

# 行政院國家科學委員會專題研究計畫 期末報告

## 我國性交易產業之立法與管制—從女性主義探討娼妓除罪化問題 (GM01)

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中文摘要：2009年，大法官釋字第666號解釋認定「罰娼不罰嫖」的社會秩序維護法違憲，2011年，我國社會秩序維護法針對性交易施行新管制措施，改採設立專區的方式，讓台灣正式進入「專區內解禁，專區外嚴禁」的時代。新措施乍看似乎讓娼與嫖站在同一線，專區內雙方皆不罰，專區外雙方皆罰，但事實上目前仍未有任何縣市願意設立專區，台灣實質上成了一個娼嫖皆罰的國家。此一匆促立法引發各界批評，不僅加深兩性之刻板印象，更使得娼妓被污名化，不利於社會兩性平等之促進。

對於性交易的觀點，女性主義者間爭論紛紛，有認為性交易是男性主宰女性的結果，不僅販賣性工作者的身體，更使得男性霸權之形象屹立不搖；但有相反的論者認為，從事性工作的女性，不僅有能力自立更生，更能翻轉男性霸權，進而解放女性。簡而言之，探討性交易的管制措施有其重要性，因其不僅可反映社會對性別角色的樣貌，更能深入研究男與女的兩性關係，進而達到性別正義的理想。

本研究將透過女性主義之論述與思想，探勘我國性交易管制的合法性與正當性；並藉由文獻回顧、法規比較和實證研究，針對各式管制措施進行探討，進而研析性工作者的人權、平等權和工作權，並同時考量社會區域管制安全和全體國民健康，促進兩性平等與和諧。本研究將會為台灣提出本土化的性交易管制措施，以兼顧理想性和實用性。

中文關鍵詞：女性主義、性別正義、釋字第666號、社會秩序維護法、性交易管制、娼妓

英文摘要：In 2009, J. Y. Interpretation No. 666 held that the regulation of prostitution under the Social Order Maintenance Act was unconstitutional. In 2011, the new Social Order Maintenance implemented a new regulation, which allows the local governments to settle and mark out the area of 'red-light' districts, where sexual transactions are permissible. The new regulation seems to equalize both sex workers and the johns, but as a matter of fact, until now, there is still no local government willing to set the district. As a result, Taiwan has become a country that outlaws prostitution. This hasty enactment has drawn all varieties of criticism. Not only does this new law reinforce the stereotypes of gender but also

stigmatizes prostitution, which demolishes the equalization of male and female.

There has been a rough debate about sex work around feminists. Some believe, prostitution is the outcome of men dominating women, since sex workers sell their body and also strengthen the idea of men's power. However, some reckon, sex workers not only have the ability to stand on their own, but also invert the men's dominance. Therefore, prostitution will liberate women. In short, it's significant to discuss about the legitimacy of prostitution regulation, because the regulation not only reflects the image of the society toward gender, also gives us a chance to go deep into the relation between sex and gender.

This study will, by means of feminism, collective bibliography, comparative regulations and empirical study, survey the legality and legitimacy of our regulation of prostitution. By analyzing all diversities of regulations, this study will emphasize on the human rights, equal rights and work rights of sex workers, at the same time, putting social security and public health into consideration. On purpose of sexual equality and harmony, our mission is to bring up a local prostitution regulation, which strikes a balance between idealism and practicalism.

英文關鍵詞： Feminism, sexual justice, J. Y. Interpretation No. 666, Social Order Maintenance Act, regulation of sex work, prostitution

## 壹、前言

民國 98 年 11 月大法官作出釋字第 666 號解釋，針對當時社會秩序維護法第 80 條第一項第一款意圖得利與人為姦、宿處罰鍰之規定作出違憲解釋，其立論基礎係基於憲法的七條平等原則。該解釋秉於系爭規定不認性交易中支付對價之一方具有非難性，卻處罰迫於經濟弱勢而從事性交易之女性，無異於僅針對參與性交易之女性而為管制處罰，致其業已窘困之處境更為不利。大法官因該條與其立法目的顯然欠缺實質關聯，且與憲法平等原則有違，故作出違憲解釋，並給予立法者兩年緩衝時間來擬定性交易之相關管制措施。

民國 100 年 11 月 4 日，為因應大法官釋字 666 號解釋所新修的社會秩序維護法即將開始施行，修正公布第 80 條以及增訂第 91 條之一的規定，廢除原先「罰娼不罰嫖」之政策，並改為透過地方政府訂定自治條款，由地方依據各地情況自行設立性交易之合法專區，但專區以外之地區則娼嫖皆罰。

在大法官作出釋字 666 號後，社會、媒體與學術界引發一陣熱烈討論，有主張男女實質平等，有主張工作權，或以人性尊嚴為首主張身體自主權、性自主權等等，不外乎針對性產業得受憲法保障提供各種不同的主張。惟社會秩序維護法（以下簡稱社維法）第 91 條之一規定，直轄市、縣市政府得因地制宜，制定自治條例，規劃得從事性交易之區域及其管理。本條貌似承認性交易之合法存在，並交由縣市政府去彈性調整設置地方性的性專區，賦予地方自治權，期能有效合理管理性產業；但社維法修法時至今日約有一年的期間，卻無任何縣市政府針對性專區制定自治條例，甚有地方首長以「民風淳樸」之說聲稱該地區無制定之必要，進而使得我國成為一律「娼嫖皆罰」之現象。

大法官釋字 666 號曖昧地處理性交易產業之合法性，似乎不勇於接觸這塊敏感區域，而立法機關表面開朗之立法政策，實仍未能突破性別刻板印象，以地方自治之名目將燙手山芋拋給地方機關。弔詭的是，地方政府似多礙於道德壓力或是選票壓力，皆無意願劃定性專區，使得這場本可讓社會理性辯論的良機倒頭來成為大法官與地方政府的一場戲，非但不能解決問題，更讓行政裁罰持續剝削弱勢性工作者們的劇碼不停上演。

## 貳、研究目的

娼妓在世界各地早已不是新鮮事，甚而古今中外皆無法禁絕此種對價性交易形態，歷史經驗告訴我們高壓強制禁止只會使其走向地下化，成為犯罪的溫床，不僅增添國家執法成本，更造成貶化弱勢者的現象。若仔細觀察從事性工作者的情形，不難發現性工作者多為弱勢女性非自願地出賣身體，不論是情感上的壓迫還是經濟上的壓迫，甚至是強制力的壓迫，在父權宰制的性別階級下，

女性多成為「天生」的受害者<sup>1</sup>。此外，性產業的高度爭議性不僅止於善良風俗，由於高暴利的特性，連帶的強盜<sup>2</sup>、毒品、性病、雛妓、人口販運、組織犯罪等都替娼妓這份工作貼上無數的污名標籤。

究竟應採取何種管制政策，「罰嫖不罰娼」、「罰娼不罰嫖」、「娼嫖皆不罰」還是「娼嫖皆罰」，都只是處理罰責上的平等與否，衡量處罰買賣雙方之利益和正當性而已。本文認為，由於國民對於性的價值觀、道德觀在各方文化交疊衝擊的過程中不斷地演變，性別和身體自主權的高漲已非固定而為浮動的現象，且礙於長期舊有父權體制下的男性宰制形態，娼妓與性別平等的爭論似乎難以脫鉤。真正的核心問題還是須以鳥瞰的方式來審視才能得到綜觀性解答。因此，不同於大法官釋字 666 號的立論基礎，本文更嘗試以女性主義的角度來檢視性產業合法與否的正當性；至於裁罰的對象、基準，甚而管制機制，則可作為平衡買賣雙方利益的途徑，亦可作為本文結論之配套措施。

社會秩序維護法自民國 100 年 11 月修正及增訂以來，已過二個年頭，究竟新法所佈局的自治性專區管制是否符合我國現今娼妓生態，其實已可從執法層面略見端倪。由於至今仍未見地方政府劃定性專區，隨著新聞仍持續報導破獲性交易行為，其中受裁罰者多為經濟弱勢或年紀已高的女性性工作者，因此造成警調和法院不僅剝奪娼妓的性工作權，更使其經濟自主性雪上加霜。而罰嫖的部份更另增警界的負擔，因性交易的破獲難度本較為高，不僅無法落實「娼嫖皆罰」，更增加警察取締成本、消耗人力資源。本文期望能擷取各界實務工作者執行上的困難，並透過文獻的蒐集和資料的彙整，來探尋現行法上的缺失，並進而提出可為實務界所接受並執行的本土化管制措施，以作為將來修法方向之參考。

## 參、文獻探討

### 一、基本權

#### (一) 工作權

究竟性工作可否作為「工作」？性工作權可否受憲法第十五條工作權的保障？由於早期我國設有公娼制度，並行之有年，但於 1997 年時台北市市長陳水扁宣布廢娼，且緩衝期不到一個禮拜，隨著婦權運動和女性主義高漲，造成當時公娼上街反抗，並激起妓權運動，故以「工作」的視角來看待娼妓的相關學術文章所在多有，以下擇其要予以回顧介紹：

<sup>1</sup> 「性侵流鶯被逮，開庭當天又犯案」，聯合報，2012 年 11 月 23 日。聯合報網站：<http://udn.com/NEWS/SOCIETY/SOC3/7518231.shtml>（最後點閱日期：2012 年 12 月 10 日）。

<sup>2</sup> 「謊稱性交易，跛腳男劫流鶯」，蘋果日報，頭條，2012 年 6 月 13 日。蘋果日報網站：<http://www.appledaily.com.tw/appledaily/article/headline/20120613/34296132>（最後點閱日期：2012 年 12 月 10 日）。

1997年，鑒於社會對於「廢娼」的要求逐漸浮上台面，當時台北市市長陳水扁決定下令廢公娼，但因緩衝期過短，於是公娼們以小公娼挑戰大市長之姿走上街頭，發起妓權運動，並進一步讓社會思考「廢娼事件」的公共政策問題。公娼事件呈現了幾個意義：台灣究竟要採用什麼樣的性產業管制政策，賣淫刑事化是否正確；地方機關與中央政府間法律鴻溝日益惡化；台灣政黨鬥爭已淹沒了人民的法定權益，難以掩飾台灣民主政治的惡質發展。縱然繼任台北市市長馬英九將緩衝期延長為兩年，讓公娼們有轉業的空間與時間，但公娼被廢，實代表著一項工作自由權被剝奪，而許多勞工和工人基於同為勞工團體之立場，也都相繼表態支持公娼，勞工與公娼的相遇，也使公娼跨越了另一種界限，更使得「性工作」這份職業工作權漸漸明朗化<sup>3</sup>。

當然，反對的聲浪也不曾退潮，亦有學者提出「性工作不是真正工作」的標準與反證例子，其中即以「身體的直接使用」作為判準來檢驗各種性工作。賣淫的特色包含出賣自我人格和賣身，這也是質疑「性工作是否為真正工作」的核心假設，因性工作不僅只是單純的勞務交換，性工作者本身身體就正是被消費的客體，一般勞務的工人是可以被機器人取代的，但性工作者卻不能被充氣娃娃取代。但亦有針對以上標準而舉出許多反例來挑戰該種架設建構，因現代性活動往往不僅只有單一的性目的，甚至有些未必有性目的，故所謂的「性交易」可以多樣詮釋。因此，傳統性工作所建構的「反例」會持續增加，也就是能呈現性自主的性工作形態逐漸增長，而賦予性工作正面的意義將有利於從事性勞動的主體，也可以解決性產業中不合理的現象<sup>4</sup>。

若從「勞動權」、「工作權」的角度出發，觀察性產業與性別化的勞動市場流動脈絡，可發現「從工廠到娼館」的命題與台灣的現象契合，顯現性別化的勞動市場為台灣的性產業儲備大量的性勞動力。早期低教育程度的女工為協助家庭脫貧而從娼，且於八〇年代台灣產業轉型，許多女性轉向服務業部門，這些女工亦隨同流轉於底層服務業間<sup>5</sup>。女性從事性工作的原因很多元，例如，追求獨立、以孝之名、權力、好玩或金錢等等，實證研究證實貧窮並不足以驅使她們從事性交易，且值得注意的一點是，西方解放主義所解釋的個體性表達自由的體現似亦非台灣女性從娼的主要原因<sup>6</sup>。

有些學者試著以實證研究的方式，推翻以往多被描繪成女性無力自主或反抗的娼妓既定圖像。其訪談成果顯示許多性工作者早已在這個看似缺乏性別善意的場域中發展出頗為自主的力量與能動性，甚至將這份「工作」當成「專

<sup>3</sup> 日日春關懷互助協會，與娼同行，翻牆越界，巨流圖書公司，2002年1月。

<sup>4</sup> 甯應斌，性工作是否為「工作」？—馬克斯的商品論與性工作的社會建構論，台灣社會研究季刊第四十六期，2002年6月，頁87-139。

<sup>5</sup> Monica R. Moukalif, See No Evil: Applying a Labor Lens to Prostitute Organization, 20 Hastings Women's L. J. 253 (2009).

<sup>6</sup> 陳美華，「從娼」作為生存策略—性別化的勞動市場、家庭與權力遊戲，女學學誌：婦女與性別研究第24期，2007年12月，頁47-101。

業」，以專業的操演方式來塑造積極操控的策略<sup>7</sup>。性工作者藉著專業自主的工作態度，以及對自身身體、「性」的自豪，來維護自己專業身分不被污名化，甚至進而發展商業策略和自我培力，這些現象早已不同於以往社會對性工作者的印象，並已隱約地逐漸壯大其脈動，儲存主體「工作」能量。

反對娼妓合法化者，有認為性產業根本就不得作為一份職業，因性產業本身的特殊爭議性，殊難想像性產業的內容能包含職業倫理道德、工作安全、職前訓練、勞工保險甚至是事業的成就與滿足等，所以根本性地否認性產業在工作權中的爭辯。但支持娼妓合法化者，則認為本於身體自主權、性自主權、人類基本需求、自我經濟獨立與培力等，沒有理由否定性工作之合法性<sup>8</sup>，且既為兩相情願之成年性行為，實無必要以法排除之。

## （二）平等權

除了工作權外，針對性工作之合法性與否，亦可從平等權來處理，此種基本權的面向亦是大法官釋字第 666 號解釋所切入的面向。該號解釋認為修正前的社會秩序維護法第 80 條第 1 項第 1 款僅處罰意圖得利之性交易一方，而不處罰消費之相對人，法律上已形成差別待遇，與憲法第 7 條平等原則相違背。

按性交易行為如何管制及應否處罰，固屬立法裁量之範圍，社會秩序維護法係以處行政罰之方式為管制手段，而系爭規定明文禁止性交易行為，則其對於從事性交易之行為人，僅處罰意圖得利之一方，而不處罰支付對價之相對人，並以主觀上有無意圖得利作為是否處罰之標準，法律上已形成差別待遇，系爭規定之立法目的既在維護國民健康與善良風俗，且性交易乃由意圖得利之一方與支付對價之相對人共同完成，雖意圖得利而為性交易之一方可能連續為之，致其性行為對象與範圍廣泛且不確定，固與支付對價之相對人有別，然此等事實及經驗上之差異並不影響其共同完成性交易行為之本質，自不足以作為是否處罰之差別待遇之正當理由，其雙方在法律上之評價應屬一致。

再者，系爭規定既不認性交易中支付對價之一方有可非難，卻處罰性交易圖利之一方，鑑諸性交易圖利之一方多為女性之現況，此無異幾僅針對參與性交易之女性而為管制處罰，尤以部分迫於社會經濟弱勢而從事性交易之女性，往往因系爭規定受處罰，致其業已窘困之處境更為不利。系爭規定以主觀上有無意圖得利，作為是否處罰之差別待遇標準，與上述立法目的間顯然欠缺實質關聯，自與憲法第七條之平等原則有違<sup>9</sup>。

惟，貌似為性工作者鳴起勝利號角的釋字第 666 號解釋，其實是大法官用來迴避「自由權」之迂迴手段，藉以閉口不談議題的核心，避免觸碰性工作的實

<sup>7</sup> 何春蕙，自我培力與專業操演：與台灣性工作者的對話，台灣社會研究季刊第 41 期，2001 年三月，頁 1-51。

<sup>8</sup> See Amalia Lucia Cabezas, Legal Challenges to and by Sex Workers / Prostitutes, 48 CLEV. ST. L. REV. 79 (2000).

<sup>9</sup> 司法院釋字第 666 號解釋理由書。

體道德價值<sup>10</sup>。若如同大法官以平等權的角度切入，似較限縮性地談論現行法下針對性交易的「管制措施」之妥當與否，有如蜻蜓點水般輕觸問題外圍的技術性事項，而非問題核心的道德非難，此策略性的手段亦可從部份大法官的意見書中探出端倪。許宗力大法官與葉百修大法官的協同意見書分別指明從「自由權」和「平等權」的角度觀察，以補充解釋文的不足。此外，陳新民大法官則根本質疑多數意見未挑戰性交易行為本身之合憲性，批評解釋文僅以平等權的角度而認定系爭條文違憲，但未解決核心問題。許玉秀大法官於部份協同意見書中則認為核心問題應係性交易是否違反比例原則，而非性交易是否違反平等原則，直接挑戰性交易的道德本質。林錫堯、陳敏、陳春生大法官協同意見書亦認為重點應在「自由權」侵害之合憲性審查，再由比例原則去探討立法管制措施之裁量是否違憲，不得僅因違反平等原則而認定須處罰性交易行為雙方當事人始為合憲。

本釋字採用「平等權」來審查條文合憲與否，其實容易將答案限縮於「雙方皆罰」或是「雙方皆不罰」，且多數意見大法官更將問題拋給地方政府，由地方政府自行訂定管制措施，似乎是希望能由代表多數民意的立法者來決定，以彰顯現今共通的社會觀感。大法官或許是為了避免間接否定先前肯認以善良風俗為由之性管制相關解釋<sup>11</sup>，亦為了避免面臨社會輿論之壓力，故採取較為保守而間接的方式，但如此「閉口」其實是讓立法者和地方政府更無所適從。

## 二、女性主義

### (一) 女性主義起源

女性主義作為一種思考分析的方法，以推翻自古父權社會宰制女性的現象為目標，顛覆性地挑戰日常生活中的每個性別刻板印象，致力於消弭性別不公、性別歧視、性別扭曲和性別既定形象<sup>12</sup>，以求達到性別友善的環境。雖然女性主義派別眾多，支流分歧，但對於女性自由意志的展現可多是相同看待，故本文嘗試以女性主義的角度，將文獻整理焦點放在女性個體、經濟獨立和性自主，藉以加強本文針對「性工作」之論述。

女性迫於長期受到壓迫宰制，困在具有父權色彩的婚姻禁錮中，因而逐漸發展出女性主義，其目的在喚起性別意識，共同促進性別平等，保障女性權益。由於女性主義學者向來將性犯罪視為父權體制存在的象徵，尤其是性侵害犯罪中主與被的特徵，因此針對性犯罪的學理有極為多元的爭辯<sup>13</sup>。男女生理上的功

<sup>10</sup> 吳佳樺，難以置信的真相—論釋字第 666 號解釋與社會變遷，台北大學法學論叢，第 84 期，2012 年 7 月 31 日。

<sup>11</sup> 釋字第 407、554、617、623 號解釋。

<sup>12</sup> See Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966- 1974*, 28 *Law & Hist. Rev.* 577 (2010).

<sup>13</sup> Amy Farrell, Geoff Ward & Danielle Rousseau, *Sections of Gender and Race in Federal Sentencing: Examining Court Contexts and The Effects of Representative Court Authorities*, 14 *JGRJ* 85 (2010).

能差異和生理特質向來是父權主義一派傳統而有力的論述，但反對者則多以傳統母系社會或現代平等社會來反駁父權主義針對生理功能所標籤的意義。

## (二) 女性主義流派

自由女性主義作為女性主義的濫觴，其係在鼓舞女性對內充實精神獨立，對外加強生理和經濟獨立<sup>14</sup>，企圖營造與男性公平競爭的環境。自由女性主義強調「自由意志」的培養，聚焦在自我、自主以及自由，期許女性不在以「他」作為出發點，而是以「我」與「她」為目標朝外發展<sup>15</sup>。雖說自由女性主義敲響女性意識的晨鐘，但仍受到不少批評，因為自由女性主義的平等量尺其實建立在男性的標準上，女性主義被鼓勵朝向性別光譜的最「男」端，因此最多只能算是形式上的平等，而非實質上的平等。依據自由女性主義的理論，在性別侵害的情況下，「硬碰硬」的較勁對於女性其實並無助益。

基進女性主義則富有強烈批判男性的色彩，披露男性長期以「性」為手段，迫使女性在社會上永遠處於劣勢的地位<sup>16</sup>。不同於自由女性主義倡導女性學習男性，基進女性主義者希望能根本破壞父權體制，要重新建構性的概念，消弭男女傳統性別印象，秉於先有破壞才能建設的想法，重新以女性的觀點來建構「性」。基進女性主義認為性騷擾、性侵害、色情和物化都是因父權體制而存在，這些性的迫害形態都是為了助長男性間的弱肉強食，象徵著男性的勇猛與強悍。但批評者有論，仍有女性透過性而感到滿足，有時男性也會因為「性」而臣服於女性，完全否定女性性權的理論似乎過於單薄。

隨著二十世紀末的到來，後現代主義也為女性主義注入新的主流意識。後現代主義的「解構」、「去中心化」和「多元」的解釋途徑，也讓許多新潮的「同志」、「第三性」和「無性」替女性主義帶來更多邏輯顛覆<sup>17</sup>。男女互斥的二分法和性別的解構讓後現代女性主義不再只是男優女劣的討論，中性甚至無性的可能拓展了性別的光譜，剛強不再專屬於男性，陰柔也不再僅存於女性。後現代女性主義也象徵著現代社會的多元交集，許多種族、國族、經濟、文化和性向的差異也參與女性主義的討論，單一角色的救贖已無法解決問題。

從早期自由女性主義追求的「平等」，到基進女性主義批判的「壓迫」，再到後現代女性主義嚮往的「解構」。從世代的變更可以發現女性試圖從當代的社會走向，解釋女性之所以受到壓迫的種種原因，並隨著思想的演變，一再地

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<sup>14</sup> Stuckey, J. H. (2001) Women and religion: Female spirituality, feminist theology, and feminist goddess worship. In N. Mandell (Ed.) *Feminist issues: Race, class, and sexuality* (3<sup>rd</sup> ed., pp. 279-306). Toronto: Prentice Hall.

