

SEX WORKER AS THE JURIDICAL SUBJECT: INTERROGATING THE VIOLENCE OF LEGAL INTERPRETATION

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This paper focuses on qualitative analysis of select judgments pronounced by the Supreme Court of India from the 1950s onwards in cases falling under prostitution/sex work related laws.¹ The analysis is discursive and not doctrinal, with feminist theory as the predominant epistemic frame used for critical reading of these judgments.² The emphasis is on judicial reasoning rather than the outcome of the case. Language, conceptual categories, interpretations have been thematically analysed to engage with judicial ‘common knowledge’ around prostitution/sex-work.³ The politics of exclusion behind the constitution of the juridical subject is as much a given now as the claims to objectivity and impartiality. This paper aims to add to the growing archive that has opened up for scrutiny the violence inherent in legal interpretation.⁴ More specifically, it enquires into how

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¹ This paper has used the terms prostitution, prostitute, sex-wok/worker depending upon the way they are used in the judgment being analysed. For a succinct understanding of the politics around different terms that are used in various discourses in Indian context. See Prabha Kotiswaran, *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Oxford University Press 2012) 21-22. The author supports the work position.

² Rosemary Hunter, while delineating the advantage of using discourse analysis as a preferred mode of feminist reading of a judgment, defines it as, “Discourse analysis involves paying close, critical attention to the judicial reasoning, including the language and concepts used, the way the argument is constructed, and what might be absent from or excluded by the text.” See Rosemary Hunter, ‘Analysing Judgments from a Feminist Perspective’ (2015) 15(1) Legal Information Management 2; This paper has used this definition as the dominant frame of reference.

³ *ibid.* Hunter, emphasis in original.

⁴ Robert M Cover, ‘Violence and the Word’ (1986) 95 Yale LJ; Veena Das, ‘A child disappears: Law in the courts, law in the interstices of everyday life’ (2019) 53(1) Contributions to Indian Sociology 97–132; Veena Das, Sexual Violence, Discursive Formations and the State, (1996) Special Issue EPW 1124; Srimati Basu, ‘Dreaming a Better Court for Women: Adjudication and Subjectivity in the Family Courts of Kolkata, India’ in Ravinder Kaur and Rajni Palriwala (eds), *Marrying*

subjectivity gets constituted when judges are faced with an unlikely subject in the figure of the prostitute/sex-worker.⁵ The images that are invoked in these judgments create a malleable identity of the sex-worker as a captive subject of law.⁶ I argue that the ambivalence produced by the conflation of the victim/offender figure and the simultaneous yet contradictory attitude of care and compassion on one hand and hostility towards these 'hypersexual' subjects, on the other hand, aids in justifying state intervention and also helps in absolving the state of its responsibility to integrate this community in its agenda of social change and growth.⁷ These words of the law are not only used to produce, reiterate and sustain gendered and sexual hierarchies, as Miranda Joseph argues, but also serve as discursive techniques that make structural violence disappear from the narrative, as Das points out.⁸ Najmabadi's warning about our complicity in naturalising and 'by implication' atemporalising gender binaries till we continue to reproduce them in our narratives is a useful reminder to feminist interlocutors of these legal interpretations, as we continue to endorse and reproduce heteronormativity through our focus on men and women.⁹ The question should be, how do we

in South Asia: Shifting Concepts, Changing Practices in a Globalising World (Orient Blackswan, Hyderabad 2014); Usha Ramanathan, *Images (1920-1950) 'Reasonable Man, Reasonable Woman and Reasonable Expectations'* in Archana Parasher and Amita Dhanda (eds) *Essays in Honour of Lotika Sarkar*, 33-70 (Eastern Book Company, 2007); Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37(1) *Conjugalities and Sexual Economies in India - Feminist Studies* 185-211; Suresh Mayur, 'The "Paper Case": Evidence and Narrative of a Terrorism Trial in Delhi' (2019) 53 *Law and Soc Rev* 173-201; Suresh, Mayur, 'The Social Life of Technicalities: 'Terrorist' lives in Delhi's Courts' (2019) 53 *Contributions to Indian Sociology* 72-96; Gee Imaan Semmalar, 'Re-Cast(e)ing Navtej Singh v. Union of India' (2020) 13 *NUJS L Rev* 3; Rachna Chaudhary, *Countering 'Alienation': Re-reading Subversion in Discursive Practices*, in Ravi Kumar (ed) *Left Politics in South Asia: Reframing the Agenda* (Aakar, Delhi 2019) 200-222.

- ⁵ Sex workers are being called unlikely subjects not because there is a dearth of litigation in this area but the stereotype of Woman as dominantly reflected in jurisprudence, is inflected with the presumed qualities of women who are not publicly recognised as prostitutes/sex-workers. This ambivalence is evident in the judgments taken up in this paper as well. Ramanathan (n 4) 68 has drawn our attention to the agentic subject position being availed by women in prostitution while approaching a court of law and also their recognition by the court as rights bearing subject. But they remain interpellated as the *other* and their marginalisation continues since the prostitute woman is not a reasonable woman as Ramanathan (n 4) 69 concludes.
- ⁶ See Chaise LaDousa, 'The Discursive Malleability of an Identity: A Dialogic Approach to Language "Medium" Schooling in North India' (2006) 16(1) *J of Linguistic Anthro* 36-57 for a brief review of literature around the role of discursive practices in creating and sustaining malleable identities.
- ⁷ See Newport's work for a similar analysis in relation to the *hijras* and their 'ambivalent position in the social imaginary' as well as the concurrent ambivalence in the law (page 88). Sarah Elizabeth Newport 'Unnatural Offences', *Postcolonial Problems: The ambivalent position of hijras in contemporary Indian law and literature* (2017) 38(1) *S Asian Rev* 87-99.
- ⁸ Miranda Joseph, 'Risking Justice: Women's Studies Beyond Measure, Feminist Formations' (2013) 25(3) *Winter Inhabitations: On Robyn Wiegman's Object Lessons* 137; Veena Das, *Violence, Gender, and Subjectivity*, (2008) 37 *Ann Rev of Anthropology* 289.
- ⁹ Afaneh Najmabadi, 'Beyond the Americas: Are Gender and Sexuality Useful Categories of Analysis?' (Spring 2006) 18(1) *J of Women's History* 12.

escape attributing the burden of sexuality to men and that of gender to women.¹⁰ Reflexivity is thus a key anchor for the analysis taken up in this paper.

The larger time frame was taken up to facilitate a mapping of the discursive shift(s) in judicial discourse, but a random search revealed that the term sex-work/worker has been used sparingly. *Budhadev Karmaskar v State of W.B.* is the only judgment in which the term sex worker has been used more frequently than the word prostitute. The mapping of such shifts in 'habitual speech forms' of the courts, is necessary to consciously work towards incorporation of more inclusive and representative terms in legal language.¹¹ Some of the selected judgments are considered to be 'landmark' judgments around prostitution and are regularly cited as precedents in related cases and hence were taken up to augment the analysis and also to rupture the stability of judicial canon where few cases continue to serve as exemplars despite being problematic in terms of the structure of reasoning, language used, ideology deployed or the final decision. Some related judgments, pronounced by High Courts have been taken up to add to the archive of legal interpretations in the context of sex work. The selection includes at least one judgment from each decade, starting from the 1950s to the present decade. Judgments, where multiple orders have been issued and kept pending for almost a decade, are being taken as a single judgment. The next section briefly outlines the regulatory legal framework within which prostitution/sex work is allowed in India and the following sections focus on a thematic analysis of select portions from the judgments under review. The later section brings together some feminist perspectives that might support our search for a less violent and possibly more inclusive jurisprudence.

I. LAWS REGULATING PROSTITUTION IN POST-COLONIAL INDIA

The genesis of existing laws in India with emphasis on eradicating prostitution can be traced to the colonial period when the Indian Penal Code, 1860, was drafted and also to the various versions of the Contagious Diseases Acts that were enacted around that time.¹² In independent India, the government passed a new law in 1956, called the Suppression of Immoral Traffic in Women and Girls Act. This was passed after the Government of India ratified the International Convention for the Suppression of Immoral Traffic in Persons and

¹⁰ *ibid* 15.

¹¹ Slavoj Žižek, *Violence: Six Sideways Reflections* (Picador, New York 2008) 2.

