REVIEWS ESSAY

DANGEROUS SEX, INVISIBLE LABOUR: SEX WORK AND THE LAW IN INDIA

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Today is International Women’s Day. Historically this day was dedicated to the working women which was later recognised as Women’s Day. This year women sex workers, domestic workers, construction worker’s, mid day meal workers, wage labourers together [have] organised a rally [for] demanding their workers right[s] and other workplace related issues. A charter of demand[s] will be submitted to the Labour Minister after the rally. Durbar [Mahila Samanwya Committee] and its allied organizations will participate in the rally along with other women workers, for their trade union rights and social security benefits. 5000 women workers from different sector[s] [are] going to participate in the rally which is initiated by NTUI [New Trade Union Initiative]-West Bengal. The rally will begin at 1p.m. in Sealdah Station and will end at Y channel in Dharmatala.

- Facebook status update of Durbar (DMSC)

8th March, 2013.

The book under review engages with the politics of mobilisations such as the above and their implications for feminist theorising on sex work and redistributive law reform. What does it mean for women selling sex to join hands with domestic workers, mid-day meal workers and other women workers in the informal economy in demanding workers’ rights from the State? What is at stake in calling for sex work to be recognised as a legitimate form of work? Prabha Kotiswaran sees her project in this book as “clarifying, contributing to, and building upon” assertions such as the one captured in the quote above, or the “work position,” as she calls it. While contemporary discourses frame the Third World sex worker either as a victim of trafficking or as a high-risk category for HIV prevention efforts, there is little consensus or even understanding regarding the sexual labour performed by her and the

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market conditions within which such labour is performed. Hence, the title of the book: Dangerous Sex, Invisible Labor.

The book has seven chapters, divided into three parts. The first chapter introduces the readers to the sex work debates and contextualises the main arguments of the book. The second chapter tracks the changing contours of the feminist debates on sex work. In search of an alternative to the motif of violence against women deployed by radical feminists and to capture the economic dimensions of sex work, the third chapter offers a genealogy of materialist feminist writings on sex work. The fourth and the fifth chapters offer legal ethnographies of two very different sex markets in India, Tirupati (Andhra Pradesh) and Sonagachhi (Kolkata), and provide rich descriptions of the operation of anti-sex work criminal laws in these locations. Chapter six presents a legal realist analysis of the economic consequences of different regulatory models on brothel-based sex markets. Finally, in chapter seven, Kotiswaran discusses features of a postcolonial materialist feminist theory of sex work by drawing on the demands of the Indian sex workers’ movements for recognition and redistribution. It is difficult to do justice to a book such as this which is dense with data, methodological insights and nuanced elaboration of arguments, in the limited space of a review. Instead of addressing all the issues that the book raises, I shall focus on only three themes: the political inadequacy of feminist positions on sex work and their unintended consequences; the use of inconsistent feminist theories to support the ‘work position’; and the advantages of a legal realist approach to understanding the operation of any law in sex markets and its impact on the rights of sex workers.

The feminist debate on sex work is mostly seen as a debate between those who think sex work is necessarily a form of violence against women and those who argue that sex work is a form of legitimate work that women take up under certain circumstances, just like any other work. If the radical feminists foreground the themes of coercion and commodification of women as the primary reasons why sex work must be abolished, then sex work advocates respond by pointing out how these factors are not absent from other aspects of women’s lives such as marriage or employment; thus de-exceptioanalising sex work as a unique economic activity or embodying a particular harm. But just as there are broad generalisations in the radical feminist/ abolitionist positions, there are blind spots in the unproblematised invocation of agency by sex work advocates.
In response to these dynamics, Kotiswaran describes how in recent years, an increasingly popular tendency among feminists has been to position themselves somewhere in between these two polarised positions, whereby they call for abolishing the "system of prostitution" while protecting the rights of individual sex workers. This is reflected in the consensus among feminists and also between feminists and the State that the law should penalise customers and not sex workers, making it a preferred policy option both nationally and internationally. Such positioning allows both radical and moderate feminists to align with the sex worker and to pledge their support for the 'victim', even while they push for anti-sex work law reform.

But this conciliatory approach, which Kotiswaran terms "middle ground feminism," is not only contradictory but also has problematic consequences, when expressed in policy terms. For one, how could one support sex workers' rights, while undermining their mode of work or their customers, who are their source of income and survival? Similarly, the middle ground position allows these feminists to condemn trafficking of women for sex work while remaining ambivalent about women who voluntarily migrate or pay traffickers to enter the sex market. At the international level, the politics of the middle ground has expressed itself in the forced/voluntary dichotomy in the anti-trafficking discourse, such that legal protection is available only for those trafficked and forced into sex work but not for those migrating or who are victims of non-sexual trafficking.

