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**COMBATING COMMERCIAL SEX IN KENYA: A CRITICAL APPROACH ON
LEGALIZATION OF PROSTITUTION.**

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DECLARATION

This dissertation is my original work and has not been presented for the award of any degree in any other University.

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Signed

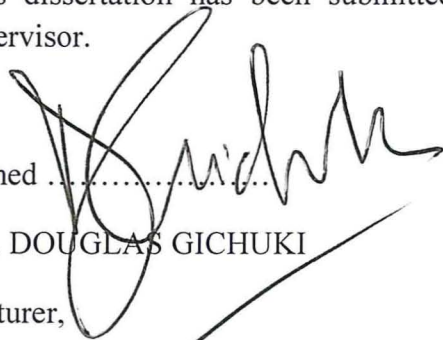


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ABSTRACT

The paper takes a critical look at legalization of commercial sex and whether it is a better approach to dealing with commercial sex compared to alternatives previously offered. It moves to the details of the history of prostitution, how such an old profession ended up a taboo in almost all States and why it is important that we take a different approach towards dealing with the practice other than criminalizing it.

The main objective of this paper is to critic the criminalization of prostitution, questioning the reason behind it, and to critically look at legalization weighing its pros and cons in a bid to answer whether it a better alternative compared to criminalizing commercial sex.

Overall, the recommendation made is that, as a nation we should open ourselves up to legalization as a means of dealing with commercial sex, as it is the best option we can be able to offer, given our circumstances as a developing country, to a group that very often faces marginalization and discrimination among other inhumane treatment.

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CHAPTER ONE: INTRODUCTION

Background

Legalization of prostitution is a very delicate matter, because of the vast moral questions it brings. Yet, despite all the controversy that it raises, prostitution has been with us for the longest time.¹ Known as the world's oldest profession,² prostitution is not a new concept to many and still faces plenty of mixed reactions at its mention. A working definition for what it actually is has remained elusive, with many having different meanings as to its interpretation, but a service of sexual exchange for money or other valuables is the general definition of it, and in that sense, an individual who indiscriminately provides sexual relations in return for money payments³ provides a working definition.

Whether it is because of moral, religious or socio-political reasons, for ages prostitution has been deemed an illegal practice by many jurisdictions and thus criminalized. However, none of these other ways of imposing prohibition sanctions (deterrence, punishment) to prostitution have worked.⁴ The practice remains rampant on our streets,⁵ with more people willingly joining in and it becoming generally but subtly commonly accepted in our society.⁶

Could it be that we have been going about this the wrong way? Would legalizing it serve a greater purpose than criminalizing it? Could the solution, perhaps, be that we should accept it as part of our lifestyle and have the law come in and regulate it? The fact remains that the practice itself will continue to exist despite any efforts put forward to curb it. Therefore, should the

¹ Earliest signs of prostitution date back to 2400BC, Gerda Lener, *The Origin of Prostitution in Ancient Mesopotamia*, University of Chicago Press, Volume 11, no.2, Winter, 1986.

² Zatz 1997

³ Kensley A Pomeroy W, and Martin C, *Sexual behavior on Human Male*, Indiana University Press, 1948.

⁴ Rio M, *Psychological and Social Research and the Decriminalization or legalization of Prostitution*, Volume 20, The Official Publication of International Academy of Sex Research, 1991, 205-218.

⁵ ECPAT Global Monitoring Report on status of commercial of commercial exploitation of children- Kenya. A study by UNICEF in 2013 that there is a high level of acceptance of prostitution...not only by tourists but also by people of Kenya, including parents of the girl involved in these acts, ECPAT International, 2007.

⁶ <http://gvnet.com/childprostitution/Kenya.htm> accessed on 2/12/15 "Child Prostitution in Kenya", A study by UNICEF in 2012 found that there is a high level of acceptance of prostitution...by the people of Kenya.

government stop neglecting it and consider the possible positive scenarios that legalization could bring?

Legalizing prostitution would mean opening ourselves up to the possibilities of economic and social improvements, enhancement of women's rights and humanization of a stigmatized group of the society, which has too few options to begin with.

This research seeks to answer the above questions. As it is now, the law in Kenya remains adamant on criminalizing the practice. The irony of it is that it does not make prostitution illegal, but living off its means. The Penal Code in Section⁷ 154 does not expressly forbid the act of prostitution but only the act of living off the earnings of this trade.

The Sexual Offences Act of Kenya⁸ takes a similar approach in the matter stating that:

Any person who:

- a) Intentionally causes or incites another person to become a prostitute; and
- b) Intentionally controls of any activities of another person relating to that person's prostitution, and does it so for or in expectation of gain for him or herself is guilty of an offence.

Thus, the act itself is not illegal, but the activities surrounding it such as soliciting, inciting and living off its means are illegal and punishable before the law. Prostitution still remains a dubious service that keeps rising in its demand, despite the fact that people know it is a crime. Spread of sexually transmitted infections, recruitment of child-sex workers, oppression and sexual violence against vulnerable women continues to be on the rise. Could it be that the problem is with the law? Has the law been inadequate with dealing with regards to this matter? The law in some jurisdictions has been used as a solution where economic, social and political factors have proven inconsequential on a variety of social issues. For instance in Sweden, where the problem

⁷Section 154, The Penal Code of Kenya.

⁸Section 17, Act no. 12 of 2012, The Sexual Offences Act of Kenya, 2012.

had proven rampant, the law decriminalized prostitution and in turn started penalizing the demand. This change of law caused a significant decrease in commercial sex.⁹

International Standing on Prostitution

From a different perspective, Kenya is a monist State¹⁰ which means that ratified international laws are automatically applicable to the laws that internally govern the citizens.

Throughout the ages,¹¹ International Sex Workers' Rights Movements have been quickly emerging with the aim of raising public awareness on the hardships that sex workers face. Such include COYOTE (Call Off Your Old Tires Ethics) in the U.S that aimed to create sex worker advocacy groups, The English Collective of Prostitutes in the UK, *The Thread* in Netherlands among others, all arguing that governments should treat prostitution as a profession and employ pragmatic regulatory tactics that would improve working conditions.¹² They gave birth to international human rights movements that specifically address prostitution. Previously, the UN had the Convention of Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others that was against prostitution, it stated

"...Prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with dignity and worth of the human person and endanger the welfare of the individual, the family and community."¹³

⁹ Farley M, *Bad for the body, Bad for the heart: Prostitution Harms women even if legalized or decriminalized*, Violence Against Women, National Victimization Report, University of Michigan Press, 2004.

¹⁰ Article 2 (6), Constitution of Kenya 2010.

¹¹ Vallerie J, *Making It Work: The Prostitutes Rights Movement in Perspective*, Adline Transcation Publishers, 1993. The international sex workers' rights movement blossomed in the 1970s, with the emergence of prostitutes' rights organizations in Western Europe and North America, and evolved into a crusade to legitimize the status of prostitutes and to decriminalize prostitution.

¹² Mgbako Chi, Smith, Laura A, 1178- *Sex Work and Human Rights in Africa*, Fordham International Law Journal, April, 2010.

¹³ Preamble, Trafficking Convention, 1949.

But later in 1979 UN international community adopted the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which specifically addresses prostitution. It implies that prostitutes are individuals who hold fundamental rights and need "equal protection of laws against rape and other forms of violence."

In 1993 UN formed the Declaration on the Elimination of Violence Against Women (DEVAW) which limited violence against women to "trafficking and forced prostitution." Most countries in Africa (including Kenya) have ratified CEDAW and should therefore address injustices facing prostitutes accordingly.

Is it about time that the law stepped in and created a structured way of dealing with this practice? A way that would create reforms and minimize as much as possible all the negative consequences brought about by the practice.