<sup>15</sup> Martha Chamallas, Rhetoric & Relevance: *An Investigation into the Present and Future of Feminist Legal Theory*, 17 Mich. J. Gender & L. 157, 2009.

<sup>16</sup> Rubin, Gayle S. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." *American Feminist Thought at Century's End: A Reader*. Ed. By Linda S. Kauffman. Oxford: Blackwell, 1993. pp3-64.

<sup>17</sup> Bridget J. Crawford, *Toward a Third-wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 Mich. J. Gender & L. 99, 2007, pp109-125.

證明父權體制的荒謬和陰謀。儘管理論各有千秋，但皆仍一脈地為女性追求性別平等，推翻父權王國。

### (三) 女性主義與性交易

針對賣淫，女性主義可謂為最有力的批評，雖仍有擁護的女性主義者認為縱賣淫為兩性不平等的表現，但仍不構成禁止此行業的足夠理由。賣淫壓迫女性，因女性多受經濟文化的劣勢影響而被迫進入賣淫市場，同樣地，賣淫也是女性被壓迫的一種手段，因壓迫的手段正是對女人的性利用與剝削。賣淫使得女人被當成工具，使娼妓成為性客體，不僅出賣身體也出賣自我。Pateman的反娼說法認為「賣淫是男嫖客對女娼妓的支配臣服」、「性行為是單方面的奴役」。Shrage的女性主義反娼說法則提出四個詮釋賣淫的不平等原則：一、強大的性驅力是普遍存在的；二、男人的宰制是生物自然的；三、性接觸會玷污女性；四、性實踐的實體化。以上四個原則即為賣淫象徵地支持、強化不平等的性文化意義<sup>18</sup>。

女性主義派系分流，但針對性工作之議題，以「基進女性主義」(radical feminism)和「自由女性主義」(liberal feminism)之主張最為主流<sup>19</sup>。基進女性主義核心主張認為，父權社會透過「性」來宰制女性，而主要媒介就是身體，故「性」成為階級化的一種工具，在性產業中，男性夠過給付對價來消弭「強姦」的概念<sup>20</sup>。自由女性主義則認為，女性之所以受歧視主要是來自於對性別的不同待遇，性交易不過是一種契約，性產業亦僅唯一種常規的商業行為，故應尊重女性自主決定權<sup>21</sup>。

以女性主義批判娼妓的文獻實不乏論述，有將「基進女性主義」反對性交易的論點一一列出，除了揭示賣淫作為一種社會體制，本身即為一種性宰制、性暴力的體系，在每一次性交易的過程中，也是男對女的性宰制和性暴力<sup>22</sup>。但亦有基於性別平等論證，關懷弱勢婦女的除罪化者多認為，娼嫖皆不罰或許可以是相對於任何一種管制政策更能夠改善娼妓的惡劣處境，雖較為消極，也並非意味著男嫖女娼的宰制體系不具非難性，但至少「合法化地管制和配套」能夠較「全面禁止」來得具有正面意義，以避免間接地妨礙性別平等之推進<sup>23</sup>。

女性主義針對性產業的主要爭辯導因於基進女性主義和自由女性主義對於「性交易」的定義分歧。基進女性主義認為，自古以來男性透過性器官的權威

<sup>18</sup> 甯應斌，賣淫的倫理學探究，台灣社會研究雜誌社，2009年5月。

<sup>19</sup> See Martha Chamallas, Rhetoric & Relevance: An Investigation into the Present and Future of Feminist Legal Theory, 17 Mich. J. Gender & L. 157 (2010).

<sup>20</sup> See Bridget J. Crawford, Toward A Third-wave Feminist Legal Theory: Young Women, Pornography and Praxis of Pleasure, 14 Mich. J. Gender & L. 99 (2007).

<sup>21</sup> 林志潔、莊宇真，在釋字六六六號之後—從女性主義理論看台灣性產業之立法與規範，月旦法學雜誌第186期，2010年11月，頁5-18。

<sup>22</sup> Cass R. Sunstein, Feminism and Legal Theory, 101 Harv. L. Rev. 826 (1988).

<sup>23</sup> 陳宜中，性交易該除罪化嗎？對性別平等論證的幾點省思，政治與社會哲學評論第27期，2008年12月，頁1-50。

建構，設立性別階級，透過「性」來宰制、主控性別文明，並藉由家庭與婚姻來達到密室權威，而性產業的存在，更能展現男上女下的精神。自由女性主義則沿襲自由主義的理念，將之推廣到女性身上，根據自由、自主與自我決定的原則，認為女性身存的目的必須自我實現，並應以自我潛能發展為優先，理當有掌控身體和性自主的權力。娼妓的爭議之所以複雜，在於既有社會所建構的性別意識已難以破壞，性別、男女和文字、思想本身難以脫鉤，若無法解構，則性別在思想上的爭論終究無法超脫長年建構的體系。

#### （四）台灣女權運動史

我國女性主義的發展多深受美國的影響，許多留學生於 1960 年間相繼回台，喚醒台灣女性的性別意識、自主權和渴望。早期的台灣深受儒家父權體制影響<sup>24</sup>，「夫唱婦隨」是好太太，「男主外、女主內」是好媳婦，「忠勤儉讓」是好女人，女人背負生兒壓力、家務重擔，從小被教育順從和壓抑。到了 1970 年間，台灣女人們受到新的思想刺激，紛紛挺身上街頭，一同為女性權益而戰。台灣女性主義運動主要分為三階段<sup>25</sup>，第一階段為呂秀蓮所引領的新女性主義，第二階段為李元貞為主的婦女新知雜誌社，第三階段則為解嚴後的新興女性運動。

在 1970 年代初期，儘管許多女性聯盟多由政府單位主導，但仍有少數私人的女性聯盟逐漸展露頭角。1971 年，呂秀蓮的《傳統的男女社會角色》開啓了女權運動的世代。不同於西方的女性主義著重於女性角色的定位和詮釋，新女性主義為了避免社會過於聚焦在傳統女性功能定位的翻覆<sup>26</sup>，先對性別角色採取妥協的手段，以防台灣男性強烈的反駁<sup>27</sup>。新女性主義先假由西方科學主義之名，並佐以「本土性」和「實踐」的色彩，試圖漸漸地將父權中心主義推翻，最終再導向「男女平等」的目標。在當時的台灣，傳統中國社會的父權思想初次受到挑戰，對台灣女性主義的萌芽可謂一大貢獻。呂秀蓮以符合台灣民情的方式，教導台灣女性以女性主義的方式剖視傳統男性中心社會，再匯集女性的力量，來完成新女性主義的任務。

到了 1980 年間，隨著台灣經濟起飛，大眾消費社會和商品經濟結構逐漸讓台灣一步步走向資本主義的社會。順著消費者運動和環保運動的興起，李元貞與幾位女性成立了「婦女新知雜誌社」，於這段期間推翻許多具有性別歧視的立法，包括親屬法<sup>28</sup>、人口販運和女性勞動等等。同新女性主義的作風，婦女新知亦採取策略性的低姿態和溫和手法。除了為了避免社會過度的反彈並吸引較

<sup>24</sup> 金孟華，2009，從女性主義法學觀察性侵害法律改革之演進，交大科法所碩士論文，頁 13-17。

<sup>25</sup> 張輝潭，1994，台灣當代婦女運動與女性主義實踐初探，清大社會人類學研究所碩士論文。

<sup>26</sup> 陳妙芬，當代法學的女性主義運動——一個法哲學史的分析，台大法學論叢，第33卷第1期，2003，頁1-47。

<sup>27</sup> 邱子修，2010，台灣女性主義批評三波論，女性學誌：婦女與性別研究，第 27 期，頁 251-273。

<sup>28</sup> 王曉丹，台灣親屬法的女性主義法學發展——以夫妻財產制為例，中正法學集刊，第 21 期，2006，頁 1-36。

「柔順」的家庭主婦一同加入，同時也在進一步拓展女性主義發展的空間，希望能廣納聚集「激進」人士，讓女性不再勢單力薄，以便發揮影響力。

二十世紀末的到來同樣也為台灣帶來不穩定的氣息，女性勞工、女大學生和女性團體如雨後春筍搬出現在各個女權運動中<sup>29</sup>。女性的力量逐漸影響到政治圈、經濟圈和學術圈，能動性和自主性的提高也使得女性不在只是以早期婦女新知的的方式單打獨鬥。但世紀末的躁動，也讓女性主義開始分流，雖然最終訴求皆相同，但台灣女性對於性別論述和立場的選擇也逐漸大相徑庭。例如，傾向自由女性主義的日日春關懷互助協會和具有基進女性主義色彩的勵馨基金會，針對同一個議題往往會有不同的出發點，雖有相同的初衷，卻有南轅北轍的手段。在多數受害者為女性的社會案件中，這樣的分歧，是台灣女性主義所面臨的困難，也是須盡速解決的窘境<sup>30</sup>。

此外，另有論者認為，不建議台灣婦運依妓權的主張將性交易視為女性的專業，主要的論述為以下兩點：一、妓權運動主張，性交易合法可排除目前娼妓所受的歧視與迫害，但其實這是倒果為因；二、妓權運動企圖以集體團結的力量來顛覆男女性關係，但娼妓的解放也只有在全體婦女得到解放時才能達成，在既有父權宰制的社會形態下，難單以娼妓的開放來達到男女性關係的顛覆<sup>31</sup>。除此之外，由於性產業對於每位女性深具不同意義，踏入性交易市場的原因形形色色，因此女性主義針對娼妓的社會定位（性奴隸或性先驅）其實並無太大的意義<sup>32</sup>。

### 三、台灣娼妓管制史

#### （一）清末時期

在唐朝時期，傳統交際花、藝妓、娼妓等性服務工作者曾是藝術和詩歌詞曲的靈感泉源，酒樓、茶坊、歌館、妓院等亦曾是男人高官們夜晚留守飲酒作樂的好去處。歌舞藝技、宴賓飲樂都成了不少作家和藝術家的精神糧食。然而，自從儒家成為中國的思想主流後<sup>33</sup>，人人皆重視忠信、仁義、奉祖、孝親，人倫家庭的觀念逐漸曾為教條<sup>34</sup>。因此，「性」這件事便不得再大肆張揚，反而變成一件隱密而不得招搖的私事，就連文學、藝術等都被禁止含有關於性的內容。

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<sup>29</sup> Liu, Liang-ya, *Queer Theory and politics in Taiwan: The cultural translation and (re)production of queerness in and beyond Taiwan lesbian/gay/queer activism*. *NTU Studies in Language and Literature*, 14: 123-153 (2005).

<sup>30</sup> 王曉丹，2007，「聆聽」失語的被害人—熟識者強暴的司法審判與女性主義的知識建構，*家庭與工作：變遷現象與多元想像研討會*。

<sup>31</sup> See Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 *N.Y.U. L. Rev.* 83 (2010).

<sup>32</sup> 黃淑玲，*台灣特種行業婦女：受害者？行動者？偏差者？*，*台灣社會研究季刊*第 22 期，1996 年 4 月，頁 103-152。

<sup>33</sup> YuFan Stephanie Wang, *The Triumph of Confucianism: How a Subjugated Legal System Is Failing a Generation of Chinese Women and Girls*, 15 *Cardozo J.L. & Gender* 691, P701-707.

<sup>34</sup> Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 *Am. J. Comp. L.* 135, p141-150.

於清朝時期（1644年至1911年），儘管在孔孟思想和佛教信仰的渲染下，慾望和感官刺激多為大忌，但隨著清末興盛繁榮的商業活動，官妓卻直接或間接地為政府主要稅收的來源，性工作者的數目也以倍數成長。如同中國大陸<sup>35</sup>，台灣文化亦深受儒家和佛教所影響，也型塑出台灣本土特有的歷史、文化、政治、道德和政策。然而，相較於中國大陸，台灣人民儘管對於娼妓的反對聲浪依然高漲，日本政府和國民黨之娼妓政策似乎較為理性而人道。

於清末時期，清朝政府規定除非一同攜配偶和子女前往台灣，否則男人不得獨自單身地前往台灣居留或居住。此項規定便使得清末時期的台灣充斥著單身男人，強烈的性需求自然造就了台灣性產業的興旺。在當時，娼妓主要分為兩種，貴族高官型御用娼妓和較為便宜的娼妓，高等娼妓多歌舞藝兼具，甚至可以挑選客人，而較便宜的娼妓則被客人所挑選。高等娼妓較類似日本藝妓，提供多種娛樂服務，便宜的娼妓則僅多提供性服務。清末政府並未對娼妓設嚴防的規定，而多由私家老闆自行管理收益。

## （二）日本殖民時期

於日本統治台灣之時，日本政府以較為積極的政策允許並直接管理娼妓。性工作者需要簽訂勞務契約、準備健檢報告單、家屬同意書和僱主的同意書來申請營業執照。此外，性工作者必須繳稅，且15歲以下不得從業，並須定期作性病檢查。藝妓館和妓院僅得在台灣部份地區營業。而後，因日本本國提倡廢娼的聲浪逐漸高漲，台灣地區的娼妓管制政策亦因而有了調整。例如，禁止從業年齡提高一歲，而16歲以上的少女須得父母的同意。契約的簽訂亦調整為短期的四年一聘，以防性工作者被綁約。這段時期的性工作者是合法並受規定所管制，因此性工作並非禁忌。1930年代的台灣，性產業更是蓬勃發展<sup>36</sup>，尤其是台北地區的茶坊、咖啡廳、舞廳和俱樂部等，總是充滿著娼妓、招待妹和舞女，夜晚的市容欣欣向榮。然而，因1943年的太平洋戰爭，紅燈區曾一度被強制關閉，但戰爭結束後，性產業又如雨後春筍般復甦。於1950年代，一些年輕少婦更出於孝道而賣身，以便解決家庭經濟問題<sup>37</sup>。二次大戰的冷戰期間，日本政府更將許多台灣女性徵至兵中擔任慰安婦<sup>38</sup>。

## （三）戰後國民政府時期

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<sup>35</sup> Hayden Windrow, *A Short History of Law, Norms, and Social Control in Imperial China*, 7 Asian-Pac. L. & Pol'y J. 244.

<sup>36</sup> Erin Aeran Chung, Daisy Kim, *Citizenship and Marriage in a Globalizing World: Multicultural Families and Monocultural Nationality Laws in Korea and Japan*, 19 Ind. J. Global Legal Stud. 195, p199-206.

<sup>37</sup> D. Bradley Gibbs, *Future Relations Between the United States and Japan: Article 9 and the Remilitarization of Japan*, 33 Hous. J. Int'l L. 137, p155-158.

<sup>38</sup> 慰安婦創於日本帝國，她們被強迫徵至軍中，以提供性服務的方式來舒緩軍人的壓力。儘管有些日本歷史學者聲稱慰安婦的徵募係出自自由意願，但許多慰安婦和日本士兵的證詞卻表示她們是直接或間接地從日本殖民地地區被強迫、壓迫、欺騙或甚至綁架至軍中擔任慰安婦。

於 1945 年，台灣回歸民國政府後，官方對於娼妓的態度和政策尚搖擺不定，儘管有部份意見認為基於衛生安全應立即廢娼，但中央政府並未主動聲明表態反對娼妓，政府僅於少數事件中採取被動手段抑制與性產業相關的活動。於國民黨執政時期，透過戒嚴手段<sup>39</sup>，國民黨將愛國主義和傳統道德掛勾<sup>40</sup>，禁娼主義因而成為孔儒思想的產物。禁娼政策包含四項主要目標，減少招待妹、禁娼、禁舞廳和打破迷信。然而，戒嚴仍和獨裁有所不同，儘管娼妓被標籤為不道德的行業，國防部仍於台灣外島保有官妓以提供性服務給部份單身軍官。經過政府的禁娼政策後，皮條客等從性產業受益最多的業者便以工作機會之名義向政府抗議。

#### （四）公娼政策時期

於 1956 年，為了回應人民的反對聲浪，國民黨政府便制定「台灣省娼妓管理辦法」，設下了兩年的過渡期間以幫助現有的性工作者能有充裕的時間轉業，並希望較為年長的性工作者亦能不再繼續執業。於 1960 期間，鑒於性產業仍然持續發展，國民黨政府發現此項辦法的成效不彰<sup>41</sup>，故將該辦法修訂為「台灣省管理妓女辦法」，開啓了台灣的公娼政策時代。此辦法採用牌照制度，包含業者的「大牌」和娼妓的「小牌」，大牌係用來管理業者的執業地點並禁止租賃、延期和繼承。亦即，一旦原大牌所有者死亡並轉予繼承人，該牌照便立即失效，而該娼館便須立即關閉。小牌則規定娼妓並須年滿 20 歲，若滿 18 歲但未滿 20 歲，尚須監護人的同意，而養女則必須得到親生父母的同意。此外，公娼不得為已婚、身障或有染性病和感染性疾病。公娼須先經合法業者之面試始能於公娼館執業。若公娼館位於台北或高雄，則公娼必須登記在公娼館名下，若在其他縣市，則公娼可登記在自己名下執業，並須附上衛生署核准的健檢報告。

國民黨政府實行公娼政策多年，儘管獲得合法牌照的公娼館少於實際數量的百分之十，但在 1970 年間至 1980 年間，鑒於越戰所帶來的大量日本和美國士兵，台灣的性產業成長迅速。於 1970 年代，美國在台灣設立兩個軍事基地，酒吧和舞廳的數量於是達到巔峰。而 1960 年代的工業化亦吸引年輕人口大量往都市移動，形成咖啡館和茶坊的次文化，部份年輕女性便開始從事服務年輕男性勞工的職業。基隆和高雄此種港口都市亦成為許多娼管的首選執業地。除了政府實行的公娼政策，另有兩項例外政策分別執行於北投和軍營中。北投設有溫泉飯店，提供官員們娼妓和舞者娛樂消遣；另一個則是專門設給軍人們放鬆的「軍妓」，其制度即如同日本的慰安婦。因當時的軍人在 28 歲以前是禁婚的，為了

<sup>39</sup> Yean-Sen Teng, *Chapter 9 Who is Afraid of Human Rights? A Taiwanese Perspective*, 16 IUS Gentium 155.

<sup>40</sup> Wen-Chen Chang, *An Isolated Nation with Global-Minded Citizens: Bottom-Up Transitional Constitutionalism in Taiwan*, 4 *Nat'l Taiwan U. L. Rev.* 203, p208-210.

<sup>41</sup> Jeffrey Martin, *A Reasonable Balance of Law and Sentiment: Social Order in Democratic Taiwan from the Policeman's Point of View*, 41 *Law & Soc'y Rev.* 665, p684-690.

減少軍人們和附近居民的衝突和爭執，所以設立軍妓以供軍人們放鬆和紓解性需求<sup>42</sup>，最有名的軍妓之一即為「金門 831」。

到了 1970 年代，民眾逐漸注意到公娼的矛盾和缺失，軍妓所帶來的爭議和敗壞的名聲亦增加民眾的不滿，當時金門更因發生了軍人強姦少婦致死和騷擾女高中生的事件而使得群眾憤慨不平<sup>43</sup>。在 1974 年，國民黨政府決定不再發放合法公娼館營業牌照。1980 年代，一場拯救原住民女性免於強迫從娼的活動促成了反娼運動，並成功地遊說台灣施行禁娼的政策。民眾們開始思考國民黨政府為何採用公娼政策之道德爭議問題。

日本殖民時代、孔孟思想和國民黨的戒嚴時期分別影響了台灣的娼妓管制歷史。起初，從日治時期的合法經營，到國民黨政府的公娼政策，再到 1990 年代的廢娼運動興起，性工作的合法性逐漸受到台灣人民的重視。

### （五）廢娼政策

1991 年所制定的社會秩序維護法第 80 條使得性工作者在台灣成為非法工作，且受處罰的對象多為從事性工作的女性，處罰 3 日以下拘留或高達新台幣 30,000 罰金，或送至矯正所 6 個月至 12 個月。1997 年，台北市市長陳水扁舉辦了一場公聽會，其中多數的參加者多為反公娼，在當時，台北市為全台灣唯一公娼仍合法的縣市。因民眾們認為公娼政策時創造了一中下階級之女性，不僅透過販賣靈魂和肉體來賺錢，更使得女性暴露在易受剝削的環境之中。在這樣的反對壓力下，台北市政府因而有意草擬廢娼的政策，並希望能在一周內施行。但因一周的過渡期間過短，台北市的公娼和業者們便大力反對，甚而組成台北公娼聯盟以聲明不滿，並要求政府應提供 2 年的過渡期間。

1999 年，當馬英九接任台北市市長時，便允諾 2 年的過渡期間至 2001 年 4 月。在 2004 年，內政部欲修改社會秩序維護法。現階段的社會秩序維護法僅處罰娼妓而非處罰嫖客，但內政部有意將條文修改成雙方當事人皆不受罰，因娼妓多為被警察、幫派和嫖客剝削、脅迫的弱勢一方，故政府希望能透過合法化來使得娼妓免作受害者的角色。但因婦女聯盟認為合法化將使得婦女持續成為受害者，故堅決反對合法化之政策，並認為唯一的解決之道便是處罰嫖客一方，因性交易市場的需求才是問題的關鍵。

### （六）在釋字第 666 號之後——現行法

於 2009 年，大法官釋字第 666 號認為社會秩序維護法第 80 條違憲，並應於本解釋文宣告後兩年內失效。解釋文基於憲法的 7 條的平等權和為了人民健康和

<sup>42</sup> Caroline Joan (Kay) S. Picart, *Attempting to Go beyond Forgetting: The Legacy of the Tokyo IMT and Crimes of Violence against Women*, 7 E. Asia L. Rev. 1, p26-31.

<sup>43</sup> Wei-long Wang, *Sex, Human Rights, and Work Comparative Discussion on the Adult Sex Trade Regulations*, Graduate Institute of National Development College of Social Science, National Taiwan University Master Thesis, 2008, 6.

