

A Jurisprudential Study of Prostitution in India and Its Role in Different School of Thought

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1.1 INTRODUCTION

The study of legal theory and philosophy entails conducting philosophical and scientific examinations of law and justice as a social phenomenon. ³ This may include engaging with theories and studies about law and justice with potential elements of speculations on the basis of ideas found in numerous disciplines, such as law, sociology, history, political science, philosophy, economics and natural sciences. The aim is to elucidate the character and nature of law, particularly in relation to society. ⁴ In practice, this takes shape in seeking to answer an indefinite range of questions about law and justice, which are not only interesting in themselves but also offer unique insights and an in-depth understanding of legal provisions and concepts in relation to their context.

Due to the nature and extent of legal theory, it is impossible to consider every possible question which could be raised on a subject matter, especially in subject areas, which may be perceived as controversial, such as laws on prostitution. The vast amount of academic literature available on the subject covers a broad range of different concepts and ideas. This can make it difficult to piece together an initial overview of the core theoretical theories and basic notions before conducting a more in-depth analysis. Within the study of legal theories, there are two predominant species of jurisprudence identified in academic literature, namely, analytical and normative jurisprudence.⁵ Analytical jurisprudence is the umbrella term for theories seeking to answer questions relating to any major concepts of law as well as general questions of the meaning law.⁶ Normative jurisprudence covers legal theoretical ideas that focus on questions relating to the moral dimensions of law.⁷

Legal Theory classifications are merely labels of convenience. When researching specific theories, they provide valuable navigational aids. However, it is important not to view each theory as a true category. Even within the distinction between analytical and normative jurisprudence, one will find analytical elements in normative jurisprudence and normative elements in analytical jurisprudence.⁸ Thus, even in this “Roadmap” certain theorists may appear in several classifications.

1.2 EXPLORING THE LEGAL THEORETICAL VIEWS ON PROSTITUTION

In accordance with the examination framework depicted above, the first questions to ask in determining the legal theoretical classification of prostitution laws are how these fit into ideas of the way the nature of law is regarded and how laws are thought to be determined. These initial questions will point towards Natural Law, Legal Positivism, Critical Legal Studies or Legal Realism. The following will address each of these classifications individually in relation to their theoretical concepts of morality, sexuality, and law and the way these apply to prostitution and how the interpretations fit into the most prominent sub-classifications.

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³ Suri Ratnapala, Jurisprudence (Cambridge University Press 2013) .

⁴ Ibid87

1.3 NATURAL LAW

According to natural law theory, laws are derived from the nature of morality and are, thus, natural moral laws. Accordingly, many Natural law theorists support the premise of *lex injusta est non lex* (Law which is not just is no law. In other words, this means that laws, which

⁵ See for example: Dennis M Patterson, *A Companion To Philosophy Of Law And Legal Theory* (Wiley-Blackwell 2010) 9; 531; William Twining, *General Jurisprudence* (Cambridge University Press 2009) 226; Antony Duff and Stuart P Green, *Philosophical Foundations Of Criminal Law* (Oxford University Press 2011) Chapter 1; Scott Shapiro, *Legality* (Harvard University Press 2011) .

⁶ HLA Hart, *The Concept Of Law* (Oxford University Press 2012) xliv.

⁷ Howard Davies and David Holdcroft, *Jurisprudence* (Butterworths 1991)

⁸ Ibid 91

contradict a moral sense of justice, are considered invalid. Over the millennia, Natural law has developed from being based on the idea of the existence of divine laws, over canon laws, towards the idea of laws being inherently based on the fundamental moral foundations of human nature and in more recent times from human biology. Despite the developments in the ideas of where.

Natural laws are derived from, some essential aspects remain consistent, namely, that laws are already omnipresent and need to be uncovered by legal scholars. The following will consider some of the main ideas in relation to sex, morality, and prostitution from the key Natural law thinkers in jurisprudential history. In Plato's Symposium, he focussed on the passion to possess the good and beautiful, which he referred to as eros. Within his writings, one can recognise the same theoretical underpinnings which were later reflected in the Christian's antagonism to sexuality. One example can be found in Plato's distinction between vulgar and spiritual eros. The latter, according to Plato, is free from lust, wantonness, or lewdness and has virtue as a central concern between mentally beautiful lovers.

