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## THE UNSEEN STRUGGLE: SEX WORKERS' RIGHTS AND LEGAL CHALLENGES IN INDIA: A CONSTITUTIONAL IMPERATIVE TOWARDS JUSTICE

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### Abstract

In the vibrant yet often contradictory tapestry of Indian society, the lives and rights of sex workers remain largely obscured, entangled in a web of legal ambiguity, societal stigma, and moralistic judgments. The legal framework governing the rights of sex workers in India, with a focus on the Immoral Traffic (Prevention) Act, 1956<sup>764</sup> (ITPA), and its implications for the dignity, safety, and empowerment of sex workers. Despite the prevalence of sex work in India, sex workers face systemic marginalisation, violence, and exploitation due to the criminalisation of their profession and the lack of a rights-based legal approach. By comparing India's legal framework with international models, such as with the Netherlands, the study highlights best practices that could inform reforms in India. The findings underscore the urgent need for decriminalization and the adoption of a rights-based approach to sex work, ensuring legal protection, social inclusion, and economic empowerment for sex workers.

Furthermore, it will discuss the perspectives of sex workers' rights and the potential pathways towards a more just and more equitable and a safer environment for sex workers are created, all whilst keeping the broader goals of societal well-being and prevention of exploitation is prioritized.

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<sup>764</sup> The Immoral Traffic (Prevention) Act, 1956

## Introduction

***"The measure of a civilization is how it treats its weakest members."***

***– Mahatma Gandhi***

This profound statement by Mahatma Gandhi underscores the moral and ethical responsibility of a society to protect and uplift its most vulnerable populations. In the context

of contemporary India, one such marginalized and often invisible group is sex workers. Despite their significant presence in the socio-economic fabric of the nation, sex workers remain among the most stigmatized, exploited, and legally unprotected communities. The legal framework governing sex work in India, primarily encapsulated in the Immoral Traffic (Prevention) Act, 1956 (ITPA), reflects a paradoxical approach: while it aims to curb trafficking and exploitation, it inadvertently criminalizes the very individuals it seeks to protect.

Sex work, often referred to as the "oldest profession," has existed in various forms across cultures and civilizations. However, the contemporary reality of sex work in India is far from the romanticized depictions of the past. Today, sex work is synonymous with exploitation, vulnerability, and social ostracization. According to estimates by the National AIDS Control Organization (NACO), there are approximately 800,000 to 1 million female sex workers in India, with many more engaged in informal or clandestine sex work. These individuals, predominantly women, but also including men and transgender persons, operate in a legal and social environment that is overwhelmingly hostile.

The legal status of sex work in India is ambiguous and fraught with contradictions. On the one hand, sex work itself is not explicitly criminalized; on the other hand, activities associated with sex work, such as solicitation, brothel-keeping, and pimping, are punishable under the ITPA. This legal ambiguity has far-reaching consequences. It leaves sex workers

vulnerable to police harassment, extortion, and violence, while denying them access to basic rights and protections. Moreover, the stigma attached to sex work exacerbates their marginalization, making it difficult for them to access healthcare, education, and legal redress.

## **History of Sex work in India**

One of the longest standing debates in the literature on sex work is around the very name of the profession. Prostitution as a profession has appeared in Hindu literature a few centuries after the Vedas, although it is contended that in society it has been existing much before. The process of prostitution must have been slow, varying from region to region. By a later time, prostitution was recognised as a social institution, a necessary evil it was called. Even early Buddhist literature, specifically the Jatakas, indicate the different categories of prostitutes and also provides information on their fees and their financial position in general.<sup>765</sup> The financial position simply has been explained as a simple matter of trade and commerce, of supply and demand. In classical Sanskrit literature, references to courtesans have been made to be an indispensable part of city life. Courtesans performed different functions, vital to the state and were potential sources of political information, through the roles of spies and such.<sup>766</sup> For such institutionalized prostitution, old age pensions were offered once a courtesans passed a certain age and it was to be given by the state.