道德的立法目的，主管機關應採用不同類型的管理措施，如工作諮詢、職前訓練或其他教育方法來提高其工作能力。

2011年，修訂社會秩序維護法第80條和第91條，並增訂第91-1條之規定，於非法區域從事性交易者，不論娼妓或嫖客，皆須受到新台幣1,500至30,000之罰金。以往僅有性工作者會受到懲罰，但現行法則改為「娼嫖皆罰」。地方政府有權區劃出合法的性工作營業範圍（亦即紅燈區），在該範圍內從事交易之雙方皆不須受罰，但於該範圍外則皆須受處罰。

## 肆、研究方法

### 一、研究範圍

本文之研究方法主以實證研究方法，輔以文獻整理與剖析，期能結合學術之探討與實務之探尋，試分析我國性交易管制之妥當性，並綜合檢討優劣，以擬出符合我國性交易生態之管制立法。其中質性研究方法的部份，本文之訪談對象包含學者專家、法官、檢察官、社工、警察以及立法委員，訪談方法則採取半結構式訪談方法，以配合受訪人多元之背景。另外，文獻回顧的部份，主要以「性工作」為文獻焦點，並輔以女性主義來論述性交易之非難性與否。另外，本文之各別細部的研究方法會在「質性研究」和，期能加強本文研究之信度與可行性，並使本文所提出之建議立法方向及管制措施能夠作為將來立法之方針。

在開始實證研究之前，本文將事先蒐集我國相關娼妓之新聞，並廣泛閱讀國內外關於「性工作」之正當性與否的文獻、相關管制措施，以及以女性主義的角度探討娼妓、性、身體自主權的文章等。蒐集、綜合比較各個文獻並有瞭解之後，再據此提出質性研究時的訪談問題大綱，並做為之後質性分析綜合比較之考量依據。質性訪談完成後，會根據大量的逐字稿作統整和編碼資料的部份，進而提出訪談之成果。現行法針對「娼與嫖」的爭論主要集中在社維法行政裁罰的範圍，至於仲介、人口販運、毒品等附隨的犯罪則為刑法的範疇，故「娼與嫖」的配套管制不會涉及刑法，本文的焦點也僅集中在行政的管制措施，刑事法中的性自主和性犯罪則不在本文欲討論之範圍內。

### 二、研究方法

本研究採用的是「半結構式訪談」與「深度訪談」，其特色在於由研究者利用較寬廣的研究問題作為訪談的依據，導引訪談的進行；在相對開放且經過設計的訪談情境中，受訪者可能會比在標準化訪談法或問卷作答中，能夠清楚地表達出自身主觀觀點。而在設計訪談大綱與實施訪談的階段，必須符合四項判準：非導引性（non-directive style）、明確性（specificity）、廣度（range）、受訪者所表現的深度與個人背景脈絡（the depth and personal context）<sup>44</sup>。

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<sup>44</sup> Uwe Flick, *An Introduction to Qualitative Research*, at 150 (2009).

在研究抽樣策略方面，質性研究之樣本有別於量化研究中，以能代表人口並推論到母群體的樣本為抽樣原則，注重樣本的隨機特質（randomness）及數量（amount）；而是重視能夠反映社會現實狀況之深度與廣度，著重於資訊的豐富內涵（information-richness）與代表性（representativeness），傾向從以往的經驗和理論的視角出發。暨此，本研究採「理論抽樣（theoretical sampling）」，不是以不同特徵的人口為對象，而是以不同情況下的案例為對象<sup>45</sup>，形成依地點、時間、事件、活動、人為分類的「抽樣架構（sampling frame）」，並挑選有特殊經驗的經驗者為綜合樣本（comprehensive sample），以取得最豐富的反應資料<sup>46</sup>。

本次研究共計訪談 9 位受訪者，選樣標準為社會秩序維護法執法過程相關領域專業人士，包括學者 2 位、法官 2 位，檢察官、社工、警官、立法委員及性工作者各 1 位，研究期間自 101 年 8 月至 102 年 7 月。基於匿名與保密的研究倫理，本文將以代碼標示受訪者，按照訪談順序排列，對照表格如下：

職業	代碼	性別
學者	P	女
法官	J	女
社工	W	女
檢察官	H	女
警官	C	男
立法委員	L	女
性工作者	A	女
學者	B	男
法官	T	男

### 三、訪談題目設計

本研究之訪談題目設計，第一部份為受訪者的背景資料，此部份著重在受訪者的工作資歷、工作內容，以及工作上觸及性交易之相關經驗與認識。第二部份為工作權，由於本文主要以性工作者之工作權為基礎，進而討論立法針對其工作權之管制，因此本部份著重在受訪者對於「性交易」的價值觀，討論其存在性、合法性、男女平等、以及女性主義。第三部份則是現行法規，由受訪者針對現行社維法以及釋字 666 號提供見解和建議，並會隨著受訪者之身份背景與研究取向，訪談時會部份調整立法部份的提問和增減討論執法困難之程度。

除了受訪者背景資料外，本研究採取的半結構式訪談大綱主要設計為兩個核心訪談部份，即「工作權」和「現行法規」。因第一部份「工作權」涉及到

<sup>45</sup> 徐宗國，紮根理論研究法：淵源、原則、技術與涵義，收錄於胡幼慧主編，質性研究：理論、方法及本土女性研究實例，頁 59（1996）。

<sup>46</sup> A. J. Kuzel, Sampling in Qualitative Inquiry, in Doing Qualitative Research (B. F. Crabtree & W. L. Miller ed.), at 36 (1992).

受訪者對於「性的價值觀」和受訪人對於性「工作」的態度與想法，故本文將此部份分為贊成與反對兩種立場，並分別彙整，以利於比較各受訪人立場的異同。第二部份則係針對現行法規之優劣作探討，因社維法的執法層面具層次性，上至立法，下至裁罰，故本文將由上游至下游逐一呈現各個層次面對現行社維法的困境與建議。

## 伍、研究分析

### 一、性工作是否為「工作」？

第一部份將分別以贊成「性工作為工作」和反對「性工作為工作」的立場作區分，臚列出各受訪人提出其立場的原因和論述，並分別以小結之段落統整其推論之脈絡，以利於分析比較兩種立場的論理依據。

#### (一) 贊成者：自主決定、生理需求、自我培力

曾針對性產業在國外做過田野調查的學者P認為，女人在性行為中並不一定是消極接受的一方，甚至可以是享受、主控的一方，強調「自主決定」的重要性。在問到「性」可否作為買賣標的這個價值觀時，學者P回答：

「我是想像一種，其實那時候在整個抗爭過程中常常會提出，我們女生也有性需求啊，我也不一定想要隨便交個男朋友啊，很麻煩啊，也許只是想要有個人幫我服務一下。」

「她自己判斷她的條件跟需求，然後她的選擇，但是也現在還是會存在那個，呃...用誘騙的，或是強迫的從娼，所以我們，我們必須面對這種情形都存在，然後希望...呃...沒有那種強迫從娼的，所謂trafficking人口販賣，然後能夠，但是在尊重那些，在有限的選擇中，自己作了那種選擇的那些人，我們應該尊重。」

學者P主張，排除少數受誘騙或強制力所迫的情況，在有限的選擇中（每個人在每一天當中的選擇本來就是有限的）選擇從事性產業的人，都應當受到尊重。同樣以需求為出發點，目前在台北地院簡易庭擔任法官的J認為，「性」是人類自然的「生理需求」，本應尊重她們的自主選擇，J於訪談時說道：

「就原則上我認為本來就是，性專區我都ok，所以我當然覺得說，它是一種本來就是古老的.....對啊，古老的一個需求，對啊。」

「我覺得原則上還是尊重她們的.....，她們的對啊.....，自己的選擇。」

已從事檢察官有八、九年資歷的台北地檢署檢察官H則認為，「性」對女人而言具有「自我培力」的功能：

「我其實覺得這個應該是很自主性的耶，有的甚至還有五、六十歲，六、七十歲，她真的需要賺錢。」

「那我覺得她用這種方式賺錢為什麼不行，對啊因為她覺得這個賺錢她也很開心啊，也覺得ok啊，為什麼不行？」「我覺得重點是那個人她**本身的意願度**，對我覺得就像性侵害為什麼變成妨害性自主，而不是以前性侵害叫強姦嘛，那也是尊重的是意願嘛，那夫妻中都可能性侵害的問題，因為那就是**自主權的問題**，那我覺得性工作我也是這樣想啊，我是真的想要去做，而且我願意做。」

而將現今性產業的現象歸因於社會結構和價值觀的警官C，目前已於台北市萬華分局擔任警官一年多；由於C是本次六位受訪者中唯一的一位男性，他對於性交易的看法則較其他受訪者來得不同。其中，針對價值觀的想法，C並未明確表示贊同或否定性交易存在的必要性。本文認為其不願意表態的理由或許係因其自身性別的敏感性。惟警官C仍將既已存在的性生態，歸因於經濟的階級化以及社會價值的扭曲。對於大部份的性工作者抱持同情心態的警官C說道：

「與其說她們被男性控制，倒不如說她們是**經濟控制**吧，對，就是經濟的因素控制了她們，只是一個很簡單也很殘酷的問題，她不去做她就沒飯吃，她的小孩就沒飯吃.....，這是讓她最簡單可以賺到錢的方法，也最快可以賺到錢的方法，啊她或許也沒有什麼謀生能力，她只能做這個事情沒辦法.....。」

學者、檢察官以及法官相信女性能可掌握「性自主」之權利，學者P更積極地認為一旦承認性工作之合法，或許能淡化父權道德色彩，鼓勵女性自我培力建立經濟獨立，應當尊重其自由意願與選擇。法官J則認為性為「生理需求」，性產業為歷久不衰的事業，其存在不無理由。檢察官H和警官C皆將現況歸因於經濟、物質、資本主義、教育和家庭功能不足，惟前者對性工作者抱持鼓勵、尊重的心態，後者則對性工作者抱持同情、憐憫的心態。

至於性工作者A所持立場的則相對單純，她們本身對於性自主權、自我培力等價值取舍並未考量太多，而是單純地把這份工作當成賺錢的途徑：

「問：到公娼館的時候（是幾歲）？」

A：40幾歲。

問：那40歲之前是做什麼工作？」

A：之前就是賣麵啦，還有幫人家打掃煮飯都有。

問：那為什麼還是會要轉換行業？」

A：因為不夠用啊！打掃一天兩間回家就很晚了，一間一個月才4500，兩間才9000塊；租房子就要6000塊，剩下3000塊吃飯都不夠了，還要孩子讀書怎麼夠。那就是沒辦法啊。」

「日日春需要的，就是要讓那些辛苦查某、歹命查某有一口飯可以吃，不是要讓那些好野人賺大錢。因為台灣歹命查某也很多.....只要哪裡有地震、淹水、颱風有的沒的，要是厝內沒有查甫人，阿母就要出去餵子，囡仔就要拜託老父老母照顧。只要有天災就會多很多小姐出來。」

曾有11年公娼公作經驗的性工作者A，見證了台灣自1980年代至今的性產業變化，也體會了現今社會對於性工作合法與非法化的拉扯；對她們而言，這是一份讓「辛苦查某」可以有一口飯吃的工作，也是支持家庭不可或缺的經濟來源。

## (二) 反對者：資源匱乏所迫、自由意志的不確定性、價值扭曲

長期直接接觸性工作者的社工 W 在社福這塊領域耕耘已長達 22 年，幫助過無數雛妓和女性渡過各種絕境。或許是看過太多令人惋惜和心痛的個案，社工 W 認為真正能透過從事性工作來脫離困境的極為少數，甚至應其歸類為極端的例子。在問到關於「性工作」的價值觀時，社工 W 回道：

「我在我們看起來是覺得她們的所謂的自由其實都是在匱乏之下的選擇，**欸，經濟或者是什麼其他的因素，今天我們會覺得，我們覺得人是一個自由意志的選擇的話，應該是說在我各種能力條件充足的狀況下，那我也可以為我的選擇去負責，可是在我們有些個案，她們是迫於無奈下，以為自己只有這樣的選擇，以為這個是最好的選擇。**」

「通常會去從事這樣工作的，一般而言都是比較是所謂的低自尊、低自信，通常她們也都是因為**低成就**，低成就所以會低自信，那這都是一個連帶的。所以她們可能在問題解決的能力就比較弱，在我們來看我們會覺得說問題，我一定是找一個付出更少代價的來解決問題，可是我們反而會覺得她們怎麼選擇一個要付出更大的代價的方式去解決一個相對比較小的問題，那所以她們問題解決的能力，那當然也是她們**資源匱乏**。」

所謂的自由，係應在沒有任何壓抑、限制因素的環境下能自主選擇、決定並盡情發展才能稱得上是自由，但社工 W 認為娼妓並不是在所謂「自由」的環境下自然發展出來的。依其二十多年來的經驗，許多娼妓背負重債、沒有受到健全家庭教育、中輟，甚至是在被誘拐、被誤導下而從娼，多數的性工作者的價值觀不正確、扭曲、偏激，進入性交易市場後不但沒有改善情況，反倒每況愈下。

曾任律師，並多為人權和女權發聲的立法委員 L 則是由多方面的角度來否定「性工作」的可非難性，而是從「自由意志」的不確定性、價值觀和物慾的扭曲，以及從「勞工」的本質來否定性工作存在的合理性。

針對「自由意志」的不確定性，立委 L 說：

「難道她們是基於真正的自由意願而去選擇了嗎，這些事情**我一直沒有辦法得到很確信**，即使後來我看到日日春有幾個學者或是一些人出來告訴我們說，那是她的身體，為什麼不可以，可是我看到的，當然就是妳當然可以去對待妳自己，可是問題是一個國家的責任在這樣子**我們不相信妳有真的基於這樣的自由意願下的真正做出妳願意的選擇**，這些都是不得不的選擇。」

針對「價值扭曲」，立委 L 說：

「如果用我個人來看待她們啦，她們**價值觀有錯誤**，她們可能對於社會的物質、物慾、慾望的部份可能是已經是超出我們一般人的理解，而且那些**觀念價值是有偏差的**，那她們去追求到像這樣子完全是以這個為依歸，而且不惜任何的代價去追求到這個部份，那我把所謂的代價包含是以自己的身體去換取報酬這件事。」

針對性工作的「勞工」本質，立委 L 殊難想像性工作可視為一份「工作」：

「因為工作權其實你要談的是她那個整個工作環境在制度裡面，她可以在那裡面也就是同時也帶著，不管是經濟安全的問題，就是同時可以成就她個人的一個另外的成就，事業的追求、事業的滿足，我們對工作權的內容其實比較是，應該說內容會更多，更豐富，那至於說……那些以性、以身體來當作換取報酬的這些人，是不是真的把她界定到我們一般對工作的那個要求跟想像，那甚至在工作相對面有要求雇主啊，整個環境的建構，我一直很難理解啦，就是那裡面是不是，因為我們去對工作的要求一定會有，比如說那是友善的環境，那妳是不是在那裡面妳一定要要求，甚至還有激勵的制度。」

在本次質性訪談中，反對性交易合法存在的比例佔少數，九位中只有兩位認為性交易無存在的正當性。其中，長期觀察並深度瞭解性工作者的社工 W 認為，女性主義所稱的自我培力在實際的案子中並不常見，且聲稱能改善性別暴力和經濟能力的想法也只是空談。依其社福經驗，許多女性在性交易遊戲的角力中多是待宰的羔羊，不僅被各方強勢者玩弄，她們的生理、心理和心靈更被透徹地利用。

曾為女權和人權律師的立法委員 L，除了同多數反對者的立場以「自由意志的不確定性」和「價值扭曲」來反對性產業的合法性外，更提出性產業不具「勞工」特性的論點，難以想像性產業能如同企業或勞工般正常地運作、發展，甚至企業化、貿易化等，以否定性產業具「勞工」的本質來肯認性產業的可非難性。

## 二、現行法規

第二部份係針對現行社維法的立法和執法情況，由各受訪人表達其對釋字 666 號以及現行法的看法與意見、修法前後造成的執法上的影響與差異，並提供想像中性專區的模型，以供未來立法參考。另外，亦於假設性交易合法之情形，請受訪人提供自認較為適合台灣民情的性管制措施，以利於本文綜合比較各方意見，嘗試提出適合我國的性管制立法。

### (一) 立法層次

立委 L 認為釋字 666 號在處理平等原則時，竟未討論法條要件上的不平等，而直接評論處罰上的不平等，論述過於跳躍，立場過於保守、曖昧，沒有直接回答問題。

「我們會覺得說他去用處罰這個角度回來去談這個平等，事實上是有點跳躍了太快了，所以我對於大法官這個解釋基本上會覺得說他確實是比較消極的啦，那我也同意其實他應該某個程度也許他應該要站在一個一定的高度喔，去表示一些意見，也給一個社會有一些更多討論的機會，可是他其實是採取比較保守的態度。」

對於我國性交易管制的方式而言，身為婦權團體的一份子，立委 L 並不贊成性交易合法化，但又因性工作者多為弱勢，實無再處罰之必要和實益，故建議以「罰嫖不罰娼」之方式，以遏止「需求面」來漸進式地消弭性交易之存在。

「那我記得當時在整個論述上，是希望能夠罰嫖不罰娼，對，那罰嫖不罰娼最主要的目的就是…我們還是認為是……呃……需求，才會讓所謂更多女性或者是更多的弱勢去投入這工作，或者是這個交易的市場裡面，所以我們會覺得說應該先去斷絕或者去處理那個……，需求面。」

另，關於性專區之設立，委員 L 的立場很清楚、明白，不僅不贊成性交易之合法化，又因我國土地使用分區的制度執行上並不徹底，因此，整體而言我國並不適合性交易合法化，遑論設置性專區。

「台灣的其實使用分區其實不是貫徹得很徹底，因為它經常就是住商是混合的，它的整個的區域的都市的使用用途不是那麼的精準的徹底的分開。」

整體而言，立委 L 認為釋字 666 號蜻蜓點水，未解決問題；應遏止需求面，漸進式地消弭性交易之存在；另一方面，我國土地使用分區行使不徹底，不適合設立性專區。

曾參與立法過程討論的學者 B，對於目前專區式的立法亦不甚贊同，同時也形容了立法過程中贊成與反對陣營缺乏對話的對立情形：

「本來的公娼，所謂公娼它是已經有一塊，大家都知道有固定的消費群，那你各縣市設專區，那我譬如說台北縣把你設到一個很遠的地方，那就……割離了本來了消費模式，那可能我一個板橋想要去做這件……這個要去消費性的人，那我還要坐個車到鶯歌去嗎，對我們覺得這個東西恐怕不見得能解決問題，所以我們覺得這不是辦法，而且世界各國經驗也都看到禁不了啦，你要禁禁不了，那我們覺得應該要再開放一點，大方向上。」

「那專區坦白講，多半都認為就是跟之前一樣，幾乎大家都覺得解決不了問題，也掩耳盜耳，所以而且你放給各縣市設專區也都不會設，大家也都這麼覺得，你總要有個方向啊，但是最後反正民調選舉前，民調一作，民調一作好像反對的很多，就不敢作了，所以我覺得結果就是如此，結果真的如大家所預料的，就是你弄立法出來說我們讓各縣市自行設專區，專區內不罰，那結果就是通通都沒設，通通都卡著，所以通通回到，就跟娼嫖全禁一樣，對啊所以我覺得其實這個看得出來那個公共政策的討論是滿糟的……」

正因為性交易為一爭議性極高的議題，政府於處理時始終小心翼翼，多次透過研究計畫、公民會議、學者討論等途徑試圖找出解決方案，但花費許多成本的研究最後仍然不敵選舉前做出的民調結果，學者 B 語氣中透露出濃濃的無奈。

## （二）法院審理層次

台北地院簡易庭法官 J 認為，釋字 666 號的立場不夠明確，僅以違反平等原則的方式輕描淡寫地帶過，因此造成各地區法院裁處時無法有統一的見解，徒增執法的困擾。

「這方面我是覺得大法官應該可以更勇敢的表示意見，不然的話其實666之後雖然它違反平等原則，但是就是每個地方的簡易庭還是有不同的看法，比如說北院我們還是認為一定要裁處，那比如說像高雄、桃園、新竹，我查過的一些實務見解，那他們原則上就是不罰，所以大法官為什麼就不勇敢的直接說？」

針對目前現行社維法的優劣，法官J認為裁處的階段應交由法院來作，現行由警察自行裁處恐有人權保障之不足；目前會送到法院來審的案子，多是因受裁處人對裁罰金額不服，因而提出異議或抗告，易言之，還有許多未異議或抗告的案件，其適法性是法院無從加以審查的。

另外，社維法雖為行政法規範疇，但受裁處人有異議時卻又送到刑事簡易庭處理，而法官J認為社維法其實部份裁處必須要用刑法的標準來判斷，因此造成行政法、刑法混雜的怪象。除此之外，考量刑法須有法益保護之目的，為避免弱勢者再被剝一層皮，性交易應除罪化，國家不應介入管制，使娼嫖皆不罰。

「我現在還是不大滿意現行的社維法，對啊.....就這一塊而言啦。」

「我是偏向除罪化，因為我是覺得沒有必要用刑罰去裁罰，對啊，所以，這是我個人的看法啦。」

「我是覺得如果要罰，就不要由警察機關那邊去裁處，如果要罰就是送到法院這邊來，因為我覺得警察對於人權的保障，一定不會有法官保留這樣要來得重要。」

社維法修法後，因改由警察自行下達處分書，直接裁處罰鍰，而僅於受處分人對罰鍰有異議或抗告時才會將案件移送到簡易庭，故送到簡易庭的案件量較修法前來得低。

「可是修法後幾乎都交給警察局去裁處罰鍰的部份，所以說法官這邊基本上只有在異議，受處分有異議的時候才會到法院這邊來，那現在呢，案件量真的是降低很多。」

「就是修法之後還有罰嫖客的部份嘛，對，那嫖客的部份剛剛有提到就是因為他基本也不怎麼會異議，所以原則上還是娼妓的這個部份。」

雖相信最終仍以除罪化最為妥適，但為順應民情，讓人民有時間緩衝適應，設置性專區未嘗不是一種辦法。提到關於性專區的想像模型，法官J偏向「原則合法，例外非法」，應採零星式性專區政策。

「我是說台灣現在的民情可能設專區.....有這個比較制度上的管理或許會比完全開放，因為可能民情的關係吧，對啊...但原則上我還是覺得還是除罪化比較好.....對啊。」

「應該是，就是某一些區不能設的這一種。」

就法院審理立場而言，釋字 666 號曖昧不明，徒增執法困擾；同時行政法規範的社維法，以刑事簡易庭處理，用刑事標準來裁處罰鍰，造成行政法、刑

法混雜。現行法因改由警察自為處分，故到簡易庭的案件量降低；法官 J 建議應除罪化，並可用原則允許，例外禁止的零星式性專區模式來緩衝。

而另一位先前於任職於非台北地區地院的法官 T，則是在「法官依法審判」的前提之下，以陳新民大法官的不同意見書以及《公民權利與政治權利國際公約》、《消除對婦女一切形式歧視公約》等國際公約，透過對憲法的解釋，適用於個案之中：

