



International Journal of Human Rights and Constitutional Studies

ISSN online: 2050-1048 - ISSN print: 2050-103X
<https://www.inderscience.com/ijhracs>

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Alisha Verma, Saroj Bohra

DOI: [10.1504/IJHRCS.2023.10053135](https://doi.org/10.1504/IJHRCS.2023.10053135)

Article History:

Received:	29 October 2022
Accepted:	04 December 2022
Published online:	04 April 2024

The rights of commercial sex workers in India: a critical analysis of the legislative and judicial trends

Alisha Verma*

Amity Law School,
Amity University Rajasthan,
NH 11C, Kant Kalwar, Jaipur,
Rajasthan, 303002, India
Email: alishav.92@gmail.com
Corresponding author

Saroj Bohra

Amity Law School,
Amity University Rajasthan,
Rajasthan 303002, India
Email: sbohra@jpr.amity.edu

Abstract: Prostitution is seen as a revile to social orders. It is an occupation that is carried out to earn money by trading sexual intercourse hence considered immoral. People who indulge in it do not get the life of dignity and respect as a human must get by virtue of basic human rights. Although the majority view is that women who enter the sex trade are forced or trapped in the industry, some of them enter the trade willfully for economic and social reasons. Neither does our Constitution considers this trade illegal and nor does any of the law in force in India say that it is prohibited. Various incidents attached to it are held illegal by the Immoral Traffic Prevention Act, 1956. The present paper critically analyses the legislative and judicial trends of the matter at hand and the status of the rights of the commercial sex workers in India.

Keywords: prostitution; commercial sex worker; trafficking; sex trade; rights; Judicial trends; constitution.

Reference to this paper should be made as follows: Verma, A. and Bohra, S. (2024) 'The rights of commercial sex workers in India: a critical analysis of the legislative and judicial trends, *Int. J. Human Rights and Constitutional Studies*, Vol. 11, No. 2, pp.169–185.

Biographical notes: Alisha Verma is currently working as an Assistant Professor Law with Amity Law School, Amity University Rajasthan and pursuing Doctoral degree in Law from Amity University Rajasthan. Her area of interest is law related to procedure of courts and law related to women.

Saroj Bohra is currently working as the Director of Amity Law School, Amity University Rajasthan. She is an astute professional with 15+ years of experience in research, teaching, and academic administration. She is responsible for the development of academic programs.

1 Introduction

Prostitution is a widely acknowledged societal reality in modern India, but it has a long history in India, starting from the ancient times up to the 19th century in British India. The poor, unskilled members of society who are the targets in the sex trade are the ones who fall prey to the trap, where wealthy criminal organisations prey on their desperation while in cahoots with the police. It was also claimed that certain women fall into the category of 'prostitutes' as a result of being victims of circumstances, false societal authorisations, disabilities, and coercive forms of sexual trade. Prostitution is defined as sexual intercourse between two people for a certain amount or in exchange for something of value. It is not a concept which is new, but one that dates back to ancient times. Because of their exquisite beauty and charm, Indian mythological characters such as Menaka, Rambha, and Urvashi were considered to be sex workers. Prostitution is mentioned in Vedic literature. Kings used to sell females who didn't have brothers to rishis as slaves. Prostitution was only recognised as a profession during the Brahmana period, and prostitutes were referred to as 'Vishya' at first and then 'Beshya,' which means one who can be touched by anybody.¹ These practise date back to the dawn of civilisation.

“Around the 6th century, the practise of 'dedicating' females to Hindu gods grew popular, eventually leading to ritualised prostitution. Devadasi literally means God's (Dev) female servant (Dasi), where young pre-pubertal girls are married off, given away in matrimony to God or the temple's local religious god, according to ancient Indian custom. The girl is frequently married before she reaches puberty, and she is forced to work as a prostitute for upper-caste community members.² The Devadasis are Buddhist nuns who were reduced to the status of prostitutes after their temples were taken over by Brahmins during the period of Brahmin resurgence following the demise of Buddhism³”.

This practise is prohibited in India under the Devadasi Security Act of 1934.

“A large number of prostitutes are kidnapped and thrown into the quagmire, the majority of them took up this occupation freely, but under duress, due to poverty and other pressing circumstances. These ladies are from impoverished families and/or lower socioeconomic groups, which means they have no official education or experience in anything other than being extremely poor and surviving”.⁴

These women use or sell their bodies to feed their families and themselves, as well as to provide a living. Prostitution is not limited to women only; male prostitutes are also there. While we've already talked about sex workers who are victims of poverty or human trafficking, there's another group of sex workers who are victims of social traditions. While the Indian Constitution guarantees everyone the chance to be treated as equals, there are some situations and occupations when this is not the case. Prostitutes are deprived women who have few other options for making a living. Prostitution, as defined by the Immoral Traffic (Prevention) Act, 1956, is the commercial sexual exploitation or abuse of a human being for financial gain.⁵

A survey found that out of India's 8 million sex workers,⁶ roughly 100,000⁷ call Asia's sex capital, Mumbai, home. Somewhere between three and five million young people work in India's sex trade, with 80% of these young women residing in only five major cities, including Bangalore. These numbers are shocking, and they highlight the need for official state intervention to curb critical underhandedness.⁸

In terms of the physical demands of one's job, prostitution is in the same league as other occupations requiring a high level of toughness and bravery. The social stigma and economic hardship faced by those in this profession are exacerbated by the influence of several cultural standards. In order to achieve a sense of equilibrium and to provide victims of abuse the agency and protection they deserve; the rule of law must be introduced into this destructive cycle. These sex workers' cases are just as compelling as, if not more so than, those of transgender people and the poor. Victims of sexual assault, public humiliation, inadequate medical care, a wide range of mental illnesses, etc. 'In spite of the fact that prostitution is illegal in India, the situation is different in other nations, where it has been given a legal status and, consequently, a plethora of malpractices associated with the profession have been reduced.' Like a coin, there are two perspectives. There are benefits and drawbacks to legalising prostitution. A few of its advantages include the stability it brings to government, the equality it fosters inside government institutions, the increased safety it provides over other systems, and the increased neutrality it establishes.