¹² These Acts symbolise a paradigm shift in terms of state regulation of prostitution, especially of brothels, as medical regulation became integral to the management of prostitution. The Acts also established prostitutes as a problem population and the provisions were used to 'preserve racial purity and to prevent miscegenation' See Ashwini Tambe, 'The Elusive Ingénue: A Transnational Feminist Analysis of European Prostitution in Colonial Bombay' in Prabha Kotiswaran (ed), *Sex Work* (Women Unlimited, New Delhi 2011) 3-26; Philippa Levine, 'Venereal Disease, Prostitution, and the Politics of Empire: The Case of British India' (1994) 4(4) *J of the History of Sexuality* 579.

the Exploitation of the Prostitution of others in 1950.¹³ The Act was amended in 1986 and is now known as the Immoral Traffic Prevention Act. The Acts, neither the previous one nor the one presently in force, ban prostitution per se, but most activities around prostitution like soliciting, especially in public places, maintaining a brothel, living on the earnings from prostitution, procurement/detention for the sake of prostitution, among others are considered criminal acts and the police has wide powers to arrest on suspicion of prostitution. The provisions have changed over the years though not radically, like the initial definition of a prostitute as a woman offering herself promiscuously under the 1956 Act has given way to the term persons in the 1986 one, but there is hardly any change in the *effect* of law as the predominant understanding is that these women and girls are 'victims' of prostitution and hence need care and protection and are also 'in need of correction'.¹⁴ There have been demands from divergent groups from different ideological backgrounds, including feminists, sex workers, activists, abolitionists to

¹³ Many international instruments aimed at curbing trafficking, often conflating it with prostitution, have informed Indian laws and policies around prostitution right from the first half of the 20th century. The most recent such influence being the Palermo Protocol of 2000, UN Convention Against Transnational Organized Crime, 2000 and Victims of Trafficking and Violence Protection Act 2000 (USA). See Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (Paradigm Publishers 2005); Catherine Dauvergne, *Making People Illegal What Globalization Means for Migration and Law* (CUP 2008); Jennifer K Lobasz, 'Beyond Border Security: Feminist Approaches to Human Trafficking' (2009) 18 Security Studies 319; Prabha Kotiswaran, 'Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law' (2014) 4 UC Irvine L Rev 353.

¹⁴ This not to say that women in prostitution are not exploited or face violence of various kinds from diverse sources but to merely see them as victims is as problematic as non-recognition of associated violence by some supporters of the work position. Such accounts also invisibilise various forms of prostitution/sex work that have socio-cultural, religious or even legal sanction. Such decontextualised narratives also take focus away from the needs of the community and keep them trapped as a problematic population group in need of intervention or beyond intervention. A cursory reading of the related provisions clearly reflects this approach as The Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956) specifies that:

"(f) "prostitution" means the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind;...

(g) "protective home" means an institution, by whatever name called, in which women and girls may be kept in pursuance of this Act and includes- (i) a shelter where female undertrials may be kept in pursuance of this Act; and (ii) a corrective institution in which women and girls rescued and detained under this Act may be imparted such training and instruction and subjected to such disciplinary and moral influences as are likely to conduce to their reformation and the prevention of offences under this Act;

(iii) a corrective institution in which women and girls rescued and detained under this Act may be imparted such training and instruction and subjected to such disciplinary and moral influences as are likely to conduce to their reformation and the prevention of offences under this Act;"

The amended version of the Act, The Immoral Traffic (Prevention) Act 1956 (Act 44 of 1986, in force from January 1987) defines

"[2](f) "prostitution" means the sexual exploitation or abuse of persons for commercial purpose, and the expression "prostitute" shall be construed accordingly;]....

"corrective institution" means an institution, by whatever name called (being an institution established or licensed as such under section 21), in which 9[persons], who are in need of correction, may be

‘reform’ the Act with suggestions ranging from legalisation of sex work, to criminalisation of the buyers of sex, to decriminalisation of sex work, during the intervening period between the two Acts and also in the contemporary context.¹⁵ But no substantial change in the regulatory framework has taken place as the official position in India continues to be that of toleration of prostitution. The stated goal within this ‘tolerant’ framework remains rehabilitation of all the ‘victims’ of prostitution and most activities around prostitution are criminalised under the existing provisions. The legal system continues to shun the work position as being articulated by the much visible sex worker’s movement in India.¹⁶

Sex workers from different parts in India have been active politically since the 1990s and the movement has continually focused on collective rights for the community and also the right to resist based on labour being their key identity.¹⁷

detained under this Act, and includes a shelter where 10[undertrials] may be kept in pursuance of this Act;]

“protective home” means an institution, by whatever name called (being an institution established or licensed as such under section 21), in which 3[persons], who are in need of care and protection, may be kept under this Act 4[and where appropriate technically qualified persons, equipment and other facilities have been provided,] but does not include—

- (i) a shelter where 5[undertrials] may be kept in pursuance of this Act, or*
- (ii) a corrective institution;]* *“protective home” means an institution, by whatever name called (being an institution established or licensed as such under section 21), in which 3[persons], who are in need of care and protection, may be kept under this Act 4[and where appropriate technically qualified persons, equipment and other facilities have been provided,] but does not include —*
 - (i) a shelter where 5[undertrials] may be kept in pursuance of this Act, or (ii) a corrective institution;]*”

¹⁵ Jean D’Cunha, ‘Demand for Legitimising of Prostitution in the West: A Critique’ in Prabha Kotiswaran (ed), *Sex Work* (Women Unlimited, New Delhi 2011) 67-93; Ratna Kapur, ‘The Tragedy of Victimisation Rhetoric: Resurrecting the ‘Native’ Subject in International/Postcolonial Feminist Legal Politics’ in Prabha Kotiswaran (ed), *Sex Work* (Women Unlimited, New Delhi 2011)94-117; Rajeshwari Sunder Rajan, ‘The Prostitution Question(s): Female Agency, Sexuality and Work’ in *The Scandal of the State Women, Law, and Citizenship in Postcolonial India* (Duke University Press, Durham 2003) 117-146.

¹⁶ While there have been judgments where the right of a prostitute to carry on her trade or profession is recognised in a limited way, the general approach has been that such an interpretation should not be read as an endorsement of prostitution as a viable livelihood choice. Justice Sahai of the Allahabad High Court, made some favourable remarks in a related case and recognised the right to work but refused to grant relief from eviction to the petitioner. See *Shama Bai v State of U.P.* 1958 SCC OnLine All 334 : AIR 1959 ALL 57.

¹⁷ There is a national level umbrella collective named National Network of Sex Workers (NNSW) that was established after deliberations at the first National Conference of Sex Workers in India, in November 1997. Its members include sex workers-led organisations and supporters of the rights of sex workers in India. NNSW has female, transgender and male sex workers as members. See <<http://www.nnswindia.org/about-us.aspx>>; Sampada Grameen Mahila Sanstha (SANGRAM), established in 1992 in Sangli, Maharashtra, is another such collective working for stigmatised communities including female, transgender and male sex workers, men who have sex with men(MSM), and transgender individuals in some districts of southern Maharashtra and northern Karnataka. <<https://www.sangram.org/>>; DURBAR, is one such prominent collective off/for sex workers working for the community in West Bengal - <<https://durbat.org/>>. It takes pride in the fact that as early as August 1995, the members succeeded in persuading the Government of

Sex Workers Forum, Kerala, a southern state in India, in a 1999 document, described the coining of the term sex-worker as a shift from the moral stigma attached to the word prostitute to the dignity and freedom associated with the identity of a worker selling sexual services.¹⁸ The legal system, however, remains impervious to these paradigm shifts as evident in the analyses in the following sections.

II. PERFECTING AMBIVALENCE: PRODUCING THE VICTIMS

The analysis of selected judgments reveals that by using terms like ‘fallen victims’, ‘unfortunate fallen women’, ‘unwilling participants and involuntary victims of compelled circumstances’, an identity of the prostitute is being carved out as a ‘victim’ and hence needing protection despite being ‘depraved’ or ‘fallen’ and additional evidence to support this identity is garnered through literature, poetry and films. The figure that emerges through these interpretations is neither a pure victim nor an autonomous subject and not the work of a single discursive element.¹⁹ An illustration can be taken from *Gaurav Jain v Union of India*, where the judges were to respond to a Public Interest Litigation (PIL) asking for direction to the respondents for providing separate schools with vocational training facilities and separate hostels for children of prostitutes.²⁰ The judge started off by writing:

“Frailty, thy name is woman”, was the ignominy heaped upon women of Victorian Era by William Shakespeare in his great work ‘Hamlet’. The

West Bengal to remove the relevant clauses from the Cooperative law so that they could register their cooperative society as the co-operative of ‘sex workers’ rather than passing off as ubiquitous ‘housewives’. Such attempts at creating alternatives to existing institutional services that remain out of bounds for such marginal groups are also examples of inclusion without rhetoric. Such real-world examples of self-empowerment, also challenge and disrupt the normative, problematic, abstract ideas of rehabilitation by giving tangible working models to address the needs of the community. The refusal to acknowledge such efforts in official discourse like judgments and policy interventions, is another strategy at invisibilising their efforts as well as their experiences; See Global Network of Sex Work Projects ‘Economic Empowerment for Sex Workers National Case Study’ <https://www.nswp.org/sites/nswp.org/files/usha_case_study_nswp_2020.pdf> accessed 4 May 2022.