Statement of problem

Prostitution is a crime¹⁴ that continues to exist and grow despite people knowing that it is wrong and could face incarceration by involving themselves in the practice. The law is proving to have little to no effect on the subject as its demands continues to grow and become more acceptable in our society. Thus, Kenyan law in its approach towards dealing with prostitution has been inadequate.

General Objective

To critically look at the different approaches taken to curb prostitution in Kenya, challenge them and attempt to suggest better approaches towards dealing with the same.

Specific Objective

To trace the history of prostitution, analyze and challenge the reasons behind it by reflecting on scholarly writing and renowned philosophers have said with regards to the same and to critique legalization as a suggested better approach towards dealing with the matter.

¹⁴ Section 17 (a) and (b), The Sexual Offences Act 2012.

Research Questions

- a) Why is commercial sex a crime?
- b) How did commercial sex become a taboo?
- c) What do well known scholars and activists have to say with regards to the matter?
- d) What is the best approach towards dealing with the practice, given our circumstances as a developing country?

Research Methodology

The main methodology adopted in this study was literature review and content analysis of statutes such as The Constitution of Kenya 2010, The Sexual Offences Act 2012, The penal code, written theses by scholars on this topic, reports, online material and other scholarly writings. The research is heavily based on use of secondary data as this was the most authoritative and available information with regards to the above subject.

Purpose of the study

The aim of this research is to delve deeper into the question of whether legalization of prostitution is a preferred solution compared to previous alternatives used to curb the same and whether it should be adapted in our country.

Scope and limitations of the study

This research sought to determine whether legalization is a better approach to dealing with commercial sex compared to criminalization, by looking at what renowned scholars, scholarly writings, authorized reports and previously done researches say with regards to the same, and what measures could be taken to deal with the matter.

While many renowned scholars have had their fair share at discussing and analyzing this topic, the discussion remains relatively new and a taboo in Kenya, thus very little research has been done on it. This has made it harder to find scholarly information that could easily relate to our situation and caused heavy reliance on philosophers, scholarly writings and other secondary sources of data of other, mostly western jurisdictions.

Definition of terms:

Exploitation: To use something in a way that helps you gain unfairly.¹⁵

Feminist theory: Historical movement which sought a just goal of man and woman: in the social political and economic lives of both and eradicate any prejudices tied to women with regards to the same.

Liberalism: Theory that entails one is free when one acts according to one's true will.¹⁶

Low income: Earning \$1.46 or less than the same amount, per day.¹⁷

Marxist theory: The economic, social, political and pseudo-scientific philosophy theory based on the works of Karl Marx.¹⁸

Monist state: A State in which international and municipal law are regarded as parts of the same legal system.¹⁹

Radical feminism: A philosophy emphasizing the patriarchal roots of inequality between men and women, or, more specifically, social dominance of women by men.²⁰

Violence: The use of physical force to harm someone physically.²¹

Abbreviations

CEDAW: Convention on Elimination of All Forms of Discrimination against Women.

COYOTE: Call Off Your Tired Old Ethics

ECPAT: End Child Prostitution and Trafficking.

¹⁵ Merriam-Webster Dictionary

¹⁶ Thomas Green Hill and Bernard Bosanquet (2001[1923])

¹⁷ www.data.worldbank.org accessed on 15/1/2016

¹⁸ www.CatholicAmericanThinker.com accessed on 15/1/2016.

¹⁹ www.peaceandjusticeinitiative.org accessed on 15/1/2016.

²⁰ Jone Johnson Lewis, Women's History Expert in www.womenshistory.about.com accessed on 15/1/2016.

²¹ Merriam-Webster Dictionary.

Chapter Breakdown

Chapter one, the introduction is divided into various sections. The background and international standing provide legal framework that surrounds criminalization of commercial sex, while the literature review delves deeper in to the topic by offering insight on what scholars, philosophers and scholarly writings specializing on this matter have reflected on.

The second chapter, the theoretical framework looks at the leading theories surrounding this subject; based on what well known scholars have discussed and concluded with regards to the same. This part brings out two competing approaches to this topic that is the oppression and the empowerment theory. The former holds that prostitution is inherently harmful to sex workers and should be criminalized; the latter holds that problems experienced by sex workers only exist due to the fact that the practice is criminalized. This generally reflects the contradicting position that that the scholars take on this topic.

In bringing out the above theories, other underlying theories that support the above approaches such as utilitarianism, libertarianism, feminism and socialism are explored too.

In the third chapter, the discussion begins with History of Prostitution. This part enables one to understand how prostitution ended up a taboo and thus criminalized. The fourth chapter details out the main reasons behind criminalization, questions them to bring then bring us well into the chapter that follows.

Chapter five gives out reasons why legalization of prostitution will be a progressive approach towards dealing with the situation, while chapter six, on the flip side, samples the critiques offered by scholars on legalization of prostitution while rebutting the arguments provided in a detailed account.

In the final part, having reflected on all the above, recommendations are provided and a conclusion on the way forward is arrived at.

A literature review

Illegality of prostitution in Kenya dates back to British colonial times, when the British government criminalized prostitution practices and this was thus adopted as our legislation.²² This has never stopped it from growing. Street prostitution, in particular remains rampant in our country. Whatever the reason to join the trade: be it lack of employment, increase of demands by dependants that need to be met, low income jobs etc, prostitution remains persistent, with many vulnerable women resorting to it as an easier way of earning a self sustaining living.

Previous methods used to curb prostitution such as illegalizing, criminalizing, deterrence, arbitrary arrest (of prostitutes in particular) and payment of hefty fines, among others, have proven unsuccessful, this is evident with the demand for commercial sex continuing to rise day by day.²³ Perhaps it is time we approached the situation from a different angle, should prostitution be legalized?

In this paper, we look at whether legalization of prostitution would create a better solution compared to the former methods mentioned. The following literature review looks at the writings of philosophers with regards to the stated topic, following the debate surrounding it through their opinions, and offering critique where possible. This is to bring about more understanding of the subject and to determine whether the debate has a chance in our jurisdiction.

Feminists are the theorists with an upper hand when it comes to this topic. They offer different diverse views representing both sides, for and against prostitution. Holly B. Fechner in *Three Stories of Prostitution in the West*, groups the feminists' theorists into three different kinds;

²² White L, *The Comforts of Home: Prostitution in Colonial Nairobi*, University of Chicago Press, 1990. The colonial government engaged in discursive practices to categorize women who had practiced sex with men either as a form of wage labour or earned income. This strategy was realized by the criminalization of prostitution services and forced registration in the name of sanitary regulation and racial segregation.

²³ The rate of commercial sex work is noted to have increased especially in urban settings (83.7%) as well as in Rural settings (70.1%). Ndolo M, an Article on *Public Perception on Commercial Sex* available at www.researchgate.net accessed on 15/1/2016

liberals, socialists and radicals.²⁴ I shall dwell on liberalists and radicals as they more relevant to the subject.

PRO LEGALIZATION

Liberalists (or liberalism theorists) hold that sex trade workers are respectable women doing dignified work. Thus, even though nobody should be forced into prostitution, if one freely chooses to do so, they should be able to carry out their work freely, with proper conditions without being looked down upon.²⁵ They champion for prostitution as work, improving prostitutes' working conditions, maximizing and validating women's choices and eradicating the social stigma of prostitution through such methods as public education and decriminalization of prostitution.²⁶

Similar to liberalists are those that argue that on the basis of personal liberty and freedom, prostitution should be legalized. These thinkers claim that a person's liberty and freedom are two elements that government should not interfere with. Thus, prostitution should be decriminalized/legalized because one has the right to choose to become a prostitute and invasion of one's will amounts to a heinous violation of human rights.

