Abstract

The fundamental question to reflect on sex trade is whether it is the sex trade itself or the various laws, systems and concepts that regulate sex trade that are serious and dangerous to women's human rights. It has not been historically proven that the policy of criminalizing sex trade is effective in reducing or eradicating it. Rather, it would be said that the criminalization policy against prostitution is causing the formation of another system of suppressing women in prostitution. After a brief review of each country's legislative history on the regulation of prostitution and the legislation policies on prostitution, the problems of the Sex Trade Punishment Act were reviewed focusing on the above decision.

First of all, the current law on the punishment of prostitution in Korea is not completely prohibited nor legal regulatory, but a half-hearted form. The purpose of the law on the punishment of prostitution seems to be "banal," but it defines sex sellers as "a kind of victim of prostitution." The reality is that there is no legal or institutional measure to follow up on the sex trade.

It is also a ambiguity of its purpose. Sound sexuality and morality are determined on the basis of the general not only of members of society, but also of very abstract, ideological, and obscure concepts that change according to times, places, circumstances and values, and even how one can define them is questionable.

The Sex Trade Punishment Law uses the National Penalty Act to secure the sex trend, and solving immoral and antisocial behavior by punishment changes according to changes in social values, and even if the standard is vague, the state cannot exercise its penal rights based on moral values, and even if it recognizes the protection law of sexuality, it is difficult to see the grave danger of sexuality, which is the protection law.

[Keywords] Protection of Sex Moral, Anti Prostitution Act, An Act of Prostitution, Decriminalization, Sexual Self-Determination

1. Intro

In 2016, the Constitutional Court ruled that Article 21 paragraph 1 of the Act on the Punishment of Sex Trade and Other Activities (Amendment to Article 10697 of the Act on the Punishment of Sex Trade, etc.) was not violated as expected by all. In the decision, the Constitutional Court stated that the above provisions did not violate the principle of excessive monetary support in the legitimacy of legislative purposes, appropriateness of means, minimisation of infringement, and balance of legal and legal interests, nor did they violate the right to equality. Of course, for many of these opinions, the inclusion of sex sellers in the category of criminal punishment violates the principle of equality in the Constitution, as some unconstitutional opinions of the two judges, "exercise excessive penalties against the law of supporting excessive fines," and the object of the judgment is against the principle of sexual self-determination and privacy of sex dealers(sellers and
buyers)." The opinions of the nine Constitutional Court justices in the decision do not seem appropriate, even if it is constitutional or unconstitutional, to suggest that it is not a matter of right or wrong, but rather a matter of personal or social belief, values and philosophy. Therefore, it will proceed with discussions based on the premise that the punishment of voluntary prostitution is a matter of legislative policy.

From a liberal point of view, however, it can never be justified because punishing an adult woman for her sexuality for the sake of healthy sexuality is an excessive "Parnalism" idea that seeks to protect her political stereotypes.

In addition, the Constitutional Court has already ruled that intermarriage charges are unconstitutional. In this sense, it is even possible to criticize the decision as a regressive one in some sense. In the following sections, we will briefly review each country's legislative history concerning the regulation of prostitution and the legislation policy on prostitution, and then review the problems of the Prostitution Law, focusing on the above decision.

2. Legislative History of the Regulation of Prostitution

Prostitution began to be defined as a crime subject to criminal punishment after the Act on Prevention of Roles and Other Practices was enacted in 1961. Article 2 of the Act on the Prevention of Roles, etc. defines 'an act of prostitution as taking money or other property profits from an unspecified person or promising them or engaging in sexual activity for other purposes of profit.' Article 4 prohibits the person who violates it from engaging in prostitution or becoming an opponent of it, and Article 14 stipulates that the person who violates it shall be punished with a fine of not more than 30,000 won or less. However, when the anti-prostitution regulations under the Act on the Prevention of Prohibition of Sex Trade, etc. were not able to exercise much normality, and when social issues such as the development of the decadence and pleasure industry and human trafficking emerged seriously after the Seoul Olympics, the Act was revised as amended by Article 4911 in 1995(Article 2 and its counterpart). The revised punishment regulations were maintained until the Act on the Punishment of Prostitution was repealed.