At the level of domestic laws, this has meant either efforts to decriminalise sex workers while criminalising clients (the unsuccessful attempt by the Indian government to amend the Immoral Traffic Prevention Act in 2006) or decriminalising sex work only when it is forced but not if it is voluntary (the 2004 South Korean law). Neither of these outcomes, flowing from the conciliatory middle ground position, is in the interest of sex workers. It is imperative for feminists of all shades therefore, to take seriously the terms in which sex workers' collectives themselves express their politics: that sex work is a legitimate form of work; that the purpose of the law should be to protect their labour rights and address workplace harms; and that for anti-trafficking measures to be successful, they must be synchronised with labour market dynamics. For feminists, therefore, there is no escaping the work position.

2. *Id.* at 33.
3. *Id.* at 32.
How does one theorise the work position? Kotiswaran turns to the writings of materialist feminists and their conceptualisations of women's reproductive labour. Kotiswaran presents a genealogy of feminist writings on sex work, starting from those of early socialist feminists such as Alexandra Kollontai to more recent work by post-industrialist feminist scholars such as Elizabeth Bernstein. For feminists such as Kollontai, sex and market constituted two completely different worlds, so sex work was condemned for mixing sex with market considerations. But at the same time, there was no way to ensure that marriage did not have a transactional element to it. Quite logically therefore, one could not advocate penalising sex for money, without interrogating marriage.

Sex work reappears in materialist feminist writings, in the domestic work debates of the 1970s, which highlighted that the exploitation of wage labour could not be understood without taking into account the non-wage labour performed by housewives. But although this body of work was geared towards recognition of the invisible labour performed by women in reproducing male labour power, owing to its institutional fixity on the family, it did not include sex work in its understanding of reproductive labour. An exception to this however, is the work of Italian feminist Leopoldina Fortunati, who looked at both housework and sex work to show how reproductive labour produced surplus value for capitalism. For Fortunati, sex work and housework were inevitably linked, for a large number of women who sold sex were also housewives and mothers. The dependency feminists, keen to offer an account of the exploitation of Third World women's labour by locating it within international political economy, broadened the terms of the domestic work debate. Going beyond the productive/reproductive labour dyad, the idea of subsistence production allowed for an expansive range of marginal labour performed by women in the developing world, including sexual labour, to be included in the discussion. But similar to the radical feminists, the dependency feminists also suffered from a high degree of commodification anxiety and hence were opposed to treating sex work as legitimate work.

More recently, feminists studying the economics of sex work in First World locations have used the term "sexual commerce" to denote the sale of a broad range of erotic and sexual services. In their elaboration of how capitalism operates at the micro level and benefits from sex work, these post-industrialist feminists point out how sex and market interpenetrate

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4. Id. at 70.
and transform each other under conditions of late capitalism thus making the constant guarding against the commodification of sex, redundant.

Interestingly, most materialist feminists are opposed to treating sex work as legitimate work. In fact, as Kotiswaran shows, there are striking similarities between radical feminists arguing for the abolition of sex work and materialist feminists, as both are structuralist. Additionally, materialist feminism is not an internally consistent body of thought; there are differences between strands of materialist feminist writings regarding sex, power and commodification. And yet Kotiswaran argues that it is an important resource for theorising the work position. She illustrates this by piecing together diverse elements from the materialist feminist oeuvre to fashion her defence for the work position. For instance, Kollontai, in spite of her understanding of sex work as the exact opposite of work, wrote about the logical and practical problems of treating sex work as exceptional and distinct from marriage. This is a method common to all materialist feminist writings – showing the continuities in women’s economic exploitation in marriage, sex work or the labour market – which can form the basis for a de-exceptionalist account of the exploitation of sex workers. Similarly, the domestic work debates despite their neglect of sex work, contributed the idea of compensation for reproductive labour, to which Fortunati later added sexual labour.

Most importantly, the materialist feminists, despite their disapproval of the work position, refuse to deploy criminal law to abolish sex work. As Kotiswaran notes: “It is almost as if the more complex the understanding of the power relations that mediate sex work in materialist feminism, the greater the refusal to abolish sex work or invoke a sharp instrument like the criminal law.” Kotiswaran’s use of materialist feminist insights and methods bears a strong imprint of her mentor, Harvard law professor Janet Halley, who advocates the use of “theory fragments” instrumentally and disloyally, while working on any problem. The methodological significance of this in the context of sex work, lies in its departure from the radical feminist impulse to tie everything back to one single theory of women’s oppression, that being sexual violence against women, even while studying the materiality of sex work.