What the above contenders bring out clearly is that, "as long as prostitution transaction is voluntary, there is no justification for governmental interference".²⁷ While at first glance, this may seem a plausible argument advocating for free will and the freedom to exercise one's choices, one needs to question whether entry into prostitution is usually as a result of one's exercise of their free will and choice. Is it really voluntary? It is evident that majority join in on

²⁴ Fechner B, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth"*, *Colombia Journal of Gender and the Law*, 1994.

²⁵ Rode Draad, *The Red Thread*.

²⁶ Fechner B et al, *Three Stories of Prostitution in the West*.

²⁷ Armentano P, *The Case for Legalized Prostitution*, 1993.
<http://prostitution.procon.org/view.answers.php?questionID=001315> accessed on 6/12/15

commercial sex due to economic stressors.²⁸ Prostitution is often a last resort²⁹ and many go through with it because they have no other means or tools to pursue better ways of earning a living. Perhaps their understanding of consent and coercion, in this case, is blurred, meaning, it is only limited to being forced by a dominant third party to join in the practice. From a realistic viewpoint, the grave circumstances surrounding a prostitute often act as coercion factors, such as economic servitude, low income jobs, poor education backgrounds, poor parenting backgrounds, partner and family violence,³⁰ all leading them towards sex trade.

ANTI-LEGALIZATION.

Radicalists, on the other hand, argue that prostitution is a system of exploitation and violence that differently harms women.³¹ They assume that prostitutes are victims of coercion in a society that services men by objectifying and subordinating women.³²

"By documenting the violence and manipulation used to recruit and trap women in sex industry, we've come to realize that prostitution is not a "career choice" or a "victimless crime" but rather that prostitution creates an environment in which crimes against women and children are defined as commercial enterprise." ³³

For this reason they argue for decriminalization of all laws punishing women and children engaged in prostitution and argue for punishing of pimps, tricks and johns demanding commercial sex.

²⁸ Richter M, Characteristics, *Sexual behavior and access to health care services for sex workers in South Africa and Kenya, PhD Research*, Ghent University, 2013.

²⁹ Nancy Romero-Daza, Margaret Weeks and Merrill Singer, "Nobody Gives a Damn Where I live or Die: Violence, Drugs and Street-Level Prostitution in Inner city Hartford, Connecticut.

³⁰ Ruhama, Dublin Based NGO, Prostitution as a Violation of Human Rights.

³¹ Fenchner B et al *Three Stories of Prostitution in the West*.

³² Freeman J, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (im)possibility of Consent*, Berkley's Women Journal, 1990, 209-210.

³³ Sanger W, *The History of Prostitution*, New York: Harper and Brothers Press, 1869, pg 35-42 page 35.

This argument may be in line with what the majority holds. However, it refuses to acknowledge that some may willingly, without any cause, join in the practice of prostitution to seek quick and easy money. Additionally, use of words such as "trap and manipulate women" is stating that all women who participate in commercial sex did not consent to it. They were all forced by some third party through perpetration of some form of violence or manipulation to trap them, which is not the case.³⁴ Each sex worker has a different individual story, and creation of such stereotypes could be easily misleading.

Another point to note is that, if prostitution is to be regarded as a crime, then punishing only the johns, when both parties commit the crime may not be just before the law. The act itself involves both parties that is, the buyer and the seller, both participate equally in the crime in manner of acting in accomplice, thus both should remain liable before the law.

Prohibitionists³⁵ or those who argue against legalization of prostitution contend that it only normalizes the violence and sexual abuse workers experience on a daily basis. They claim it encourages men to buy women for sex, facilitates and increases trafficking into the jurisdiction and that workers do not want prostitution to be considered legitimate work as it would create more risks and harm for women from already violent customers and pimps. Their main argument is that prostitution enhances oppression of women in all the aforementioned ways.³⁶

The above may be true to some extent but research on countries that have legalized prostitution show otherwise. For example, a study of Thai sex workers found that only 15% wanted to quit selling sex, whereas the remainder wanted to keep working in the sex trade. 69% said they thought sex work was a good job.³⁷ With regards to the above, we see that radicalists, as well as prohibitionists may be generalizing the situation by regarding all prostitutes as "victims".

³⁴ Weitzer R, *The Mythology of Prostitution: Advocacy Research and Public Policy*, George Washinton Unoversity Press, 2010, pg 17.

³⁵ Janice Raymond, Sheila Jefferey, Donna Hughes, Jody Raphael, Prohibitionist writers.

³⁶ Raymond J, Prohibitionist Writers et al.

³⁷ Weitzer R et al, *The Mythology of Prostitution*.

Studies of research in legal brothels in Nevada also show that brothels "offer safest environment available for women to sell consensual acts for money".³⁸ In Netherlands (Dutch Brothels) and Queensland Australia, it was found too, that workers often felt safe, and that, without a doubt licensed brothels offer the safest working conditions for sex workers, i.e healthy, safe and legal.³⁹ This brings a shift from the oppression paradigm of radicalists and prohibitionists, showing factually, that with proper legal reforms, commercial sex operation could improve. Even in Third World Countries, legal workers can experience enhanced self esteem due to increased earnings, lack of police harassment or other improvements relative to their prior life experiences.⁴⁰

In conclusion, perhaps previously there have been many generalizations with regards to how commercial sex workers feel about their work and how it should be handled. From the given findings, legalization could actually bring positive reforms that have previously been ignored when debating over prostitution as many want to view prostitutes as victims. Given that prostitution is not going away anytime soon, I contend that having this debate with an open mind towards legalizing prostitution may be worthwhile in our attempt to improve the current situation surrounding prostitution.

³⁸ Brents and Hausbek.

³⁹ Weitzer R et al, *The Mythology of Prostitution*.

⁴⁰ Weitzer R et al, *The Mythology of Prostitution*.

CHAPTER TWO: A THEORETICAL FRAMEWORK ON LEGALIZATION OF PROSTITUTION

Oppression theory vs. Empowerment theory.

From the previous discussions we have seen that prostitution is not necessarily wrong, it is the consequences that surround it. Thus, the need to come up with ways that will reduce the negative consequences of indulgence in prostitution has become salient in our country. A proposed solution is to legalize it and let the law re-structure it in a way that will mitigate the negative effects as much as possible. This theoretical framework critically looks at the various theories that are in favour of and against the legalization of prostitution that will help question whether legalization of prostitution is the better way forward. From the writings surrounding the debate, it is clear that the philosophers touching on this subject look at it from two different perspectives, that is, legalization as enhancement of oppression or empowerment of women. Thus the framework shall be guided by such and have sub-theories expounding on each perspective. From these theories, I argue that, as a nation we should open our minds towards legalizing prostitution for we may have more to gain by doing so; in terms of prevention of further sexual offences (such as sexual violence, child-sex prostitution and rampant spread of sexually transmitted infections) by allowing the law to step in, reform the practice and all together, take control of it. I maintain that law and policy makers in our country can come up with better ways of dealing with commercial sex, a practice that has remained adamant, even after all other means to eradicate it have not been as successful as the initiators had hoped, and one such solution may be to legalize it.

Oppression Theory

When looking at theorists and scholars who are against legalization of prostitution we see them bring forth the ideology of legalization as a perpetrator of other sexual harms and essentially not solving the problem.

Under radical feminism,⁴¹ the thinkers along this line contend that prostitution is fundamentally wrong because it commodifies something that cannot be detached from self.⁴² This then brings about the question of the relationship between sex and selfhood and Carole Pateman⁴³ states: prostitution is wrong because for the client to buy mastery of and objectified female (or male) body, the prostitute must sell herself (or himself) in a very different way and a much more real sense than that which is required by any other occupation.⁴⁴ This brings out the human element of prostitution that separates it from any other capitalistic transaction, where it touches on personhood, and the fact that commercial sex workers cannot separate themselves from the act itself.