¹⁸ ‘Sex Workers’ Manifesto: First National Conference of Sex Workers in India’ <<https://www.nswp.org/sites/default/files/Sex%20Workers%20Manifesto%20-%20Meeting%20in%20India.pdf>> accessed 4 May 2022; Prabha Kotiswaran, *Sex Work: Issues in Contemporary Indian Feminism* (Women Unlimited 2011) 206.

¹⁹ Héctor Grad & Luisa Martín Rojo ‘Identities in discourse: An Integrative View’ in Rosana Dolón and Júlia Todolí (eds), *Analysing Identities in Discourse for Discourse Approaches to Politics, Society and Culture* (John Benjamins 2008).

²⁰ *Gaurav Jain v Union of India* 1990 Supp SCC 709 : AIR 1990 SC 292 - A Public Interest Litigation under Indian law means litigation for the protection of public interest and need not be taken to the court by the aggrieved party but any private person/party can approach the court provided it is accepted as involving issues of public interest. The court can also take *suo motto* cognisance in such cases.

*history or sociology has, however, established the contrary, i.e., 'fortitude', thy name is woman; 'caress', thy name is woman; 'self-sacrifice', thy name is woman; tenacity and successful pursuit, their apathetically is women. Indira Gandhi, Margaret Thatcher, Srimovo Bhandarnaike and Golda Meir are few illustrious women having proved successful in democratic governance of the respective democratic States. Amids them, still, a class of women is trapped as victims of circumstances, unfounded social sanctions, handicaps and coercive forms in the flesh trade, optimised as 'prostitutes', (for short, 'fallen women')"*²¹

While a plain reading would imply this as an exercise in rhetoric, Resnik and Heilbrun point out the subversive potential of these convergences of law and literature as then one would be able "to see how each discipline incorporates these assumptions (as men speak, judge, describe, and ascribe) and how to challenge that shared vision of the social order".²² Resnik's call for questioning the materials that constitute the canon of law is also relevant here if the aim is to push the limits of law and to counter the 'resiliency of legal culture to critical attack'.²³

The act of naming a few 'successful' women is a strategy to stress that women too can lead an impressive life since modern democratic societies treat them as equal to men. The implication then is that women who fail to take advantage of such empowering societies are to be blamed rather than the society. The 'lens of pity' used by the judges helps in creating and sustaining the image of the prostitute in need of protection and hence not capable of taking decisions or someone beyond redemption (Tambe 2009: 80).²⁴ The mobilization of fear, the

²¹ *Gaurav Jain v Union of India* (1997) 8 SCC 114.

²² Heilbrun and Resnik's critique of the field of "law and literature" as being either about law in literature or law as literature needs to be incorporated in any critical analysis in this area. See Carolyn Heilbrun & Judith Resnik, 'Convergences: Law, Literature, and Feminism' (1990) 99 Yale LJ 1914.

²³ Judith Resnik, 'Ambivalence: The Resiliency of Legal Culture in the United States' (1993) 45(6) Stan L Rev 1528.

²⁴ In another case from that time period, *Public at Large v State of Maharashtra* 1997 SCC OnLine Bom 308, the Bombay High Court took suo moto cognizance of a newspaper article published in the Indian Express which drew attention to an 'alarming' numbers of minor girls who are trafficked and forced to be sex workers. On the basis of the issues highlighted in the article, the Court questioned the law enforcement agencies as to why actions were not taken under the relevant provisions of IPC and SITA. The court gave directions to formulate and implement a scheme to improve the situation. In this case, the Court observed:

"This obnoxious trade in women has been recognised, but not stamped out. In a embed country minor girls cannot be permitted to be confined for illegal and immoral purpose and their rescue operations should not be delayed. Our society, right through the ages, though has given a special status to women, nevertheless, exploits women for pleasure Arthashastra compiled by Kautilya, Kamsutra of Vatsyayana, dancing and singing girls during the Mughal period and the Devadasi women where young girls were introduced basically in service of temples but were exploited by the temple officials, reverberate in our ears."

There is another related case from the Delhi High Court, *Raghu Nath Pandey v Bobby Bedi* 2006 SCC OnLine Del 221 : (2006) 89 DRJ 40. This was a defamation suit filed by the

fear of moral depravity in this instance, also gives state authorities the right to present themselves as protectors of these *fallen* women as well as the social order.²⁵ The imagination in these borrowings from literature is that all women inhabit the same social context and temporality, thus erasing the grounds of difference that mark any sex worker's life in comparison to women who are not in sex work, thus precluding the possibility of reimagining femininities in multiple ways.²⁶

In *Budhadev Karmaskar v. State of West Bengal*, a case around the brutal murder of a sex-worker, the judges wrote,

*"In the novels and stories of the great Bengali Writer Sharat Chand Chattopadhyaya, many prostitutes have been shown to be women of very high character, e.g., Rajyalakshmi in 'Shrikant', Chandramukhi in 'Devdas' We may also refer to the character Sonya Marmelodov in Dostoyevsky's famous novel 'Crime and Punishment'. Sonya is depicted as a girl who sacrifices her body to earn some bread for her impoverished family".*²⁷

The opening line in this judgment was that sex workers are also human beings. Their humanity is not assumed and needs to be approved as an addition

descendants of Mangal Pandey against the makers of a film on Mangal Pandey as the film showed Mangal Pandey in a romantic relationship with a sex worker named Heera and there was a scene suggesting Mangal Pandey married the sex worker by applying *sindoor*/vermilion on her forehead. The Court dismissed the suit on the basis of creative liberty to the filmmaker. The judge, however, took great pains to attribute respectability to every interaction between Mangal Pandey and Heera as evident in the following passage:

"Before proceeding further, let us analyze the character of 'Heera' in the film. Her character is carefully chosen. She is a young and petite girl. At the same time she is strong, rustic and her words few and brusque. She is not the one who had adopted prostitution as her trade by choice. It was not to earn money. In the very first scene introducing her character she-coming from unknown and one could infer from a poverty stricken background-is sold as a slave. Even at that time her resistance speaks volumes of her mighty character. Nevertheless she is helpless when forced to prostitution. She is forced to sell her flesh but her soul is intact. She does not compromise with her honour, dignity and self-respect. She is not a body with a soul. She is a soul with a physical part called the body. Depiction of Heera with such strong attributes of her character would not be viewed by the public as something abhorrent. Audience fall in love even with the negative characters when crafted carefully by the producers. Filmmakers keep in mind as to what will appeal the viewers. They regard the Indian cinema audience not only as the reader but also the real author of the text of Hindi films. I do not think that even a common man would have a perception that Mangal Pandey has denigrated himself by associating with Heera, whose character would rather be admired. A prostitute is also a woman. She can possess strong character like any other woman of good virtues."

In this account, a hierarchy of sinners is being created and the prostitute fares better as a human being than those serving the repressive machinery of the colonial state.

²⁵ Iris Marion Young, 'The Logic of Masculinist Protection: Reflections on the Current Security State' (2003) 29(1) *Signs* 3.

²⁶ While Najmabadi (n 9) 15, uses the term 'alternative femininities', I have used the words 'multiple ways' to address the (unintended) possibility of a hierarchical positing of femininities where a particular idea is taken as the norm and any *deviations* are seen as alternatives.

²⁷ *ibid.*

to the existing category of human beings, this act of inclusion, in fact, interpellates the sex worker as merely the 'other'. Since this case involves a sex worker who was brutally murdered in full public view, the sex worker is no longer a threat and her inclusion in humanity will not rupture the social/moral order. Death has purged the moral impurity of the deceased and to indeed restore her as a human being despite being a sex worker, literary alibis of prostitutes with 'strong character' are being sought.

By citing these old literary texts, the sex-worker gets established historically as presenting her ahistorically, somehow implicates the present regimes. The trans-nationality attached to such descriptions makes the narrative more authentic without mentioning the structural specificities of different cultures/contexts. The judges are also employing these literary alibis to ensure what Worrall calls 'reproduction of consensus' that is a commonsensical understanding of the prostitute.²⁸ These women have gone against the givens of law as well as gender roles and hence, their femininity is to be proved rather than assumed. This can be done by mentioning characters like Chandramukhi, Rajyalakshmi, Sonya as these tales of self-abnegation secure the figure of the prostitute as deserving compassion.