The materiality of sex markets is brilliantly captured in two chapters in the second part of the book, in which Kotiswaran provides a rich account of the complex internal dynamics of sex markets in Tirupati and Kolkata. In addition to the brothel, sex work is carried out in varied

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5. *Id.* at 81.
institutional settings, including streets and highways, hotels and private houses. Equally diverse are the modes of doing sex work, which could be as bonded labour, as an employee or as self-employed. Kotiswaran disaggregates each of these modes of sex work into three main relational dynamics: the service relation, as between the sex worker and the customer; the labour relation, as between the sex worker and her employer/contractor; and the tenancy relation, as between the sex worker/employer and the owner of the premises used for sex work. Through an ethnographic study of the markedly different sex markets in Tirupati and Kolkata, Kotiswaran shows how the institutional location, the mode of doing sex work and varied combinations of relational dynamics within the sex market have a bearing on the work conditions of sex workers. Further, in every sex market, there are internal stakeholders such as brokers and landlords, and external stakeholders, such as the police, rowdies and local NGOs, that influence how sex work is done.

The picture of sex markets that emerges has not just sex workers and their customers but multiple actors who are mired in complex webs of power relations. Sex workers also do not constitute a uniform category, as we see that the interests of various categories of sex workers are often in conflict. To what extent do governments or even feminists take these complexities into account while proposing regulatory models for sex work?

Across the board, there is a heavy reliance on the powers of criminal law in this regard. Predominantly, the operation of anti-sex work criminal laws in sex markets is described as embodying a set of structural problems of enforcement, be it through unfair targeting of sex workers, shoddy investigation by the police, providing immunity to politicians and other powerful people or the deplorable conditions of custodial homes where ‘rescued’ sex workers are housed. Kotiswaran terms this the “structural bias thesis.”

The experience with the enforcement of the Immoral Traffic Prevention Act (ITPA) in both Tirupati and Kolkata largely validates the structural bias thesis. But the ITPA is part of a wider set of criminal laws deployed by the State to regulate sex markets. Looking at enforcement patterns shows that there are situations where the State refrains from using the anti-sex work criminal law or uses it strategically to achieve certain effects, which Kotiswaran refers to as “de-facto decriminalisation.”

7. Kotiswaran, supra note 1, at 117.
8. Id. at 128.
This is where the structural bias thesis loses its explanatory powers, on account of its formalism. Kotiswaran argues that instead of looking at gaps between the statutory law and its enforcement, it is more fruitful to closely look at methods of enforcement, the reason behind the choice of laws, factors that are taken into consideration while enforcing or not enforcing the ITPA or any other criminal law and the disparate results that it produces, if one wishes to understand the impact of criminal laws on sex markets. Moving away from formalism in this way also allows for capturing the negotiations between the State and sex workers at times, which results in de-facto decriminalisation. For instance, Kotiswaran discusses an episode in Tirupati where the police agreed not to enforce the ITPA against sex workers provided they did not solicit in public spaces or create public nuisance by abusing drugs.

The structural bias thesis tells us how the criminalising of sex work by the ITPA and other laws impacts the bargaining position of sex workers. But, as Kotiswaran shows, sex markets in both Tirupati and Kolkata, have an elaborate set of civil law rules, informal rules, social norms and market practices that operate along with the formal criminal laws in endowing various stakeholders, such as, sex workers, customers, madams, brokers, landlords and the police, with different bargaining powers. For instance, the sex market in Kolkata reveals the significance of tenancy arrangements, both formal and informal, to sex workers’ decisions regarding their mode of work.

The structural bias thesis fails to account for the impact of these informal rules on sex markets. Adopting a legal realist approach, Kotiswaran presents an analysis of the economic consequences of various law reform models, including decriminalisation and legalisation, on a complex brothel based sex market like that in Kolkata. Instead of looking at anti-sex criminal law in isolation, she locates it in the complex network formed by informal rules, social norms, tenancy arrangements and market practices.

Additionally, she assesses the impact of each law reform model on each mode of sex work, involving all the relational dynamics and the main stakeholders. The result is a highly diverse set of consequences for different categories of sex workers operating in different modes, in different institutional settings. The outcome of pursuing legalisation or decriminalisation of sex work therefore might be counter-intuitive, for all one knows.
In contrast to the high level of determinism in the radical feminist invocation of criminal law to regulate sex markets, the legal realist approach outlined by Kotiswaran makes one alert to how sex markets may adapt and respond to particular regulatory models and what unintended consequences these might have on the rights of sex workers.

Given the clenched-fist, ideologically charged nature of the debates on the legal regulation of sex work, both within feminist circles and without, the experimentalist attitude of the book towards law reform is indeed refreshing. Further, given the stifling amount of positivism and formalism in Indian legal academia, the legal realist ethnographic approach that Kotiswaran presents is a major contribution to Indian legal scholarship, which could be used productively to study several other contemporary legal issues. For instance, her legal realist ethnographic method could serve as a template for exploring possibilities for the regulation of another market involving invisible female reproductive labour, namely paid domestic work. Similarly, the debate (patriarchal backlash?) over the supposed ‘misuse’ of anti-domestic violence laws by women, could learn and advance from Kotiswaran’s discussion of enforcement practices of criminal laws and de-facto decriminalisation.

To sum up, this is a brilliant book which would hopefully lead to greater interest and engagement with questions of method in Indian legal scholarship.