「我反覆去看釋字 666 號跟那些公約，我感覺大法官的意思並不是要像現在這種管制方法，我感覺現在這種管制方法等於是違憲的，因為釋字 666 的意思是說你應該要照顧經濟弱者，那你說要開放專區，那開放專區更政府等於都不開放嘛，那不開放跟原來大法官的想法就不一樣……所以事實上以我們的見解會認為說事實上以目前現階段的法律狀態，它根本就是違憲的，那到底應不應該，但是它是指所謂實踐上違憲，到底應不應該聲請釋憲呢，還是可以直接駁回，因為我沒有遇到案子，因為我沒有遇到案子所以我沒有在深刻想這個問題，我有可能會考慮直接……駁回啦……」

「因為我們被要求要遵守憲法，所以憲法跟法律我們都應該要遵守。你一定聽過所謂的合憲性解釋，所以我那個裁定，我絕不認為我自己是遊走在法律邊緣，我認為那是在現行憲法之下對法律最好的解釋。在這種情況之下，我們不應該准許易以拘留。因為這樣不足以保護社會的弱勢，給我們的解釋是這樣子的。」

即使在釋字 666 之後，修法仍然無法達到維持兩性平等、保障經濟弱勢的目的，而僅能透過法官個人對於法條及釋字的詮釋落實當初的立法目的，本次修法的實質成效如何也就不言而喻了。

### （三）檢察官偵查層次

檢察官 H 針對釋字 666 大致上表示贊同：

「我覺得他講那個，他講那個是違憲，我覺得滿好的啊，我覺得滿好的，他確實要好好檢討這個區塊。」

由於檢察官處理的多是馬夫、性交易仲介第三人或集團犯罪，而一般性交易買賣雙方的娼與嫖都是直接用社維法之行政裁罰就處理完畢，所以檢察官並不會接觸到社維法，而娼妓與嫖客在檢察官這個層次多做為證人的角色。

「像社維法的部份，我們不會起訴，因為社維法的部份就是移到行政裁罰了，我們就不會處理到，但是他們在我們這邊可能就是證人的身分。」

「客人的話也是證人。」

檢察官 H 認為，修法後的社維法會增加刑事辦案的難度，因早期採不罰嫖之政策時，嫖客較願意以證人之身份提供證詞，不必恐於受罰緩處分。現今專區外娼嫖皆罰之情形，嫖客將不願意出面作證。

「我相信男客一定……，想盡辦法跑掉。少說我沒有也沒有真的去統計過啦，所以你說有沒有真的減少，我想辦案難度這邊會提升，我如果知道，

當然如果當場被發現，警察都發現他跑不了，但是如果是後面要被抓，找回來做證的，我覺得那個難度會提升。」

針對社維法修法之建議，檢察官 H 認為，儘管仲介難以取締，但仲介是最大的剝削者，理應罰仲介。而嫖係基於生理需求，娼係基於經濟需求，故無罰娼嫖之理。

「我覺得罰娼也不合理說真的，她們就是需要錢啊。當然如果合法了，如果將來合法化就沒有這個問題，不合法的時候，**仲介當然要罰，仲介通常是賺最多，剝削最多**，他出最少力，他接兩邊電話，比較有經濟實力，我覺得可是罰仲介有困難，怎麼找到仲介啊，這個有高度的困難性耶，**罰娼我不贊成。**」

關於性專區之想像，檢察官 H 認為性專區便於集中管理，在考量台灣地狹人稠，不妨比照國外紅燈區，以既有的中山區或萬華區般之模型劃定集中式性專區。

「其實我還**滿贊成設置專區**的耶，因為我覺得為什麼不設專區，你讓她（流鶯）到處竄，你讓她在某些地方都一樓一鳳，什麼什麼，你為什麼不讓她變成一個……對但大家說專區，這個區我不要讓它變成，可是像中山區都是啊，萬華區那個還是都是啊。」

大體而言，檢察官 H 認為罰嫖將會增加刑事取締仲介辦案成本；仲介才是罪魁禍首，娼妓和嫖客實無處罰之實益；而性專區可參考國外紅燈區，劃定我國集中式的性專區。

#### （四）警官執法層次

於萬華分局執業一年多的警官 C，立場上認同釋字 666 號的精神。

「因為沒道理只罰娼啊，你去嫖的人說實在的，對不對，要怎麼講呢……會去嫖的人經濟狀況一定比較強勢。」

至於警察執法上，警官 C 表示，罰娼的案件數量持續降低，因娼妓多為經濟弱勢者，一再的取締娼妓只會造成該轄區分局的執行率降低，為避免成效不彰，於是多有意地降低萬華地區的罰娼數量，避免母數過大，使得達成率不足。另外，目前雖採專區外娼嫖皆罰的政策，罰娼的部份可單純以「拉客」之行為取締便已足夠，但取締嫖客的部份事實上有困難的，因性交易多在隱密處履行契約，警察難以直接證明。

C：「其實修法之後案件量變少很多，修法前 100 年的話大概是 193 件左右，對，193 件，然後今年（101 年）大概只有 65 件。」

問：「為什麼會差這麼多？」

C：「不敢抓。」

問：「為什麼？」

C：「啊抓過來之後怎麼執行？沒有辦法執行。」

「可是因為不敢抓的原因是因為單純我們轄區特性……，她沒有那個錢可以繳出來（罰鍰）……，執行率太低。」

關於現行社維法修法建議，警官 C 認為，因目前我國民情恐怕尚無法接受性交易全面合法化，但又因性交易實為各取所需，期待性交易消失的想法不切實際，故設立專區似為解套的良方，且因專區便於管理、控制，只要立法上能做出相關配套措施，或許更能促進經濟成長。

「我有時候會覺得說罰這種東西滿沒有意義的，對啊，因為就是一個**各取所需**的行為而已啦。就性交易是各取所需啊，就一定有需求才會有供應嘛，如果沒有需求就不會有供應啊，所以我單純就我個人來講，你要嘛就設一個專區，因為我以我們台灣的生態來看完全不罰是不可能啦。」

至於警官 C 對於性專區的想像，為所有受訪者中描述最仔細並富有創造力的模型。警官 C 認為性專區不應劃定在既有的中山或萬華區，因當地民眾不可能同意，所以不妨參考博弈條款的策略，設置在離島、人煙稀少或是較偏遠的地區，並結合觀光、休閒和娛樂，建構出財團經營之複合式娛樂場所；在專區內，完全由市場機制去決定性交易產業的生態。觀光產業的發展，更能提供大量工作機會，解決年紀較大、失去競爭力的娼妓失業問題。除此之外，一旦集中管理後，相關的配套措施就相對容易達成，並更有利於警察的臨檢和取締執行。

「只是剛好想說馬祖，它有通過這個博弈條款，到時候會在那邊蓋賭場，一定會吸引一定的人潮過去，啊既然你不給它合法化它一定會過去，它不可能不過去，基本上會來那邊蓋飯店的人一定是，基本上他們轄下一定會有酒店那一些，都會在那邊會有，啊你就直接在那邊就好了啊。」

「配合博弈就變成一個**複合的娛樂場所**，因為可能就有一點像澳門這個樣子，我可能也有一些景觀可以去參觀。」「我們可能就是**以娛樂稅的方式吧**，對我們發牌照給她們，像澳門的賭場，我們就發一張賭場營業的牌照給他，然後可能就大家來投標，我們政府就賺這個投標的錢，然後我一年大概固定抽你可能幾趴的營業稅，然後管理的方式就是由財團他們去管理，當然法律要限定他，基本上一定是人性化管理，然後該做的健康檢查。」

就站在第一線執法的警官觀察，娼妓多為經濟弱勢者，加強取締反而造成分局的業績達成率不足，娼妓亦無力繳交罰鍰；且因性交易富隱密性且難以證明，修法後罰鍰之執行更加困難。有需就有供，性專區之設立較能積極性地解決問題；若性專區委由財團經營，打造成複合式的娛樂場所，不僅便於管理，更能促進經濟發展。

## 陸、結論

娼妓問題牽涉領域廣泛，凡舉政治學、社會學、公共衛生、犯罪學、國家發展、都市規劃、法學……等，有志研究者皆可從中探求對應的研究題目，學術文章更多如繁星；而法學領域的相關討論，雖自 2009 年司法院大法官釋字第 666 號作出、2011 年社會秩序維護法修法後，法學者對此議題的注意被喚起，

有較多期刊文章、學位論文加以探討，然而與其他學門相較，數量仍然偏少，且缺乏以實證角度剖析法學於娼妓問題中的應用方法與成效之研究。

法律作為一種社會規範，其終極目的在於影響人類行為趨向公平正義；對於社會現象的觀察，自應根據特定社會與人類行為所發生的實際結果而為判斷。唯有經過實際證據資料的蒐集與分析，通過科學方法驗證的學說與規則，始能確立法律規定及學說理論的社會接受性<sup>47</sup>。隨著管制福利國家的興起，法律的介入領域不斷擴張；為了有系統地自實證性（positive）及規範性（normative）角度研究法律與人民的互動，以達到「探討法律的影響」、「理解法律為何是如此」以及「法律應該是如何」等三個目的，採行法釋義學以外的研究方法確有其必要。

暨此，本文從娼妓問題的爭議出發，透過女性主義理論之導入、台灣婦女運動發展史、我國性交易管制政策演進之整理等，企圖自具有歷史思維的法學方法中描摹出社會變遷的脈絡；而本文研究核心：實證研究（empirical study）中的質性研究方法（qualitative research），透過呈現九位身處與性產業執法相關領域的專業人士，對於社會秩序維護法實踐程序之看法，確認立法與行政的妥適性及完備性與否；最後，就性交易的贊成與反對、對釋字 666 之看法、現行法檢討、性專區設置建議等整理出受訪者的看法，呈現現階段性交易於台灣各界人士中的映像，期望能協助當權者，找出對於現今已逐漸開放的台灣社會而言，最能為大多數人所接受，也是最能保障弱勢、尊重彼此的制度。

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<sup>47</sup> 劉尚志、林三元、宋皇志，走出繼承，邁向立論：法學實證研究之發展，科技法學評論，卷 3，頁 1（2006）。

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**Can Sex Be Sold? —  
Evaluating Prostitution Regulation in Taiwan by Feminist Theories**  
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**I. Introduction**

Known as the world's oldest profession, prostitution has always been a risky industry and a tough issue for a society to handle. Some say laws against prostitution would unfairly victimize women, while others focus on the consequence of legality that transforms “tolerance zone” into a magnet for human trafficking and drug abuse. In Taiwan, the government has never stopped working on the balance between the supply and demand of prostitution market.

In this article, firstly, we will go through the history of prostitution regulation and social women movements in Taiwan, compare with other countries around the world; secondly, based on interviews of interviewees from various occupations related to prostitution, we piece up the reality in Taiwan, which ordinary people refuse to understand, and suggest better resolution than now. Since 1644, Taiwanese government has been seeking for answer over centuries; this article may provide a different point of view.

**II. Prostitution History in Taiwan**

**A. Late-Ching Dynasty**

Jiggling in time to the music, long chatting with men, guzzling and chuckling, geisha and sex workers were once the inspiration of art and poetry. After-hours clubs and lounge were once the overt entertaining playgrounds for men to stay overnight during the Tang Dynasty. Those clubs and lounges were the fountain of motivation for the great masterpieces of artists and poets. However, when Confucianism took<sup>2</sup> the place of other ideologies in the field of education in China, courtesy, manners and morality could not have been emphasized more. Families and filial piety became the dogma of the society.<sup>3</sup> From then on, sex were no longer a daily issue but rather a private, unspeakable part of truth. Literature was also banned from containing sexual content. During the Ching Dynasty (1644-1911), public prostitutes directly and

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<sup>2</sup> YuFan Stephanie Wang, *The Triumph of Confucianism: How a Subjugated Legal System Is Failing a Generation of Chinese Women and Girls*, 15 *Cardozo J.L. & Gender* 691, at 701-707 (2009)

<sup>3</sup> Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 *Am. J. Comp. L.* 135, at 141-150 (2009).

indirectly took up the major portion of government's tax earnings despite the fact that Confucianism and Buddhism put a taboo on sensuality and desire. Thanks to the rising and flourishing commercial activities throughout the end of the Ching Dynasty, the numbers of sex workers multiplied.

Like China,<sup>4</sup> Confucianism and Buddhism have significantly influenced Taiwanese culture. Therefore, they have shaped up Taiwanese morality, politics, history and policy as well. Nonetheless, compared with China's situation, the Japanese and KMT's policy toward prostitution seemed much more reasonable and humanitarian, even though the denunciation of prostitution was quite fierce.

During the end of Ching Dynasty, Ching set a rule that man could only travel alone to Taiwan without bringing his wife and children along. Subsequent to the rule, men's sex desire became the trigger to Taiwan sex industry. Back then, there were two types of sex workers, the courtesans and the cheap one. The courtesans could play instruments and sing and could even pick their clients' identities, while the cheap one could not. The courtesans were more like Japanese geisha, while the cheap one was mainly for sex service only. In brief, Ching Dynasty didn't set strict regulation on prostitution, and hence let the private proprietors take the lead.

## **B. Japanese Colonial Period**

For the time of Japanese colonial period, the colonial government chose to allow and regulate prostitution, adopting a more positive policy. Several districts were administrated by orders or the police, instead of the law or the central government. Sex worker needed to sign labor contract, prepare health examination sheet, families' permission to sell up, and employer's acceptance to hire and so forth to register for license. Sex worker had to be taxed. Geisha houses and brothels had been authorized to operate in certain districts of Taiwan. Children under fifteen were forbidden to practice, and they were ordered to periodically have venereal disease tests. Later on, owing to Japanese repeal of prostitution in its own land, several regulations were accordingly adjusted. For instance, children under sixteen were not allowed to practice and those above or at sixteen needed parents' acceptance. Indentures were designed into a short-term four-year format in case that sex workers could not change their occupations.

During Japanese colonial period, prostitution was legalized, and regulated under provisions. Consequently, prostitution was not a taboo. Besides, because of its legality,

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<sup>4</sup> Hayden Windrow, *A Short History of Law, Norms, and Social Control in Imperial China*, 7 *Asian-Pac. L. & Pol'y J.* 244 (2006).

in the 1930s, sex service in Taiwan was thriving,<sup>5</sup> especially in Taipei. Teahouses, cafes, dance clubs and lounges full of geishas, prostitutes, receptionists and taxi dancers were blossoming all over the city. Although due to Pacific War in 1943, “red-light district” was once closed down by force, after the War was over, it prospered again. As late as 1950s, many young women had been sold by their parents into prostitution for financial reasons or out of filial piety.<sup>6</sup> During World War II, the Japanese recruited many Taiwanese women into serving as comfort women.<sup>7</sup>

### **C. Postwar Nationalist Government**

With the return to Chinese rule in 1945, the policy and attitude of the government toward prostitution was in a fog. Even though the voice for repeal of prostitution was loud on the ground of sanitary, the central government did not seize the initiative in taking a stand against prostitution. There were only several times, at most, the government did take passive action to prohibit sex related activities. During the Chinese Nationalist government (KMT) period, with its authoritative policy,<sup>8</sup> KMT engraved morality with patriotism and tradition.<sup>9</sup> Hence, the abolishment of prostitution was adopted as a response to the wave of Confucianism. This policy contained four major missions, such as to clamp down on female receptionists, to abolish prostitution, to prohibit dancing and to crack down on superstition. However, the authoritativeness was still a bit different from autocracy. Even though the Government labeled prostitution as immoral phenomenon, at the same time the Ministry of Defense still maintained official brothels on outer island to provide sex service to many single soldiers who arrived from the mainland in 1949. Due to the prohibition, those who benefited a lot from sex industry, such as profiteers and house runners, started to take a stand against the government and staged a protest to call for new working opportunities.

### **D. Public Prostitute Policy**

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<sup>5</sup> Erin Aeran Chung, Daisy Kim, *Citizenship and Marriage in a Globalizing World: Multicultural Families and Monocultural Nationality Laws in Korea and Japan*, 19 *Ind. J. Global Legal Stud.* 195, at 199-206 (2012).

<sup>6</sup> D. Bradley Gibbs, *Future Relations Between the United States and Japan: Article 9 and the Remilitarization of Japan*, 33 *Hous. J. Int'l L.* 137, at 155-158 (2010).

<sup>7</sup> Comfort women created by the Empire of Japan, were women and girls forced into prostitution, which set to comfort and release the tension of soldiers. Even though some of the Japanese historians stated that the recruitment of comfort women was voluntary, the testimony of ex-comfort women and surviving Japanese soldiers showed that they were either directly or indirectly involved with forcing, coercing, deceiving or even kidnapping young women throughout Japan's occupied territories.

<sup>8</sup> Yean-Sen Teng, *Chapter 9 Who is Afraid of Human Rights? A Taiwanese Perspective*, 16 *IUS Gentium* 155 (2012).

<sup>9</sup> Wen-Chen Chang, *An Isolated Nation with Global-Minded Citizens: Bottom-Up Transitional Constitutionalism in Taiwan*, 4 *Nat'l Taiwan U. L. Rev.* 203, at 208-210 (2009).

As a response to people's complaints, with a stratagem to gain a respite, in 1956, KMT's government established the Measures for the Administration of Taiwan Province of Prostitutes, which set a two-year transition stage, attempting to help prostitutes switch to another profession in hopes that those elder sex workers would bit by bit vanished. In 1960, reflecting on the outcomes of the Measures, KMT found their mission was not completed,<sup>10</sup> since prostitution was still prospering. Subsequently, the Regulations were later revised the older provision as Measures for the Regulations of Taiwan Province of Prostitutes Governing, and started the era of public prostitute policy.

The Measures for the Administration of Taiwan Province of Prostitutes implemented licensing system, including proprietor license and prostitute license. The proprietor license administered the working site and disallowed extension, lease, and succession. That is to say, if the proprietor license was withdrawn of it the original owner died or was taken by over by a member of the immediate family, the license would be invalid, and the brothel had to be closed down. The prostitute license regulated that prostitute had to be twenty or above. If she was eighteen above and under twenty, custodian's acceptance was required. Adopted daughter could not register without biological parents' admission. Also, sex worker should be without spouse, disability, venereal disease or contagious disease. If there was a vacancy in a brothel, she had to be interviewed by the proprietor in advance. If the brothel was in Taipei or Kaohsiung, she had to go get licensed from the police station under the brothel's name. If it was in other counties, she could get licensed from the police station under her own name with health examination sheet approved by Department of Health and identification papers. After getting licensed, she could start to practice.

KMT's government had long implemented public prostitute policy. Although only less than 10% of the existing brothels received license, the industry continued to prosper between 1970 and 1980, thanks to the huge influxes of Japanese men and American soldiers fighting in Vietnam who frequented the illegal, yet open the ubiquitous sex industry in Taiwan. In the 1970s, when the opening of two US army bases stationed in Taiwan, the number of bars and dance halls rose to the peak. Rapid industrialization in the 1960s brought a flood of young people into the cities, giving rise to a coffee-house and teahouse subculture, where young female hostesses catered to young male workers. Harbor cities like Keelung and Kaohsiung had prostitutes in every corner. In addition to the public prostitute policy, there were other two exceptional policies adopted. One is in Peitou, the hot spring hotels offered prostitutes

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<sup>10</sup> Jeffrey Martin, *A Reasonable Balance of Law and Sentiment: Social Order in Democratic Taiwan from the Policeman's Point of View*, 41 *Law & Soc'y Rev.* 665, at 684-690 (2007).

and dancers for the officials to relax. The other was the brothel specially built for soldiers, also known as “the brothel in camp,” much the same as the comfort women created by the Japanese. The most famous one was called “Kinmen 831.” Back then, soldiers were not allowed to get married until twenty-eight. In order to avoid conflict between the public and soldiers,<sup>11</sup> the brothel in camp were established for them to relieve, in case of their sexual necessity.

Not until 1970s did the public notice the discrepancy of the public prostitute policy. Later on, the immoral controversy led to the increasing police attention on intimacy in public and even in private. “The brothel in camp” drew much attention because the system carried high controversy and was twisted with bad reputation. What’s more, several soldiers were reported to rape young women to death and proved to harass high school girls in Kinmen.<sup>12</sup> Therefore, the news outraged the public. In 1974, the Government stopped licensing new brothels, and in 1980s, a campaign of rescuing aboriginal girls forced into prostitution grew into an anti-prostitution movement, which successfully lobbied for fully banning of prostitution across Taiwan. When it comes to its morality issue, people started to doubt the reason why KMT government adopted public-prostitution policy.

Prostitution, one of the oldest professions of all times, has carried high controversy over the centuries. In Taiwan, Japanese colonial period, Confucianism and KMT’s authoritativeness all profoundly influenced the history of the regulations governing prostitution. Firstly, the Japanese regulated prostitution by legalization. Then, KMT’s government set a public prostitute policy. However, in the 1990s, the abolishment of prostitution started to make its round in the conversation.

### **E. The abolishment of Public Prostitute Policy**

Sex work became illegal under the Article 80 of the Social Order Maintenance Act 1991, which replaced the Police Offense Law of the 1950s, and criminalized the mainly female population of sex workers. Sex workers could be detained for a maximum of three days, fined up to NTD<sup>13</sup> 30,000 or sent to a correctional institution for a period between 6 and 12 months. In 1997, Taipei mayor Chen Shui-bian held a public hearing, which the attendants were mostly against the public prostitutes’ policy. Back then, Taipei city was the only place in Taiwan where the public prostitutes were still legal. People assumed that the public prostitute policy had created a vast,

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<sup>11</sup> Caroline Joan (Kay) S. Picart, *Attempting to Go beyond Forgetting: The Legacy of the Tokyo IMT and Crimes of Violence against Women*, 7 E. Asia L. Rev. 1, at 26-31 (2012).

<sup>12</sup> Wei-long Wang, *Sex, Human Rights, and Work Comparative Discussion on the Adult Sex Trade Regulations*, Graduate Institute of National Development College of Social Science, National Taiwan University Master Thesis, 2008, 6.

<sup>13</sup> New Taiwan Dollar, hereinafter “NTD.”

permanent underclass of women who sold their souls in exchange of money and made them easy prey for all manner of exploiters. Under the overwhelming pressure, the government attempted to draft the abolishment of public prostitutes and immediately enforced within one week. Since the period of transition was too short to get accustomed to, Taipei sex workers and proprietors were all vigorously opposed to the new abolishment policy and hence organized the Taipei Public Prostitutes Union to provoke emotions. Sex workers asserted themselves with a two-year grace period. In 1999, when Ma Ying-jeou assumed the office of Taipei mayor, he allowed the two-year grace period that extended till April 2001.