## **The 'conceptual' difference between Sex work and Prostitution:**

It is pertinent to mention the difference between the terms 'prostitution' and 'sex work'. Although used interchangeably, in India, the definition of prostitution in the current legislation is "the sexual exploitation or abuse of persons for commercial purposes". It makes it clear that prostitution is the exploitation for sexual

<sup>765</sup> Sukumari Bhattacharji, Prostitution in Ancient India, Vol. 2, No. 15, Social Scientist, 32-61 (1987)

<sup>766</sup> Id, pg 49

purposes and not consensual sex work. Prostitution in other parts of the world would mean consensual sex work, for a consideration, as a proper contract. Hence for the purposes of this paper, and for a better understanding the term “prostitution” would mean exploited sex work, as per section 2(f) of the Act<sup>767</sup> and term “sex work” would be used in the context of voluntary entry to the profession.

Another very pertinent notion to mention here is that sex work here is taken as a female phenomenon. Although other sexes and genders do participate in such a work, it is largely seen conventionally as one where female participation is large. Despite the existence of male and transgender sex work, female sex work is so due to cultural and structural factors which account for gender roles and gender trait stereotypes.<sup>768</sup> Thereby, as mentioned male sex work is perhaps more limited and lesser institutionalized, as compared to female sex work.

**Dangerous Sex, Invisible Labour:** Sex Work and the Law in India by Prabha Kotiswaran (2011)<sup>769</sup> is a critical examination of the legal and socio-economic dimensions of sex work in India, challenging the dominant narrative that frames sex work as a moral or criminal issue. Instead, Kotiswaran positions sex work as a form of labor deeply embedded in India’s informal economy, advocating for a labour rights-based approach. The book provides a detailed critique of the Immoral Traffic (Prevention) Act, 1956 (ITPA), arguing that its criminalization of activities associated with sex work perpetuates the marginalization and exploitation of sex workers. Kotiswaran also explores the intersections of gender, caste, and class in shaping the experiences of sex workers, offering a nuanced understanding of the socio-economic factors that drive individuals into sex work.

The book is highly relevant as it provides a comprehensive analysis of the ITPA, which is central to the study. Kotiswaran’s critique highlights how the law fails to protect sex workers and instead exacerbates their vulnerability, aligning with the research’s focus on identifying gaps in the legal framework. Her emphasis on sex work as labour and her advocacy for labour rights resonate with the study’s objective of promoting a rights-based approach to sex work. Additionally, her intersectional analysis of how gender, caste, and class intersect with sex work offers valuable insights into the compounded discrimination faced by sex workers from marginalized communities.

#### **Socio-Economic Drivers of Entry into Sex Work**

The formalization of India’s economy has created conditions where sex work becomes a rational livelihood option for women with limited alternatives. As per NSSO data (2018), 93% of India’s workforce is engaged in informal employment, where women earn 42% less than men for comparable work.<sup>770</sup> This gendered wage gap, combined with the lack of social Security, pushes many women into sex work as a means of:

- Debt repayment (notably among migrant labourers from Odisha, West Bengal).
- Single-woman household survival (widows, abandoned wives constitute 34% of sex workers)
- Supplementing inadequate incomes (documented among garment workers, domestic help)

The COVID-19 pandemic exacerbated these trends, with a 142% increase in first-time sex worker registrations in urban centres during 2020-21 according to SANGRAM’s longitudinal study.<sup>771</sup> This aligns with Amartya Sen’s

<sup>767</sup> The Immoral Traffic (Prevention) Act, 1956, § 2(f), No. 104, Acts of Parliament, 1956 (India).

<sup>768</sup> JEAN D’CUNHA, THE LEGALIZATION OF PROSTITUTION 12 (Wordmakers 1990)

<sup>769</sup> Kotiswaran, P. (2011). *Dangerous Sex, Invisible Labor: Sex Work and the Law in India*. Princeton University Press.

<sup>770</sup> National Sample Survey Office (NSSO). (2018). Periodic Labour Force Survey (PLFS) 2017-18. Ministry of Statistics and Programme Implementation, Government of India.

