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Constitutional Morality, Human Rights and Regulatory Challenges in the Legal Status of Prostitution in India

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Abstract

This paper aims to examine the question of the legal status of prostitution in India in three intertwined axes: constitutional morality, international human rights frameworks and regulatory governance. “The Immoral Traffic (Prevention) Act 1956”, which is supposed to be against the exploiters of the person involved in prostitution, has instead been used to marginalize and criminalize the very same person's it is intended to protect. This paper, which uses an institutional approach to doctrinal analysis, alongside empirical information from the “National Crime Records Bureau” and the landmark “Crime in India Reports 2019-24”, highlights that the present regime: (i) fails the constitutional morality test across multiple dimensions; (ii) infringes on fundamental rights under Article 14, 19(1)(g) and 21 of the Constitution of India; and (iii) creates an enforcement paradox where the real trafficking offenders are almost free from punishment, while consenting sex workers suffer disproportionate criminal liability. NCRB data 2023 shows that the conviction rate for human trafficking is less than 10 percent across the country (as low as 2.3 percent in Andhra Pradesh and 3.7 percent in Telangana), thus revealing the failure to work in real time of ITPA. This paper argues for an international and rights-based, by drawing inspiration from the Supreme Court's pathfinder directions in “Budhadev Karmaskar v. State of West Bengal (2022)” and international regulatory frameworks as well as current literature on human rights. It also demands that there needs to be a clear distinction between consensual prostitution and trafficking and that there should be extensive changes to ITPA in accordance with India's constitutional responsibilities under Bharatiya Nyaya Sanhita, 2023.

Keywords: Constitutional Morality; Sex Work; Fundamental Rights; ITPA 1956; Article 21; NCRB Data; Harm Reduction; Trafficking; Decriminalisation; Dignity; Labour Rights; Bharatiya Nyaya Sanhita.

I. Introduction

One of the most controversial, and legally litigious, positions in the Indian law is prostitution and in this case, sex work. It is not fully legalised and it is not yet fully regulated; it is not yet completely outlawed either and for those practising it, effective protection has been inadequate; in short, it is in a penumbral grey area neither of partial prohibition, which has neither worked to completely regulate nor to adequately protect those indulging in it. The Immoral Traffic (Prevention) Act, 1956 (ITPA) makes activities related to sex work such as brothel keeping, soliciting, pimping, or livelihood off the proceeds of sex work, etc. illegal but doesn't explicitly ban the provisioning of sex work for remuneration itself. Even when the legal effects of this architecture are not quite uniform, one thing remains paradoxical: on the one hand, sex workers are not considered criminals, on the other hand they are deprived of the opportunity of any legal sphere within which they can engage in the practice of sex work safely.

This paper engages with three overlapping normative registers through which the legal status of sex work must be assessed in contemporary India. First, constitutional morality the jurisprudential principle most comprehensively articulated in Navtej Singh Johar v. Union of India (2018)[1] holding that constitutional values of dignity, autonomy, and equality must override majoritarian social morality in matters of fundamental rights. Second, international human rights standards, including CEDAW, ICCPR, and the Palermo Protocol on Trafficking in Persons. Third, empirical regulatory governance demonstrated through current NCRB data which shows the practical failure of a regime designed to suppress exploitation but which has instead institutionalised it.

II. Historical and Socio-Legal Evolution of Prostitution Law in India

A. Ancient and Medieval India

Prostitution in India is inseparable from complex socio-religious structures that considerably pre-date colonial intervention. The Devadasi system the dedication of women to temple service, which frequently involved sexual service to priests and patrons and the Ganika tradition, documented extensively in Kautilya's Arthashastra (circa 4th century BCE), attested to institutionalised forms of sex work that carried differentiated social meanings in ancient India.[2] The Nagarvadhu or "courtesan of the city" occupied an elevated social position in classical culture, while the Tawaif of Mughal-era India was associated with classical music, poetry, and elite patronage.

B. Colonial Legislation and the Cantonment System

Prostitution was utilitarian in British Colonial Rule. The Contagious Diseases Acts of the 1860s were introduced in India and instituted a surveillance regime that compelled the medical inspection and registration of women suspected of engaging in sex work in cantonment areas, largely to maintain the health of British soldiers.[3] These laws were not acts aiming to stamp out prostitution but laws that organised prostitution for colonial purposes. It was a nationalist reaction to this, driven as much by the will to improve and clean the caste system and to make devadasi women respectable in the eyes of social disapprobation as by any conviction for the right to sexual freedom.