In agreement to the above one could also look at marxist thinkers⁴⁵ and their position on the notion that a labourer and his (or her) labour cannot be separated. They argue that a person's labour whether sexual, emotional, mental or manual are an "inalienable property of the human individual", and their bodily functions. What employers buy from their servicers is the power to control them for them for an agreed period of time in exchange of a certain valuable. Sexual labour requires that one gives control of their body, which is not right, as a human person is not a commodity.

Additionally, another philosopher that shares such sentiments is John Stuart Mill. From his work, one could easily derive strong radical feminist affiliations. He took a stand with the dominant public mood that considered prostitution as one of the "great social evils" as it inhibited personal freedom and safety of women.⁴⁶ Although it would be important to note that he departed from dominant thinking that blame should lay on the women working as prostitutes and supported

⁴¹ Definition of "Radical feminism" available on [Http://www.womenhistory.about.com/radical feminism](http://www.womenhistory.about.com/radical_feminism) accessed on 15/1/2016.

⁴²O'connel D, *Rights and wrongs of Prostitution*, Online Wiley Volume 17, No. 2, 2002, pg 84.

⁴³ Pateman C, *The Sexual Contract*, Stanford University Press, 1998, pg 1-10.

⁴⁴ O'connel D et al, *Rights and Wrongs of Prostitution*.

⁴⁵ Definition of "Marxism" <http://newworldencyclopedia.com> accessed on 15/1/2016.

⁴⁶ McGlynn C, *John Stuart Mill on Prostitution: Radical Sentiments, Liberal Prescriptions*, Durham University Press, 2012.

monitoring of men who demanded prostitution, deeming it appropriate for the law to interfere in such instances.⁴⁷

John Stuart Mill championed for decriminalization of law targeting prostitution, because, to him, this was targeting vulnerable groups.

Other philosophers such as Dworkin (1993) and MacKinnon (1989) have argued that prostitution is a part of wider patriarchal political regime which seeks to oppress women. They understand prostitution to be violence against women, not only in the act itself but also in the idea of buying sex that is part of a system linked to male domination that then represents 'the absolute embodiment of patriarchal male privilege' (Kesler, 2002:19). They bring out the point that through prostitution women are fully reduced to sexual objects that can be bought and sold.

Although the above arguments hold much water, one can't help but wonder why there is a generalization of all women as *vulnerable, coerced groups of people who have been forced into prostitution*. While it is not debatable that this represents the majority, it would be wrong to assume that all prostitutes fall under this category. It fails to cater for the groups that enter into prostitution without coercion and do so for economic reasons, because to them, it is a representation of work.

In addition to that, the above arguments posited have been brought out with the pre conceived mindset that prostitution is morally wrong which, contrary to what they advocate for, shows that they contribute to the marginalization of prostitutes. Regarding it as already wrong further perpetrates its stigmatization which is the main reason why prostitutes have faced many abuses and denial of their fundamental rights in the first place.

Empowerment theory

Critiquing the above analyses are those in line with the empowerment theory. These philosophers support the idea of legalizing prostitution, as, according to them, it is empowering to the marginalized group (i.e prostitutes) and may offer a better, safer alternative.

⁴⁷ "Rationale Freedom" 46.

Such philosophers who support the above, for starters, is John Locke and his theory of property. In his words: every man has property in his own person. This means nobody has any right to it but himself. The labour of his body and the work of his hands, say are properly his.⁴⁸ This implies that one has property in his (or her) body and the liberty to do as they deem fit with it.

Liberal feminists or "sex work" feminists opine that prostitution is fundamentally right because it a form of trade involving respectable women doing dignified work. They claim it provides access to something that clients require in order to fulfill parts of their human needs and express their true selves. They have compared prostitution to other forms of occupation where workers offer their services but restate that prostitution should be understood as a form of emotional labour where the prostitute is in control of their emotion and can therefore "summon and contain their emotion within the commercial transaction as a useful tool in boundary maintenance rather than a loss of self."⁴⁹

Liberal theorists⁵⁰ lie under liberal political philosophies and argue that the invasion of an individual's will is a heinous violation of fundamental human rights, such as ones right to privacy, autonomy and freedom of labour relations.⁵¹ These laws and policies that go against liberalism then perpetuate the marginalization and stigmatization of those who are adults that have freely consented to the practice as well as those who have freely chosen commercial sex as an occupation.

"The most important argument for the legalization of prostitution services is such that prohibitions violate one's most basic and human rights. Prostitution is the voluntary sale (or rental) of labour service. Individuals own their bodies and have the absolute right to decide how those labour services should be used. As long as the prostitution is voluntary, there is no

⁴⁸ O'Connell D et al, *Rights and Wrongs of prostitution*.

⁴⁹ Chapkis W, *Live Sex Acts*, Women and Gender Studies Programme, University of Southern Maine, 1997.

⁵⁰ Definition of "Liberalism" on <http://plato.stanford.edu/entries/liberalism> accessed on 15/1/2016.

⁵¹ Article 31 and 41, The Constitution of Kenya, 2010.

justification for governmental interference. Indeed, such interference constitutes an infringement of the privacy and personal liberty of the individuals involved."⁵²

The above contenders mainly argue on the basis of exercise of personal freedom and liberty where one should be allowed to exercise their free will to choose what work suits them and not face social, economic or political stigmatization for doing so. They put heavy emphasis on personhood, autonomy, rights, dignity and self-respect. (Nussbaum 1999:57) In her words,⁵³

“At the heart of tradition is a twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth, no matter where they are situated in the society, and that the primary source of this worth is a power of moral choice between them, a power that consists in the ability to plan a life in accordance with one’s own evaluations of ends.”⁵⁴

Under the theory of constitutionalism, one may argue that not advocating for legalization of prostitution may be unconstitutional. In Kenya, the newly promulgated constitution states that each and every citizen has the right to have their dignity respected and protected, which includes commercial sex workers.⁵⁵ At the very heart of constitutionalism is the requirement of the government to adhere to constitutional principles and maintain constitutional supremacy. This should be the case with regards to according prostitutes access to their basic rights and protections which they often lack.

From the above theories I opine that the philosophers failed to look at factual reasons why prostitution should be legalized or not. With one party already declaring all prostitutes as

⁵² The words of Paul Armentano, a Senior Policy Analyst in Dec.1993 *Freedom Daily's* article *The Case for Legalized Prostitution*, for The Future of Freedom Foundations, may be able to fully express the views of liberal thinkers on this matter.

⁵³ Max Morris, *The Political Philosophy of Prostitution: Should Selling Sex be Legalised?* University of Liverpool, 2013. (Dissertation Thesis)

⁵⁴ Nussbaum M, *Sex and Social Justice*, Oxford University Press, pg 57, 1999.

⁵⁵ Chapter 4, Article 28, Constitution of Kenya, 2010.

oppressed, while the other declaring that they exercised their free will in order to join in on the practice, they fail to look at realities that apply, especially with regards to third world countries.

Specific to us, I argue that we should consider making prostitution legal on the factual basis⁵⁶ that, as a developing country we have a long way to go before we can be able provide an array of options for such vulnerable women to choose other means to be productive. With that in mind, prostitution will continue to be an option for them for a long time coming. Illegalizing prostitution only contributes to our detriment as it continues to give space for such women to be abused, lack access of their basic fundamental rights that are guaranteed in the Constitution, be stigmatized as well as continue to spread sexually transmitted infections. But by legalizing prostitution, we take advantage of the situation, and create reforms that allow the Law to take hold of the situation and mitigate these negative consequences as much as possible. This is bound to leave us with more to benefit from, as opposed to leaving the situation as it- undealt with or rather, ignored. As Martha Nassabaum, a liberal feminist, states, legalization "...is likely to make things a little better for women who have too few options to begin with."⁵⁷

⁵⁶ Kenya has been defined as a lower middle income country by World Bank, www.data.worldbank.org/country/Kenya. Accessed on 15/1/2016.

⁵⁷ Max Morris et al, *The Political Philosophy of Prostitution*.