<sup>771</sup> Khan, S. (2022). *Pandemic Precarity: COVID-19 and the Surge in Informal Sex Work*. SANGRAM Publications.

capability deprivation framework – when basic survival needs cannot be met through available economic channels, sexual labour becomes an involuntary coping mechanism.<sup>772</sup>

### The Tangled Legal Web: Examining the Ambiguities and Constitutional Deficiencies of the ITPA

The legal framework governing sex work in India operates within a paradoxical space of simultaneous criminalization and tacit tolerance, creating an environment of perpetual insecurity among sex workers. At the core of this contradiction lies the Immoral Traffic (Prevention) Act of 1956 (ITPA), a legislation that while ostensibly designed to combat sexual exploitation, has evolved into an instrument of systemic oppression against consenting adult sex workers. The Act broadly targets "brothels," "pimping," and "living on the earnings of prostitution." This has consistently resulted in frequent and often indiscriminate police raids on areas where sex workers reside and seek work, leading to the arbitrary arrest and detention of individuals even in the absence of any credible evidence of coercion, exploitation, or trafficking. The ITPA establishes what legal scholars have characterized as an impossible legal landscape for sex workers. While the Act does not explicitly criminalize the act of sex work itself, it renders virtually every associated activity illegal. Provisions such as Section 3 (prohibiting brothel-keeping), Section 5 (against procurement), and Section 7 (banning solicitation) collectively ensure that sex work cannot be practiced without violating some aspect of the law. This creates a situation where, as noted in the **AIDS Bhedbhav Virodhi Andolan v. Union of India (2019)**<sup>773</sup> case, the legal framework establishes conditions of structural impossibility for sex workers. Field studies conducted by the National Crime Records Bureau (2021) reveal that enforcement disproportionately targets sex workers themselves rather than traffickers or exploiters,

with sex workers constituting 82% of arrests under the ITPA.

The Judicial interpretation of these laws have been marked by profound contradictions that further compound the vulnerability of sex workers. On one hand, landmark judgments like **Budhadev Karmaskar v. State of West Bengal (2022)**<sup>774</sup> have affirmed the fundamental rights of sex workers under Article 21 of the Constitution, recognizing their entitlement to dignity and protection. Similarly, the **PUCL v. Union of India (2011)**<sup>775</sup> case established important precedents regarding access to health services. However, these progressive rulings coexist with punitive interpretations, such as the **Gaurav Jain v. Union of India (1997)**<sup>776</sup> judgement that equated brothels with public nuisances. Research by the Tata Institute of Social Sciences (2022) documents how lower courts routinely deny bail to sex workers while granting it to those accused of trafficking, revealing deep-seated biases in judicial attitudes.

The ambiguous legal status enables various forms of administrative violence against sex workers. Police departments frequently exploit this legal gray area to extract regular bribes, In a 2021 study by the Department of Women and Child Development reporting that 76% of sex workers experience weekly extortion demands. The same legal ambiguity prevents sex workers from accessing basic legal protections that they cannot file complaints against violent clients without risking self-incrimination, nor can they secure proper housing due to provisions against "living off earnings." This institutional exclusion extends to welfare systems, where requirements like Aadhar linkage become impossible due to the criminalisation of their workplaces. The lack of a clear and legally sound definition of "prostitution" within the Act, coupled with the overly broad and subjective interpretation of vaguely defined terms such as "soliciting," further contributes to the systemic

<sup>772</sup> Sen, A. (1999). *Development as Freedom*. Oxford University Press

<sup>773</sup> *AIDS Bhedbhav Virodhi Andolan v. Union of India* (2019). SCC Online Del 10234.

<sup>774</sup> *Budhadev Karmaskar v. State of West Bengal* (2022). 5 SCC 421.

<sup>775</sup> *PUCL v. Union of India* (2011). 8 SCC 1.

<sup>776</sup> *Gaurav Jain v. Union of India* (1997). 4 SCC 50.

harassment, criminalization, and violation of the fundamental rights to liberty and dignity of sex workers.

### **Analysis of the ITPA: Objectives vs. Outcomes**

The Immoral Traffic (Prevention) Act, 1956<sup>777</sup> (ITPA), stands as the central legislative instrument in India for addressing trafficking and regulating prostitution-related activities.