The Sex Trade Punishment Act, enacted under Article 7196 of the Act, stipulated that sex trade should be prohibited and criminalized by including not only sex but also similar sex acts in the sex trade, using the term prostitution instead of the term prostitution(article 4, article 21 paragraph 1). The Sex Trade Punishment Act, as amended by Article 10697 of the Act, changed the definition of prostitution to a promise to accept or accept the part of the agreement(article 2, paragraph 1), and amended some of the wordings to those who sold sex to those who sold sex(article 21 paragraph 1). However, the legal punishment for sex trafficking is the same as that of the anti-prostitution law(Article 21, Clause 1), from the time the Act on the Punishment of Prostitution to the present, including imprisonment of up to one year, imprisonment of a fine of up to 3 million won or fines.

3. Comparative Legal Review

As foregoing, legislation on prostitution is a mixed area of morality, economics and philosophy in the society, and it is quite difficult for a country to define its policies accurately in one position to the extent that they vary from time to time. Policies related to prostitution in countries around the world have various and unique systems of laws depending on real situations, including historical and social and cultural backgrounds, the characteristics of prostitution sites and the government's stance on prostitution. Below, the legislation on prostitution will be classified into categories of abolitionism, legal regulation and prohibitionism, which will give a brief look at the laws of the countries that fall under each system.
3.1. Abolitionism

Abolitionism is a stance to make sex trade illegal or legal by identifying it as providing personal services rather than selling the body[1]. Abolitionism sees sex trade as purely a personal matter, not a subject of prohibition and regulation of public power, and the state recognizes sex trade in certain areas as a profession to ensure free operation and collect taxes. It argues that individuals are free to choose whether to use their bodies as a means of money and sexual satisfaction, and that the choice should not be assessed and despised or imposed criminal sanctions on the basis of a moral majority[2]. As such, it is characteristic of abolitionism not to make moral judgments about prostitution itself.

Today’s France, Ireland, Finland, Spain, the Czech Republic and Denmark take a non-criminalized stance on personal sex trade, as well as the Convention for the Prohibition of the Trafficking of Persons and the Proprietary of the Proprietary, adopted by the United Nations in 1949.

3.1.1. France

In France, the legal principle for prostitution lies in the guarantee of rights to one’s own body. This right extends to the extent that one can use one’s body for economic purposes, and the right to have sexual relations respects one’s privacy, so naturally the rights of prostitution themselves are protected. Only when active solicitation is accompanied can the punishment be punished, which constitutes a misdemeanor. The sex buyer shall not be punished except in the case that the sex seller is underage, and only if it can be found that the sex seller is underage in this case. As such, France specifically makes it a rule not to engage in personal prostitution unless there are human rights abuses or exploitation issues.

Specifically, the Criminal Law revised in 1991 prohibited sex sellers and sex buyers from engaging customers in public places by including those engaging in obscene gestures, attitudes, actions or words, although it was not illegal. In particular, the Public Protection Act, which was amended in 2003, provided that the act of soliciting by any means, such as clothing, posture, or behavior, could be punished with up to two months in prison, making passive solicitation a crime. And by strictly banning pimps, they even punish their families who depend on the income of sex workers. In addition to directly benefiting from sex trafficking, any assistance in prostitution is also considered illegal, with the protection of sex workers, economic benefits from sex workers, income from sex workers, hiring others for sex trafficking or forcing others to engage in prostitution, all subject to up to seven years in prison.

3.1.2. Germany

In 2001, the German House of Representatives passed a bill that, with the approval of a majority, recognizes sex trade as a legitimate occupation and grants social security benefits and labor rights to sex workers, including health insurance, unemployment benefits and pension benefits (Neufassung vom 20. Dezember Regelung der Rechtsverhältnisse der Prostitution). Under the law, sex trade is not regarded as an activity of vulgarity, but is recognized as a legitimate profession, and all sexual workers’ employment and supply have been legalized. Individuals can also hire sex-selling women, but they must go as far as not to harm the individual and economic independence of the workers. However, German criminal law punishes the commission for managing or interfering in the lives of sex-selling women. Germany, meanwhile, has public brothels authorized to reside for sex trade in each city, and federal states have the right to ban sex trade in certain areas or at certain times.