CHAPTER THREE: HISTORY OF PROSTITUTION

Known as the world's oldest profession,⁵⁸ it has always been the case that where we find evidence of human culture, we find evidence of prostitution. From the days of earliest human forms in times of Mesopotamia,⁵⁹ sex trade emerged along temples, customs, markets and laws thus, Mesopotamian religious practices gave birth to prostitution. Herodotus, for example, notes that women of ancient Babylonia were to give themselves once as temple prostitutes before marriage.⁶⁰ It was a feature of religious life in the first high civilizations, seen as a means to connect with gods or rather an institutionalized expression of primitive orgiastic communion.⁶¹

Temple prostitution continued but it evolved to an independent profession, for example, with the commercial life of Athens as a metropolitan seaport.⁶² It was seen to also have been imported as a practice in ancient Egypt and persisted through to Hellenic and Roman periods.⁶³ From then on we see the Greeks and Romans actually regulating prostitution and the profession going further to be regarded as useful in the context for two main purposes: a) toleration of male experimentation but insistence on female virginity b) distinction of a class of women that were freed from traditional familial and clan constraints.⁶⁴

In simple terms prostitutes were regarded as of worth instrumentally in satisfying certain male needs as much as Aristotle regarded slaves as valuable instruments and tools for their masters.⁶⁵

Later came the era of Christianity, in which the history of prostitution falls under two different periods-Pre-reformation and reformation.⁶⁶ In pre-reformation period, Catholic views on this

⁵⁸ "The Sumerian term for female prostitute 'kar.kid', occurs in the earliest list of professions dating back to ca. 2400BC." Gerda Lerner, "The Origin of Prostitution in Ancient Mesopotamia," *Signs*, Winter 1986.

⁵⁹ These times date back to 3400 B.C, http://www.mesopotamia.co.uk/time/explore/main_mes.html accessed on 2/12/15.

⁶⁰ Herodotus, *Histories Book*, Volume I.

⁶¹ Ellis H, *Studies in the Psychology of Sex*.

⁶² S. Pomery, *Goddess, Whores, Wives and Slaves* pg 89-92, 1975).

⁶³, Sanger W, Ellis H Bullough, *The History of Prostitution*, New York: Harper and Brothers Press, 1869, pg 35-42.

⁶⁴ H. Ellis et. al, , *Studies in the Psychology of Sex*.

⁶⁵ Richards D, *Aristotle, Politics, Commercial, Sex, and the Rights of a Person*, Book One Part V, 1974, pg 9-15.

⁶⁶ Richards D et al, *Commercial, Sex, and the Rights of a Person*.

matter took dominance over any other previous beliefs that were there before. In Catholic Europe, all forms of sexual activity outside of marriage were regarded as sinful. Prostitution specifically was understood from St. Augustine's perspective, that is, that the only proper "genital commotion" is that which is consciously aimed at reproduction of the species in marriage.⁶⁷ Thus any sexual activity that was not done within marriage, with the purposes of procreation, then, was seen as shameful, and, of course, immoral. This view continued to determine how prostitution was viewed seen that the same perspective was adopted by St. Thomas and eventually the whole of Europe.

This was the clear beginning of stigmatization of prostitution. Later with the emergence of reformation thinkers such as Luther and Calvin view of marriage changed and instead of being seen as a union solely based on procreation, there was championing for compassionate marriage where in which all ones emotional and sexual needs are met.⁶⁸ Thus such thinkers regarded prostitution as immoral because of the emotional detachment tied to it by parties involved and for the mere fact that they believed that such needs (sexual) should only be met in marriage.⁶⁹ For the above reasons, they not only regarded prostitution as immoral but also for its total abolition. Calvinist chain of thought was based on the belief that one should remain chaste till marriage referred to as Puritanism. It ended up having a large impact on people's attitudes and legal treatment towards prostitution in England and United States.

Therefore, as European colonization continuously expanded, legislation increasingly enacted a tighter control of sex trade.

In Kenya, legislation for curbing prostitution began with the colonial government.⁷⁰ In its attempt to separate women who had practiced sex from those who had not, it came up with laws for the sake of sanitization, i.e prevention of venereal diseases and racial segregation, these laws criminalized prostitution. This did not stop the practice. The practice continued but fluctuated

⁶⁷ Augustine, *The City of God*. 577-94 (H. Bettenson trans. 1972) (1st ed. 413-426 A.D.) St. Thomas is in accord with Augustine's view.

⁶⁸ Karant-Nunn C. and Weisner-Hanks on Luther on Women, *Natural Place of Women, in sexual love and Western Morality*, pg 134-43, 1992, Cambridge University Press, 2003.

⁶⁹ Luther et.al, *Natural Place of Women*.

⁷⁰ White L et al, *Comforts of Home*, Chapter 2.

according to shifting colonial strategies designed to curb it, where even at times it remained autonomous to colonial regime.⁷¹ Before the First World War, prostitution figured prominently in Nairobi. Women and girls from pastoral communities engaged in commercial sex as a means of generating income which could be used to purchase livestock (in 1900-1918)⁷² thus replenishing depleted herds and maintaining livestock values during periods of rising agricultural values.⁷³

To sum up this chapter, we see that prostitution, in beginning was often seen as an acceptable religious ritual but with the rise of Christian era, specifically Catholic, its stigmatization began to spread. With the merging of law and religion, prostitution became criminalized in all Europe thus, through colonization; the act became a crime in Kenya (and other European colonies). However, despite colonial restraints, we see that the act persisted with many women using it as a means to generate income and an opportunity for accumulating capital.

⁷¹ White L et al, *The Comforts of Home*.

⁷² White L et al, *The Comforts of Home*. Chapter 2.

⁷³ Reviewed works of *The Comforts of Home* by White L, by Siedman G, University of Wisconsin Press, 1993, pg 708.

CHAPTER FOUR: CRIMINALIZATION OF PROSTITUTION

This part looks at why prostitution is criminalized, the reasons behind it and whether the reasons justify criminalization of prostitution or are subject to critique.

Reflecting on David A. J. Richards,⁷⁴ Professor of Law's work, (New York University) having done research on the above sub topic, author of *Commercial Sex and the Rights of the Person: A Moral Argument for Decriminalization of Prostitution*, there are four arguments that stand as defenses for criminalization of prostitution. He summarizes them as the following:⁷⁵

- a) Criminogenesis.
- b) The control of venereal diseases.
- c) Intrinsically immoral and degrading nature of commercial sex.
- d) In relation to the above point, the self-destructive or debilitating nature of prostitution.

Criminogenesis

“Criminogenesis” loosely means the origin of crime, meaning that prostitution is often prohibited as it gives rise to, or rather provides means for other crimes to be conducted,⁷⁶ such as theft, trafficking narcotic drugs, assault of/ violence against women in prostitution etc. but on the contrary he argues that criminalization is indeed the reason the above evils continue to advance. Due to its prohibition, prostitution is carried out in underhand ways, and that the covertness of the same breeds consequential crime.

With tolerated prostitution by law, police are able to effectively deal with any emerging violence from prostitution as the workers themselves are the ones that will bring matters to polices, attention. With regards to use of narcotic drugs, he argues that criminalization of prostitution has reinforced the stigma surrounding it and workers turn to narcotic drugs for solace, or as an attempt to mentally survive it.⁷⁷ He goes on to conclude that crime and prostitution do not necessarily go hand in hand, thus criminogenesis is not fostered by prostitution but by criminalization of the same.

⁷⁴ Author of *Commercial Sex and the Rights of the Person: A Moral Argument for Decriminalization of Prostitution*.

⁷⁵ Richards D et al, *Commercial Sex and the Rights of the Person*, pg 1215.

⁷⁶ Karpman B, *The Sexual Offender and his Offences*, Julian Press Inc, 1959 pg 609.