This ambivalence produced by the conflation of the victim/offender figure is also evident in a 1975 judgment, *Chintan J. Vaswani v State of W.B.*. The judge was to decide if the bar in question was located within the forbidden distance from public places as defined in the Suppression of Immoral Traffic in Women and Girls Act, 1956.²⁹ The judge described the scene in the bar at the time of the raid thus:

*"A hall of enchantment extends nocturnal invitation to have a nice time with svelte sylphs. The entrance fee is but a paltry Rs. 15/- per man and inside is served animating liquor. Scantly clad female flesh of sweet seventeen or thereabouts flit about or sit on laps, to the heady tune of band music. They solicit carnal custom, and the willing male victims pay Rs. 30/-, choose whom they fancy drink together and, taking leave of decencies, indulge in promiscuous sex exercise legally described as operation prostitution. The stage is busy with many men and girls moving into rooms, lavatories and chambers. The curtain rises and a raiding party of police and excise officers surprise this erotic company drowned in drink and damsels."*³⁰

The men and women in the bar were alternately described as victims and perpetrators. The seemingly well-meaning judge ends up objectifying the women

²⁸ Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge 1990).

²⁹ *Chitan J Vaswani v State of W.B.* (1975) 2 SCC 829.

³⁰ *Chitan J Vaswani v State of W.B.* (1975) 2 SCC 829.

assumed to be prostitutes and further denies dignity to them. In this judgment, youth, beauty, virginity and being manipulative are assumed to be qualities of the women/girls present/performing in the Bar.³¹ The body of these women, once marked with *immorality*, remains trapped in the universe of (legal) meaning and the language used to describe them, becomes a mode of systemic violence. The adjectives used to describe the bodies of girls found in the bar, are almost salacious and confirm their status as fallen/depraved women.

In *Gaurav Jain*, the court observed,

*"Recent trend is that ladies from higher levels of income are initiated into the prostitution to sustain sufficient day-to-day luxurious style of life so as to ensure continuous economic support for their well-being.....It is also an inevitable consequence that over years the fallen women are accustomed to certain life-style and in terms of expenditure they need certain amount of money for their upkeep and maintenance".*³²

Such constructions keep intact the stereotype of the prostitute/sex worker as not just the desiring subject in terms of being hypersexual but also as wanting more from life in terms of material objects and comforts. So the focus of law as a subjectifying discourse shifts from sex workers living in squalid conditions to those who may very well serve as the icon of neoliberal consumerism. The judicial ambivalence invoked earlier in the paper in the context of sex work as well as the worker is evident here as those who are in sex work due to poverty are to be pitied while those who sell sex to afford a lavish lifestyle are transgressing the norms of femininity in multiple ways and hence judicial ire is to be directed at them. This ambivalence in legal discourse can also be read in the 'uncertainties' in approaches towards the subject of 'sex' itself, as John and Nair mark it, both, in the context of social movements or even as a field of inquiry.³³ This absence of sex/sexual relations from cases involving sex workers also discounts the possibility

³¹ *ibid.*

³² *Gaurav Jain v Union of India* (1997) 8 SCC 114.

³³ Mary E. John and Janaki Nair, *A Question of Silence? The Sexual Economies of Modern India, Kali for Women*, (New Delhi 1998) 33; Even though John and Nair point out the 'massive and indisputable' presence of sexuality in the sphere of law, along with demography or medicine, we barely see any mention of sex itself, other than the illegitimacy and immorality ascribed to any act involving commercial selling of sexual services. I have highlighted elsewhere that this absence is "in stark contrast to the predominant presence of sex and its importance that has been regularly stressed in successive judgments related to matrimonial disputes." (John and Nair, page 1) See Chaudhary (n 4) 210. This contention was supported by an excerpt from a division bench judgment in *Rita Nijhawan v Bal Kishan Nijhawan*, 1973 SCC OnLine Del 52 : AIR 1973 Del 200. The judge wrote: "Marriage without sex is an anathema.....It has been said that the sexual relations when happy and harmonious vivifies the woman's brain, develops her character and trebles her vitality.....";

of engaging with the problematic aspects of conflicting characteristics of women's labour.³⁴

III. THE 'ORGANIC' LINK BETWEEN POVERTY AND MORAL DEPRAVITY

In *Vishal Jeet v Union of India*, a 1990 judgment delivered by a division bench, a Public Interest Litigation was filed by an advocate to request the court to give directions for inquiry against police officials under whose jurisdiction, 'forced prostitution' in the form of Devdasi system and Jogin traditions were being practiced and also for rehabilitation of these victims.³⁵ These practices in religious or sacred prostitution wherein women or young girls are dedicated to deities and hence are sexually available to upper caste men are still prevalent in some of the states in India despite abolition laws being in place.³⁶ The petition described the situation thus:

*"Many unfortunate teen-aged female children (hereinafter referred to as 'the children') and girls in full bloom are being sold in various parts of the country, for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping that their children would be engaged only in household duties or manual labour. But those who are acting as pimps or brokers in the 'flesh trade' and brothel keepers who hunt for these teen-aged children and young girls to make money either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into 'flesh trade'..... These victims though unwilling to lead this obnoxious way of life have no other way except to surrender themselves retreating into silence and submitting their bodies to all the dirty customers including even sexagenarians with plastic smile".*³⁷

The description given above is what Zizek, borrowing from Steven Wallace, names as 'description without place' as the judges are describing a decontextualised reality which is not the existing reality but an approximation to a certain

³⁴ Mary E John, 'The Problem of Women's Labour: Some Autobiographical Perspectives' (2013) 20(2) Indian J. of Gender Studies 177–212, 178.

³⁵ *Vishal Jeet v Union of India* (1990) 3 SCC 318 : AIR 1990 SC 1412.

³⁶ Anagha Tambe, 'Different Issues/Different Voices: Organisation of Women in Prostitution in India' in Rohini Sahni, V. Kalyan Shankar and Hemant Apte (eds), *Prostitution and Beyond* (Sage 2008) 73; Janaki Nair, 'From Devdasi Reform to SITA: Reforming Sex Work in Mysore 1892–1937' (1993) Special Issue on Feminism and Law National Law School Journal; Sharmila Rege, 'The Hegemonic Appropriation of Sexuality: The Case of the Lavani Performers of Maharashtra' in Patricia Uberoi (ed), *Social Reform, Sexuality and the State* (Sage 1996); Ashwini Tambe, *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay* (University of Minnesota Press 2009).

³⁷ *Vishal Jeet v Union of India* (1990) 3 SCC 318 : AIR 1990 SC 1412.

extent.³⁸ Such obfuscation is illustrative of symbolic violence inherent in legal interpretation. The family is being exonerated here from the charges of pushing the child into prostitution by redefining 'need' as poverty. This helps in the 'normalisation' of the families of those in prostitution by the lawyers since 'need' happens to be subjective and not a valid ground for lenience, poverty is a social category over which the individual has no control.³⁹ This is paradoxical in a country where we find prostitution/sex work being part of certain traditions or where the complicity of the family, as well as the community in the engagement of their women in prostitution, is a public secret.⁴⁰

The blame is then shifted to the pimps, brothel keepers and *brokers of flesh trade* who entice the girls or kidnap them. Trafficking is cited as the major reason 'forcing' unsuspecting women and girls to enter prostitution. Other than the fact that there are multiple reasons that lead women to sex work, this understanding of all trafficking as leading to sexual exploitation is problematic. Doezeema points out the problem in the 'circular manner' in which authors like Kathleen Barry construct the injuries of sex, as prostitution is always considered injurious due to dehumanising sex and sex also takes on a dehumanising character as it is happening within prostitution.⁴¹ The alternative narratives of the 'experience' of sex-work are then not deemed possible.⁴² These judgments also establish 'moral depravity' as an almost compulsory adjunct of poverty.

The moral impurity that is generally ascribed to 'illicit' intercourse is also brought out in such descriptions of the physical space occupied by the practice of prostitution and the people involved in it. A distinction between the conscious self and the body as a commodity is being made in a Cartesian vein.⁴³ When terms like submitting bodies, flesh trade are used, this dualism gets reiterated.

IV. THE MICRO POLITICS OF ZONING

These judgments are also about marking space that is available and not available to certain people, behaviours, identities, choices and activities. In the

³⁸ Zizek (n 11).

³⁹ Worrall (n 28); Srimati Basu, 'Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India' (2012) 37(2) *Signs* 469.