C. Post-Independence Legislation: SITA to ITPA

Earlier, the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) was enacted as a result of India's obligations under the United Nations Convention for the Suppression of the Traffic in Persons (1949) taken up a prohibitionist view of treating all prostitution as trafficking and exploitation of women and girls. In 1986, the Act has been significantly amended and renamed the Immoral Traffic (Prevention) Act (ITPA) and the scope of its applicability has been expanded to male cultural commadore and power to create protective homes for rescued cultural commadore has been additionally established. The overall structure, however, was untouched: the act of engaging in sex work was without problem tolerated in a legal vacuum, while all the other services were criminalized. The coming into force of a new legislation, Bharatiya Nyaya Sanhita (BNS), 2023, replacing the Indian Penal Code as of July 2024, adds new layers of complexity while not filling in the original legislative void.

Table 1: Key Provisions of the ITPA, 1956 — Critical Constitutional Assessment

S.	Provision	Punishment	Constitutional Assessment
S.3	Keeping/managing a brothel	≤3 yrs + fine	Conflates exploitative management with cooperative worker arrangements; denies safety to consensual workers
S.4	Living on earnings of a sex worker	≤2 years	Criminalises family members, support persons, and health outreach workers — chilling effect on welfare

S.	Provision	Punishment	Constitutional Assessment
S.5	Procuring / inducing for prostitution	≤7 yrs; life if minor	No distinction between coercive trafficking and consensual adult recruitment — violates Art.19 & 21
S.6	Detaining a person in premises	≤7 years	Legitimate provision targeting coercion; appropriately framed against genuine captivity
S.7	Prostitution near public places (200 m)	Imprisonment + fine	Forces sex workers into isolated, dangerous locations — increases violence and HIV risk
S.8	Soliciting / seducing in public	≤6 months	NLSIU 2016 study: primary tool of police extortion; disproportionately targets women — Art.14 violation
S.15–17	Rescue, protective custody, rehabilitation	Admin. detention	Coercive "rescue" without consent documented by NHRC and sex worker organisations as rights-violating

III. Constitutional Analysis of the ITPA

A. The Framework of Constitutional Morality

In the past decade, the idea of constitutional morality, in contrast to popular/social morality, has become the guiding star of the Supreme Court's jurisprudence around questions of freedoms of religion and expression. In "Navtej Singh Johar v. Union of India (2018)", the five-judge Constitution Bench unanimously adopted the principle that constitutional morality should take precedence over social morality, and that the constitutional value of dignity means that the State should not disapprove of the individual if they are disapproved by the majority. This principle, earlier foreshadowed in "Naz Foundation v. Government of NCT of Delhi (2009)"[6] and subsequently affirmed in "Indian Young Lawyers Association v. State of Kerala (2018)",[7] has direct application to the rights of sex workers, whose marginalisation is rooted precisely in the imposition of popular moral disapprobation through the mechanisms of law.

According to constitutional morality as applied to the ITPA, the moral judgment of disability and taking issue with sex work should not be the criteria by which the law is judged, but rather the degree of fulfilment of its constitutional values, namely dignity, equality, liberty and autonomy, of the people it concerns. So far as that goes, as the following analysis shows the ITPA falls short on every front.

B. Article 14: Equality before Law and the Arbitrariness Doctrine

Equality before law and equal protection of the laws is the guarantee of Article 14. In E.P. Royappa v. State of Tamil Nadu (1974),[8] the Supreme court reads into Article 14 an expanded version that goes beyond the traditional classifier/non-classifier model to create an expressly substantive prohibition on arbitrariness. Selective and predatory use – the police use of Section 8 of the ITPA to extort money from the poorest sex workers and not from the others – is arbitrary state action that does not sail in the winds of Article 14 of the Constitution. The distinction between the sex worker, whose activity is tolerated and the sex worker who makes herself (publicly) available to a client, and who is criminalised is not intelligible, nor is there any rational relationship between the distinction and the legitimate aim of combating trafficking.