In 2004, Ministry of Interior started to take account of amending the Social Order Maintenance Act, which set administrative penalties on prostitutes instead of the customers. Ministry of Interior aimed to convert this policy into decriminalization of both prostitutes and the customers. Since prostitutes were often bullied, threatened, or exploited by the police, gangsters and customers, the government tried to save these victims, who remained as underdogs in sex industry by legalization. However, women's Union was implacably opposed to legalization, because they believed the key factor to the exploitation was that, in essence, women fell prey to men. The only resolution to destroy the status quo was to penalize the customers, since they were the heart of the matter.

On the grounds of treating prostitution as a matter of human rights, the government concluded that punishing sex workers only forced them underground, leaving them easy to abuse. Even though the sexual transactions between consenting adults should be confined to personal, moral, religious and educational consideration, rather than by laws, the sex workers should be regulated like any other occupations.

#### **F. Constitutional Decision**

Following this, the Constitutional Court declared the existing legislation unconstitutional, and ordered that it ceased to be effect within 2 years. In 2009, J. Y. Interpretation No. 666 held that Article 80, Section 1, Sub-section 1 of the Social Order Maintenance Act<sup>14</sup> was unconstitutional, and shall be cease to be effective no later than two years since the issuance of this Interpretation. The reasoning was based on the principle of equality prescribed by Article 7 of the Constitution. To carry out the legislative purpose of maintaining citizens' health as well as morality, the government agency should implement different types of effective management, career-counseling measures, job training, or other educational methods to empower

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<sup>14</sup> Article 80, Section 1, sub-section 1 of the Social Order Maintenance Act that punishes any individual who engages in sexual conduct or cohabitation with intent for financial gains by detention not more than three days or by a fine not more than NTD 30,000.

their working capability. Yet, thanks to Taiwan's democracy, public opinions could be discussed; people's voice could be heard. Interpretation No. 666 has long been debated and remained controversial.

### **G. The New Law**

In 2011, Article 80 and 91 of the Social Order Maintenance Act were amended and Article 91-1 thereof was revised. Under the new policy, both the sex workers and the customers are subject to fines ranging from NTD 1,500 to NTD 30,000 for engaging in paid sex outside the permissible districts. In the past, only the sex workers themselves were penalized while the johns were allowed to go free. Local Governments have the rights to settle and mark out the area of "red-light" districts, which sexual transactions are permitted while outside of the "red-light" districts, all the sexual transaction and parties are forbidden. Sex workers can now offer services legally in designated red-light districts and neither the prostitute nor the customer will be prosecuted.

Currently, only 11 of the originally licensed brothels were left. Nonetheless, it is reported that there are more than 100,000 sex workers in practice and two million customers looking for sex service in Taiwan.<sup>15</sup> Many of Taiwan's sex workers are victims of human trafficking from China and Southeast Asian countries, deceived by smugglers with fraudulent marriages and fake employment offers.

The new policy seems to admit the existence of prostitution and massed the brothels together for better regulation. Nevertheless, as it turns out, all 22 counties and city mayors have spoken against fencing off a sex zone in their district, unwilling to mark out the "red-light" district. No local governments are prepared to create one of these districts because of fear over a jump in crime rates and plunging real estate values. As a result, the new policy indirectly became a regulation setting administrative penalties on all the parties, including prostitutes and customers. This outcome caused rage throughout the sex industry and women's Union. From feminists' perspective, prostitutes still remain as victims in the system, and get ripped off by administrative penalties. From men's perspective, sexual drive unreasonably becomes a wrongful act. Therefore, the debate between prostitutes and the public are still unsettled.

Whoever falls prey to this game, there is always a player that takes the whole advantages with bare hands. The procurer, who promotes prostitution by pandering, is typically involved with sexual exploitation usually leading to forced prostitution. Procurers or pimps are the individuals who extend the service, capital and resource

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<sup>15</sup> Collective of Sex Worker and Supporters (COSWAS), <http://coswas.org/>

that make sexual trafficking of children both a feasible and lucrative industry<sup>16</sup>. The majority of people believe pimps are the ones to blame, since they merely benefit from the whole industry without costs. In Taiwan, since the first enactment in 1935, the government has long criminalized procurers as offense against morality. According to current Criminal Law, the article 231, a person who for purpose of making a male or female to have sexual intercourse or make an obscene act with a third person induces, accepts, or arranges them to gain shall be sentenced to imprisonment of not more than five years and, in addition thereto, a fine of not more than one hundred thousand yuan may be imposed. Most of the prostitution businesses that procurers do are at bars, hotels, clubs, and massage salons, sometimes extending to trafficking for sexual exploitation.<sup>17</sup> Prostitutes are often seriously ripped off and treated unfairly by these bloodsuckers. Therefore, the legality of procurers hardly stands as a matter in question.

### **III. Feminism Movements in Taiwan**

#### **A. The Old Thinking**

Traditionally, due to Confucianism, any talk and issue related to woman could hardly survive on the table in Taiwan. Women were not supposed to deal with public matters, let alone education, politics and rights. Women were supposed to take over all the household duties and childcare, and at the same time, count on men for living. For long, women had been treated as good mothers and wives, impeccable housekeepers and blushing brides. Women were bonded to patriarchy. Nevertheless, in 1960s, when liberation and feminism befell women, the women's movement seemed poised to change the world. In general, women's rights movement is a political movement striving for gender equality in the rise of feminism. Women's rights movement is also a social movement endeavoring to improve women's social position and economic status.<sup>18</sup> The ultimate goal is to alter the old-fashioned impression on women and help women empower themselves.

In 1949, when the Chinese Nationalist government (KMT) took up Taiwan, patriotism was the top priority. Under the martial law, Taiwanese citizens had to be obliged to the discipline of the Party, so the government's policy centered on the education of partisan spirit. Back then, KMT run most of the women unions, which instructed women to be good mothers with partisanship instead of women's rights. It

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<sup>16</sup> Tracy Agyemang, *Reconceptualizing Child Sexual Exploitation as a Bias Crime under the Protect Act*, 12 *Cardozo J.L. & Gender* 937, at 942-951 (2006).

<sup>17</sup> Martti Lehti, Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 *Crime & Just.* 133 (2006).

<sup>18</sup> Stuckey, J. H., Women and religion: Female spirituality, feminist theology, and feminist goddess worship. In N. Mandell (Ed.) *Feminist issues: Race, class, and sexuality* (3<sup>rd</sup> ed., pp. 279-306). Toronto: Prentice Hall (2001).

was an authoritative period in which women were asked to help strengthen family function and build family ethics. Accordingly, women were the members to help reinforce the Party's mission to lead Taiwan against the communists in China. Women were not encouraged to call for rights. Instead, they were told to ask for more responsibilities. They were expected to abide by the traditional ethics and manners, stay home as good wives and mothers, and to be introverted, gentle and kind. Strict patriarchy and restrictions on free speech restrain feminism, which had already widely known in the West, from spreading out. Radical feminism,<sup>19</sup> liberal feminism and Marxism were still abracadabra for the public.

## **B. Waking Up**

In the 1950s to 1960s, the society paid no attention to equality, women's rights, not to mention feminism. In contrast, morality, loyalty and responsibilities drew much more attention. Even though some of the student who studied abroad went back to advocate feminism, women's need, desire, rights and interests were still completely left behind by the government. Therefore, the 1970s decade became the rebound of this oblivion.

In general, women's movements in Taiwan were usually divided into three phases: Lu Hsiu-lien's New Feminism, Li Yuan-chen's Awakening Foundation, and the new women's movement after the martial law ended. The first phrase was said to liberate the mental and practical bondage of women's social conditions, including education rights, working rights, legal power and political power. The second phrase was seen as a period of international cooperation between women all over the world. And the third phrase was a transformation of feminism through cultures, aiming to challenge women's own ideologies and constraints set by patriarchy.

## **C. The First Phrase: New Feminism**

The initial stage of 1970s, even though the government-running women unions did try to adjust to the trend, private-running women unions started to take the lead. In 1971, the article "Traditional Characters of men and women" written by Lu Hsiu-lien started the era of women's rights movement. Different from the government-running unions' policies, private-running women unions emphasized more on the revolution and the protection of women's rights. In the 1970s, women's needs and self-awareness gradually became the topics in the air. Liu Hsiu-lien, the author of the book "New Feminism" and also known as the leading role of Taiwan women's rights movement, presented some issues to be discussed, such as Taiwan's marriage system, the law of succession, the law of custody, imbalance in economic pyramid, women's voting right

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<sup>19</sup> Cass R. Sunstein, *Feminism and Legal Theory*, 101 Harv. L. Rev. 826 (1988).

and education. She also deeply compared the status between upper-class women and middle-class women, capability between countryside women and prostitutes. Lu had already sensed the conversion between generations and claimed the government's policy had already been out of fashion. Lu was famous for being the first one carrying banner for feminism, and devoted to making difference.

New Feminism defines itself as a philosophy or truth, hence based on the Three Principles of the People, from an idea, to faith and at the end to power. Lu Hsiu-lien was not influenced by the western women's movements. In order to complete her mission, she centered on localism and put it into practice. Instead of testing the gender features as the western feminists, she stayed neutral to traditional gender roles. Despite the fact that new feminism did succeed to psychology, biology and anthropology from the west to overcome patriarchy, it still maintained Chinese traditional spirit to construct the idea of women's power.

#### **D. The Second Phrase: The Awakening**

As a consequence of economic boom, Taiwan was changing into a model of consumer society. Under the influence of capitalism, Taiwan's economic structure gradually built by "mass production" and "high techniques," accompanied with "commercialization" and high population. Responding to the rampant capitalism, Taiwan's consumer protection campaign and environmental protection campaign later flourished to take a stand.

In the 1980s, under the leadership of the Awakening Foundation, more women's issue and talk could finally strike up the conversation. On February 1982, Li Yuan-chen established Awakening Foundation, when women and housewives started to realize their power and rights. With some other feminists, Li became the major power to promote women's movement after New Feminism. During 1980s, Feminism was no longer an unfamiliar ideology. Women were encouraged to mobilize to stand out. In 1984, the Foundation demanded the legalization of abortion. In 1985, the Foundation required the Legislative Yuan to revise Civil Law. In 1987, the Foundation staged a protest against the human trafficking of child prostitutes. In 1989, the Awakening Foundation introduced the "Gender Equality in Employing Bill," which was eventually passed in 2001 after continual proposals to the government. In addition to lobbying for women's rights, the Foundation has also helped strengthen the participation of women in public affairs, and ensure the government policy for women were properly enforced. It was not until 1987 did the government declare the martial law ended. After 1987, Taiwan finally became a democratic country. Second-wave feminism, such as the liberal and the radical, began to pour into

people's minds.<sup>20</sup>

The Awakening Foundation strived to perform women's liberal and independent character instead of introverted, dependent and subordinate impressions. Aside from occasionally publishing issues, the Foundation also held many campaigns and movements to strengthen feminism. What really decorated the Awakening phrase was the focus on "women's self-consciousness." The concept of "women's self-consciousness" was to help women empower themselves to be independent, encourage them to participate in social movements and exploit their potential. Even though Liu Hsiu-lien had already introduced this idea, the Awakening had, one step further, concentrated, and rebuilt it into a common symbol, and pushed the idea into practice. On one hand, they tried to arouse women's pressure on themselves; on the other hand, they tried to meet recognition of women to share the same emotions and experiences.

Compared with other consumer movements at the same time, Awakening Foundation was known for its low-profile strategy and moderate style. With its moderate fashion, they could ease off the restraints from society and also leave some space for cooperation. In addition, housewives, mostly seen as lacking in feminism and lack of participation in public issues, were willing to take part in this "radical" social movement, which was also a surprising phenomenon in Taiwan.

### **E. The Third Phrase: Transformation**

During this period, whether politically or socially, it was an unstable era in Taiwan. In the 1980s, women's rights movement had not stopped prospering. However, many women's unions shared a same characteristic: a strong and protruding attitude. Therefore, this situation later caused them to separate and even go against each other. After a longtime fermentation, women's movement in 1980s erupted as an unstoppable volcano. Female workers, female college students and feminism clubs thrived within parties. Women's unions began to go professional and global and even cooperate with the government.

Generally speaking, the third phrase movement had the following features: high mobility, high cooperation between parties, and one issue at one time. In 1994, Taipei Association for the Promotion of Women's Rights (TAPWR) was founded and spared no efforts to fight for a more equal society. TAPWR directly cooperated with the Taipei government run by Democratic Progressive Party regardless of politics. Sexual

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<sup>20</sup> Chang, S. Y. (1990) Three generations of Taiwan's contemporary women writers: A critical introduction. In A. Carver and S.Y. Chang (Eds.), *Bamboo shoots after the rain: Contemporary stories by women writers of Taiwan* (pp.15-25). New York: The Feminist Press.

harassment at school and work, sexual desire, sexual violence, prostitution of children, pornography, feminizations of poverty and unequal treatment all have their own fervent rounds in debates.<sup>21</sup>

#### **F. From Disunion to Divergence**

After 1980s, ten-year development had made Taiwan full of unexpected trends and later transformed Taiwan into a hotbed of radical social movements, organizations and clubs. In 1990s, women's movements progressively changed from an "ideal ideology" to "strategy." They claimed to redraft many legislations containing gender discrimination. What's more, sensational literature was no longer an undercover issue. Lesbian, Gay, Queer, and sexual orientation began to occupy the front page of everyday issue and intended to subvert the old-fashioned way of gender thinking and tradition. TAPWR firstly introduced localism into central issue of women's movement. They aimed to reconstruct the forgotten Taiwanese women's experience and rewrite the Taiwan history with women's stories.

#### **G. Women's Rights versus Sexual Rights**

In 1944, "Bold Women," written by Chuen-juei Ho, proclaimed the war of sexual liberation, and poured sexual rights into sex politics. The sexual revolution became the new and contentious issue of the women's movement, which also caused internal disorders between women's rights and sexual rights. Sexual rights supporters pivoted on the liberation of women's motions and emotions. They tried to help sexual minority groups practice sexual conducts and settle in their own relationships. Even though the public tended to get familiar with pornography and sex, it didn't represent those sexual minority groups could find their own position in the society. Chuen-juei Ho strived to correct the existing discrimination against the slutty impression on women by sex-role revolution. She had embarked on a journey of realizing women's sexual desires in the pursuit of orgasm, and aimed at demolishing the praise of virgin luck. Sexual rights supporters don't believe in the two sides of gender, since the identity of female hadn't been the nature of women but the representation of men's power and dominance. The liberation, they insist, can free women from men's desire and the worship of penis. Forwardly, it can remove the unreasonable burden that most women have shouldered.

However, women's rights supporter claimed that women do have versatile emotions and desires. They paid much more attention to the constituency to take part

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<sup>21</sup> Liu, Liang-ya, Queer Theory and politics in Taiwan: The cultural translation and (re)production of queerness in and beyond Taiwan lesbian/gay/queer activism. *NTU Studies in Language and Literature*, 14: 123-153 (2005).

in sexual politics,<sup>22</sup> putting emphasis on tradition, major politics, bureaucracy, hierarchy and leadership. Different from the radical means those sexual rights supporters took, in order to get their ideas across, women’s rights supporters intended to make compromise with the public instead of the radical fashion. As a matter of fact, this was all about strategies, not the fundamental concepts or theories. Women’s rights supporters took a tenderer and moderate stand and tried to maintain the traditional order of genders and sex. In this case, they could draw some other supporters that sexual rights supporters couldn't.

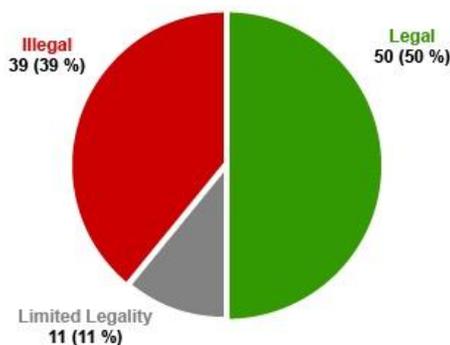
#### IV. Prostitution Policies in Other Countries

##### A. Regulation among 100 Countries

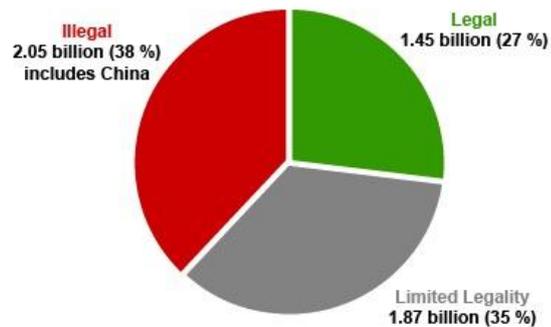
An investigation from “Pros and Cons of Controversial Issues” website collects prostitution policies in 100 countries, includes their geographical locations, population, religions and legislative regulations, according to calculative information provided by CIA. The static classifies 100 countries into 3 categories: legalization, partial-legalization and illegalization. 50 countries legalize prostitution, 11 countries stand on partial-legalization, while 39 countries support illegalization. The charts are as follows:<sup>23</sup>

**Legal in 50 (50%); Limited Legality in 11 (11%); Illegal in 39 (39%); Total: 100 (100%)**

**Number and Percentage of Countries with Legal, Illegal, and Limitedly Legal Prostitution (of the 100 countries)**



**Population (total # and % of total) of Countries with Legal, Illegal, and Limitedly Legal Prostitution (of the 100 countries)**



Legalization (50%)	Partial-legalization (11%)	Illegalization (39%)
Argentina	Australia	Afghanistan
Armenia	Bangladesh	Albania
Austria	Bulgaria	Angola

<sup>22</sup> Rubin, Gayle S., *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, American Feminist Thought at Century's End: A Reader. Ed. By Linda S. Kauffman. Oxford: Blackwell, 1993. 3-64.

<sup>23</sup> Pros and Cons of Controversial Issues, <http://prostitution.procon.org/view.resource.php?resourceID=000772> (last visited 2013/2/13).

Belgium	Iceland	Antigua and Barbuda
Belize	India	Bahamas
Bolivia	Japan	Barbados
Brazil	Malaysia	Cambodia
Canada	Norway	China
Chile	Spain	Croatia
Colombia	Sweden	Cuba
Costa Rica	United States	Dominica
Cyprus		Egypt
Czech Republic		Grenada
Denmark		Guyana
Dominican Republic		Haiti
Ecuador		Iran
El Salvador		Iraq
Estonia		Jamaica
Ethiopia		Jordan
Finland		Kenya
France		Korea, North
Germany		Korea, South
Greece		Liberia
Guatemala		Lithuania
Honduras		Malta
Hungary		Philippines
Indonesia		Romania
Ireland		Rwanda
Israel		Saint Kitts and Nevis
Italy		Saint Lucia
Kyrgyzstan		Saint Vincent and Grenadines
Latvia		Saudi Arabia
Luxembourg		Slovenia
Mexico		South Africa
Netherlands		Suriname
New Zealand		Thailand
Nicaragua		Trinidad and Tobago
Panama		Uganda
Paraguay		United Arab Emirates
Peru		
Poland		

Portugal		
Senegal		
Singapore		
Slovakia		
Switzerland		
Turkey		
United Kingdom (including Scotland)		
Uruguay		
Venezuela		

(Taiwan was covered by China in this form; however, the legislation had been modified since 2011, therefore Taiwan should be classified as partial-legalization country.)

## **B. Advantages and Disadvantages**

### **(A) Legalization – Netherlands**

Since October 2000, prostitution, brothel ownership and pimping are all legalized in Netherlands. Prostitutes must be over 18 and clients must be over 16; prostitutes must register and pay taxes. Brothel owners are subject to licensing and zoning requirements. Pimp living off income from a prostitute is legal if it doesn't involve coercion. Without specific law regarding prostitution, related articles separate in Criminal Code, Labor Law and Dutch Policy of Prostitution.<sup>24</sup>

One of the most famous red-light zones in the world is in Amsterdam. Exists since 13<sup>th</sup> century, the red-light zone profits significantly from sight-seeing and sex trade – the owner can earn 750 Euros each day. In 2005, there are estimated 25,000 prostitutes working in over 6,000 locations, many came from Central and Eastern Europe.

Legalization increases the income of government; also make it easier to restrain. However, on the other hand, the more and more serious problems of human trafficking, drug abuse and gangsters make the situation worse. Amsterdam city government passed “1012 project” in 2007, practiced by a national organization Nederlands Archfonds, looking forward to reduce red-light windows in a forthcoming decade.

<sup>24</sup> Netherlands Ministry of Foreign Affairs, *Dutch Policy on Prostitution*, available at: <http://prostitution.procon.org/sourcefiles/NetherlandsPolicyOnProstitutionQ&A2005.pdf> (2005).

## **(B) Partial-legalization – Sweden**

The leading model of partial decriminalization is Swedish law passed on January, 1999.<sup>25</sup> The Swedish law treats prostitutes as victims, while punishes the johns. In Swedish Penal Code chapter 6, section 11, purchasers of sexual services will be imposed with a fine or imprisonment up to 6 months.<sup>26</sup> Based on supply-and-demand rule, the rationale behind the legislation is that once the demand of sexual services decreases, prostitution will be eradicated.<sup>27</sup>

Seems like having an overwhelming success, the official evaluation reported that since the new law went into effect, street prostitution has been reduced by 50%,<sup>28</sup> and there has not been an increase in indoor prostitution, such as massage parlors, sex clubs, hotels, etc..<sup>29</sup> The government also reported that the ban acts as a barrier to human traffickers.<sup>30</sup>

While Swedish authorities have deemed the law as success, critics allege it has not reduced prostitution, but rather forced it into more isolated and dangerous environment.<sup>31</sup> A spokeswoman for the Sex-workers and Allies Network in Sweden claims that the law does push prostitution underground, make streetwalkers facing more exposure to dangerous clients because safer clients are afraid of arrest,<sup>32</sup> also more unsafe sex and rapes.<sup>33</sup> Therefore, prostitutes are more dependent on pimps or transfer to work in nearby countries, such as Norway or Iceland.<sup>34</sup>

## **(C) Criminalization – South Korea**

After a fire accident burned down one illegal brothel in Gunsan and took lives away from 5 women imprisoned in that brothel in 2000,<sup>35</sup> the then-current

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<sup>25</sup> Government Offices of Swed., *English Summary Evaluation of the Ban of Purchase of Sexual Services*, at 35 (2010).

<sup>26</sup> Brottsbalken (Criminal Code) 6:11, Swed..

<sup>27</sup> *supra note 24*, at 29 (2010).

<sup>28</sup> *Id.* at 34 (2010).