⁴⁰ See Anuja Agrawal, *Chaste Wives and Prostitute Sisters: Patriarchy and Prostitution among the Bedias of India*, (Routledge, New Delhi 2018).

⁴¹ Jo Doezeema, 'Ouch!: Western Feminists' 'Wounded Attachment' to the 'Third World Prostitute' (2001) 67 *Feminist Rev* 16.

⁴² Experience is not being imagined here as the source of some ultimate truth but the imaginary retellings in official accounts like the judgments taken up for analysis in this paper need to be replaced by more grounded 'historical investigations, ethnographic accounts and statistical analyses' and the accounts shared by women in sex work/prostitution. See Mary John (n 34) 179; See also Joan W Scott, 'The Evidence of Experience' (1991) 17(4) *Critical Inquiry* 773-797.

⁴³ Kajsa Ekis Ekman, *Being and Being Bought- Prostitution, Surrogacy and the Split Self*, (trans. Suzanne Martin Cheadle, North Melbourne: Spinifex Press 2013) 86-87.

judgment *State of U.P. v Kaushaliya*, the respondents were alleged to be prostitutes carrying on their trade in the city of Kanpur.⁴⁴ The question was if Section 20 of the Act abridged the fundamental rights of the respondents under Art. 14 and sub-clause (d) and (e) of Article 19(1) of the Constitution.⁴⁵ The court held that a law would not be held to have infringed Article 14 of the Constitution if the classification was based on an intelligible differentia. The court pointed out that just as the prostitute and the non-prostitute women are placed in different classes,

*“...there are obvious differences between a prostitute who is a public nuisance and one who is not. A prostitute who carries on her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may not be so dangerous to public health or morals as a prostitute who lives in a busy locality or in an overcrowded town or in a place within the easy reach of public institutions like religious and educational institutions. Though both sell their bodies, the latter is far more: dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded -locality or in the vicinity of public institutions not only helps to demoralise the public morals, but, what is worse, to spread diseases not only affecting the present generation, but also the future ones.”*⁴⁶

The court thus made a distinction between the two categories of prostitute women by justifying restrictions on the movements of one but not the other who was not a ‘public nuisance’.

In the *Chintan Vaswani* case, the provision about not allowing prostitution within the ‘offending’ distance of 200 yards of any ‘public place’ of religious worship, educational institutions, hostels, hospitals, nursing homes’ and others was

⁴⁴ *Smt. Kaushilya v. State*, (1967) 4 ACC 160: (1968) 5 ACC 1.

⁴⁵ The Suppression of Immoral Traffic in Women and Girls Act 1956:

“20. Removal of prostitute from any place. (1) A magistrate on receiving information that any woman or girl residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, may record the substance of the information received and issue a notice to such woman or girl requiring her to appear before the magistrate and show cause why she should not be required to remove herself from the place and be prohibited from re-entering it.” Constitution of India: Article 14 – “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Articles 19(1) All citizens shall have the right —

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; 1[and].”

Also the exception is given as “(5) Nothing in 1[sub-clauses (d) and (e)] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.”

⁴⁶ *Smt. Kaushilya v. State*, (1967) 4 ACC 160: (1968) 5 ACC 1.

interpreted widely.⁴⁷ The Judge did it in the name of ensuring moral hygiene in the locality and also equated the closing down of the bar as equivalent to moral scavenging operation, or a fumigation process.⁴⁸ This belief about the prostitute being a contagion is age old and continues to inform contemporary mainstream discourses.⁴⁹ He wrote:

"No nation, with all its boasts, and all its hopes, can ever morally be clean till all its women are really free - free to live without sale of their young flesh to lascivious wealth or commercialising their luscious figures. India, to redeem this 'gender justice' and to proscribe prostitution whereby rich men buy poor women through houses of vice, has salved its social conscience by enacting the Act."

Further, it was observed:

*"Often times, a bar or restaurant is a euphemism for a brothel and the socialites, unsuspectedly and without smirch, satisfy their sex in these respectably labelled houses patronised by even prestigious dignitaries and opulent businessmen."*⁵⁰

A clear binary of rich oppressors and poor victims is reiterated in successive judgments. Trafficking and prostitution as phenomena are much more complex than these simple renderings. A lot of planning goes into defining, constructing and maintaining urban spaces as bodies and desires are distributed in specific ways to maintain the binary of licit and illicit.⁵¹ Moral regulation of public spaces has been at the core of prostitution related laws like prohibition of soliciting. That is how the spatiality of (licit/illicit) sexuality is maintained. The 'fake sense of urgency' created by such descriptions, also justifies immediate intervention by the law and its agents to restore as well as uphold the moral order.⁵²

⁴⁷ The Suppression of Immoral Traffic in Women and Girls Act, 1956:

"7. Prostitution in or in the vicinity of public places.—6[(x) Any 7[person], who carries on prostitution and the person with whom such prostitution is carried on, in any premises,— (a) which are within the area or areas, notified under sub-section (3), or (b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or magistrate in the manner prescribed, shall be punishable with imprisonment for a term which may extend to three months.]"

⁴⁸ Ibid.

⁴⁹ Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (CUP, New York 1980); Judith R. Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London* (Chicago U Press 1992); See also Tambe (n 36) and Levine (n 12).

⁵⁰ *Chitan J Vaswani v State of W.B.* (1975) 2 SCC 829.

⁵¹ Phil Hubbard, *Cities and Sexualities* (Routledge, Oxon 2012).

⁵² Zizek (n 11) 6; The phrase fake urgency is more in terms of sensationalising subjective violence and thus diverting attention from objective/systemic violence which keeps us locked in the state of violence being ineliminable. See Elizabeth Grosz, 'The Time of Violence: Derrida,

V. RESCUING ‘PROSTITUTE CHILDREN’: REPRODUCING THE NATION

The anxiety to ‘reproduce the nation’ was evident in *Gaurav Jain* and *Vishaljeet*.⁵³ This social reproduction happened at various levels. Young lawyers were lauded for taking the lead in working for the welfare of these ‘fallen women’ and their children.

*“Seeking their redemptions, a few enlightened segments are tapping and doors of this Court under Article 32 of the Constitution, through a public spirited advocate, Gaurav Jain who filed, on their behalf, the main writ petitions claiming that right to be free citizens; right not to be trapped again; readjusted by economic empowerment, social justice and self-sustenance thereby with equality of status, dignity of person in truth and reality and social integration in the mainstream are their magna carta. An article “A Red light trap: Society gives no chance to prostitutes’ offspring” in ‘India Today’ dated July 11, 1988 is founded as source material and has done yeoman’s service to ignite the sensitivity of Gaurav to seek improvement of the plight of the unfortunate fallen women and their progeny.”*⁵⁴

The young lawyer seemed oblivious to the “violence on which the nation-state and its laws are founded, the violence of the same modernity that teaches us to think of the law as the key instrument of social justice”.⁵⁵ The image of the nation as modern with conscious and responsible citizens, is being conjured through such remarks and there is an assumed collective will directed towards nation building as evident in the observation given below:

“India has a tradition of voluntary action which shall be the endeavour of the State to encourage and strengthen voluntary actions so that State and NGOs complement each other”.⁵⁶

This is also symbolic of the neo-liberal political framework where participatory social action allows the state to withdraw from certain areas of governance. While the prostitute mothers are seen as undesirable citizens existing on the

Deconstruction and Value’ in Elizabeth Grosz(ed), *Time Travels: Feminism, Nature, Power* (Duke University Press, Durham 2005) 55-70.

⁵³ *Gaurav Jain v Union of India*, 1990 Supp SCC 709 : AIR 1990 SC 292; *Gaurav Jain v Union of India*, (1997) 8 SCC 114; AIR 1997 SC 3021; *Gaurav Jain v Union of India* (1998) 4 SCC 270; *Vishal Jeet v Union of India* (1990) 3 SCC 318; AIR 1990 SC 1412.

⁵⁴ *Gaurav Jain v Union of India* (1997) 8 SCC 114.

⁵⁵ Dipesh Chakrabarty, *Habitations of Modernity: Essays in the Wake of Subaltern Studies* (Chicago U Press 2002) 102.