C. Article 19(1) (g): The Right to Practise a Profession

The right to pursue a trade, to practise any profession or to carry on any business, occupation or trade and business guaranteed under Article 19(1)(g) of the Constitution is unrestricted except for reasonable restrictions stipulated under Article 19(6) for the sake of general public. In Budhadev Karmaskar v. State of West Bengal (2022), [10] however, the Supreme Court indirectly touched upon the constitutional status of prostitution (voluntary adult sex work) as a profession germane to Article 19(1)(g) of the Constitution, in which it upheld the same. A condition which simply makes safe exercise of the right impracticable not formally ban but effectively cannot meet Papnasam Labour Union v. Madura Coats Ltd (1995)[11] substantive test on reasonableness of restrictions on the right.

D. Article 21: Right to Life, Dignity, and Livelihood

The sense of the right to life with dignity as interpreted in the case of Maneka Gandhi v. Union of India (1978)12 covers the right to live a life which is meaningful, purposeful and worth living. The interpretation of Article 21 as applicable to sex workers has been said to have several overlapping claims: firstly, the right to dignity and the state cannot treat sex workers as legally non-existent persons; secondly, the right to livelihood, the state cannot be said to be denying sex workers the right to earn a livelihood and they must provide meaningful alternatives to sex work; thirdly, the right to health and medical care, the state must provide access to health care to sex workers without police harassment, which is fundamentally non-discriminatory.

Table 2: Constitutional Rights Framework — ITPA Compliance Assessment

Article	Guarantee	Application to Sex Workers	ITPA Compliance	Key Case
Art.14	Equality; prohibition of arbitrariness	Right to non-discriminatory enforcement; equal legal protection	FAILS	Royappa (1974)
Art.19(1)(g)	Right to practise profession / occupation	Sex work as protected profession; restrictions must be reasonable	FAILS	Papnasam (1995)
Art.21 (dignity)	Right to life with dignity; freedom from violence	Protection from police violence, forced rescue, exploitation	FAILS	Maneka Gandhi (1978)
Art.21 (livelihood)	Right to livelihood (Olga Tellis)	Cannot criminalise sole livelihood without viable alternative	PARTIAL	Olga Tellis (1985)
Art.21 (health)	Right to health and medical care	Non-discriminatory access to STI, HIV, reproductive health services	FAILS	Paschim Banga (1996)
Art.23	Prohibition of trafficking and forced labour	Mandates distinction between trafficking and voluntary sex work	PARTIAL	NHRC Report 2002

IV. Supreme Court Jurisprudence

A. Budhadev Karmaskar v. State of West Bengal (2011–2022)

The Budhadev Karmaskar litigation, which originated in a criminal appeal and was converted by the Supreme Court into a suo motu proceeding on the rights and rehabilitation of sex workers, represents the most significant judicial engagement with the legal status of sex workers in Indian constitutional history.[17] In its 2011 decision, a two-judge bench held that sex workers are human beings entitled to dignity under Article 21, and directed the constitution of an expert panel to address rehabilitation, occupational health, prevention of trafficking, and social security.

The final directions issued by the Supreme Court's three-judge bench in May 2022 represent a watershed: (i) sex work is a profession and sex workers are entitled to the full array of fundamental rights; (ii) police cannot arrest, penalise, harass, or be violent against sex workers; (iii) sex workers who are crime victims are entitled to access the criminal justice system; (iv) minor children living with sex workers shall not be separated from their mothers solely on the ground of the mother's profession; (v) sex workers are entitled to receive non-discriminatory healthcare; and (vi) all sex workers are entitled to benefits under all government welfare schemes.[18] These directions, operative under the Supreme Court's Article 142 jurisdiction, effectively constitute a judicially-created rights framework that the existing legislative regime conspicuously fails to provide.

Table 3: Supreme Court Directions in Budhadev Karmaskar (2022) — Status Assessment

No.	Direction Issued	Constitutional Basis	Implementation Status (2024)
1	Sex work is a profession; sex workers entitled to all fundamental rights	Arts.14,19(1)(g),21	Judicially recognised; legislative codification absent
2	Police shall not arrest, penalise, harass, or be violent against sex workers	Art.21 (dignity); Art.14	Widespread non-compliance; structural police impunity
3	Sex workers who are crime victims entitled to full access to criminal justice system	Arts.14, 21	Limited; fear of criminalisation deters reporting
4	Minor children of sex workers shall not be separated from mothers on ground of profession alone	Art.21; UNCRC	Mixed; requires legislative codification
5	Sex workers entitled to non-discriminatory healthcare	Art.21 (health)	Progress in some states; rural gaps remain
6	Sex workers entitled to benefits under all government welfare schemes	Arts.14, 21	Identity document barriers persist; limited uptake