⁷⁷ Winick C and Kinsie Eschur P, *Law and Society*.

Venereal diseases

Another reason prostitution is prohibited is to prevent the spread of sexually transmitted diseases. He argues that prostitution only accounts for a small percentage of spread of venereal diseases. Other means that foster the spread of STDs are promiscuous behavior among the youth, and not necessarily prostitution. In Kenya prostitution is actually a big reservoir for transmission of STDs, particularly gonorrhoea being very prevalent among prostitutes in Nairobi. Depending on social strata and number of clients daily, up to 70% of prostitutes have at least one STD.⁷⁸ Thus, where the goal is to curb transmission of sexually transmitted diseases, we see that prohibiting commercial sex has done little to achieve the above end with the practice continuing despite the sanctions surrounding it. Further research shows that apart from prostitution, another major contributor to the spread of venereal diseases in Kenya is promiscuity among young adults.⁷⁹ This goes on to show that criminalizing prostitution is perhaps not the solution but instead education on the same and encouraging practicing of safe sex among youth and those involved commercial sex.

David J also suggests that instead of prohibiting prostitution, there should be emphasis on public education on the topic and precautionary and safety measures with regards to sexual activity be encouraged among the youth.

Moral Argument

This part touches on the last two points. This part reflects on the fact that public morality, or what the society at large intuitively considers to be right or wrong, has a large impact on the laws that will govern it

“It is an uncontroversial truth that the criminal law rests on the enforcement of “public morality” in some sense. Criminal penalties identify and stigmatize certain moral wrongs that the society at large justifiably condemns as violations of the minimum boundary conditions of civilized social life.”⁸⁰

⁷⁸Lourdes J, D’costa, M.F Francis, Ian Bomwer MD, *Prostitutes are a major reservoir of Sexually Transmitted Diseases in Nairobi, Kenya*, pg 66.

⁷⁹ Voeten H, *HIV in Kenya*, pg 149.

⁸⁰ Butler J, *The works of Joseph Butler Upon Resentment* (sermon VIII), in 2.

For that reason, public morality has been and still plays an essential role in determining what laws any particular society will subject itself to. With regards to prostitution, as we have seen, views on it changed with the coming of Christianity, with many people of Europe adopting Augustine's and St. Thomas's views.

“It is a known fact that sex workers have traditionally been associated with the “whore stigma” to distinguish them from “respectable women”⁸¹

As we have seen before, the social stigma surrounding prostitution originated from Augustine and St. Thomas's views on what amounts “proper” sex in Catholic and Christian terms. Due to the fact that prostitution does not fit this definition of “proper” sex, they then deemed it inherently evil. These arguments provided by the mentioned thinkers contain loopholes and can easily be challenged. Augustine's pro creational model for example suggests that sexual passion is wrong as it is a form of loss of control, that is, mental control, experiences sensation and behavior.⁸² This is because, according to Augustine and St. Thomas, sex itself is inherently shameful and immoral and can only be permissible in marriage with a view to procreation.

These views presented by such well known catholic scholars became the center of shaping how prostitution is viewed and even the laws governing it. The same idea of sex being shameful outside of those particular functions is found its way into prostitution, thus criminalizing it.

“Stigma traditionally attached to prostitution is based on a collage of beliefs most of which are rationally defensible, and beliefs which should be vehemently rejected by feminists: beliefs about the evil character of female sexuality, the rapacious character of male sexuality and the essentially marital and reproductive character of “good” woman and “good sex.”⁸³

This reason, however can be easily challenged as it is seen that people can be involved in non-commercial sexual activity outside of marriage and the same laws do not apply to such, that is, their sexual activity is not criminalized. Thus, the stigma that surrounds prostitution that leads to

⁸¹ Ericson L, *Charges Against Prostitution, An attempt at a philosophical Assessment*, Re-printed in Matthews R and O'neil M, pg 335-366, 1980.

⁸² David Richards et al, *Commercial Sex and the Rights of the Person* pg 1210.

⁸³ Nussbaum M, *Should selling sex be legalized? The Political Philosophy of Prostitution, Sex and Social Justice*, Oxford University Press 1999, pg 501.

its criminalization is based on ancient beliefs that only prostitution is subjected to but the same beliefs are often rejected in other aspects of our social lives. This shows that even the moral reasoning behind prohibition of prostitution should be subject to criticism.

John Stuart Mill presents a different perspective in the “separation of law and morality” debate. He argues in what is coined “The Harm Principle” that, “The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”⁸⁴ This means that apart from some exceptions, we should not use either law or moral condemnation to alter the behavior of others unless they are causing harm to others.

In this case save for exceptional cases, for instance, circumstances involving children, the law should only interfere where an action is guaranteed to cause harm; not just where there is sufficient reason to do so.

In relation to prostitution, where two voluntarily consenting adults are involved, the act becomes one that may be considered immoral by the society but one that does not cause harm to others.

In The Report of the Committee on Homosexual Offences and Prostitution,⁸⁵ is an enlightened and realistic document that reflects the greatest credit on the civilized and humane outlook of members of committee.

“As a General proposition it will be universally accepted that the law is not concerned with private morals, or ethical sanctions. On the other hand, the law is plainly concerned with the outward conduct of the citizen in so far as the conduct injuriously affects the rights of other citizens. Certain form of conducts it has always been thought right to bring within the scope of criminal law on the account of the injury which they occasion to the public in general.”⁸⁶

The Wolfenden report took a similar approach, where public solicitation of commercial sex services are prohibited through hefty fines, but private conduct is not interfered with. H.L.A

⁸⁴ Mill Stuart J, *On Liberty- “The Harm Principle”*, Havard Classics Volume 25, 1869

⁸⁵ Wolfenden Report, No. 247, 1957.

⁸⁶The street Offences Committee, under the Chaimanship of Mr. High Macmillan K.C.

Hart, in his defense of the Wolfenden report categorized prostitution an immoral act that is a “victimless crime” and went on to detail how enforcement on legal moralism imposes unnecessary excessive costs.⁸⁷

⁸⁷ Hart, H.L.A, Law, *Liberty and Morality*, Stanford University Press, 1963, pg 45 and 53.

CHAPTER FIVE: JUSTIFICATIONS

Prostitution continues to be rampant in Kenya, as more people with financial struggles resort to it as their only way of earning a living and supporting their dependants. Criminalizing it only brings about increased levels of sexual violence and oppression as sex workers are rendered fully dependent upon pimps, brothel owners, clients and police who easily take advantage of them because they do not have the alternative of seeking legal redress. Additionally, they continue to lack access to basic rights and protections that everyone else has access to and are guaranteed in the Constitution.⁸⁸

This chapter looks at why legalization would constitute a better alternative compared to criminalizing commercial sex.

Separation of Law and Morality

Many positivists argue that the law has no business reflecting the morality of a society, the law is based on social facts and therefore, there should be a separation of law and morals judgment when formulating laws. The debate has existed for centuries between different philosophers such as HLA Hart and Lon Fuller, all which do not give an accepted conclusion but only open room for further debates.

Giorgio Pino,⁸⁹ a legal positivism philosopher gives an argument that I find profoundly relevant to this discussion. To begin with, it may be important to clearly establish that legal positivism represents philosophers that hold that law is a matter of social facts (positivism or social facts thesis) and that legal validity is not necessarily dependant on moral value (separability thesis).

In his writing,⁹⁰ he states that law and morality actually connect but in different relations (previous philosophers of positivism did not take account of this), some relations should be rejected, others taken account of while others completely disregarded as they are of no use when it comes to law. He brings out many important relations between law and morality, among them, psychological relations that I find key to this subject. He states, "The fact that the law consistently makes some act obligatory, permissible or forbidden, may as a matter of fact

⁸⁸Chapter 4, Bill of Rights, The Constitution of Kenya 2010.