⁵⁶ *Gaurav Jain v Union of India* (1997) 8 SCC 114.

margins of the social as well as legal, children are considered important for the project of nation building. Hence, their welfare becomes imperative so that:

“... our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endorsed with the skills and motivations needed by the society.”⁵⁷

This ‘deliberative act of understanding’ is also a violent iteration as it imagines a nation with only able-bodied citizens.⁵⁸ The premium placed on children as future wealth and citizens of the nation is evident as the judges were keen upon rescuing the children from the vicious environment in brothels, but their mothers were assumed and/or expected to continue with their profession. The prostitute mother’s role in social reproduction, both in terms of being a reproductive resource as a bearer of children who are perceived as the future wealth of the nation and reproducing herself as a worker barely receives judicial attention. The privileging of the maternal over the libidinal as assumed in a comparison between women in sex work and those outside gets disrupted as despite being perceived as a sexual subject, neither the maternal nor the libidinal is acceptable in this ambivalent framework of law and its workings. The abjection of sex workers from the project of nation-building is thus secured time and again through such silences in judicial speech.

*“Segregating prostitute children by locating separate schools and providing separate hostels, in our opinion, would not be in the interest of such children... it is in the interest of such children and of society at large that the children of prostitutes should be segregated from their mothers and be allowed to mingle with others and become part of the society”*⁵⁹

The Law Commission, in its 64th Report in 1975, emphasised upon the proper upbringing of children living in brothels with their mother, to supplement the efforts of the government in curbing the spread of the ‘evil of prostitution’.⁶⁰ These official narratives augment the continuous production, reiteration and circulation of dominant narratives, thus keeping critical perspectives outside the system and further aid in muting the already marginalised speeches. This is not to say

⁵⁷ *ibid.*

⁵⁸ Cover (n 4).

⁵⁹ *Gaurav Jain v Union of India* 1990 Supp SCC 709 : AIR 1990 SC 292. Here again, a parallel can be drawn with the segregation of disabled persons in different institutions, for education as well as employment. The difference is that in case of disabled persons or children, a functional incapacity is regarded as the basis while in children of prostitutes/sex workers, it is the social stigma and assumed propensity towards criminal behaviour that structures the terms of debate. See Renu Addlakha, ‘Gendered Constructions of Work and Disability in Contemporary India: Discursive and Empirical Perspectives’ in Asha Hans (ed) *Disability, Gender, and the Trajectories of Power* (Sage, New Delhi 2015).

⁶⁰ Law Commission of India, Sixty-Fourth Report on Suppression of Immoral Traffic in Woman and Girls Act 1956, *Implementation of the Act – Some Important Points* (1975) 74.

that marginal speech has no recourse to making itself heard and it does reverberate in other forums and platforms but the official discourse remains resistant to it or incorporates it in a more sanitised and domesticated form.⁶¹ The court observed:

*“Children of prostitutes should, however, not be permitted to live in inferno and the undesirable surroundings of prostitute homes. This is particularly so for young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. While we do not accept the plea for separate hostels for prostitute children it is necessary that accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified.”*⁶²

This assumption of only women and girls having bodies that can be raped or prostituted is a dangerous oversight as all bodies are rape-able. Reiteration of such stereotypes leads to invisibilisation of ‘other’ rapes like marital rape, which has largely failed to be a part of legal imagination in India and also the rapes of ‘others’ like alit women, women from minority communities, transgenders, transsexuals, gays, lesbians and even men and boys. There is also a need to problematise the universal category of the child with purity/asexuality as the hallmark.

VI. THE PROSTITUTE MOTHER

The law makes a distinction between the promiscuous mother and the non-promiscuous mother and the children are to be protected against the non-promiscuous mother.⁶³

“It is said that prostitutes do not want to have children and ordinarily when children are born to them it is inspite of their desire not to rear children.”⁶⁴

The prostitute is constructed not only as a reluctant mother but an inefficient one as well. Motherhood is exalted and eulogised in various Indian traditions, texts and rituals. But it is only the right kind of mother who is socially validated: the mother who can bear sons within marriage since son-preference

⁶¹ *Gaurav Jain v Union of India* 1990 Supp SCC 709 : AIR 1990 SC 292; Brown suggests an alternative reading of this relationship between speech and silence where the former is symbolic of power and the latter signifies powerlessness. She posits refusing to speak as a mode of resistance and “a method of refusing colonization, refusing complicity in injurious interpellations or subjection through regulation.” See Wendy Brown, ‘In the ‘folds of our own discourse’: The Pleasures and Freedoms of Silence,’ (1996) 3(1) The University of Chicago Law School Roundtable 197 <<http://chicagounbound.uchicago.edu/roundtable/vol3/iss1/8>> accessed 4 May 2022.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

remains the dominant norm due to various reasons like primarily patrilineal inheritance norms, ritualistic requirements of sons like offering water libations to dead ancestors amongst the Hindus and also the construction of daughters as belonging to their matrimonial family.⁶⁵ While women who conform to the moral codes of society are deified, deviants like prostitutes are treated with contempt. De Beauvoir writes that a caste of 'shameless women' allows the 'honest woman' to be treated with the most chivalrous respect.⁶⁶ Legal interpretation in such cases refuses to factor in the prohibition and strict regulation of motherhood in brothel based prostitutes.⁶⁷ Ghosh's contention that the women in brothels get entangled in 'surrogate practice of domesticity' as they idealise and try to replicate heteronormative families by living with their children and male partners is problematic as we label this as an imitation instead of imagining the possibility of multiple and diverse forms of cohabitation.⁶⁸

Kotiswaran points out that a dominant motif of self-identification by sex workers in India is that of working class women fulfilling familial obligations.⁶⁹ Unlike the judicial perception of the prostitute being a bad mother, like surrogacy, the need to feed the family and children is emphasised in these descriptions as a cultural compensation for doing something that is otherwise morally, socially unacceptable.⁷⁰ Here poverty and need to, paradoxically, be a responsible mother (again as an individual responsibility), is a culturally acceptable explanation for taking up such 'reprehensible' profession.

VII. REHABILITATING THE DEVIANT

Much has been written about and around the notion of victimisation, the predominance of rescue and rehabilitation strategies as a response on part of the state and non-state actors, the question(s) of agency and choice in both mainstream and critical discourses.⁷¹ The prostitutes/sex workers are still seen as threats

⁶⁵ See Ujjayini Ray, 'Idealizing Motherhood': The Brahmanical Discourse on Women in Ancient India (CIRCA 500 BCE- 300 CE)' (1999) Thesis Submitted for the Degree of Doctor of Philosophy School of Oriental and African Studies University of London <<https://eprints.soas.ac.uk/28499/1/10672658.pdf>> accessed 4 May 2022.

⁶⁶ Simone De Beauvoir, *The Second Sex* (Constance Borde and Sheila Malovany-Chevallier tr, 3rd edn, Vintage Books 2011).

⁶⁷ Swati Ghosh, 'Of Woman Whoring: Motherhood and Domesticity' in Samita Sen, Ranjita Biswas and Nandita Dhawan (eds.), *Intimate Others: Marriage and Sexualities in India* (STREE, Kolkata, 2011) 357.

⁶⁸ *ibid* 359.

⁶⁹ Prabha Kotiswaran (ed), *Sex Work, Women Unlimited*, New Delhi 2011, p xiv.

⁷⁰ Sex Workers' Manifesto (n 18).

⁷¹ See Kathleen Barry, *Female Sexual Slavery* (Avon 1979); See Kathleen Barry, *The Prostitution of Sexuality: The Global Exploitation of Women* (NYU Press 1995) for the victimisation narrative; See Jo Doezema (n 41); Kotiswaran (n 1) for problematisation of the victimisation trope; See also Kapur (n 15); Sunder Rajan (n 15); Shah (n 91).

in terms of health and morality. And are simultaneously being sexualised (by objectifying them) and desexualised (by re-presenting them as victims).

These non-womanly or even non-humanly women are (re)cuperated by the law as their bodies and lives are made more productive and conformist by sending them to corrective institutions or marrying them off or teaching them gendered vocational skills so that they do not return to sex work again. Despite constant criticism of these ideas of rehabilitation, they remain firmly entrenched as the ultimate official solutions.⁷² Even now, the 'skills' taught in rehabilitation homes include options like embroidering, stitching and tailoring, cane basket making, among others. More career options include being trained as a beautician, secretary or a sales girl/woman.