<sup>29</sup> *Id.* at 36 (2010).

<sup>30</sup> *Id.* at 37 (2010).

<sup>31</sup> Karl Ritter, *World Takes Notice of Swedish Prostitute Laws*, Truthout, available at: <http://archive.truthout.org/article/world-takes-notice-swedish-prostitute-laws> (2008).

<sup>32</sup> Paul O'Mahony & James Savage, *Swedish Prostitution: Gone or Just Hidden?*, The Local, available at: <http://www.thelocal.se/9621/20080110> (2008).

<sup>33</sup> Andre Anwar, *Criminalizing the Customers: Prostitution Ban Huge Success in Sweden*, Spiegel Online, available at: <http://www.spiegel.de/international/europe/0,1518,516030,00.html> (2007).

<sup>34</sup> Katie Beran, *Revising the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 *Law & Inequality* 19, at 14-15 (2012).

<sup>35</sup> Ji Hye Kim, *Korea's New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature's Intent to Protect Prostitute from Abuse*, 16 *Pacific Rim Law & Policy Journal* 493, at. 1 (2007).

Law against Morally Depraved Behaviors, which outlawed prostitution since 1961, had faced challenges. Nevertheless, the over harsh legislation did not eradicate prostitution; according to 2004 investigations, over 330,000 women engaged in sex industry,<sup>36</sup> it was a business profited over 22 billion per year.<sup>37</sup>

Therefore, in February 2004, Korean government passed 2 new laws, in order to penalize procurers and traffickers while protecting prostitutes as victims. Unexpectedly, nearly 2,700 prostitutes took street protest in October 2004, claimed that they were legitimate labors who entered prostitution voluntarily, they had the right to make a living as sex workers; the new legislature will make their works further underground.<sup>38</sup> Over severe acts, like current Act on the Punishment of Intermediating in the Sex Trade, causes crime displacement, make it more difficult to defeat criminals<sup>39</sup>.

Some women's right groups, such as Korean Women's Association United, proposed modification to the government. First, regulation: to approbate licenses for business owners and prostitutes; second, decriminalization: either abolishes all penalties or limit penalties among prostitution; and third, the government must create enforcement mechanism along with NGOs and Prostitution Emergency Assistance Center that encourages prostitutes to report abuses and prove their victim status.<sup>40</sup>

Due to the differences of cultures of each country, it is difficult to conclude that whether legalization, partial-legalization or illegalization has more economical and social advantage, or more disadvantages such as human trafficking, drug abuse or gangs.

## **V. In-depth Interview**

### **A. Reaserch Method**

The research method we took in this study is "in-depth semi-structured interview." It is a method of qualitative research, typically done face-to-face, in which the

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<sup>36</sup> Hyeran Oh, *A Study on the Factors Affected the Legislation of the Sex Trafficking Prevention Act: Focusing on the Governance Perspective and the Role of Women NGOs*, *Journal of Women's Studies*, at 51 (2004).

<sup>37</sup> Sa-Jong Hong, *Futility of Efforts to Legislate Morality*, *JoongAng Ilbo*, vol. 12, part 6 50-1, at. 13 (2004).

<sup>38</sup> Eun-Joo Cho, *Speaking about Subordination Challenger's Politics: Prostitutes Who Took to the Streets*, *Korean Grand Alliance of Lab. Unions Res. Memorandum*, at 5 (2006).

<sup>39</sup> Kyung-Seok Choo et al., *The Impact of the "Act on the Punishment of Intermediating in the Sex Trade" and the Police Crackdown in Red Light Districts on Sex Industry in South Korea*, *Crime and Criminal Justice International*, vol. 17, at. 59 (2011).

<sup>40</sup> Jin-Wan Chung, *Women Victim's Hotline is 1366*, *Report on Prostitution*, *MunHwa Ilbo*, at 117 (2005).

researcher asks open-ended questions orally and records the interviewee's answers. The interviewer has a general plan of inquiry, however without specific set of questions that must be asked with particular words and in a particular order.

Before the interview the interviewers have well formalized topic – prostitution in Taiwan – in advance, designed limited set questions with flexible structure, allowing new questions to be brought up during the interview as a result of where the conversation goes. We design our questions into 3 parts generally: first, the background information of the interviewee; second, which ethical approach about prostitution the interviewee takes; and third, the interviewee's opinion toward current regulation regarding prostitution in Taiwan.

In this study, we collect interviewees from various professional fields which related to prostitution, further inquire their opinions toward legislation, regulation and judicial practice about prostitution in Taiwan, in order to sketch the picture of present situation. The corresponding codes of the interviewees are as follows:

<b>Occupation</b>	<b>Code</b>	<b>Gender</b>
Scholar	S1	Female
Scholar	S2	Male
Judge	J	Female
Prosecutor	P	Female
Social worker	W	Female
Police officer	O	Male
Legislator	L	Female
Sex worker	X	Female

## **B. The flaws of current regulation**

X, a former public prostitute, is now 60 years old and retired, had worked as prostitute for over 10 years. Now she is a volunteer in COSWAS, advocating the rights of prostitutes. She directly gives away the motivation of being a prostitute: money.

*I was a house cleaner before I became a prostitute. In 1980's, the salary for housekeepers is NTD 4,500 per month per house; I cleaned two houses and earned NTD 9,000 monthly. However, my husband left me with two sons; I need to afford the rent – 6,000 each month, with remaining 3,000 to support kid's education, meals, clothes and other living expenses. The situation gave me no choice but enter prostitution. Prostitution made me able to earn about 50- 60*

*thousand dollars per month.*

O, a young police officer serving in Wanghua district, Taipei, is very familiar with vulnerable and poor economic conditions of old prostitutes, since Wanghua is one of the most famous gathering places for sex workers, especially streetwalkers. The age of prostitutes here varies from 20 to 80; the cheapest price to buy sexual intercourse is 300 dollars.

*(The price of sex trade around here) depends on the appearance and age of certain prostitute... the range is from NTD 300 to 3,000. I have encountered a 70-year-old one last time; she has no other skills but selling her body. Other forms of sex trade, such as clubs, massage parlor, KTV, MTV, one-woman brothel<sup>41</sup> or enjokosai,<sup>42</sup> require higher price and provide younger sex workers. However, in Wanghua, most prostitutes are old and cheap streetwalkers.*

Ironically, under Social Order Maintenance Act article 80, the most vulnerable ones are punished by the most severe penalty to them: fine. As a prosecutor working in Taipei District Prosecutors Office with 9 years experiences, P explained different inspection processes under Criminal Code and Social Order Maintenance Act:

*Most cases prosecutors deal with involve criminal offenses, such as human trafficking, drug using, or sex trade with minors; consensus intercourse between adults is not penalized by Criminal Code. On the other hand, cases under Social Order Maintenance Act are into the scope of Administrative law; polices have the authority to impose fine or custody right when they arrest the wrongdoer... Sex workers who benefit a lot, such as girls in expensive clubs, will neither be punished under Criminal Code nor be found under Administrative law, yet streetwalkers are the main target of Social Order Maintenance Act.*

Sex workers with pimps or covered by organizations need not to solicit by themselves, easier to avoid police, have better and more private environment to serve their customers. Meanwhile, streetwalkers have to do the solicitation, expose to potential risks such as violence or robbery, and are targets to polices who want to accumulate "performance point;" polices with lower performance point than expected may be blamed by supervisors. As a result, streetwalkers have to pay the fine which is far higher than their income. O says:

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<sup>41</sup> It is illegal for two or more prostitutes to work in the same premises in Hong Kong; as a result, the most common form of legal prostitution is the so-called "one-woman brothel", where one woman receives customers in her apartment.

<sup>42</sup> It means "compensated dating" and is a practice which originated in Japan where older men give money and/or luxury gifts to attractive women for their companionship and, possibly, for sexual favors. The female participants range from primarily school-aged girls to housewives.

*National Police Agency passed an internal document in response to the latest modification of Social Order Maintenance Act, which regulates the amount of penalty of different situations about prostitution... The fine for a prostitute who is caught first time is NTD 1,500. It will become NTD 6,000 when she gets caught the second time; to the third-time the fine will be NTD 12,000, while their income for sex favor has already be forfeited in advance. In Wanghua, streetwalkers would rather die than pay the fine. However, if the wrongdoer objected to district court, mostly the judge will not adjudicate to fine more than NTD 1,000.*

Obviously, there is a big gap lying between police agencies and district court judges. Why the results of their decision making will be so parted away? J, a Taipei District Summary Court judge, gave us some answer:

*To me, Social Order Maintenance Act is a law covers too broadly and endows too much authority to polices, make them capable to penalize others... sometimes meaningless. Personally, when facing these prostitution cases, I will consider the educational background, the economic condition, the price of sex trade, and the evidences that police collected, all the above circumstances of the objector; if the possibility was not beyond reasonable doubt, then I will not adjudicate guilty. Even if the result is guilty, I will not fine more than the price of sex trade that time... polices often impose high fines such as NTD 12,000 or 15,000, which are unbearable burdens to those prostitutes!*

To sum up, under current situation, each profession is unable to help. To prostitutes, they need money, but Order Maintenance Act forbid them to do it legally; To polices, they acknowledge and pity the vulnerability of prostitutes, however following the performance point system and internal document made by National Police Agency, they have to keep chasing prostitutes unwillingly; and to judges, making controversy determination with polices seem to be the only thing they can do.

## **VI. Conclusion**

Back in the old times, the revolution to legalization had occupied hundreds of pages, left several question marks on economics, humanity and justice. In decades, women's movements have caused many rounds of debates, whether criminal laws versus labor laws or women's rights versus sexual rights.

Examples from other countries, no matter legalization or illegalization, have their own merits and defects. Legalization increases national taxation, however leave the management of red-light zone a huge problem. Illegalization stimulates prostitution

curbs more enormously; meanwhile, prostitutes are left with higher risk of violence and rape.

Based on the above records of interviews, the enforcing legislation of Social Order Maintenance Act needs to be modified. But the trickiest question is: how? Feminists separate into two extreme opposing groups, as illustrated before – radical and liberal feminism. They take totally reverse approaches toward prostitution, and never compromise; it is not only a war between women, but also a dilemma for any government to make decision.

# 出國報告——參與第三屆東亞法與社會國際研討會

林志潔

## 一、研討會簡介

第三屆東亞法與社會國際研討會（The Third East Asian Law & Society Conference）之主題為「建構亞洲法社會學共同體：理論視野與實踐挑戰」。本次研討會承襲前兩次研討會之精神，由上海交大凱原法學院主辦，並邀請世界各地著名學者進行主題發表，以提供所有關注亞洲法社會學發展的人士們交流和分享的平台。

研討會中會議論文的主題涵蓋眾多法律與社會研究領域，例如：刑事司法、能源環境與科技、性別與平等、司法改革、爭端解決以及其他和法社會學相關的主題；不僅鼓勵針對特定區域國家提出具體研究，也支持超越一國之界的比較法探索，以期能達到共同體建構之展望。本人參加文章發表的場次為「性別、家庭與法律」場次，希望透過公開場合的交流與討論，加強、增進本國科會研究報告的學術水準。

## 二、舉辦學校及學術中心簡介

上海交通大學凱原法學院（KoGuan Law School, Shanghai Jiao Tong University）位於上海徐匯校區，為具有綜合性、研究型 and 國際化的世界一流大學。凱原法學院不僅被上海交通大學定位為交大的未來優勢學科和強勢學科，更被中國教育部批准為國家高等學校特色專業建設，因此成為中國國內一流培養法學菁英的法學重鎮。

亞洲法律中心則提供凱原法學院全體師生對外交流的管道，並著重於比較法和法社會學的學術研究。於中心成立初期，先將主力聚焦於日本法、韓國法和印度法之研究，之後將逐步提升東亞、南亞、東南亞和中亞等國家地區的法律研究和整合，最終將形成日本法、韓國法、南亞與東南亞國家法以及中亞與西亞國家法四個重點領域。

## 三、發表文章介紹

本人於研討會提出之論文名稱為“Can Sex Be Sold? – Evaluating Prostitution Regulations in Taiwan by Feminist Theories”，內容論及台灣的性交易管制措施。鑒於台灣於 2011 年底針對社會秩序維護法中的性交易條文作修正，並施行新管制措施，其匆促立法的結果引發社會各界的批評，新法改採設立專區之管制，結果導致實際上娼嫖皆罰的窘境，反而更驅緩兩性平等之促進。

本文藉由各女性主義流派之脈絡和理論，結合台灣本土女權運動的發展，對於我國性交易之法律規範進行探討。此外，更與許多實務界的專業人士進行質性訪談，從事深入的實證研究，以求理論與實踐之整合。因性交易制度之管制有其社會影響性，不僅驗證了人民對於性別角色之潛意識，更反向積極形塑社會結構，對於台灣社會之性別平等實有重大影響。本文希望能提出較符合台灣當地民情與性別正義之性管制政策，以俾促進台灣社會性別主流化。

#### 四、發表場次介紹

本人參與之場次為「性別、家庭與法律」，由成功大學的郭書琴教授和上海交通大學的李學堯教授共同主持，與談人則為華東理工大學的 Zhimin Liao 教授。本場次的主題發表涵蓋層面多元，共有六位發表人，除本人外分別為：

國立清華大學林昀嫻教授，“Having a Child after Death: Regulating Technologies, Protecting Reproductive Rights”；

日本明治大學 Syugo Hotta 教授，“Linguistic Justice: A Linguistic Analysis of Deliberation”；

國立成功大學郭書琴教授，“Unbinding the Constraints between Marriage and Family?—A Socio-Legal Analysis of Family Law in Contemporary Taiwan”；

韓國建國大學 Dahye Chang 教授，“A Empirical Study on ‘Criminal Settlements’ in Sexual Assault Cases: A Feminist Jurisprudential Approach”；以及

澳洲邦德大學 Vai Io Lo 教授，“The Promotion of the Employment of Persons with Disabilities in China, Japan and the US”。

本場次發表人各來自台灣、日本、韓國和澳洲等亞太國家，著實提供了亞洲地區法社會學、性別、弱勢權益、法律管制與社會的交流契機，也讓鄰近的亞洲國家學者能參與討論台灣性管制措施的優劣。

#### 五、參訪上海交大並商談交流合作事宜

本人於此次交大凱原法學院所舉辦之研討會中收穫豐盛，除了自身演講外，亦參與多場論文演講，增進許多無論法學理論或政策提出等多元面向的學術廣度；並藉由參與本次研討會之機會，與凱原法學院商談校際之交流合作事宜。

感謝國科會計畫長年之支持與鼓勵，使本人得以在性別和女性主義領域耕耘多年，致力將台灣的性別議題提升至國際學術層次，而上海交通大學凱原法學院的亞洲法律中心正是契合的國際舞台。藉由本次親臨上海交通大學的機會，有機會參與國際研討會、與各國菁英進行學術交流，除了能收介紹台灣於國際、讓亞洲區域國家深入瞭解台灣之效，也讓台灣能為亞洲學術整合帶來更廣闊而多元的視野。

## 附件一、Invitation Letter

### The Third East Asian Law & Society Conference

*Shanghai Jiao Tong University, Koguan Law School  
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E-mail: east3rd\_sjtu@163.com  
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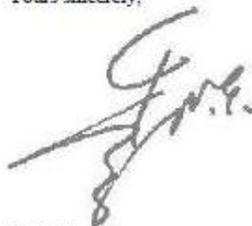
Dr. Chih-Chieh Lin  
No.1001, University Road,  
Hsinchu City 300 -10, Taiwan  
Passport Number:210952151  
Topic: Can Sex Be Sold? — Evaluating Prostitution Regulation in Taiwan By Feminist Theories  
Registration Fee: 100 USD

Dear Dr. Chih-Chieh Lin :  
On behalf of the conference organizers and Steering & Advisory Committee, I am writing to invite you to participate in the Third East Asian Law & Society Conference, "Building the East Asian Socio-Legal Community: Theoretical Visions and Empirical Challenges" – to be held March 22-23, 2013, at the Shanghai Jiao Tong University Koguan Law School in Shanghai, China. The conference is hosted by KoGuan Law School and organized by the Law & Society Association's Collaborative Research Network East Asian Law and Society (CRN-EALS).

Information about registration is at this website:  
<http://www.socio-legal.sjtu.edu.cn/En/Detail.aspx?id=1023>, for further news about lodging and attendance planning matters, please link:  
<http://www.sociolegal.sjtu.edu.cn/En/Detail.aspx?id=925>.

We look forward to welcoming you in the new Law Building of KoGuan Law School in downtown Shanghai in March 2013.

Yours sincerely,



Ji Weidong  
Chair Professor & Dean  
Shanghai Jiao Tong University, Koguan Law School

## **Can Sex Be Sold? — Evaluating Prostitution Regulation in Taiwan by Feminist Theories**

**Chih-Chieh Lin**

### **I. Introduction**

Known as the world's oldest profession, prostitution has always been a risky industry and a tough issue for a society to handle. Some say laws against prostitution would unfairly victimize women, while others focus on the consequence of legality that transforms "tolerance zone" into a magnet for human trafficking and drug abuse. In Taiwan, the government has never stopped working on the balance between the supply and demand of prostitution market.

In this article, firstly, we will go through the history of prostitution regulation and social women movements in Taiwan, compare with other countries around the world; secondly, based on interviews of interviewees from various occupations related to prostitution, we piece up the reality in Taiwan, which ordinary people refuse to understand, and suggest better resolution than now. Since 1644, Taiwanese government has been seeking for answer over centuries; this article may provide a different point of view.

### **II. Prostitution History in Taiwan**

#### **A. Late-Ching Dynasty**

Jiggling in time to the music, long chatting with men, guzzling and chuckling, geisha and sex workers were once the inspiration of art and poetry. After-hours clubs and lounge were once the overt entertaining playgrounds for men to stay overnight during the Tang Dynasty. Those clubs and lounges were the fountain of motivation for the great masterpieces of artists and poets. However, when Confucianism took<sup>1</sup> the place of other ideologies in the field of education in China, courtesy, manners and morality could not have been emphasized more. Families and filial piety became the dogma of the society.<sup>2</sup> From then on, sex were no longer a daily issue but rather a private, unspeakable part of truth. Literature was also banned from containing sexual content. During the Ching Dynasty (1644-1911), public prostitutes directly and indirectly took up the major portion of government's tax earnings despite the fact that Confucianism and Buddhism put a taboo on sensuality and desire. Thanks to the rising and flourishing commercial activities throughout the end of the Ching Dynasty, the numbers of sex workers multiplied.

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<sup>1</sup> YuFan Stephanie Wang, *The Triumph of Confucianism: How a Subjugated Legal System Is Failing a Generation of Chinese Women and Girls*, 15 *Cardozo J.L. & Gender* 691, at 701-707 (2009)

<sup>2</sup> Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 *Am. J. Comp. L.* 135, at 141-150 (2009).

Like China,<sup>3</sup> Confucianism and Buddhism have significantly influenced Taiwanese culture. Therefore, they have shaped up Taiwanese morality, politics, history and policy as well. Nonetheless, compared with China's situation, the Japanese and KMT's policy toward prostitution seemed much more reasonable and humanitarian, even though the denunciation of prostitution was quite fierce.

During the end of Ching Dynasty, Ching set a rule that man could only travel alone to Taiwan without bringing his wife and children along. Subsequent to the rule, men's sex desire became the trigger to Taiwan sex industry. Back then, there were two types of sex workers, the courtesans and the cheap one. The courtesans could play instruments and sing and could even pick their clients' identities, while the cheap one could not. The courtesans were more like Japanese geisha, while the cheap one was mainly for sex service only. In brief, Ching Dynasty didn't set strict regulation on prostitution, and hence let the private proprietors take the lead.

## **B. Japanese Colonial Period**

For the time of Japanese colonial period, the colonial government chose to allow and regulate prostitution, adopting a more positive policy. Several districts were administrated by orders or the police, instead of the law or the central government. Sex worker needed to sign labor contract, prepare health examination sheet, families' permission to sell up, and employer's acceptance to hire and so forth to register for license. Sex worker had to be taxed. Geisha houses and brothels had been authorized to operate in certain districts of Taiwan. Children under fifteen were forbidden to practice, and they were ordered to periodically have venereal disease tests. Later on, owing to Japanese repeal of prostitution in its own land, several regulations were accordingly adjusted. For instance, children under sixteen were not allowed to practice and those above or at sixteen needed parents' acceptance. Indentures were designed into a short-term four-year format in case that sex workers could not change their occupations.

During Japanese colonial period, prostitution was legalized, and regulated under provisions. Consequently, prostitution was not a taboo. Besides, because of its legality, in the 1930s, sex service in Taiwan was thriving,<sup>4</sup> especially in Taipei. Teahouses, cafes, dance clubs and lounges full of geishas, prostitutes, receptionists and taxi dancers were blossoming all over the city. Although due to Pacific War in 1943, "red-light district" was once closed down by force, after the War was over, it prospered again. As late as 1950s, many young women had been sold by their parents into prostitution for financial reasons or out of filial piety.<sup>5</sup> During World War II, the Japanese recruited many Taiwanese women into serving as comfort women.<sup>6</sup>

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<sup>3</sup> Hayden Windrow, *A Short History of Law, Norms, and Social Control in Imperial China*, 7 *Asian-Pac. L. & Pol'y J.* 244 (2006).

<sup>4</sup> Erin Aeran Chung, Daisy Kim, *Citizenship and Marriage in a Globalizing World: Multicultural Families and Monocultural Nationality Laws in Korea and Japan*, 19 *Ind. J. Global Legal Stud.* 195, at 199-206 (2012).

<sup>5</sup> D. Bradley Gibbs, *Future Relations Between the United States and Japan: Article 9 and the Remilitarization of Japan*, 33 *Hous. J. Int'l L.* 137, at 155-158 (2010).

<sup>6</sup> Comfort women created by the Empire of Japan, were women and girls forced into prostitution, which set to comfort and release the tension of soldiers. Even though some of the Japanese historians stated that the recruitment of comfort women was voluntary, the testimony of ex-comfort women and surviving Japanese soldiers showed that they were either directly or indirectly involved with forcing, coercing, deceiving or even kidnapping young women throughout Japan's occupied territories.