⁸⁹ Pino G, *Positivism, Legal Validity, Separation of Law and Morals*, Unviversity of Palermo, 2012, pg 59.

⁹⁰ Pino G, et al, *Positivism, Legal Validity*.

engender the belief that those acts are morally obligatory, permissible or forbidden. Law in other words, may have the effect of influencing and moulding the prevalent mentality and attitudes of the social group it is addressed to, the positive morality of the relevant society."

Here, he acknowledges that the law often represents the general moral view of a society, and also affects the morals of the same, which is the case when it comes to prostitution. The basis of illegality or criminalization of prostitution is mainly because it is considered a social evil in many countries, ours included.

He continues to state, "According to many positivists, the existence of such a relation- and the need to immunize the citizens against- is exactly what makes a positivists attitude pragmatically and "pedagogically" preferable, because it educates citizens into thinking there is no immanent normativity or sacred aura in the law, and it better prepares them for moral criticism of the law, and for resistance to unjust laws."

This could easily apply towards reforming the laws that legalize or criminalize prostitution. By letting the society know that the law does not have a sacred aura tied to it that it should follow, which inclines it to reflect moral opinions of the society, citizens better able to scrutinize the law more accurately. With that in mind, citizens should open up their minds when looking laws criminalizing prostitution, and question whether they serve the purpose of effecting justice or simply inhibit prostitutes from accessing the same.

Victimless crime

It has been argued that prostitution is a victimless crime,⁹¹ where parties involved (which is often the case) are adults, who have consented to the act. Should the law interfere with personal decisions made by consenting adults with regards to their private actions?

The question of personal liberty comes into play. Don't individuals own their bodies and have the absolute right to decide how to use them?

⁹¹ A legal offense to which all parties involved consent to and no party is injured. Examples of illegal conduct sometimes described as "victimless crimes" are drug and alcohol abuse, gambling, prostitution, and homosexuality. See N. Morris, and G. Hawkins, *The Honest Politician's Guide to Crime Control*, The University of Chicago Press, pg 2-6 (1970).

I argue that, through legalizing prostitution the law is able to ensure that those who participate in commercial sex, are adults, of legal age, who have voluntarily chosen to exercise their free will and become commercial sex workers. Unlike now, whereby, the current state is that even children, through dubious methods are recruited into prostitution because the law has no strategic way of monitoring the operation of commercial sex.

Once the law creates a structured means of conducting commercial sex, it will be a requirement to have commercial sex workers be registered and licensed like any other legitimate business under the law. This will allow the government agents who are assigned to do this task to keep track of the age of those involved in commercial sex and ensure that they are doing so voluntarily.

[Economic and Social benefits](#)

Legalizing sex trade would mean that it is subject to state control. This means that it will be regarded as a normal occupation and the state will regulate it in the same way it regulates other sectors of the labour industry.

This would, in turn, require that sex workers and all affiliated institutions be licensed, allowed to work freely and access health care benefits that also accorded to other kinds of employees.

HEALTH CARE BENEFITS

The benefits of initiating the above is that the state will now control abuses, transmission of sexually transmitted infections, and other negative effects associated with prostitution in a better way. Giving sex workers proper access to health care, means that they can now easily access contraceptives and health checkups, free screening, NHIF benefits that will benefit them and their clients.

ECONOMIC BENEFITS

Sex workers and any affiliated institutions will be taxed creating revenue for the government. Allowing sex workers to form collectives that improve their financial statuses will also benefit their dependants, which contributes to the overall increase in the welfare of such vulnerable women, as many have resorted to prostitution due to economic stressors.

SOCIAL BENEFITS

Social benefits that arise from having commercial sex be legalized are having this particular marginalized group access its fundamental rights and be treated in a dignified manner. Many have suffered from degrading treatment from local authorities who feel justified in doing so “in the name of the law”.⁹² Given that the State will take over in handling commercial sex matters, abuse of legal enforcement practices used to victimize sex workers such as arbitrary arrests and detention, assault, violence, demanding sex in exchange of their freedom⁹³ and other cruel, inhumane and degrading treatment all in the name of “enforcing the law” will have to stop. Police officers will be sensitized on how to approach matters of commercial sex workers breaking the law in a dignified manner. Additionally, mechanisms to monitor closely enforcement practices of police officers will be put in place, and where such activities that put sex workers’ security and autonomy persist, there will be means to seek legal address.

⁹² Steinacker, L, *A Call for Ecologically Informed Policy to Address Sex Work: Evidence from Kenya*, Cornell International Affairs Review, Vol. 6 No.1, 2012.

⁹³ Steinacker, L et al, *A Call for Ecologically Informed Policy to Address Sex Work: Evidence from Kenya*.

CHAPTER SIX: CRITIQUE ON LEGALIZATION

This part of this thesis looks at the main reasons provided for legalization of prostitution and question whether legalization will actually bring about the results expected.

a) Legalization of prostitution will lead to better protection of sex workers.

Pro legalization thinkers argue that legalization will benefit sex workers as it will help protect them from assault/violence from pimps, johns and the like. This is because the stigma that surrounds prostitution will decrease now that sex work will be recognized as a legitimate occupation in the eyes of the Law. This will give sex workers confidence to report any sort of violence done against them, thus generally promoting their safety in their work.

Additionally, they contend that criminalizing prostitution only makes sex workers more vulnerable to pimps and johns as they are the only ones they can turn to earn a living with no other means of escape.

This argument, although convincing, has been challenged by anti-legalization contenders. They argue that legalization only normalizes the violence against sex workers. In reality it is difficult for sex workers to prove assault or any other harm done against them such as rape because even the general public, including those in the legal field can hardly draw the line between a sex worker being raped and one who was “just doing their job”.

A research done in Colombia, Germany, Mexico, South Africa and Zambia showed that 46% of women in prostitution did not feel that legalization would offer them safety from physical and sexual assault.⁹⁴

Another study shows that protection given, if any, is usually for the benefit of the buyers and not the sex workers, theirs is given a secondary priority or no importance at all.⁹⁵ Legalization will not improve the health status of sex workers.

⁹⁴Farley M, “*Bad for the body, Bad for the heart.*” pg 1096.

⁹⁵ Raymond Janice G, *10 Reasons not to legalize prostitution and a legal response to the demand for Prostitution*, Haworth Press, 2003.

It has been theorized by pro-legalization thinkers that with the monitoring of prostitution by the State, the health status of sex workers will improve as the state will make a point of ensuring that they go through health check-ups, while readily supplying necessities for their occupation such as contraceptives and encouraging them to practice safe sex.

It is important to note that while undertaking the above initiative would be commendable, the health measures are only taken up by the sex workers and not the buyers, thus they still remain at high risks of contacting different STDs. With regards to practicing safe sex, a study found that most buyers were willing to pay more if guaranteed that they can get away without using protection⁹⁶ and with the economic vulnerability that many sex workers experience, most would accept.

Another reason why legalization does not improve the health of sex workers is that some of the health problems they experience are inherent to their job. Such include exhaustion, frequent viral illnesses, depression, stomach aches etc.⁹⁷ A Canadian Commission found that the death rate of sex workers was forty times higher than that of the general population. (Special Committee of on Pornography and Prostitution, 1998) A mortality survey done in the U.S of commercial sex workers concluded that 50% of deaths of women in prostitution was through murder and review comparable studies found that murder accounted for the cause of death between 29% and 100% of all sex workers reported death in Birmingham, UK, Nairobi, Vancouver, Canada and London.⁹⁸

The above arguments can be rebutted by looking at it from a different perspective. If prostitution is legalized, it will be required by the law that both parties involved in the practice take precautionary measures such as safe sex and initial testing. This will be an initiative put in place to help protect workers too. Where the sex workers feel threatened, they could now have the freedom to report their concerns to the relevant authorities, as part of occupational safety which, again, is offered by the State to all legal employees. Additionally, where they feel that the law is not doing enough to protect them in terms of their health status, there would be legal channels

⁹⁶ Raymond J, et. al, *10 Reasons not to legalize prostitution*, pg 72.