3.2. Legal regulatoryism

Legal regulatoryism acknowledges that prostitution can be morally reprehensible but at the same time socially rooted, and understands that prostitution is an unavoidable phenomenon and a “necessary evil.” Since prostitution is an entity that harms social order or public health, it makes maintaining a safe society from prostitution a legislative goal[3]. Legal regulatoryism has the following view on prostitution. First, it is reasonable to criminalize the voluntary simple sex trade as
there is a risk that state intervention in the privacy of individuals will be abused. Second, the expansion of sexually transmitted diseases, including AIDS, can be reduced through medical examination and medical monitoring of women who sell sex. Third, it can reduce sex crimes. Fourth, it can prevent prostitution crimes forced by the management and supervision of prostitution businesses. Fifth, we can isolate sex trade in certain areas to protect living areas in a sound manner[4]. Legal regulatoryism, however, differs from abolitionism in that it does not have the right as a worker and the state does not take responsibility for ensuring its working conditions, as it is pointed out that the state takes over control of sex trafficking, not as a pimp, only protects society from prostitution, and does not recognize sex trade as a profession or a right.

3.2.1. The United Kingdom

The basic legal regulations on prostitution are under the Sex Offence Act 1956 and the Street Offices Act 1959. The former stipulates various crimes related to prostitution, such as the operation of prostitution businesses, exploitation and prostitution, while the latter is a law aimed at countering public unlawful interference caused by prostitution. The Street Crimes Act, which regulates prostitution directly, punishes those who sell sex on their own in recognition of their personal activities and those who sell sex in the home for soliciting, advertising, and contact between sex sellers and sex buyers in public factories. In other words, if a person wandered around a street or a public place for the purpose of selling sex or soliciting sex at that place, he shall be punished with a fine. Instead of lowering the social visibility of prostitution, the laws are said to have covered up illegal sex trade and contributed to making prostitution itself more commercial.

3.2.2. Canada

While it is not illegal in Canada, most prostitution-related activities, such as prostitution in the sex trade industry, solicitation in public places, and exchange of doctors for sex trade-related purposes were prohibited, making it impossible to actually have sex trade. However, the sex trade law was declared unconstitutional on September 28, 2010. Prostitution was not illegal, but it was responsible for making sex workers face risks in that it makes most aspects related to prostitution illegal. Ontario's High Court does not comply with the essential principles of justice as the three provisions of the Act that prohibit the possession of prostitution, the living of prostitution by others, and the prohibition of communication of intention to prostitution are inconsistent with the principles of essential justice. They also pointed out that they are forcing sex workers to choose between one's own preferences and the right to security, which is guaranteed under the Canadian Charter of Rights and Freedoms.

3.3. Prohibitionism

In banalism, it identifies sex trade as a "social evil" that should be eradicated, and thus bans the practice of profiting from prostitution, recruitment and prostitution. In other words, promote voluntary prostitution, including prostitution, including good offices actions to punish sex workers in related activities. In the banalism aimed at eradicating prostitution, sex trade is recognized as an infringement of women's rights and acts of violence stemming from male patriarchal power, and it is recognized as a social issue that accelerates the sexualization of human beings, the main body of dignity and value, and distorts the normal flow of funds and labor force.

Today, countries that ban and punish prostitution itself include South Korea, China, Vietnam, some states in the Philippines and the United States, Japan and Taiwan among the parties that are not two-sided, and Sweden, Norway and Iceland that only punish sex buyers[5].

3.3.1. Japan

Japan has the most similar legislative system to our country. However, although Japan legally stipulates that all sales and purchase activities are prohibited, there is no punishment for certain types of sex acts, and no actual crackdown or punishment is taken[6].
Japan’s anti-prostitution law is similar to that of Korea in terms of the view that prostitution damages one’s dignity as a human being and disrupts society’s good customs against sexual morality, but it is distinct in that it focuses on the act of encouraging sex trade when it comes to punishment.