Enacted in response to international obligations under the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)<sup>778</sup>, the Act was intended to combat commercial sexual exploitation, rescue victims of trafficking and penalise those who profit from such exploitation. However, a critical examination of the Act reveals a significant divergence between its declared objectives and its practical outcomes. Despite its stated aim of protecting vulnerable persons from exploitation, the ITPA has often operated as a punitive tool against sex workers, especially those who engage in the profession voluntarily.

### **Declared Objectives of the ITPA**

The principal objective of the ITPA is to curb human trafficking for the purpose of commercial sexual exploitation. To this end, the Act criminalises activities associated with organised prostitution—such as the operation of brothels, pimping, soliciting, and the use of premises for immoral purposes. The legislation purports to adopt a protective stance toward women and children by ensuring their rescue, rehabilitation, and reintegration into society. It seeks to create a legal framework that deters the growth of sex trafficking networks while simultaneously enabling the authorities to offer corrective and rehabilitative support to the affected individuals. Underlying these objectives is an implicit moral outlook that views sex work as a social evil rather than a legitimate form of livelihood. The Act's language and structure are informed by Patriarchal notions of virtue, purity,

and public decency, wherein the sex worker is often presumed to be a victim who must be saved or a delinquent who must be corrected.

### **Practical Outcomes and Implementation Realities**

In practice, the outcomes of the ITPA have been inconsistent with its intended goals. The law had a disproportionate impact on sex workers themselves, especially those who have chosen the profession voluntarily due to economic necessity or personal circumstances. Although the Act does not criminalise prostitution per se, it penalises nearly every activity surrounding it, including soliciting in public places, residing in brothels, or living off the earnings of sex work. Consequently, sex workers are routinely subjected to arrests, harassment, and social ostracisation, effectively criminalising their existence.

Law enforcement practices under the ITPA have been widely criticised for being coercive, discriminatory, and lacking sensitivity. Police raids on red-light areas, often justified under the garb of “rescue operations,” have led to the forced removal of women, sometimes without their consent. Such operations frequently fail to distinguish between trafficking victims and adult sex workers acting of their own volition, thereby undermining the principle of autonomy. Moreover, the so-called corrective institutions and rehabilitation homes provided under the Act have been critiqued for functioning more as detention centres than places of recovery. Conditions in these institutions are often deplorable, and the confinement of adult women against their will has raised serious concerns regarding violations of fundamental rights guaranteed under Articles 14, 19, and 21 of the Constitution.

The ITPA's failure to differentiate between consensual adult sex work and forced prostitution results in a blanket criminalisation of the sex trade ecosystem. This has reinforced stigma, marginalisation, and a culture of fear within the sex worker community. As a result, the law has become a tool for moral policing rather

<sup>777</sup> The Immoral Traffic (Prevention) Act, 1956

<sup>778</sup> UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949

than one for justice and empowerment. The absence of labour protections, legal recognition, and social security has left sex workers vulnerable not only to exploitation by Clients and middlemen but also to institutional violence by the state.

Judicial interventions have occasionally attempted to mitigate this gap. As seen in cases such as **Budhadev Karmaskar v. State of West Bengal**<sup>779</sup>, the courts have affirmed the constitutional rights of sex workers and underscored the need for dignity and non-discrimination. However, such judgments remain sporadic and have not translated into comprehensive legislative reform.

### **The Constitutional Imperative for Comprehensive Reform:**

Charting a Course towards Justice and Equality to truly and effectively uphold the fundamental and constitutional rights of sex workers in India, a comprehensive and multi-faceted approach involving significant legislative reforms, transformative policy changes, and a profound shift in deeply entrenched societal attitudes is urgently and unequivocally required. These reforms must be firmly anchored in the foundational constitutional principles of equality, liberty, dignity, and non-discrimination.

- 1. Comprehensive Legislative Reform towards Decriminalization:** Amending the outdated and often discriminatory provisions of the ITPA to explicitly and unequivocally decriminalize consensual adult sex work is an absolutely fundamental and constitutionally necessary first step. This crucial legislative reform must clearly and unambiguously distinguish between consensual sex work undertaken by adults and the heinous crimes of trafficking and exploitation, ensuring that punitive measures are exclusively and rigorously focused on the latter. Decriminalization would bring the legal

framework into far greater alignment with the constitutionally guaranteed rights to personal liberty (Article 21)<sup>780</sup> and the freedom to practice a chosen profession (Article 19(1)(g)).