⁹⁷ Pheterson G, *The Prostitution Prism*, Amsterdam, Amsterdam University press (1996).

⁹⁸ Pheterson G et. al, *The Prostitution Prism*.

available to them to ensure they enforce this now that commercial sex will be regarded as usual occupation.

Another point brought out is that the economic vulnerability experienced by commercial sex workers is what may lead them to forego safety measures in order to receive a higher pay. However, one could challenge this by acknowledging that, if commercial sex were to be regarded as any other occupation, they would have legal means to seek better pay that would not leave them susceptible to bribes that may end endangering their health.

b) Legalization of prostitution will reduce child prostitution.

With regards to child prostitution, there has been speculation that legalization will only lead to its increase. Some studies have shown, for example, in Netherlands, the number of children in prostitution has dramatically increased by more than 300% since the 1990s, most being from trafficking Nigerian girls⁹⁹ (Additionally in Australia, Victoria a State that has legalized prostitution, child prostitution has dramatically increased compared to those that had not.¹⁰⁰

To this pro-legalization scholars have argued that with government intervention in prostitution, child prostitution will actually decrease. This is because the State will now be keen to ensure that those getting involved in prostitution are of legal age (18 and above) through licensing and registration of sex workers. This will make it easier for them to trace the underage in the industry, and more energy will be focused on this as opposed to arresting all prostitutes as is the case when it is prohibited.

The above argument could also be challenged by emphasizing that where a proper, structured system is built to monitor sex workers and the sex industry at large, the problem of child prostitution can be curbed. From the studies given above, we must also question whether other factors led to its increase which do not necessarily touch or reflect on legalization, because it is not made clear. Such factors may include offering bribes, relevant authorities being slow on their job among others.

⁹⁹ Tiggeloven G, Child Prostitution in the Netherlands,2001, available at www.catwinternational.org accessed on 6/12/2015)

¹⁰⁰ ECPAT, *Youth for Sale, Australia's Inquiry into Commercial and Social Exploitation of Children in Australia*, 2003.

c) Legalization of Prostitution will enhance women's choices.

Some studies done have suggested that legalization does not necessarily enhance women's choices. Most of them consider commercial sex work as a last resort, due to lack of other options. In such circumstances we cannot conclude that they willingly joined the sex industry when they lacked other options to choose from and are often looking for a means to leave.

A 1998 International Labour Organization report suggested that the sex industry be treated as a legitimate economic sector¹⁰¹ but still found that:

“...Prostitution is one of the most alienated forms of labour; the surveys (in four countries) show that women worked with ‘a heavy heart’, ‘felt forced’ or were ‘conscience stricken’ and had negative self-identities. A significant proportion claimed they wanted leave sex work if they could.”¹⁰²

The above differs from what Pro Legalization scholars argue, which is that sex workers like the rest of us have the right to exercise their individual rights to use their bodies as they please and although we may condemn the fact that they commodify their bodies, it does give us legitimate reason to criminalize it.¹⁰³ Such contenders fail to see a distinction between commercial sex and any other form of labour, where those economically vulnerable, thus with limited options, are exploited by their authorities, made to work long hours and do as their authorities please in order to earn a living. Thus for the sake of equal concern and respect for autonomy, people are entitled make choices for themselves and it is unfair not to criminalize such cases but impose heavy sanctions on prostitution. In such cases, although we may condemn earning a living in such a way, we do not regard criminalization as the appropriate means to reinforce our condemnation.¹⁰⁴

¹⁰¹ Raymond J et al, *10 Reasons not to legalize prostitution*.

¹⁰² Lim L.L, *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*, International Labour Office (ILO) Geneva, Switzerland, pg 213, 1998.

¹⁰³ C. Fried, *Right and Wrong*, page 142-143, 1978. C. Fried on the distinction between the sale of body from the sale of services.

¹⁰⁴ David, J et al, *Commercial Sex and the Rights of the Person*.

The above argument offered by critics fails to acknowledge that, once commercial sex is considered a legitimate occupation, it will cease to be seen as a stigmatized form of occupation and one that is guaranteed all the benefits like any other occupation under law, which will remove the “heavy heart”, “conscience stricken”, “feeling forced” attitude that commercial sex workers face according to the ILO observation given above.

d) Legalized prostitution enhances sex trafficking

Another report found that 80% of women in brothels, Netherlands, were trafficked from other countries. (Budapest Group 1991 (1)) in Germany, after legalization in the late 1980s, by 1993, it was recognized that 75% of the women in sex industry in Germany were foreigners from Argentina, South America, Uruguay and other countries¹⁰⁵.

It has been argued that through legalization of prostitution the State will be able to monitor the exploitation of desperate immigrant women who are often trafficked for prostitution. This again touches on one of the aforementioned point that if a proper well structured system is built to monitor workers, sex trafficking can be prevented to a large extent, and for those who choose (and qualify) to join in, will now be taking part in a legal profession and not necessarily being trafficked.

¹⁰⁵ Atlink J, *Stolen Lives: Trading Women into Sex and Slavery*, London, Scarlett Press, 1993 pg 33.

RECOMMENDATION

Seeing that criminalizing commercial sex only worsens the situation, it is now obvious to us that the problem cannot be dealt with by penalizing commercial sex workers. Legalization as we have seen, offers a better solution. Given all its benefits, legalization will ensure that commercial sex workers are treated with dignity and have all access to their fundamental human rights as opposed to being marginalized and often disregarded by the society at large.

It is then clear that legalization is a better approach, compared to criminalizing which does not eradicate prostitution but only focuses on punishing the workers-the victims. Legalization addresses the problems associated with commercial sex work from its root causes, looking at what perpetrates the trade, and instead of merely shunning it, it allows for the same to be used to everyone's advantage.

It is important that I make it clear that the idea here is not to romanticize legalization as the only solution to dealing with prostitution, because as it stands alone, it cannot offer the best solution. Thus, heavier emphasis should be put in finding an array of alternatives that can be offered to these people involved as well as means to rehabilitate them.

Legalization, however, offers a good place to start as it protects the workers from marginalization, discrimination, oppression, violence and denial of their fundamental human rights as they look for alternative means to earn a living. It is way of offering a safe harbour for commercial workers to transition to other occupations or explore other alternatives, as well as guaranteeing others the autonomy of choice.

Given that we are a developing country,¹⁰⁶ and providing a wide array of other alternatives to commercial sex workers may prove difficult for now, I recommend legalization as the better alternative compared to any previous attempts and a positive step towards catering to a group often neglected.

¹⁰⁶ 45.9% of Kenyans are at or below the poverty line in Kenya, according to www.data.worldbank.com/country/Kenya accessed on 5/12/2015.

CONCLUSION

The paper began by questioning why prostitution as crime remains rampant, despite the Law being clear on its illegality. This then led to a detailed look at the history of prostitution, the reasons why the practice is criminalized and a questioning of the latter. It comes out clearly that reasons behind prostitution can easily be challenged and do not prove valid enough to have the practice be heavily penalized by the law.

Further, we delve deeper into whether legalization is a better solution by looking contradicting views of renowned scholars in the field regarding the same subject. We analyze the benefits that pro-legalization contenders bring forth and also reflect on criticisms offered by their contradictors. Eventually, we come to the conclusion that legalization would be a better solution compared to criminalization not only because it offers benefits to the many who are economically disadvantaged and turn to commercial sex as a necessity for their survival.

It is also important to note that, in dealing with commercial sex we not only look at legalization as the only solution, but stress that a wide array of alternatives be offered to such groups as well as laying heavy emphasis on finding means to rehabilitate them.

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