B. Antecedent Jurisprudence

The Budhadev Karmaskar directions were based on large number of earlier precedents. In Gaurav Jain vs Union of India (1997), the Court stressed upon rehabilitation and welfare of sex workers and their children and advised

that the children of sex workers should not be discriminated against in public schools. In State of Uttar Pradesh v. Kaushaliya (1963),[2] the Court had previously ruled that some of the restrictions in the prostitution legislation were constitutional, and the state had a parens patriae duty towards the sex workers who were in distress. The positive duties placed on the State, and particularly known as far as women are concerned; to ensure their protection against sexual exploitation in institutionalised settings as in Vishaka v St of Rajasthan, 1997, also underscore the constitutional mandate to afford protection to sex workers from the police force. As a collective, this jurisprudential thread recognizes sex workers as persons with their own rights to have something not computationally comfortable in the logic of the ITPA.

V. Critical Analysis: Regulatory Failures of the Current Regime

A. The Structural Conflation of Sex Work and Trafficking

The most basic fault of the ITPA is that it does not differentiate between voluntary and victimised sexual contact between adults in the legislation. The entire concept of the rescue and rehabilitation regime of the Act and the communications ban under Section 5 against "inducing" persons into prostitution denies agency and autonomy to all sex workers. The result of this confluence at the policy-level, from the NHRC's 2002 report through the anti-trafficking initiatives by the Ministry of Women and Child Development, has been the near total failure in prosecution that has clear implications that the conflation has not only failed to protect voluntary sex workers, but has also made it structurally impossible to gather the victim testimony and corroborating evidence necessary for prosecuting genuine traffickers, as per the data of the NCRB.

B. Police Abuse and Absence of Legal Recourse

Sex workers in India exist in a condition of structural legal vulnerability in which they cannot access police protection without triggering their own criminalisation. Multiple field studies by Human Rights Watch, the ILO, and domestic researchers document that Section 8 (solicitation) and Section 4 (living on earnings) are routinely deployed not for genuine law enforcement but for extortion and sexual exploitation of sex workers.[38] The legal architecture of the ITPA creates the conditions for this exploitation by placing sex workers outside the protection of ordinary labour and criminal law while making them vulnerable to police coercion under special legislation. NCRB data showing a 44.7% spike in ITPA enforcement in 202 concentrated in election-year states is consistent with documented patterns of politically-motivated enforcement drives against sex workers.

C. Exclusion from Labour Rights and Social Security

Legislation on sex work in India does not consider it a proper job, hence sex workers are not protected under the Contract Labour (Regulation and Abolition) Act, 1970, the Employees' State Insurance Act, 1948 and other labour welfare laws. Without exposing their members to criminal prosecution, they cannot organise into Trade Unions as recognised under the Trade Unions Act, 1926. Such a systematic denial to the labour law framework means that sex workers are deprived of occupational health benefits, set minimum wages and social security benefits that are afforded to workers in other occupations. This exclusion from public health infrastructure is effects of the NCRB's own data that revealed HIV prevalence rate among female sex workers was more than ten times the general population rate.

VI. Recommendations for Legislative and Policy Reform

The following legislative changes are suggested which will help fulfil the dual mandate of preserving the rights of voluntary adult sex workers, whilst also enhancing the legal responses to coercive trafficking:

Securing repeal of Sections 7 and 8 of the ITPA (The proximity restriction and the solicitation provision) based on the New Zealand Prostitution Reform Act 2003 criminalising sex work, but not protecting against exploitation.

Modify Section 3 of the Act to differentiate between a small, owner-operated business (which should be acceptable) and the exploitative third party brothel business (which should continue to be criminal).

Update Section 5 to address only coercive procurement, not all forms of recruitment by inducement, which would include consensual adult recruitment arrangements.

Add a definitional element that would clearly allow for a separation between "sex works" (embarking on consensual exchange of sexual services among willing adults for monetary compensation) and "trafficking" (the coerced or deceived movement of persons for the purpose of sexual exploitation).

Propose careful changes to BNS Sections 143-144 to remove any overlaps with the ITPA, and prevent a possible expansion of the criminalisation of consensual sex work inherent within the BNS broader trafficking definitions.