3.3.2. Sweden

In Sweden, the Proposition on the Purchase of Sex Service was enacted in 1999. Prostitution is not socially desirable, but sex sellers are victims of gender inequality, so they cannot be punished, only to reduce violence against women caused by prostitution by punishing men who try to satisfy their sexual desires by exploiting women’s unequal status. The law defines sex trade as a violation of human rights against women, and thus is a model for introducing the concept of victims of prostitution in Korea’s Sex Trade Punishment Act by enacting a law that punishes only sex buyers, rather than punishing women as victims of prostitution.

4. The Problem of the Sex Trade Punishment Law

4.1. Limitations of symbolic legislation

The current law on the punishment of prostitution in Korea is not completely prohibited nor legal regulatory, but it can be said to be a half way. The purpose of the law on the punishment of prostitution seems to be "banal," but it defines sex sellers as "a kind of victim of prostitution." The reality is that there is no legal or institutional measure to follow up on the sex trade. The current law on the punishment of prostitution is symbolic legislation, and the reason it gives symbolism to penal codes even though it is not effective is because the majority of lawmakers’ emotional thinking that a long-term change of consciousness will take place among the public has been involved[7]. And although the Sex Trade Punishment Act was enacted by women’s organizations and the Ministry of Gender Equality, rather than by law enforcement scholars and working-level officials, and for this reason, the law, which does not take into account the ability to protect the sex trade, does not have the intended effect, and in the long run, it seems highly likely that it will become a symbolic legislation such as the Act on the Prevention of the Act on the Prevention of Illegal Act[8].

As such, the Sex Trade Punishment Act was enacted based on a momentary grandiose rather than a deep criminal policy review of the root cause and background of the crime, which is the characteristic of the special criminal law. This solution reveals its limitations as a symbolic criminal act in relation to the effectiveness of the norm, given that it has found no effective means of sanction to enforce the norm other than by defining sex trade as a crime. This particular law has a symbolic function to simply suppress and reduce prohibited acts without any effect, and from a criminal policy point of view, it is an irrational law, but has certain social and political functions[9]. In other words, it can be dismissed as a policy of criminal response for political purposes, not an effective response to a specific crime, and it can bring about a crisis of criminal justice by encouraging the intervention of punishment for abstract risks rather than actual infringement of legal interests by first protecting the universal legal interests of social integration and public interest rather than individual interests[10].

In fact, in the case of simple prostitution under the Sex Trade Punishment Act, it is said to be punishable, but in practice, the law only stipulates to the outside world the nation’s ban on prostitution because it is a crime and a wrong act, which is quite lenient compared to other crimes such as suspension of indictment, disposition of protection and fines.

4.2. Justification of purpose

The legislative purpose of the Sex Trade Punishment Act to ban voluntary prostitution altogether is beyond the limit for the purposes of basic rights restrictions, given the circumstances of the act to root out such acts as trafficking or forcing or exploiting prostitution for purposes of prostitution and to protect. The Act shows the indeterminacy of the law, which cannot distinguish between the law and other laws by stipulating that the
purposes set forth in this Act are only general ideologies that all laws have in common. Furthermore, it is common knowledge that the purpose of criminal punishment for any act is to eradicate such acts. Moreover, the legislative purpose of punishing sex sellers to protect their human dignity and personal autonomy is hardly acceptable in itself. After all, the current purpose of punishing prostitution in Korea is a problem that cannot be drawn up by the law alone[11]. The most important foundation of criminal justice lies in the democratic request that the state shall punish on the basis of the will of the representative of the people, and therefore the punishment based on the criminal law shall be based on the will of the people. In other words, certain religions, ethics, and morality should not be protected[12].