1.4 DETERMINING THE NECESSITY OF PROSTITUTION LAW UNDER NATURAL LAW IDEAS: VIRTUE JURISPRUDENCE OR DEONTOLOGY

As discussed in the previous point, Natural law believes that ideals of justice and laws are pre-established by, for example, nature, or a higher power. Virtue jurisprudence is a sub- category of Natural Law that believes that the purpose of laws is to promote virtuous behaviour in a given society. Thus, laws criminalising prostitution are necessary to promote the development of the virtuous characters of citizens. Established above, key supporters of these ideas can be found in Plato, Aristotle and St. Thomas Aquinas.

Legal Deontologists believe that actions are morally wrong, regardless of the consequences. According to Rawls, these moral intuitions, which vary between individuals, can be determined through a process he describes as 'reflective equilibrium.' Accordingly, the collective of raw moral intuitions may be ordered in general principles, which could unify the collective of judgments in certain cases.⁹ Kant, following a deontological ideology, thought that the central idea of morality was found in duty. He based this ideology on the idea of a

⁹ John Rawls, *A theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999).

good will. Accordingly, "nothing can possibly be conceived in the world or out of it that can be called good without qualification except a good will." Good will, in this sense, was seen to be a will, which has the objective of achieving *good* rather than merely being based on desire and inclination.

However, despite Kant believing that prostitution constituted a grave violation of a person's moral duties, his theories in relation to autonomy are often used as a theoretical basis to claim that the law cannot force people to be morally upright. In recent decades, there has been a significance placed on Kantian ideas in prostitution discussions, which

make it advisable to conduct a more in depth contemporary analysis of his theories in relation to prostitution at an early stage of jurisprudential research in prostitution laws.

1.5 DETERMINING WHY PROSTITUTION LAWS SHOULD BE MADE: CONSEQUENTIALISM OR PUBLIC REASON

Consequentialism holds that the consequences of someone's conduct or laws are the decisive foundation for judgments in relation to the right or wrongness of a specific conduct or provision. Hence, the Consequentialism stance is that a morally right act will produce an outcome society would describe as good. In essence, consequentialists believe that "the ends justify the means."¹⁰ Accordingly, if a specific consequence is morally significant enough, it will justify any method. Consequentialism feeds into the realm of paternalists and other representatives of holistic understandings of societies who claim that human beings are intrinsically social beings. Thus, due to the fact that people form complex, inseparable relationships with other members within their societies, their individual actions will automatically have an effect on the other members of their society or even on the entire society as a whole.¹¹ As aforementioned, Jeremy Bentham has been attributed to the Utilitarian School of Legal Thought. Especially his thoughts about marriage, sexual relations and morals touch on philosophical issues relating to prostitution and prostitution laws.

It is of significance in relation to prostitution, that Bentham acknowledged in these ideas, that this pleasure was not necessarily exclusive within legal marriage. In his considerations of

¹⁰ John Mizzoni, *Ethics* (Wiley-Blackwell 2010) 104.

¹¹ Rohnn B Sanderson and Marc A Pugliese, *Beyond Naivete* (University Press of America 2012) 160.

non-conform sexual intercourse, by which he meant sexual intercourse outside of marriage for other reasons than procreation, he explained that the harm caused from the enforcing of a marriage contract was palpable enough.

In his utilitarian view, men may commonly realise after having enjoyed sex with one woman, that they could enjoy sex just as much with another woman. This idea was not solely attributed to male views and he saw this to be equally true for women. Accordingly, the sexual restraint which came with the enforcement of a marriage contract was an inconvenience for both sexes.

These thoughts have also been expressed by others in a way which could be reconcilable with the concepts of Natural Law. In this sense, Denis Diderot viewed a lifelong commitment to one-woman incompatible with the natural inconstancy of men and Rousseau, although believing that marriage was advantageous for the human species as a whole, did not believe that the permanent union between women and men was dictated by nature. In regards to prostitution, Bentham recognised similar distinctions between forms of prostitution as in a hierarchy as already mentioned in regards to Aristotle.