Table 4: Summary of Recommended Reforms — Action, Basis, and Comparative Precedent

Reform Area	Recommended Legislative / Policy Action	Constitutional / Rights Basis	Comparative Precedent
ITPA Amendments	Repeal S.7 & S.8; amend S.3 (small premises); reformulate S.5 (trafficking only); add definitional provision	Arts.14,19(1)(g),21	NZ Prostitution Reform Act 2003; Budhadev Karmaskar 2022
BNS Harmonisation	Clarify BNS S.143–144 interface with ITPA; amend both instruments to remove legislative duplication	Arts.14,21; rule of law	Parliamentary Law Commission recommendations; BNS Statement of Objects
Labour Framework	Extend Unorganised Workers Social Security Act 2008 to sex workers; recognise sex worker cooperatives under Multi-State Cooperative Societies Act	Art.21 (livelihood); ILO Conventions	Sonagachi Usha Cooperative; NZ labour protections
Public Health	Mandate non-discriminatory STI/HIV services under NHM; protect health outreach workers from S.4 prosecution; facilitate safe practice	Art.21 (health); ICESCR Art.12	UNAIDS Guidance Note on HIV and Sex Work (2012)
Anti-Trafficking	Enact Trafficking in Persons (Prevention) Act with victim-centred identification; require free and prior consent for rescue operations; disaggregate HT from sex work in NCRB data	Art.23; Palermo Protocol	UN Model Law Against Trafficking in Persons (2009)
Police Reform	Mandatory sex worker rights training; dedicated ITPA abuse complaint mechanism; amend standing orders to	Art.14; Budhadev 2022 directions	NHRC guidelines; Delhi Police Protocol (proposed)

Reform Area	Recommended Legislative / Policy Action	Constitutional / Rights Basis	Comparative Precedent
	prohibit misuse of S.8 for extortion		
Welfare Access	Expedite identity documents (Aadhaar, ration cards); ensure children's access to education; extend PM Ujjwala and other welfare schemes	Arts.21,21A; Gaurav Jain (1997)	Gaurav Jain v. UOI; NCPCR guidelines
NCRB Data Reform	Direct NCRB to disaggregate consensual adult sex work cases from trafficking cases in annual Crime in India Reports; create separate ITPA enforcement sub-categories	Art.14 (evidence-based governance); right to information	New Zealand annual reporting; UNODC trafficking measurement guidelines

VII. Conclusion

The law of prostitution in India is one of the most significant pending conflicts in Indian law. The way the ITPA has been designed to partially decriminalize prostitution to criminalize any and all conditions which make prostitution safe has not curtailed prostitution. It has placed sex workers in greater danger of exploitation, violence, and disease and has given impunity to their exploiters. The existing NCRB data is clear and stunning: the national rate of conviction for trafficking cases rests at about 10%, while trafficking cases have been acquitted at 84% and there has been a 44.7% surge in enforcement of ITPA during an election year with focus on the states that are most politically convenient to enforce the Act.

What is needed is a radically different approach consistent with the constitutional morality framework stated by the Supreme Court. Where a class of slaves is denied all the protections of their occupation while it is denied even the protection of the labour law, subjected to systematic dental violence and extortion by the police and court and few genuine trafficking persons get convicted, then it fails the constitutional test because the Constitution provides for equality of protection, flats and dignity that are very much applicable and elementary.

Since then the most important intervention on sex workers' rights by the judiciary has been the orders passed by the Supreme Court in Budhadev Karmaskar in May 2022, which acknowledged sex work as a profession and advised the police to stop harassing sex workers. Though the orders given by the Judiciary under article 142 are well-intentioned but they cannot be a substitute of detailed legislation in this context which was based on a constitutional principle. The laws in India which are currently in effect are not anti-trafficking laws but laws which have been enacted by the government under the umbrella of anti-trafficking in 2023 through Bharatiya Nyaya Sanhita, 2023, which has added new provisions of anti-trafficking in the law without solving the mismatch of the laws.

The Criminal Law Amendment is required to: decriminalize voluntary sex work by adults and expand coverage of all labour and social security protections to all sex workers; strengthen the criminal law response to trafficking with the rate of convictions, achieved by the CWA, that is likely to punish traffickers; establish powerful accountability mechanisms for police abuses; and require NCRB to disaggregate consensual sex work from trafficking in its annual data. The way forward is not ‘moral policing' nor the abolitionist fantasy that

criminalisation will eradicate sex work, but a constitutional commitment to treating every person as an end in themselves with dignity, to make choices autonomously and ensures they are equally protected by the law.

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