Society's maintenance is not observed by its members sharing one dominant view of values, but by acknowledging that each individual has different values and tolerating the actions of those with different values. Just as the values and content of happiness pursued by different people differ, so does the outward expression of sexual desire. A person who has a very strict conception of sex may think that the act of selling sex is a commercialization of himself and is by no means acceptable as a recognition of moral slavery. However, not everyone has such a strict sense of morality, and voluntary prostitution by the union of free doctors among adults is possible. Voluntary prostitution is the sex seller's decision to have sex with the other party on his own free will for his own benefit, not to surrender human character and body to the power of capital. Prostitution is also less antisocial because it is done under an agreement between sex sellers and sex buyers. Also, sex trade is selling sexual services, not human bodies or personalities, within such limits, sex trade is not fundamentally different from labor provided by other services. The claim that prostitution infringes on sex sellers’ rights by commercializing sex, damages the sex market, and deforms the industrial structure is not an attribute of prostitution itself, but a result of social stigma against prostitution[13]. Sound sexuality and morality are determined on the basis of the general not only of members of society, but also of very abstract, ideological, and obscure concepts that change according to times, places, circumstances and values, and even how one can define them is questionable. With the rapid spread of individualism and open-door thinking, it is hard to conclude that the general perception among members of our society is that certain sex acts are harmful to sound sexuality and morality just because they are made by money or other means. The state's intervention in the cause of establishing a sound sex habit and sexual morality in the inner circle of sex life, which should establish order on its own, ultimately identifies and enforces certain moral principles of the legislator, which are clearly opposed to our constitutional values neutral in gender, religion, social status, and thus is not based on gender-based gender equality and gender-biological thinking.

4.3. The minimunimy of encroachment

The Sex Trade Punishment Law uses the National Penalty Act to secure the sex trend, and solving immoral and antisocial behavior by punishment changes according to changes in social values, and even if the standard is vague, the state cannot exercise its penal rights based on moral values, and even if it recognizes the protection law of sexuality, it is difficult to see the grave danger of sexuality, which is the protection law. The law also divides sex sellers into prostitutes and victims of prostitution and does not punish the latter, which is limited in that it opens the possibility of selective and arbitrary law enforcement, which can lead to distrust among the public, and that it maintains the attitude of the anti-prostitution law, which ultimately makes prostitutes subject to moral censure by punishing them on the premise of voluntary execution. Such discriminatory criminalization results in the criminalization of the right to refuse to testify under the Constitution by forcing a prostitute to avoid being punished,
while such an environment could become entrenched by the failure to sue the sexual predators for fear of punishment.

The trend of modern criminal law is a trend toward non-criminalization of privacy. It was in this context that the Constitutional Court ruled unconstitutional the intermarriage or adultery law, which was stipulated in the criminal code in the past. In particular, there is no social hazard in the case of a judgment clause, as opposed to a two-year jail term for adultery, the latter is a sentence of up to one year in prison or a fine of up to 3 million won or less, and in the case of adultery, it is a violation of the marriage system and family system or a risk of such an act in violation of its sexual integrity and there is no social harm in the case of the judgment clause. As such, both in the real law and in the law-enforcement process of society, the court considers the clause to be lighter than a crime of adultery. Therefore, considering why the Constitutional Court has already ruled the adultery law unconstitutional, conditions now appear mature enough to make sex trafficking non-criminalized. However, the argument that the non-criminalization of prostitution does not mean the legalization of prostitution, and that non-criminalization will undermine the soundness of society by encouraging and spreading sex trade is only a logical leap forward.

The best solution to the sex trade issue is to help women escape prostitution through the expansion of social security and social welfare policies. Although the possibility of a protective disposal for sex sellers is said to be minimizing the exercise of the right to punish sex sellers, the protection of sex sellers under the Prostitution Act is not a fundamental solution because such qualitative infrastructure is not established even though it should be effective in combination with guidance, treatment and counseling. Some of the legislation’s laws allow certain countries to sell sex or make sex uncriminalized, demonstrating that there is a more relaxed means of limiting basic rights than punishing sex traffickers. Since it is possible to allow sex sellers to sell sex within certain areas for only a certain amount of time without criminalizing them, the Sex Trade Punishment Law would also violate the principle of least infringement[14].

4.4. Abolitionism

The Sex Trade Punishment Law violates the right to equality under the Constitution, given that it only punishes sex offenders against unspecified people and does not punish prostitution, so-called congratulatory acts or contracts with local offices. In this case, an unspecified person means that the other party is not limited to a special relationship, and the person combined into a special relationship is not an unspecified person. In this regard, it does not mean that an unspecified person in the sex trade is an unspecified person in principle, but that he or she randomly selects the other person from among the unspecified men, focuses on the price and does not value the specificity of the other person.

