostitution will also be beneficial for law agencies restrain human trafficking. It is clear that laws governing prostitution in India are inadequate and have no clear approach. The natural law outlook on prostitution curbs the basic human rights of prostitutes this way and hence India must incorporate the legal theory of liberal feminism to change the view and disregard that India has towards prostitution.

### REFERENCES

1. Alicia Danielsson, *Legal philosophical considerations of prostitution: A roadmap to undertaking diverse approaches to prostitution in Europe*, Volume 3, Issue 1, (2017), <https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/documents/studentlawreview/thirdeditionpapers/Danielsson.pdf>.
2. Debmalya Biswas, Sex workers: Undeserving of Morality? LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (Oct. 29, 2022, 8:45 PM), <https://lawschoolpolicyreview.com/2022/06/04/sex-workers-undeserving-of-morality/>.
3. IMMANUEL KANT AND MARY J GREGOR, *THE METAPHYSICS OF MORALS* (Cambridge University Press 1996).
4. IMMANUEL KANT, PETER HEATH AND J B SCHNEEWIND, *LECTURES ON ETHICS* (Cambridge University Press 1997).
5. Kathryn Alice Zawisza, *The Ins and Outs of Prostitution: A Moral Analysis*, Graduate Theses and Dissertations, Retrieved from <https://scholarworks.uark.edu/etd/173>.
6. Khyati Mehrotra, *Immoral agreements in a contract*, IPLEADERS (Oct. 28, 2022, 9:30 PM), <https://blog.ipleaders.in/immoral-agreements-contract/>.
7. Yuktha Suresh, *Legalization of Prostitution in India and its impact on the exploitation and violence against women*, Volume 4, Issue 2, 2021, <https://www.ijlmh.com/paper/legalization-of-prostitution-in-india/>.
8. Chris Herlinger, *The worldwide debate about sex work: Morality meets reality*, GLOBAL SISTERS REPORT (Nov. 24, 2022, 7:35 PM), <https://www.globalsistersreport.org/news/trafficking/worldwide-debate-about-sex-work-morality-meets-reality-48216>.
9. Lara Gerassi, *A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex work*, NATIONAL LIBRARY OF MEDICINE (Oct. 29, 2022, 9:15 AM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4730391/>.
10. GLOBAL FREEDOM OF EXPRESSION COLUMBIA UNIVERSITY, <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/> (last visited Nov. 3, 2022).