1.6 CRITICAL LEGAL STUDIES

When initially conducting research into jurisprudence of prostitution laws, it becomes clear that theoretical approaches falling under the umbrella term of Critical Legal Studies form by far the most extensive category. Nevertheless, this "Roadmap" to understanding prostitution laws in Europe, will only be able to provide a superficial and selective glimpse of the available theoretical ideas. Critical legal studies first emerged in the 1970s as a revolutionary legal theory, which sought to reshape society in accordance with human personality, without the influences of class domination and political agendas. In this sense, supporters of these ideas, such as Kennedy and Klare, defined Critical Legal Studies as being "concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society."

1.7 DETERMINING THE CRITICAL VOICES AND CRITICAL RACE THEORY AND FEMINIST LEGAL THEORY

Over the past decades, the significance of the Critical Legal Studies movement has disappeared and been replaced by more specialised movements, that share the initial common foundation inspired by Critical Legal Studies, such as feminist legal theory and critical race theory.¹² Critical Race Theory views prostitution as a social phenomenon, which reflects the social injustices within society. Within these views, this is most significantly seen in the overrepresentation of people with certain ethnic backgrounds. The aim of Critical Race Theories is to direct the law towards a focus on the experiences of minority groups in prostitution in order to tackle racial injustice. The general ideas of Critical Race Theory perceive the laws as still predominantly made by middle to upper class white males. This means that the experiences of people from other backgrounds are inadequately regulated for.

The Liberal Equality Model seeks genuine equality for women in contrast to merely nominal equality. This objective is sought by means of application of liberal values, predominantly female experiences. The sexual Difference Model, in contrast, seeks to highlight the natural gender differences and seeks these differences to be acknowledged within the law. They believe that this is the only way distinctive female issues can be adequately remedied. This approach is based on the idea that there are natural or cultural characteristics which distinguish women from men, which need to be taken into account in the laws.

1.7 WHY WOMEN BECOME PROSTITUTES THE FACTS OF STREET LIFE

Not so long ago it was thought that women who became prostitutes did so because they were mentally deficient nymphomaniacs who were not mature enough to face the life society expected of them - as wives and mothers. Many psychoanalytical theories were developed to explain why women would sell their bodies for money rather than give them for love. First, the women have to be mentally abnormal and to have lost all sense of identity. Secondly, they are likely to fear sexual intimacy with men in any "normal" sense. Thirdly, and best of all, in good Freudian terms, the women have never progressed beyond the childhood stage of

¹² John Henry Schlegel, 'Critical Legal Studies', In Sally E Hadden and Alfred L Brophy, *A Companion To American Legal History* (John Wiley & Sons 2013).

sexually loving their fathers to the adult stage of non-erotic love. The client, the "strange man" who pays for her favours is the deteriorated image of her father; at the same time, [she] registers her violently jealous disapproval of her mother's marriage by, as it were, debasing her own feminine currency.

1.8 THE "EXPLOITED" HOOKER'S POINT OF VIEW -FEMINIST APPROACH

Arguably few women have escaped prostituting themselves for a dinner, a present, for love, or for security. The prostitute is really at the extreme end of a continuum from which few women ever escape. We have all grown up in a male-dominated society in which men define women's assets as residing in their sexuality to a greater or lesser extent. The prostitute suffers for this in a particular way. I submit that prostitutes are exploited by a society that treats women as second-class citizens fit to be recipients of men's dominance and exploitation. Prostitutes are prosecuted for soliciting in a way "respectable women" who flirt are not. They are prosecuted for running a brothel if they take money for sex in a way "respectable women" who have sex in their homes are not. Their punishable mistake is that they get paid for work women are supposed to do as part of their "duty." Women are supposed to have sex for love, not money. The problem, however, is not in accepting money for sex. The problem lies in the unequal sexual construction that operates in society. Society says it is wrong to take money for sex yet offers many women no viable alternative barring marriage, which radical feminists identify as a variation on the same theme.

1.9 CONCLUSION

A sensible second step would be to take action in the social and economic spheres. Generally, prostitutes do not enjoy the work they do. Prostitution is not a glamour world nor a paradise for deranged nymphomaniacs. Prostitutes, in common with many women, would welcome a better option but for most of them the stereotyped, low paid jobs offering to "normal" women do not provide such an option. Decriminalisation of prostitution would alleviate some of the surface problems faced by prostitutes but the problem goes deeper than that.