In a related move, the Supreme Court recently said that it is difficult to conclude that anyone with the financial resources to help themselves had met with a doctor who was willing to engage in sex acts and receive bribes, adding that taking bribes and committing sexual acts against certain people is not subject to punishment. However, there is no reasonable reason to treat certain sex acts with a promise to accept or accept bribes or other property benefits differently only when the Sex Trade Punishment Act is against an unspecified person, even though it is essentially the same sex trade, whether it is against a specific person or an unspecified person. In the decision, the Constitutional Court’s majority opinion said that prostitution against unspecified people is far more harmful than prostitution against certain people, which is nothing but groundless social prejudice. Rather, it would be extremely unfair for the law to result in a social embarrassment by punishing only those who have sex trafficking against an unspecified person, for example, expensive prostitution against a certain person, such as a congratulatory act or a foreign partner’s contract or a celebrity’s sponsorship contract, but only relatively cheap and less harmful traditional prostitution against an unspecified small number of citizens.
5. Outro

The fundamental question that should be reflected in relation to prostitution is whether the factors and backgrounds that seriously and imperil the human rights of women in prostitution are the sex trade itself or its various laws, systems and concepts that regulate sex trade. It has not been historically proven that the policy of criminalizing sex trade is effective in reducing or eradicating it. Rather, it would be said that the criminalization policy against prostitution is causing the formation of another system of suppressing women in prostitution.

In response to the proposal made by the National Assembly Legislation and Judiciary Committee to the Ministry of Justice, the ministry said in its review of the proposal made by the Ministry of Justice, 'We believe that strengthening punishment without sufficient discussion and eradication of sex-related laws can undermine the normality and effectiveness of the law, and we oppose the legislation as it is necessary to reflect it in the process of revising the Act on the Prevention of Illegal Act.' But in the end, the Sex Trade Punishment Law was enacted, and now we are facing the side effects we had predicted in the past. Side effects of the Prostitution Punishment Law have raised the issue of the effects of the variety of prostitution and ballooning, especially as the number of sex trade has soared, it is now out of the limited space of business. As prostitution via the Internet is being openly conducted, including minors, and the number of men going abroad to buy sex has increased, it has become impossible to identify and crack down on negative and intelligent sex trade throughout society. Even if you look at this, you can see how unrealistic the current legal system is.

In 2009, the Constitutional Court said in relation to setting limits on state intervention in private areas, "In principle, lawmakers' broad right to form legislation is recognized as a crime and what punishment to impose, but, unlike laws that regulate areas of privacy, such as occupational and property areas that do not. This is because, due to the nature of the right and freedom, the state should refrain from interference and regulation as much as possible and leave the exercise of the right of state punishment to the individual's self-determination, and the exercise of the right of state punishment should be limited to the minimum extent necessary as an ultimate means only in cases where the grave danger to legal and interests is evident. Therefore, unlike other living areas, stricter standards should be applied in determining the need for criminal protection and punishment, especially in the area of sexual privacy," he said, emphasizing the supplemental or ultimate means of national intervention in the private sphere. In addition, when it comes to judging the unconstitutionality of the intermarriage charge regulation, "There are areas in our living area where the law will govern itself, but there are areas that should be left to moral law. Laws should not intrude recklessly into areas that should be left to moral codes that fall under higher standards. Therefore, no matter what kind of sexual activity and love an adult may have, it is in principle within the domain of the individual's freedom, but only if the law regulates it when it is expressed outwardly and clearly harms society. Those who commit adultery under the guise of marriage will be subject to ethical and moral social criticism and sanctions in various ways, including at home, society, and work, so there is no need for the criminal law to interfere by tracing each of these activities that are essentially part of the privacy of individuals. Therefore, it would be sufficient to allow an offender to be punished only when he or she causes social harm such as violence, intimidation, or coercion of power in sexual decisions of adult women, and in other cases, he or she should leave the offender to their own responsibility and not in the field of intervention by the criminal law," the court said in a statement on the same issue of restricting state intervention in the field of sexual rights.

6. References

6.1. Journal articles
6.2. Thesis degree


6.3. Books