### C. Postwar Nationalist Government

With the return to Chinese rule in 1945, the policy and attitude of the government toward prostitution was in a fog. Even though the voice for repeal of prostitution was loud on the ground of sanitary, the central government did not seize the initiative in taking a stand against prostitution. There were only several times, at most, the government did take passive action to prohibit sex related activities. During the Chinese Nationalist government (KMT) period, with its authoritative policy,<sup>7</sup> KMT engraved morality with patriotism and tradition.<sup>8</sup> Hence, the abolishment of prostitution was adopted as a response to the wave of Confucianism. This policy contained four major missions, such as to clamp down on female receptionists, to abolish prostitution, to prohibit dancing and to crack down on superstition. However, the authoritativeness was still a bit different from autocracy. Even though the Government labeled prostitution as immoral phenomenon, at the same time the Ministry of Defense still maintained official brothels on outer island to provide sex service to many single soldiers who arrived from the mainland in 1949. Due to the prohibition, those who benefited a lot from sex industry, such as profiteers and house runners, started to take a stand against the government and staged a protest to call for new working opportunities.

### D. Public Prostitute Policy

As a response to people's complaints, with a stratagem to gain a respite, in 1956, KMT's government established the Measures for the Administration of Taiwan Province of Prostitutes, which set a two-year transition stage, attempting to help prostitutes switch to another profession in hopes that those elder sex workers would bit by bit vanished. In 1960, reflecting on the outcomes of the Measures, KMT found their mission was not completed,<sup>9</sup> since prostitution was still prospering. Subsequently, the Regulations were later revised the older provision as Measures for the Regulations of Taiwan Province of Prostitutes Governing, and started the era of public prostitute policy.

The Measures for the Administration of Taiwan Province of Prostitutes implemented licensing system, including proprietor license and prostitute license. The proprietor license administered the working site and disallowed extension, lease, and succession. That is to say, if the proprietor license was withdrawn or if the original owner died or was taken over by a member of the immediate family, the license would be invalid, and the brothel had to be closed down. The prostitute license regulated that prostitute had to be twenty or above. If she was eighteen above and under twenty, custodian's acceptance was required. Adopted daughter could not register without biological parents' admission. Also, sex worker should be without spouse, disability, venereal disease or contagious disease. If there was a vacancy in a brothel, she had to be interviewed by the proprietor in advance. If the brothel was in Taipei or Kaohsiung, she had to go get licensed from the police station under the brothel's name. If it was in other counties, she could get licensed from the police

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<sup>7</sup> Yean-Sen Teng, *Chapter 9 Who is Afraid of Human Rights? A Taiwanese Perspective*, 16 IUS Gentium 155 (2012).

<sup>8</sup> Wen-Chen Chang, *An Isolated Nation with Global-Minded Citizens: Bottom-Up Transitional Constitutionalism in Taiwan*, 4 Nat'l Taiwan U. L. Rev. 203, at 208-210 (2009).

<sup>9</sup> Jeffrey Martin, *A Reasonable Balance of Law and Sentiment: Social Order in Democratic Taiwan from the Policeman's Point of View*, 41 Law & Soc'y Rev. 665, at 684-690 (2007).

station under her own name with health examination sheet approved by Department of Health and identification papers. After getting licensed, she could start to practice.

KMT's government had long implemented public prostitute policy. Although only less than 10% of the existing brothels received license, the industry continued to prosper between 1970 and 1980, thanks to the huge influxes of Japanese men and American soldiers fighting in Vietnam who frequented the illegal, yet open the ubiquitous sex industry in Taiwan. In the 1970s, when the opening of two US army bases stationed in Taiwan, the number of bars and dance halls rose to the peak. Rapid industrialization in the 1960s brought a flood of young people into the cities, giving rise to a coffee-house and teahouse subculture, where young female hostesses catered to young male workers. Harbor cities like Keelung and Kaohsiung had prostitutes in every corner. In addition to the public prostitute policy, there were other two exceptional policies adopted. One is in Peitou, the hot spring hotels offered prostitutes and dancers for the officials to relax. The other was the brothel specially built for soldiers, also known as "the brothel in camp," much the same as the comfort women created by the Japanese. The most famous one was called "Kinmen 831." Back then, soldiers were not allowed to get married until twenty-eight. In order to avoid conflict between the public and soldiers,<sup>10</sup> the brothel in camp were established for them to relieve, in case of their sexual necessity.

Not until 1970s did the public notice the discrepancy of the public prostitute policy. Later on, the immoral controversy led to the increasing police attention on intimacy in public and even in private. "The brothel in camp" drew much attention because the system carried high controversy and was twisted with bad reputation. What's more, several soldiers were reported to rape young women to death and proved to harass high school girls in Kinmen.<sup>11</sup> Therefore, the news outraged the public. In 1974, the Government stopped licensing new brothels, and in 1980s, a campaign of rescuing aboriginal girls forced into prostitution grew into an anti-prostitution movement, which successfully lobbied for fully banning of prostitution across Taiwan. When it comes to its morality issue, people started to doubt the reason why KMT government adopted public-prostitution policy.

Prostitution, one of the oldest professions of all times, has carried high controversy over the centuries. In Taiwan, Japanese colonial period, Confucianism and KMT's authoritativeness all profoundly influenced the history of the regulations governing prostitution. Firstly, the Japanese regulated prostitution by legalization. Then, KMT's government set a public prostitute policy. However, in the 1990s, the abolishment of prostitution started to make its round in the conversation.

### **E. The abolishment of Public Prostitute Policy**

Sex work became illegal under the Article 80 of the Social Order Maintenance Act 1991, which replaced the Police Offense Law of the 1950s, and criminalized the mainly female population of sex workers. Sex workers could be detained for a maximum of three days, fined up to NTD<sup>12</sup> 30,000 or sent to a correctional institution for a period between 6 and 12 months. In 1997, Taipei mayor Chen Shui-bian held a

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<sup>10</sup> Caroline Joan (Kay) S. Picart, *Attempting to Go beyond Forgetting: The Legacy of the Tokyo IMT and Crimes of Violence against Women*, 7 E. Asia L. Rev. 1, at 26-31 (2012).

<sup>11</sup> Wei-long Wang, *Sex, Human Rights, and Work Comparative Discussion on the Adult Sex Trade Regulations*, Graduate Institute of National Development College of Social Science, National Taiwan University Master Thesis, 2008, 6.

<sup>12</sup> New Taiwan Dollar, hereinafter "NTD."

public hearing, which the attendants were mostly against the public prostitutes' policy. Back then, Taipei city was the only place in Taiwan where the public prostitutes were still legal. People assumed that the public prostitute policy had created a vast, permanent underclass of women who sold their souls in exchange of money and made them easy prey for all manner of exploiters. Under the overwhelming pressure, the government attempted to draft the abolishment of public prostitutes and immediately enforced within one week. Since the period of transition was too short to get accustomed to, Taipei sex workers and proprietors were all vigorously opposed to the new abolishment policy and hence organized the Taipei Public Prostitutes Union to provoke emotions. Sex workers asserted themselves with a two-year grace period. In 1999, when Ma Ying-jeou assumed the office of Taipei mayor, he allowed the two-year grace period that extended till April 2001.

In 2004, Ministry of Interior started to take account of amending the Social Order Maintenance Act, which set administrative penalties on prostitutes instead of the customers. Ministry of Interior aimed to convert this policy into decriminalization of both prostitutes and the customers. Since prostitutes were often bullied, threatened, or exploited by the police, gangsters and customers, the government tried to save these victims, who remained as underdogs in sex industry by legalization. However, women's Union was implacably opposed to legalization, because they believed the key factor to the exploitation was that, in essence, women fell prey to men. The only resolution to destroy the status quo was to penalize the customers, since they were the heart of the matter.

On the grounds of treating prostitution as a matter of human rights, the government concluded that punishing sex workers only forced them underground, leaving them easy to abuse. Even though the sexual transactions between consenting adults should be confined to personal, moral, religious and educational consideration, rather than by laws, the sex workers should be regulated like any other occupations.

#### **F. Constitutional Decision**

Following this, the Constitutional Court declared the existing legislation unconstitutional, and ordered that it ceased to be effect within 2 years. In 2009, J. Y. Interpretation No. 666 held that Article 80, Section 1, Sub-section 1 of the Social Order Maintenance Act<sup>13</sup> was unconstitutional, and shall be cease to be effective no later than two years since the issuance of this Interpretation. The reasoning was based on the principle of equality prescribed by Article 7 of the Constitution. To carry out the legislative purpose of maintaining citizens' health as well as morality, the government agency should implement different types of effective management, career-counseling measures, job training, or other educational methods to empower their working capability. Yet, thanks to Taiwan's democracy, public opinions could be discussed; people's voice could be heard. Interpretation No. 666 has long been debated and remained controversial.

#### **G. The New Law**

In 2011, Article 80 and 91 of the Social Order Maintenance Act were amended and Article 91-1 thereof was revised. Under the new policy, both the sex workers and the customers are subject to fines ranging from NTD 1,500 to NTD 30,000 for

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<sup>13</sup> Article 80, Section 1, sub-section 1 of the Social Order Maintenance Act that punishes any individual who engages in sexual conduct or cohabitation with intent for financial gains by detention not more than three days or by a fine not more than NTD 30,000.

engaging in paid sex outside the permissible districts. In the past, only the sex workers themselves were penalized while the johns were allowed to go free. Local Governments have the rights to settle and mark out the area of “red-light” districts, which sexual transactions are permitted while outside of the “red-light” districts, all the sexual transaction and parties are forbidden. Sex workers can now offer services legally in designated red-light districts and neither the prostitute nor the customer will be prosecuted.

Currently, only 11 of the originally licensed brothels were left. Nonetheless, it is reported that there are more than 100,000 sex workers in practice and two million customers looking for sex service in Taiwan.<sup>14</sup> Many of Taiwan’s sex workers are victims of human trafficking from China and Southeast Asian countries, deceived by smugglers with fraudulent marriages and fake employment offers.

The new policy seems to admit the existence of prostitution and massed the brothels together for better regulation. Nevertheless, as it turns out, all 22 counties and city mayors have spoken against fencing off a sex zone in their district, unwilling to mark out the “red-light” district. No local governments are prepared to create one of these districts because of fear over a jump in crime rates and plunging real estate values. As a result, the new policy indirectly became a regulation setting administrative penalties on all the parties, including prostitutes and customers. This outcome caused rage throughout the sex industry and women’ Union. From feminists’ perspective, prostitutes still remain as victims in the system, and get ripped off by administrative penalties. From men’ perspective, sexual drive unreasonably becomes a wrongful act. Therefore, the debate between prostitutes and the public are still unsettled.

Whoever falls prey to this game, there is always a player that takes the whole advantages with bare hands. The procurer, who promotes prostitution by pandering, is typically involved with sexual exploitation usually leading to forced prostitution. Procurers or pimps are the individuals who extend the service, capital and resource that make sexual trafficking of children both a feasible and lucrative industry<sup>15</sup>. The majority of people believe pimps are the ones to blame, since they merely benefit from the whole industry without costs. In Taiwan, since the first enactment in 1935, the government has long criminalized procurers as offense against morality. According to current Criminal Law, the article 231, a person who for purpose of making a male or female to have sexual intercourse or make an obscene act with a third person induces, accepts, or arranges them to gain shall be sentenced to imprisonment of not more than five years and, in addition thereto, a fine of not more than one hundred thousand yuan may be imposed. Most of the prostitution businesses that procurers do are at bars, hotels, clubs, and massage salons, sometimes extending to trafficking for sexual exploitation.<sup>16</sup> Prostitutes are often seriously ripped off and treated unfairly by these bloodsuckers. Therefore, the legality of procurers hardly stands as a matter in question.

### **III. Feminism Movements in Taiwan**

#### **A. The Old Thinking**

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<sup>14</sup> Collective of Sex Worker and Supporters (COSWAS), <http://coswas.org/>

<sup>15</sup> Tracy Agyemang, *Reconceptualizing Child Sexual Exploitation as a Bias Crime under the Protect Act*, 12 *Cardozo J.L. & Gender* 937, at 942-951 (2006).

<sup>16</sup> Martti Lehti, Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 *Crime & Just.* 133 (2006).

Traditionally, due to Confucianism, any talk and issue related to woman could hardly survive on the table in Taiwan. Women were not supposed to deal with public matters, let alone education, politics and rights. Women were supposed to take over all the household duties and childcare, and at the same time, count on men for living. For long, women had been treated as good mothers and wives, impeccable housekeepers and blushing brides. Women were bonded to patriarchy. Nevertheless, in 1960s, when liberation and feminism befell women, the women's movement seemed poised to change the world. In general, women's rights movement is a political movement striving for gender equality in the rise of feminism. Women's rights movement is also a social movement endeavoring to improve women's social position and economic status.<sup>17</sup> The ultimate goal is to alter the old-fashioned impression on women and help women empower themselves.

In 1949, when the Chinese Nationalist government (KMT) took up Taiwan, patriotism was the top priority. Under the martial law, Taiwanese citizens had to be obliged to the discipline of the Party, so the government's policy centered on the education of partisan spirit. Back then, KMT run most of the women unions, which instructed women to be good mothers with partisanship instead of women's rights. It was an authoritative period in which women were asked to help strengthen family function and build family ethics. Accordingly, women were the members to help reinforce the Party's mission to lead Taiwan against the communists in China. Women were not encouraged to call for rights. Instead, they were told to ask for more responsibilities. They were expected to abide by the traditional ethics and manners, stay home as good wives and mothers, and to be introverted, gentle and kind. Strict patriarchy and restrictions on free speech restrain feminism, which had already widely known in the West, from spreading out. Radical feminism,<sup>18</sup> liberal feminism and Marxism were still abracadabra for the public.

## **B. Waking Up**

In the 1950s to 1960s, the society paid no attention to equality, women's rights, not to mention feminism. In contrast, morality, loyalty and responsibilities drew much more attention. Even though some of the student who studied abroad went back to advocate feminism, women's need, desire, rights and interests were still completely left behind by the government. Therefore, the 1970s decade became the rebound of this oblivion.

In general, women's movements in Taiwan were usually divided into three phases: Lu Hsiu-lien's New Feminism, Li Yuan-chen's Awakening Foundation, and the new women's movement after the martial law ended. The first phrase was said to liberate the mental and practical bondage of women's social conditions, including education rights, working rights, legal power and political power. The second phrase was seen as a period of international cooperation between women all over the world. And the third phrase was a transformation of feminism through cultures, aiming to challenge women's own ideologies and constraints set by patriarchy.

## **C. The First Phrase: New Feminism**

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<sup>17</sup> Stuckey, J. H., Women and religion: Female spirituality, feminist theology, and feminist goddess worship. In N. Mandell (Ed.) *Feminist issues: Race, class, and sexuality* (3<sup>rd</sup> ed., pp. 279-306). Toronto: Prentice Hall (2001).

<sup>18</sup> Cass R. Sunstein, *Feminism and Legal Theory*, 101 Harv. L. Rev. 826 (1988).

The initial stage of 1970s, even though the government-running women unions did try to adjust to the trend, private-running women unions started to take the lead. In 1971, the article "Traditional Characters of men and women" written by Lu Hsiu-lien started the era of women's rights movement. Different from the government-running unions' policies, private-running women unions emphasized more on the revolution and the protection of women's rights. In the 1970s, women's needs and self-awareness gradually became the topics in the air. Liu Hsiu-lien, the author of the book "New Feminism" and also known as the leading role of Taiwan women's rights movement, presented some issues to be discussed, such as Taiwan's marriage system, the law of succession, the law of custody, imbalance in economic pyramid, women's voting right and education. She also deeply compared the status between upper-class women and middle-class women, capability between countryside women and prostitutes. Lu had already sensed the conversion between generations and claimed the government's policy had already been out of fashion. Lu was famous for being the first one carrying banner for feminism, and devoted to making difference.

New Feminism defines itself as a philosophy or truth, hence based on the Three Principles of the People, from an idea, to faith and at the end to power. Lu Hsiu-lien was not influenced by the western women's movements. In order to complete her mission, she centered on localism and put it into practice. Instead of testing the gender features as the western feminists, she stayed neutral to traditional gender roles. Despite the fact that new feminism did succeed to psychology, biology and anthropology from the west to overcome patriarchy, it still maintained Chinese traditional spirit to construct the idea of women's power.

#### **D. The Second Phrase: The Awakening**

As a consequence of economic boom, Taiwan was changing into a model of consumer society. Under the influence of capitalism, Taiwan's economic structure gradually built by "mass production" and "high techniques," accompanied with "commercialization" and high population. Responding to the rampant capitalism, Taiwan's consumer protection campaign and environmental protection campaign later flourished to take a stand.

In the 1980s, under the leadership of the Awakening Foundation, more women's issue and talk could finally strike up the conversation. On February 1982, Li Yuan-chen established Awakening Foundation, when women and housewives started to realize their power and rights. With some other feminists, Li became the major power to promote women's movement after New Feminism. During 1980s, Feminism was no longer an unfamiliar ideology. Women were encouraged to mobilize to stand out. In 1984, the Foundation demanded the legalization of abortion. In 1985, the Foundation required the Legislative Yuan to revise Civil Law. In 1987, the Foundation staged a protest against the human trafficking of child prostitutes. In 1989, the Awakening Foundation introduced the "Gender Equality in Employing Bill," which was eventually passed in 2001 after continual proposals to the government. In addition to lobbying for women's rights, the Foundation has also helped strengthen the participation of women in public affairs, and ensure the government policy for women were properly enforced. It was not until 1987 did the government declare the martial law ended. After 1987, Taiwan finally became a democratic country. Second-

wave feminism, such as the liberal and the radical, began to pour into people's minds.<sup>19</sup>

The Awakening Foundation strived to perform women's liberal and independent character instead of introverted, dependent and subordinate impressions. Aside from occasionally publishing issues, the Foundation also held many campaigns and movements to strengthen feminism. What really decorated the Awakening phrase was the focus on "women's self-consciousness." The concept of "women's self-consciousness" was to help women empower themselves to be independent, encourage them to participate in social movements and exploit their potential. Even though Liu Hsiu-lien had already introduced this idea, the Awakening had, one step further, concentrated, and rebuilt it into a common symbol, and pushed the idea into practice. On one hand, they tried to arouse women's pressure on themselves; on the other hand, they tried to meet recognition of women to share the same emotions and experiences.

Compared with other consumer movements at the same time, Awakening Foundation was known for its low-profile strategy and moderate style. With its moderate fashion, they could ease off the restraints from society and also leave some space for cooperation. In addition, housewives, mostly seen as lacking in feminism and lack of participation in public issues, were willing to take part in this "radical" social movement, which was also a surprising phenomenon in Taiwan.

### **E. The Third Phrase: Transformation**

During this period, whether politically or socially, it was an unstable era in Taiwan. In the 1980s, women's rights movement had not stopped prospering. However, many women's unions shared a same characteristic: a strong and protruding attitude. Therefore, this situation later caused them to separate and even go against each other. After a longtime fermentation, women's movement in 1980s erupted as an unstoppable volcano. Female workers, female college students and feminism clubs thrived within parties. Women's unions began to go professional and global and even cooperate with the government.

Generally speaking, the third phrase movement had the following features: high mobility, high cooperation between parties, and one issue at one time. In 1994, Taipei Association for the Promotion of Women's Rights (TAPWR) was founded and spared no efforts to fight for a more equal society. TAPWR directly cooperated with the Taipei government run by Democratic Progressive Party regardless of politics. Sexual harassment at school and work, sexual desire, sexual violence, prostitution of children, pornography, feminizations of poverty and unequal treatment all have their own fervent rounds in debates.<sup>20</sup>

### **F. From Disunion to Divergence**

After 1980s, ten-year development had made Taiwan full of unexpected trends and later transformed Taiwan into a hotbed of radical social movements, organizations and clubs. In 1990s, women's movements progressively changed from

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<sup>19</sup> Chang, S. Y. (1990) Three generations of Taiwan's contemporary women writers: A critical introduction. In A. Carver and S.Y. Chang (Eds.), *Bamboo shoots after the rain: Contemporary stories by women writers of Taiwan* (pp.15-25). New York: The Feminist Press.

<sup>20</sup> Liu, Liang-ya, Queer Theory and politics in Taiwan: The cultural translation and (re)production of queerness in and beyond Taiwan lesbian/gay/queer activism. *NTU Studies in Language and Literature*, 14: 123-153 (2005).

an “ideal ideology” to “strategy.” They claimed to redraft many legislations containing gender discrimination. What’s more, sensational literature was no longer an undercover issue. Lesbian, Gay, Queer, and sexual orientation began to occupy the front page of everyday issue and intended to subvert the old-fashioned way of gender thinking and tradition. TAPWR firstly introduced localism into central issue of women’s movement. They aimed to reconstruct the forgotten Taiwanese women’s experience and rewrite the Taiwan history with women’s stories.

### **G. Women’s Rights versus Sexual Rights**

In 1944, “Bold Women,” written by Chuen-juei Ho, proclaimed the war of sexual liberation, and poured sexual rights into sex politics. The sexual revolution became the new and contentious issue of the women’s movement, which also caused internal disorders between women’s rights and sexual rights. Sexual rights supporters pivoted on the liberation of women’s motions and emotions. They tried to help sexual minority groups practice sexual conducts and settle in their own relationships. Even though the public tended to get familiar with pornography and sex, it didn’t represent those sexual minority groups could find their own position in the society. Chuen-juei Ho strived to correct the existing discrimination against the slutty impression on women by sex-role revolution. She had embarked on a journey of realizing women’s sexual desires in the pursuit of orgasm, and aimed at demolishing the praise of virgin luck. Sexual rights supporters don’t believe in the two sides of gender, since the identity of female hadn’t been the nature of women but the representation of men’s power and dominance. The liberation, they insist, can free women from men’s desire and the worship of penis. Forwardly, it can remove the unreasonable burden that most women have shouldered.

However, women’s rights supporter claimed that women do have versatile emotions and desires. They paid much more attention to the constituency to take part in sexual politics,<sup>21</sup> putting emphasis on tradition, major politics, bureaucracy, hierarchy and leadership. Different from the radical means those sexual rights supporters took, in order to get their ideas across, women’s rights supporters intended to make compromise with the public instead of the radical fashion. As a matter of fact, this was all about strategies, not the fundamental concepts or theories. Women’s rights supporters took a tenderer and moderate stand and tried to maintain the traditional order of genders and sex. In this case, they could draw some other supporters that sexual rights supporters couldn’t.