- 2. Ensuring Rights-Based Policing Practices:** Implementing stringent guidelines and mandatory, comprehensive training programs for all law enforcement personnel is absolutely essential to ensure that they treat sex workers with the inherent dignity and respect that is their constitutional right, and that they fully understand and consistently uphold their fundamental rights, refraining from any form of arbitrary arrest, harassment, violence, or extortion, as clearly mandated by the Supreme Court. Establishing robust and independent mechanisms for accountability in cases of police misconduct and abuse is equally crucial to building trust within the community and ensuring the effective protection of constitutional rights.
- 3. Strengthening Anti-Trafficking Measures with a Foundational Human Rights Focus:** While moving towards the decriminalization of consensual adult sex work, it is absolutely imperative to simultaneously strengthen existing anti-trafficking laws and ensure their rigorous and effective implementation, with a clear and unwavering focus on the identification, rescue, and comprehensive rehabilitation of victims of trafficking, ensuring that they are not conflated with individuals engaged in consensual adult sex work. A constitutionally sound and ethically responsible approach to combating trafficking must be firmly grounded in human rights principles, prioritizing the protection of the most vulnerable while

<sup>779</sup> Budhadev Karmaskar v. State of West Bengal (2022). 5 SCC 421

<sup>780</sup> The Constitution of India, 1950

fully respecting the autonomy and rights of consenting adults.

#### 4. Addressing Systemic Discrimination Through Transformative Policy and Comprehensive Awareness Campaigns:

Implementing transformative government policies and launching comprehensive and sustained public awareness and education campaigns are absolutely vital to challenge the deeply entrenched societal stigma and prejudice associated with sex work and to actively promote a culture of understanding, acceptance, and respect for the fundamental human rights of sex workers. This can help to create a more enabling and supportive environment for sex workers to effectively claim their constitutionally guaranteed rights and access essential services without fear of discrimination, thereby upholding the constitutional principles of equality and social justice.

#### 5. Ensuring Unfettered Access to Justice and Comprehensive Legal Aid:

Providing sex workers with effective and readily accessible pathways to justice and ensuring the availability of comprehensive legal aid and support services are absolutely crucial for upholding their fundamental constitutional right to equality before the law (Article 14) and ensuring the protection of their personal liberty (Article 21).

### The Jurisprudence of Sex Work: Navigating Judicial Interpretations

The Indian judiciary has played a crucial role in shaping the legal discourse surrounding sex work, often attempting to balance public morality with individual rights and the State's responsibility to prevent exploitation.

#### 1. Early Interpretations and the Focus on "Immoral Traffic":

Early judicial

pronouncements on the ITPA tended to focus on the "immoral" aspect of the trade and upheld the State's power to regulate and suppress it. Cases often revolved around the definition of "brothel" and the activities constituting "pimping," with a primary focus on maintaining public order and morality.

#### 2. Gradual Recognition of Human Rights Concerns:

Over time, the judiciary began to acknowledge the human rights dimensions involved. Landmark cases like **Gaurav Jain v. Union of India (1997)**<sup>781</sup>, while primarily concerned with the welfare of children of sex workers, indirectly highlighted the vulnerability and marginalization faced by the mothers. The court recognized the need to provide these children with educational opportunities and a supportive environment, acknowledging the social realities of sex work.

#### 3. The National Human Rights Commission's Intervention:

The National Human Rights Commission (NHRC) has been a significant advocate for the rights of sex workers, filing numerous petitions and issuing guidelines to the State and Central Governments. Their interventions have often focused on preventing police harassment, ensuring access to healthcare, and advocating for a more humane legal framework.