In *Gaurav Jain*, the court, while exploring the possibilities of rehabilitating these 'fallen' women observed:

"Marriage is another object to give them real status in society".⁷³

The state is thus 'outsourcing' its surveillance responsibilities by putting these 'loose' women under the charge of husbands or families or even NGOs. There seem to be no private lives for these 'public' women as the paternalistic state takes it upon itself to help these women by marrying them or by taking the custody of their children as the judges observe:

"The motivation by the NGOs makes a deeper dent into the mind of the prostitute mothers or child prostitutes to retrieve them from the flesh trade and rehabilitate the children as useful citizens in the mainstream of the society".⁷⁴

The emphasis was on using counselling, cajoling and coercion to educate and rehabilitate these children.⁷⁵ The prostitute as the marked subject of law is thus time and again 'infantilised' by taking away her power to take decisions, even in personal matters. The prostitute and her children are also being stripped of the context as coming out of prostitution is seen as the struggle of individual psyche, or continuing to be a prostitute is perceived as a product of a flawed mindset. This kind of assertions preclude the possibility of seeking responses "with the help of the women involved, the ordinary women who are sold, who choose, who are forced, who drift into prostitution in the context of hegemonic heterosexuality and patriarchal capitalism in postmodern times".⁷⁶

⁷² Rajeshwari Sunder Rajan, 'The Prostitution Question(s): Female Agency, Sexuality and Work' in *The Scandal of the State Women, Law, and Citizenship in Postcolonial India* (Duke U Press 2003) 117-146.

⁷³ *Gaurav Jain v Union of India* (1997) 8 SCC 114.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Maggie O'Neill, *Prostitution and Feminism: Towards a Politics of Feeling* (CUP 2001) 190.

In all the cases taken up in this study, not a single judgment made suggestions about ‘making a dent in the thinking of’ either the (male) clients of these prostitutes or their traffickers or pimps nor the rest of the population who respond/relate to them by stigmatising them.

VIII. MUTING MARGINAL VOICES

As mentioned earlier, in a later order in *Budhadev Karmaskar vs. State Of West Bengal*, the Union of India sought modification of an earlier order passed by the Supreme Court on 19th July, 2011, while referring certain issues to the Committee which had been constituted by the above-mentioned order.⁷⁷ The first modification sought by the Union of India was the removal of the Durbar Mahila Samanwaya Samiti, a sex workers collective that has been a prominent mobilising force since the early 1990s, from the panel.⁷⁸ The Durbar describes itself as “a collectivization of 65000 sex workers, functions as an exclusive forum of female, male and transgender sex workers in West Bengal, India”.⁷⁹ A sex workers’ collective was unacceptable as an equal partner on the negotiation table and the resistance is also because the collective is known for lobbying for recognition of sex work as a legitimate source of livelihood. While the court agreed to allow the collective on the panel, it modified one of the terms of reference for the panel which gave the impression that the panel was also to look into:

“Conditions conducive for sex workers who wish to continue working as sex workers with dignity”.⁸⁰

The executive was worried that if the collective continued to be in the panel, it would give a wrong impression to the public that the Union of India supported prostitution.

The court acceded to the demand to modify the third term of reference to,

“Conditions conducive for sex workers to live with dignity in accordance with the provisions of Article 21 of the Constitution”.⁸¹

It was also categorically denied that this term in any way meant encouraging prostitution.⁸² The wording of the order suggests the reservations of the court as far as ‘legalising’ prostitution is concerned. The binary of injured/polluted and redeemer cannot be collapsed and has to be maintained lest it threatens the status quo. Resnik alerts us to the futility of such gestures as even though they appear

⁷⁷ *Budhadev Karmaskar v State of W.B.* (2013)1 SCC 294.

⁷⁸ *ibid.*

⁷⁹ *Durbar Mahila Samanwaya Samiti* <<https://durbar.org/>> accessed 1 April 2022.

⁸⁰ *Budhadev Karmaskar v. State of W.B.* (2013)1 SCC 294.

⁸¹ *Budhadev Karmaskar v. State of W.B.* (2013)1 SCC 294.

⁸² *ibid.*

to be aimed at radical transformation of the system, they remain in practice ‘impenetrable to profound change’.⁸³

IX. REPACKAGING JUSTICE: WHITHER FEMINISM

The context of sex work in different parts of contemporary India is layered and any meaningful engagement should focus on the specificities and also the conversations and collaborations between the women’s movement and sex workers’ movement.⁸⁴ Gangoli has outlined three ways in which Indian Feminists (a term she broadly uses for academics, activists and NGOs) have addressed the prostitution question – the first response, she lists as silence, by pointing out that initially, ‘mainstream’ Indian feminists did not raise issues of sexuality resulting, therefore in questions of rights of prostitutes to be relegated to the margins.⁸⁵ This contention is valid to a certain extent for the early 90s though not closer to the end of the 20th century and the last two decades. Women’s movement in India and feminist academicians have been quite vocal rather than silent in supporting the demands of sex-workers in the contemporary period.⁸⁶ The second approach refers to what she terms as the radical feminist theorisations of prostitution as violence and hurt.⁸⁷ These two seem to be the dominant approaches as they have validated and have been validated through feeding into and reflecting mainstream patriarchal views on prostitution. The third approach, which can be described as the sex work approach seems like an alternative to Gangoli for its potential for securing agency for those involved in commercial sex.⁸⁸ While the last one seems to be a more inclusive perspective, it still doesn’t preclude the need for multilayered, complex and nuanced theorisations to avoid indulging in further erasures. Kotiswaran alerts us to simplistic renderings of sex-work in India following

⁸³ Resnik (n 23) 1535; Resnik was commenting on the failure of various courts in the US to bring in changes in legal practice despite serious indictments of discrimination by the ‘gender bias task forces’ and ‘race and ethnic bias task forces’.

⁸⁴ This homogenised reference of one women’s movement and one sex workers’ movement is more for convenience than to erase or conflate multiple groups and positions that exist in contemporary India.

⁸⁵ Geetanjali Gangoli, ‘Immorality, hurt or choice: Indian feminists and prostitution’ in Rohini Sahni, V Kalyan Shankar and Hemant Apte (eds), *Prostitution and Beyond* (Sage 2008) 21-39.

⁸⁶ Around 25 women’s groups/organisations issued a signed statement opposing the ban on dance bars by the government of Maharashtra in 2005. See Women’s Groups in Mumbai and All over India, Womens’ Groups Oppose Ban on Dance-Bars See Nivedita Menon (ed), *Sexualities* (Women Unlimited, New Delhi 2007) 295-7. This collection of essays also includes campaign document from the sex workers movement to place their voice along with others writing about them. Similarly, Kotiswaran (n 69) includes movement documents and manifestos from the sex worker’s movement. Feminist academics have been continuously articulating the issues around prostitution through their research and writing. See Kotiswaran (n 1), Shah (n 91), Agrawal (n 40), among others have done extensive ethnographic research with communities of women in prostitution.

⁸⁷ Gangoli (n 85).

⁸⁸ Gangoli (n 85).

Western formulations in terms of pleasure, reciprocity or dignity only as it would elide the violence inherent in the sex industry, including that by the police.⁸⁹

Tambe further ruptures the binary conceptualisation of prostitution as choice based or its conflation with trafficking by drawing attention to the socio-religious compulsions that lead families to dedicate daughters to deities which marks them as sexually available to upper caste men.⁹⁰ Shah's work brings out the complex spatial and socio-cultural negotiations in the process of selling of sexual services thus highlighting sexual commerce as a livelihood strategy which aids in shedding the exceptionalism associated with prostitution.⁹¹ Shah also takes the focus away from the 'isolated' brothel as the only recognised site of sexual commerce and brings it to the street-corner thus suggesting alternate yet related contexts for understanding sex-work in contemporary India.⁹² A few autobiographical works written/co-authored by sex workers are also available now to augment our understanding of diverse experiences of women in prostitution or sex-work.⁹³ The need for more nuanced theorisations being brought to a re-imagined feminist jurisprudence is also tied to larger structural issues like lack of diversity on the bench at various levels of the Indian judicial system. It is imperative to address the skewed gender ratio in the legal profession as women judges are still very few, especially at the top levels of the judiciary and they also struggle more in terms of access to equal opportunities as lawyers. Diversity on the bench would definitely bring in alternative and inclusive perspectives to statutory interpretations. Empathy/sensitivity to life contexts of the marginalised can be present/absent in any human being and as a society, we need to consciously nurture these qualities in all stakeholders for any substantial impact on the legal system. The female-feminist correlation has been much debated in feminist theory, and more than the gender, it is the lived experience of marginalisation and discrimination and the commitment to social transformation that is likely to impact judicial behaviour in a radical way. Gender then becomes one of the key axes of diversity rather than being the only axis of ensuring diversity.

⁸⁹ Kotiswaran (n 69) xiv.

⁹⁰ Ashwini Tambe, *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay* (U of Minnesota Press 2009) 92.

⁹¹ Svati P. Shah, *Street Corner Secrets: Sex, Work, and Migration in the City of Mumbai* (Orient Blackswan 2014).