## **IV. Prostitution Policies in Other Countries**

### **A. Regulation among 100 Countries**

An investigation from “Pros and Cons of Controversial Issues” website collects prostitution policies in 100 countries, includes their geographical locations, population, religions and legislative regulations, according to calculative information provided by CIA. The static classifies 100 countries into 3 categories: legalization, partial-legalization and illegalization. 50 countries legalize prostitution, 11 countries

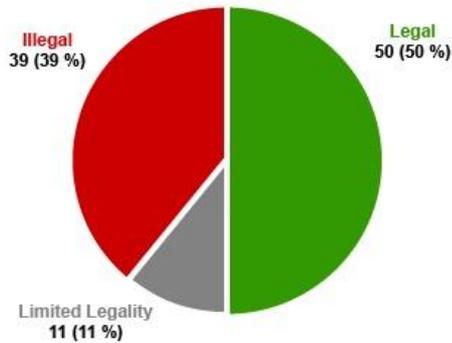
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<sup>21</sup> Rubin, Gayle S., *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, American Feminist Thought at Century’s End: A Reader. Ed. By Linda S. Kauffman. Oxford: Blackwell, 1993. 3-64.

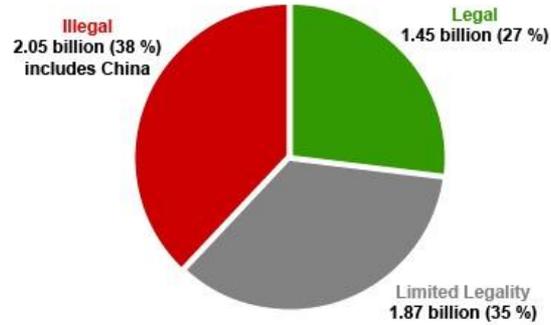
stand on partial-legalization, while 39 countries support illegalization. The charts are as follows:<sup>22</sup>

**Legal in 50 (50%); Limited Legality in 11 (11%); Illegal in 39 (39%); Total: 100 (100%)**

**Number and Percentage of Countries with Legal, Illegal, and Limitedly Legal Prostitution (of the 100 countries)**



**Population (total # and % of total) of Countries with Legal, Illegal, and Limitedly Legal Prostitution (of the 100 countries)**



<b>Legalization (50%)</b>	<b>Partial-legalization (11%)</b>	<b>Illegalization (39%)</b>
Argentina	Australia	Afghanistan
Armenia	Bangladesh	Albania
Austria	Bulgaria	Angola
Belgium	Iceland	Antigua and Barbuda
Belize	India	Bahamas
Bolivia	Japan	Barbados
Brazil	Malaysia	Cambodia
Canada	Norway	China
Chile	Spain	Croatia
Colombia	Sweden	Cuba
Costa Rica	United States	Dominica
Cyprus		Egypt
Czech Republic		Grenada
Denmark		Guyana
Dominican Republic		Haiti
Ecuador		Iran
El Salvador		Iraq
Estonia		Jamaica
Ethiopia		Jordan
Finland		Kenya
France		Korea, North
Germany		Korea, South
Greece		Liberia
Guatemala		Lithuania
Honduras		Malta
Hungary		Philippines
Indonesia		Romania

<sup>22</sup> Pros and Cons of Controversial Issues, <http://prostitution.procon.org/view.resource.php?resourceID=000772> (last visited 2013/2/13).

Ireland Israel Italy Kyrgyzstan Latvia Luxembourg Mexico Netherlands New Zealand Nicaragua Panama Paraguay Peru Poland Portugal Senegal Singapore Slovakia Switzerland Turkey United Kingdom (including Scotland) Uruguay Venezuela		Rwanda Saint Kitts and Nevis Saint Lucia Saint Vincent and Grenadines Saudi Arabia Slovenia South Africa Suriname Thailand Trinidad and Tobago Uganda United Arab Emirates
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(Taiwan was covered by China in this form; however, the legislation had been modified since 2011, therefore Taiwan should be classified as partial-legalization country.)

## **B. Advantages and Disadvantages**

### **(A) Legalization – Netherlands**

Since October 2000, prostitution, brothel ownership and pimping are all legalized in Netherlands. Prostitutes must be over 18 and clients must be over 16; prostitutes must register and pay taxes. Brothel owners are subject to licensing and zoning requirements. Pimp living off income from a prostitute is legal if it doesn't involve coercion. Without specific law regarding prostitution, related articles separate in Criminal Code, Labor Law and Dutch Policy of Prostitution.<sup>23</sup>

One of the most famous red-light zones in the world is in Amsterdam. Exists since 13<sup>th</sup> century, the red-light zone profits significantly from sight-seeing and sex trade – the owner can earn 750 Euros each day. In 2005, there are estimated 25,000 prostitutes working in over 6,000 locations, many came from Central and Eastern Europe.

Legalization increases the income of government; also make it easier to restrain. However, on the other hand, the more and more serious problems of human trafficking, drug abuse and gangsters make the situation worse. Amsterdam city government passed “1012 project” in 2007, practiced by a

<sup>23</sup> Netherlands Ministry of Foreign Affairs, *Dutch Policy on Prostitution*, available at: <http://prostitution.procon.org/sourcefiles/NetherlandsPolicyOnProstitutionQ&A2005.pdf> (2005).

national organization Nederlands Archfonds, looking forward to reduce red-light windows in a forthcoming decade.

### **(B) Partial-legalization – Sweden**

The leading model of partial decriminalization is Swedish law passed on January, 1999.<sup>24</sup> The Swedish law treats prostitutes as victims, while punishes the johns. In Swedish Penal Code chapter 6, section 11, purchasers of sexual services will be imposed with a fine or imprisonment up to 6 months.<sup>25</sup> Based on supply-and-demand rule, the rationale behind the legislation is that once the demand of sexual services decreases, prostitution will be eradicated.<sup>26</sup>

Seems like having an overwhelming success, the official evaluation reported that since the new law went into effect, street prostitution has been reduced by 50%,<sup>27</sup> and there has not been an increase in indoor prostitution, such as massage parlors, sex clubs, hotels, etc..<sup>28</sup> The government also reported that the ban acts as a barrier to human traffickers.<sup>29</sup>

While Swedish authorities have deemed the law as success, critics allege it has not reduced prostitution, but rather forced it into more isolated and dangerous environment.<sup>30</sup> A spokeswoman for the Sex-workers and Allies Network in Sweden claims that the law does push prostitution underground, make streetwalkers facing more exposure to dangerous clients because safer clients are afraid of arrest,<sup>31</sup> also more unsafe sex and rapes.<sup>32</sup> Therefore, prostitutes are more dependent on pimps or transfer to work in nearby countries, such as Norway or Iceland.<sup>33</sup>

### **(C) Criminalization – South Korea**

After a fire accident burned down one illegal brothel in Gunsan and took lives away from 5 women imprisoned in that brothel in 2000,<sup>34</sup> the then-current Law against Morally Depraved Behaviors, which outlawed prostitution since 1961, had faced challenges. Nevertheless, the over harsh legislation did not eradicate prostitution; according to 2004 investigations, over 330,000 women

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<sup>24</sup> Government Offices of Swed., *English Summary Evaluation of the Ban of Purchase of Sexual Services*, at 35 (2010).

<sup>25</sup> Brottsbalken (Criminal Code) 6:11, Swed..

<sup>26</sup> *supra note 24*, at 29 (2010).

<sup>27</sup> *Id.* at 34 (2010).

<sup>28</sup> *Id.* at 36 (2010).

<sup>29</sup> *Id.* at 37 (2010).

<sup>30</sup> Karl Ritter, *World Takes Notice of Swedish Prostitute Laws*, Truthout, available at: <http://archive.truthout.org/article/world-takes-notice-swedish-prostitute-laws> (2008).

<sup>31</sup> Paul O'Mahony & James Savage, *Swedish Prostitution: Gone or Just Hidden?*, The Local, available at: <http://www.thelocal.se/9621/20080110> (2008).

<sup>32</sup> Andre Anwar, *Criminalizing the Customers: Prostitution Ban Huge Success in Sweden*, Spiegel Online, available at: <http://www.spiegel.de/international/europe/0,1518,516030,00.html> (2007).

<sup>33</sup> Katie Beran, *Revising the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 *Law & Inequality* 19, at 14-15 (2012).

<sup>34</sup> Ji Hye Kim, *Korea's New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature's Intent to Protect Prostitute from Abuse*, 16 *Pacific Rim Law & Policy Journal* 493, at 1 (2007).

engaged in sex industry,<sup>35</sup> it was a business profited over 22 billion per year.<sup>36</sup>

Therefore, in February 2004, Korean government passed 2 new laws, in order to penalize procurers and traffickers while protecting prostitutes as victims. Unexpectedly, nearly 2,700 prostitutes took street protest in October 2004, claimed that they were legitimate labors who entered prostitution voluntarily, they had the right to make a living as sex workers; the new legislature will make their works further underground.<sup>37</sup> Over severe acts, like current Act on the Punishment of Intermediating in the Sex Trade, causes crime displacement, make it more difficult to defeat criminals<sup>38</sup>.

Some women's right groups, such as Korean Women's Association United, proposed modification to the government. First, regulation: to approbate licenses for business owners and prostitutes; second, decriminalization: either abolishes all penalties or limit penalties among prostitution; and third, the government must create enforcement mechanism along with NGOs and Prostitution Emergency Assistance Center that encourages prostitutes to report abuses and prove their victim status.<sup>39</sup>

Due to the differences of cultures of each country, it is difficult to conclude that whether legalization, partial-legalization or illegalization has more economical and social advantage, or more disadvantages such as human trafficking, drug abuse or gangs.

## V. In-depth Interview

### A. Research Method

The research method we took in this study is "in-depth semi-structured interview." It is a method of qualitative research, typically done face-to-face, in which the researcher asks open-ended questions orally and records the interviewee's answers. The interviewer has a general plan of inquiry, however without specific set of questions that must be asked with particular words and in a particular order.

Before the interview the interviewers have well formalized topic – prostitution in Taiwan – in advance, designed limited set questions with flexible structure, allowing new questions to be brought up during the interview as a result of where the conversation goes. We design our questions into 3 parts generally: first, the background information of the interviewee; second, which ethical approach about prostitution the interviewee takes; and third, the interviewee's opinion toward current regulation regarding prostitution in Taiwan.

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<sup>35</sup> Hyeran Oh, *A Study on the Factors Affected the Legislation of the Sex Trafficking Prevention Act: Focusing on the Governance Perspective and the Role of Women NGOs*, Journal of Women's Studies, at 51 (2004).

<sup>36</sup> Sa-Jong Hong, *Futility of Efforts to Legislate Morality*, JoongAng Ilbo, vol. 12, part 6 50-1, at. 13 (2004).

<sup>37</sup> Eun-Joo Cho, *Speaking about Subordination Challenger's Politics: Prostitutes Who Took to the Streets*, Korean Grand Alliance of Lab. Unions Res. Memorandum, at 5 (2006).

<sup>38</sup> Kyung-Seok Choo et al., *The Impact of the "Act on the Punishment of Intermediating in the Sex Trade" and the Police Crackdown in Red Light Districts on Sex Industry in South Korea*, Crime and Criminal Justice International, vol. 17, at. 59 (2011).

<sup>39</sup> Jin-Wan Chung, *Women Victim's Hotline is 1366*, Report on Prostitution, MunHwa Ilbo, at 117 (2005).

In this study, we collect interviewees from various professional fields which related to prostitution, further inquire their opinions toward legislation, regulation and judicial practice about prostitution in Taiwan, in order to sketch the picture of present situation. The corresponding codes of the interviewees are as follows:

Occupation	Code	Gender
Scholar	S1	Female
Scholar	S2	Male
Judge	J	Female
Prosecutor	P	Female
Social worker	W	Female
Police officer	O	Male
Legislator	L	Female
Sex worker	X	Female

### B. The flaws of current regulation

X, a former public prostitute, is now 60 years old and retired, had worked as prostitute for over 10 years. Now she is a volunteer in COSWAS, advocating the rights of prostitutes. She directly gives away the motivation of being a prostitute: money.

*I was a house cleaner before I became a prostitute. In 1980's, the salary for housekeepers is NTD 4,500 per month per house; I cleaned two houses and earned NTD 9,000 monthly. However, my husband left me with two sons; I need to afford the rent – 6,000 each month, with remaining 3,000 to support kid's education, meals, clothes and other living expenses. The situation gave me no choice but enter prostitution. Prostitution made me able to earn about 50- 60 thousand dollars per month.*

O, a young police officer serving in Wanghua district, Taipei, is very familiar with vulnerable and poor economic conditions of old prostitutes, since Wanghua is one of the most famous gathering places for sex workers, especially streetwalkers. The age of prostitutes here varies from 20 to 80; the cheapest price to buy sexual intercourse is 300 dollars.

*(The price of sex trade around here) depends on the appearance and age of certain prostitute... the range is from NTD 300 to 3,000. I have encountered a 70-year-old one last time; she has no other skills but selling her body. Other forms of sex trade, such as clubs, massage parlor, KTV, MTV, one-woman brothel<sup>40</sup> or enjokosai,<sup>41</sup> require higher price and provide younger sex workers. However, in Wanghua, most prostitutes are old and cheap streetwalkers.*

Ironically, under Social Order Maintenance Act article 80, the most vulnerable ones are punished by the most severe penalty to them: fine. As a prosecutor working in Taipei District Prosecutors Office with 9 years experiences, P explained different inspection processes under Criminal Code and Social Order Maintenance Act:

<sup>40</sup> It is illegal for two or more prostitutes to work in the same premises in Hong Kong; as a result, the most common form of legal prostitution is the so-called "one-woman brothel", where one woman receives customers in her apartment.

<sup>41</sup> It means "compensated dating" and is a practice which originated in Japan where older men give money and/or luxury gifts to attractive women for their companionship and, possibly, for sexual favors. The female participants range from primarily school-aged girls to housewives.

*Most cases prosecutors deal with involve criminal offenses, such as human trafficking, drug using, or sex trade with minors; consensus intercourse between adults is not penalized by Criminal Code. On the other hand, cases under Social Order Maintenance Act are into the scope of Administrative law; polices have the authority to impose fine or custody right when they arrest the wrongdoer... Sex workers who benefit a lot, such as girls in expensive clubs, will neither be punished under Criminal Code nor be found under Administrative law, yet streetwalkers are the main target of Social Order Maintenance Act.*

Sex workers with pimps or covered by organizations need not to solicit by themselves, easier to avoid police, have better and more private environment to serve their customers. Meanwhile, streetwalkers have to do the solicitation, expose to potential risks such as violence or robbery, and are targets to polices who want to accumulate “performance point;” polices with lower performance point than expected may be blamed by supervisors. As a result, streetwalkers have to pay the fine which is far higher than their income. O says:

*National Police Agency passed an internal document in response to the latest modification of Social Order Maintenance Act, which regulates the amount of penalty of different situations about prostitution... The fine for a prostitute who is caught first time is NTD 1,500. It will become NTD 6,000 when she gets caught the second time; to the third-time the fine will be NTD 12,000, while their income for sex favor has already be forfeited in advance. In Wanghua, streetwalkers would rather die than pay the fine. However, if the wrongdoer objected to district court, mostly the judge will not adjudicate to fine more than NTD 1,000.*

Obviously, there is a big gap lying between police agencies and district court judges. Why the results of their decision making will be so parted away? J, a Taipei District Summary Court judge, gave us some answer:

*To me, Social Order Maintenance Act is a law covers too broadly and endows too much authority to polices, make them capable to penalize others... sometimes meaningless. Personally, when facing these prostitution cases, I will consider the educational background, the economic condition, the price of sex trade, and the evidences that police collected, all the above circumstances of the objector; if the possibility was not beyond reasonable doubt, then I will not adjudicate guilty. Even if the result is guilty, I will not fine more than the price of sex trade that time... polices often impose high fines such as NTD 12,000 or 15,000, which are unbearable burdens to those prostitutes!*

To sum up, under current situation, each profession is unable to help. To prostitutes, they need money, but Order Maintenance Act forbid them to do it legally; To polices, they acknowledge and pity the vulnerability of prostitutes, however following the performance point system and internal document made by National Police Agency, they have to keep chasing prostitutes unwillingly; and to judges, making controversy determination with polices seem to be the only thing they can do.

## **VI. Conclusion**

Back in the old times, the revolution to legalization had occupied hundreds of pages, left several question marks on economics, humanity and justice. In decades, women’s movements have caused many rounds of debates, whether criminal laws versus labor laws or women’s rights versus sexual rights.

Examples from other countries, no matter legalization or illegalization, have their own merits and defects. Legalization increases national taxation, however leave the management of red-light zone a huge problem. Illegalization stimulates prostitution curbs more enormously; meanwhile, prostitutes are left with higher risk of violence and rape.

Based on the above records of interviews, the enforcing legislation of Social Order Maintenance Act needs to be modified. But the trickiest question is: how? Feminists separate into two extreme opposing groups, as illustrated before – radical and liberal feminism. They take totally reverse approaches toward prostitution, and never compromise; it is not only a war between women, but also a dilemma for any government to make decision.

# 國科會補助計畫衍生研發成果推廣資料表

日期:2013/10/17

國科會補助計畫	計畫名稱: 我國性交易產業之立法與管制—從女性主義探討娼妓除罪化問題 (GM01)
	計畫主持人: 林志潔
	計畫編號: 101-2629-H-009-001- 學門領域: 基礎法學
無研發成果推廣資料	

101 年度專題研究計畫研究成果彙整表

計畫主持人：林志潔		計畫編號：101-2629-H-009-001-					
計畫名稱：我國性交易產業之立法與管制—從女性主義探討娼妓除罪化問題 (GM01)							
成果項目		量化			單位	備註 (質化說明：如數個計畫共同成果、成果列為該期刊之封面故事...等)	
		實際已達成數 (被接受或已發表)	預期總達成數 (含實際已達成數)	本計畫實際貢獻百分比			
國內	論文著作	期刊論文	0	0	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	0	0	100%		
		專書	0	0	100%		
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力 (本國籍)	碩士生	1	0	100%	人次	
		博士生	0	0	100%		
		博士後研究員	0	0	100%		
		專任助理	0	0	100%		
國外	論文著作	期刊論文	0	0	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	1	0	100%		
		專書	0	0	100%		章/本
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力 (外國籍)	碩士生	0	0	100%	人次	
		博士生	0	0	100%		
		博士後研究員	0	0	100%		
		專任助理	0	0	100%		

<p>其他成果 (無法以量化表達之成果如辦理學術活動、獲得獎項、重要國際合作、研究成果國際影響力及其他協助產業技術發展之具體效益事項等，請以文字敘述填列。)</p>	<p>本研究期中成果已發表於 2013. 22-23 於上海交通大學凱原法學院舉辦之「第三屆東亞法與社會國際研討會」(The Third East Asian Law &amp; Society Conference)，論文名稱為' Can Sex Be Sold? - Evaluating Prostitution Regulations in Taiwan by Feminist Theories'，本人參與之場次為「性別、家庭與法律」，本場次發表人各來自台灣、日本、韓國和澳洲等亞太國家，著實提供了亞洲地區法社會學、性別、弱勢權益、法律管制與社會的交流契機，也讓鄰近的亞洲國家學者能參與討論台灣性管制措施的優劣。</p>
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	成果項目	量化	名稱或內容性質簡述
科 教 處 計 畫 加 填 項 目	測驗工具(含質性與量性)	0	
	課程/模組	0	
	電腦及網路系統或工具	0	
	教材	0	
	舉辦之活動/競賽	0	
	研討會/工作坊	0	
	電子報、網站	0	
	計畫成果推廣之參與(閱聽)人數	0	

# 國科會補助專題研究計畫成果報告自評表

請就研究內容與原計畫相符程度、達成預期目標情況、研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）、是否適合在學術期刊發表或申請專利、主要發現或其他有關價值等，作一綜合評估。

## 1. 請就研究內容與原計畫相符程度、達成預期目標情況作一綜合評估

達成目標

未達成目標（請說明，以 100 字為限）

實驗失敗

因故實驗中斷

其他原因

說明：

## 2. 研究成果在學術期刊發表或申請專利等情形：

論文： 已發表  未發表之文稿  撰寫中  無

專利： 已獲得  申請中  無

技轉： 已技轉  洽談中  無

其他：（以 100 字為限）

本研究期中結果已發表於 2013. 22-23 於上海交通大學凱原法學院舉辦之「第三屆東亞法與社會國際研討會」(The Third East Asian Law & Society Conference)，題目名稱為' Can Sex Be Sold? - Evaluating Prostitution Regulations in Taiwan by Feminist Theories'，發表場次為「性別、家庭與法律」，發表人來自台灣、日本、韓國和澳洲等亞太國家，著實提供亞洲地區法社會學、性別、弱勢權益、法律管制與社會的交流契機，也讓鄰近的亞洲國家學者能參與討論台灣性管制措施的優劣。同時，本研究之成果論文亦已著手撰寫，預計發表於學術期刊。

## 3. 請依學術成就、技術創新、社會影響等方面，評估研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）（以 500 字為限）

法律作為一種社會規範，其終極目的在於影響人類行為趨向公平正義；對於社會現象的觀察，自應根據特定社會與人類行為所發生的實際結果而為判斷。唯有經過實際證據資料的蒐集與分析，通過科學方法驗證的學說與規則，始能確立法律規定及學說理論的社會接受性。隨著管制福利國家的興起，法律的介入領域不斷擴張；為了有系統地自實證性（positive）及規範性（normative）角度研究法律與人民的互動，以達到「探討法律的影響」、「理解法律為何是如此」以及「法律應該是如何」等三個目的，採行法釋義學以外的研究方法確有其必要。

暨此，本文從娼妓問題的爭議出發，透過女性主義理論之導入、世界各國立法例之介紹、我國性交易管制政策演進之整理等，企圖自具有歷史思維的法學方法中描摹出社會變遷的脈絡；接著進入本文研究核心：實證研究（empirical study）中的質性研究方法（qualitative research），呈現 9 位身處與性產業執法相關領域的專業人士，對於社會秩序維護法實踐程序之看法，確認立法與行政的妥適性及完備性與否；最後提出結論，就

現行法檢討、性交易應否管制、應如何管制等三個問題提出階段解答，並擬定遠程、中程、近程目標，期能找出對於現今已逐漸開放的台灣社會而言，最能為大多數人所接受，也是最能保障弱勢、尊重彼此的制度。

本文藉由各女性主義流派之脈絡和理論，結合台灣本土女權運動的發展，對於我國性交易之法律規範進行探討。此外，更與許多實務界的專業人士進行質性訪談，從事深入的實證研究，以求理論與實踐之整合。因性交易制度之管制有其社會影響性，不僅驗證了人民對於性別角色之潛意識，更反向積極形塑社會結構，對於台灣社會之性別平等實有重大影響。本文希望能提出較符合台灣當地民情與性別正義之性管制政策，以俾促進台灣社會性別主流化。