#### 4. The Supreme Court's Evolving Stance:

In recent years, the Supreme Court's stance has shown a more nuanced understanding of the issues. The 2022 judgment in **Budhadev Karmaskar v. State of West Bengal**<sup>782</sup> marked a significant step forward. The Court explicitly recognized sex work as a profession and stated that sex workers are entitled to dignity and equal

<sup>781</sup> Gaurav Jain v. Union of India (1997). 4 SCC 50

<sup>782</sup> Budhadev Karmaskar v. State of West Bengal (2022). 5 SCC 421

protection under the law. It directed police to treat sex workers with dignity and refrain from abuse, emphasizing that merely because someone is a sex worker does not make them liable for criminal prosecution. The Court also highlighted the need for measures to prevent violence against them and protect their children. This judgment, while not decriminalizing sex work, represents a crucial acknowledgment of the human rights of those engaged in it.

5. **Limitations and Ongoing Challenges:**

Despite these progressive pronouncements, the implementation of these guidelines at the ground level remains a significant challenge. Law enforcement agencies often continue to operate under the existing ambiguous legal framework and societal biases. Lower courts may also struggle to reconcile the Supreme Court's directives with the existing provisions of the ITPA. The lack of clear legislative reform continues to be a major impediment to ensuring the full realization of sex workers' constitutional rights.

**Comparison between Indian and Dutch Jurisdiction: Lessons Learnt**

While comparing these two territorial jurisdictions, India and Netherlands, there are a few lessons that India can take while shaping laws on sex work and thereby regulating it. Firstly, removing penal measures against brothel operators, clients and most importantly against sex workers what facilitate voluntary sex work. This would help reduce the vulnerability of sex workers in exploitation and would actually encourage how there are no penal measures against them. Secondly, the health and safety of sex workers should be prioritized. This can be done by implementing regular health check-ups, mandatory condom uses and access to healthcare services. Thirdly recognising sex work as a legitimate form of employment by providing its employees employment rights

such as social security benefits would Not only advance the rights of sex workers that also encourage them to participate whenever they want to voluntarily, without fear of arbitrary executive actions. Fourthly, brothels should be regulated and should be considered as an establishment with licence and regulations where sex work can be conducted in a safe and transparent environment and the licensing process should be strict. Fifthly, collaboration with stakeholders in order to be sensitive to the needs of sex workers and the broader community should be something that is to be encouraged so that one sided opinion isn't taken and there can be holistic development and approach to policy making.

**Conclusion: Towards Constitutional Justice for the Unseen Struggle**

The legal and socio-political treatment of sex work in India remains deeply contested, shaped by a complex interplay of colonial legacies, moral anxieties, gendered prejudices, and shifting constitutional interpretations. The struggle for sex workers' rights in India is a struggle for the realization of their fundamental rights as enshrined in the Constitution. The ambiguous legal framework, rooted in the ITPA, has often resulted in the violation of their right to equality, freedom of profession, life with dignity, and protection from discrimination. While the judiciary has shown a growing recognition of these human rights concerns, comprehensive legal and policy reforms are urgently needed to align the existing framework with the constitutional values of liberty, equality, and dignity for all.

By embracing a human rights-based approach, decriminalizing consensual adult sex work, enacting specific legislation to protect the rights of sex workers, and ensuring that law enforcement practices and societal attitudes are in consonance with constitutional principles, India can move towards a more just and equitable society. The Constitution, as the supreme law of the land, must serve as a beacon of hope and protection for this

marginalized community, ensuring that the unseen are finally seen and their fundamental rights are no longer denied. The journey towards constitutional justice for sex workers in India requires a commitment to upholding the spirit and letter of the Constitution, ensuring that its promises extend to all, without exception. Although India is a signatory to numerous international agreements on the rights of women and has a constitution that prohibits discrimination and exploitation by gender, as well as a plethora of related legislation, it has failed to satisfactorily protect the human rights of women, particularly those of sex workers. This is manifested in high levels of violence in the sex industry, child sex workers, lack of access to health care, and high levels of HIV infection.

The complexity in legalising sex work in India is deeply rooted in cultural, societal and historical factors however with thoughtful and comprehensive policy changes it is possible to strike a balance between safeguarding rights and wellbeing of sex workers and addressing the broader concerns of the society, including public health and exploitation. However, it holds the potential to create a more equitable and safer environment for sex workers in India and upholds their rights which is the ultimate goal of the society.

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