⁹² *ibid.*

⁹³ Nalini Jameela, *The Autobiography of a Sex Worker* (Westland, Noida 2007); Nalini Jameela, *Romantic Encounters of a Sex Worker* (Reshma Bharadwaj tr, Om Books International, Noida 2018); Manada Devi and Arunava Sinha, *An Educated Woman in Prostitution* (Simon & Schuster India, Noida 2021).

X. CONCLUSION

The rights bearing citizen subject of modernity is evident in the articulations of the sex-workers movements but the law sees them only as sexual deviants who are to be dealt with in a compassionate way by the modern legal system.

The legal personality of the sex worker or 'the particular constellation of rights and duties' held by them is quite dependent upon the way the judges inflect their status as legal persons with ever-shifting and contradictory characterisations as Naffine has argued.⁹⁴ While the blame-free victim subject is continuously invoked in successive judgments taken up for analysis in this paper, there are some interesting insights with regard to 'agentic' subjects and subjectivities as well. In *Hafazat Hussain v Abdul Majeed*, the property under dispute was originally recorded in the name of Zohra Bibi Tawayaf, and the registry was cancelled in 1923 and was re-registered in the name of Smt. Zohra Bibi, wife of Hazi Mohammed Siddiq as Trustee.⁹⁵ The disputed aspect, in this case, was that the property was bought by Zohra Bibi with her earnings from prostitution and hence could not be gifted through a Waqf deed as the same is forbidden under Muslim Law. The Supreme Court judges held that though Zohra Bibi was "a prostitute she had other income from properties as well to purchase the disputed property" and hence the disputed property was not tainted. This recognition of Zohra Biwi's earning capacity and the acknowledgement of her status as an independent property owner is in contrast to the conventional association of women with propertylessness in terms of things, their labour, their body, soul or even will and hence the resultant non-recognition of moral agency.⁹⁶ Oldenburg's observation about the courtesans of Lucknow being in the highest tax bracket, as registered in the civic tax ledgers of 1858-77 and supported by related official correspondence of the Municipal Corporation records of that time counters the narrative of propertylessness as well as lack of full subjecthood to a certain extent.⁹⁷

The legal use of terms like profession, trade, professional prostitute, attributing autonomy to the prostitute and the possibility of ascribing subject status

⁹⁴ Ngaire Naffine, *Law's Meaning of Life Philosophy, Religion, Darwin and the Legal Person* (Hart, Oregon 2009).

⁹⁵ *Hafazat Hussain v Abdul Majeed* (2001) 7 SCC 189.

⁹⁶ Donna Dickenson, *Property, Women and Politics* (CUP 1997) 114-119; Dickenson has drawn attention to the dialectical relationship between women's propertylessness and their status as subjects or rather the lack of that status (See page 6). Hence women are not perceived as political subjects since they are propertyless and conversely, the denial of the status of subject results in women owning little or no property (See p 6).

⁹⁷ Veena Talwar Oldenburg, 'Lifestyle as Resistance: The Case of the Courtesans of Lucknow, India' 16(2) (1990) *Feminist Studies - Speaking for Others/Speaking for Self: Women of Color* 259; The celebratory mode of Oldenburg's work has its limits when countered by other studies that highlight the violence that structures the everyday context of women in prostitution/sex work. Also, each form of sex work/prostitution has its specificities so generalised claims will lead to exclusions of different kinds and degrees.

even in a limited way is made possible by the statutes and their interpretation.⁹⁸ Furthermore, it was held that the existing provisions of the PITA only penalise persons(s) living on the earnings of a prostitute or trafficked victim and are not applicable to a prostitute/trafficked victim herself.⁹⁹ This protection is withdrawn if the sex worker violates any provision that prohibits soliciting or seducing in a public place. The ambivalence that is evident in legal interpretations where the victim/offender figures are conflated is thus intrinsic to the law instead of being merely supplied from outside.

There is also a separation of women and girls in sex work where girls are assumed to be unwilling victims and hence treated with lenience and empathy while the women are perceived to be in this profession by choice.¹⁰⁰ The presumption of a victim subject also facilitates a subject position of 'virtuous masculinity' for the presiding judge(s) as protectors of these victim subjects.¹⁰¹

⁹⁸ This tacit acceptance of prostitution as work aligns with the sex workers' description of their 'labour and identity as well as the political economy of sex markets' as Kotiswaran (n 69) xiii points out.

⁹⁹ *Vaddadi Rajeswari v State of A.P* 2012 (2) ALD (CRI) 70.

¹⁰⁰ In a High Court of Calcutta judgment, *Sakina Bibi v State of W.B.* 2017 SCC OnLine Cal 16115 which involved the trafficking of a teenaged Bangladeshi girl, the judge remarked "By way of prefatory observation it can be said that if anybody wants to go through the F.I.R. with his inner eyes, he would see that the F.I.R. was not written by ink but by tears." The judge, while commenting upon petitioner's behaviour during cross-examination, wrote: "She faced cross-examination and stood like a 'Rock of Gibraltar'. Staking her honour and knowing it fully well that her chance of marriage, and rehabilitation is very remote she disclosed everything. Why she would tell a lie and what did she gain by implicating the appellants is a question of billion dollars. On a careful scrutiny of her evidence I find impress of truth in it." This is in stark contrast from the description of women involved in sex work in some judgments analysed in the initial sections of the article. Young's framework of the logic of protection in the context of such gendered meanings and images can help in understanding the way these legal interpretations help in making sense of people, acts, events and circumstances but also facilitates and justifies the 'positions and possibilities for action within them' See Young (n 25) 2; The use of the terms 'girls' rather than women by Yakub and Quwas in their work and the potential for subversion behind this choice might be useful in countering the logic of protection deployed in the judgments analysed here. Yakub highlights that the qualities of liminality and change inherent in the category girls and thus captures the complexity of women's struggle as they "continually create, reinforce, and change themselves and their relations with others through their feelings, thoughts, speech, and actions" (page 7). This is a radical departure from the rejection of the use of the term girls for adult women by feminists in the US during the 1970s (page 7). See Nadia Yaqub and Rula Quawas (eds) *Bad Girls of the Arab World* (U of Texas Press, Austin, 2017); In *Public at Large v State of Maharashtra* 1997 SCC OnLine Bom 308, there is mention of a report where the girls rescued from sex work after police raids were sent to protection homes and the Superintendent of the Observation Home pointed out in this report that the rescued girls, after proper counseling, gave up wearing 'garish' make up and cried uncontrollably when the father of one of the girls visited her. The description mentioned that all girls touched the feet of this visitor and started dressing up simply after that and expressed their desire to contact their families. The possibility of that liminal space provided by 'girlhood' as a space of protest, transgressions and even conformity or subjection to authority and the scope for reconstituting subjectivities despite the constraints of their captive status needs to be factored in by any account of their being.

¹⁰¹ Young (n 25).

The terms of legal discourse are to be changed, and that change is possible by bringing in formulations by feminists and critical theorists, some of whom have been mentioned in this study. It is then the combined burden of the legal fraternity and feminist/critical scholars and activist sex workers to reiterate the critical readings in various forums so that they become a part of the discursive regimes that contribute to the constructions of the figure of the prostitute.¹⁰² Then only the displacement of the existing stereotypes/hegemonic scripts is possible which is essential for a more inclusive judicial system and towards the development of a “context specific jurisprudence”.¹⁰³

¹⁰² It is worth noting that in many of the judgments on prostitution/sex work, an attempt has been made to invite stakeholders from the sex workers community in a consultative capacity or communication by the representatives of the community has been included in the published judgment. Some re-imaginings of the legal canon thus already exist but more rigorous and continuous engagements are needed. See *Budhadev Karmaskar v State of W.B.* (2013)1 SCC 294, series of order regarding inclusion of DMSC in the committee formed as a by-product of the concerns raised in the case. In *Vinod v State of Gujarat* 2017 Indlaw Guj 1173 the clarification issued by the Justice Verma Commission regarding the criminalisation of the client not being the intention of the recommendations made by the committee is mentioned in the form of an exchange between the Verma Commission and Ms. Meena Seshu, the founder of sex workers' collective SANGRAM, Maharashtra. Another mode of critical engagement has been the rewriting of judgments through feminist perspectives. While such attempts have been made elsewhere in the world in the past, including United Kingdom, Australia, Northern Ireland, Canada, among others, Indian Feminist Judgments Project also brought out a dedicated issue including critical engagement with Indian jurisprudence by rewriting a few prominent judgments. See Aparna Chandra, Jhuma Sen & Rachna Chaudhary, 'Introduction: the Indian feminist judgements project' (2021) 5(3) ILR 261-264.

¹⁰³ Kumkum Sangari, 'Politics of Diversity: Religious Communities and Multiple Patriarchies' (1995) 30(52) EPW 3381.