"There are pros and cons to this approach, including the fact that it can be implemented with different degrees of power, that it concentrates political power on the people, that it offers no assurance of the quality of rule, that it can discourage necessary social change, etc. By analysing the effects of both scenarios in light of the current conditions, a set of laws can be crafted to suit the requirements. Although the constitution does not explicitly protect the rights of sex workers, it does guarantee fundamental freedoms for all citizens, including the right to equality under Article 14, protection from discrimination on the basis of sex, caste, race, religion, or place of birth under Article 15, the right to personal liberty and life under Article 21, and the right to enforce one's rights under Article 32".⁹

2 History of commercial sex work in India

Many temples and other sacred buildings dedicated to various deities were located throughout the Ancient Near East. Herodotus, a Greek historian, documented the common practise of sacred prostitution in these temples and churches in his book 'The Histories'. The earliest known mention of prostitutes as a profession dates all the way back to 2400 BC, to Sumerian documents.¹⁰ Ministers in the Sumerian city of Uruk run a temple-brothel, as depicted here. Dedicated to the goddess Ishtar, these quarters housed three female evaluators. The upper class of women were only permitted to engage in sexual ceremonies within the sanctuary, while the middle class were expected to welcome visitors to the grounds and the lowest class actually lived there. In addition, the lower classes were permitted to use the lanes as a client discovery tool. Over time, countries like Greece, Japan, and others legalised and regulated female prostitution.

In the Mughal period of south Asian history, courtesans known as *tawaifs* catered to the wealthy men of the region. People like that would perform dances, songs, and poems for others to enjoy (kings and other people). The event's main goal was to provide amusement for the attendees. Back then, sexual activity was more of a side note than a formal part of a contract. When the highest-ranking *tawaifs* needed someone to dance, play music, or do other labour for them, they might choose anyone from the prostitutes.

In India, the term '*Devadasi*' refers to someone who is revered for their job as a temple server but also for their status as a 'servant of Deva.' All Devadasis were wed to a

Devi, or goddess. It was their responsibility to maintain the temples and conduct the ceremonies that took place there. They also participated in ancient arts such as 'Bharatanatyam' performances. For these reasons, they were considered to be members of the upper class. In India, the status of temples and the devadasi caste structure both declined precipitously after the advent of Islam. Having lost their kings and their temples, the devadasis who had previously worked in those institutions were left without work and, as a result, were driven to prostitution by poverty. With the British invasion of India in the 18th and 19th centuries, prostitution gained widespread acceptance. Their evening was brightened by the dancing and music of Devadasis. There was a decline in the demand for Indian prostitutes after British women began travelling there.

3 Law related to commercial sex work in India: the present scenario

In India, the courts do not view prostitution as unlawful but do view it as unethical. The Immoral Traffic (Prevention) Act, 1956¹¹ makes it unlawful to operate a brothel, use profits from prostitution as a primary source of income, encourage or coerce another person to engage in prostitution, or traffic minors or women for the purpose of prostitution (ITPA). So, while it may be against the law to operate a sex racket or to accept payment in exchange for sexual services without first soliciting clients, private prostitution and the like may be permitted. The ITPA defines 'prostitution' as 'the commercial exploitation or abuse of a female for financial advantage', and a 'prostitute' as 'the person who receives such gain¹²'.

"The Constitution of India (1950), the Indian Penal Code (1860), and the Immoral Traffic (Prevention) Act, 1956 are all relevant to the legal framework governing sex work in India. The Constitution provides the denial of human trafficking and forced labour in addition to its protections of equality, freedom of association, the Right to life, and personal liberty".

3.1 The constitution of India

According to the preamble of India's constitution, the country is a sovereign, socialist, secular, democratic, and republic, and all its residents must be guaranteed the same rights, freedoms, and opportunities. The Indian Constitution guarantees all citizens the same basic protections and liberties, regardless of their gender, caste, religion, socioeconomic status, or any other distinguishing factor. Among the constitutionally protected liberties are those specified in

Article 14 ('the right to equality before the law') and ('the right to be free from discrimination on the basis of race, colour, national origin, gender, sexual orientation, or disability'). It ensures that all residents are treated as equals.

Article 15: "No person should be subjected to discrimination on the basis of his or her sex, caste, race, religion, or national or ethnic origin, according to this article of the Indian Constitution. In no event shall any citizen be subject to discrimination on the basis of the aforementioned categories, as outlined in this provision".

Article 21 guarantees "the right to life and freedom. No one's right to life or freedom will be violated thanks to this safeguard."

Article 32: this article guarantees that “any person who has been denied a right may petition the Supreme Court to restore that right.”

Under Part 4, i.e., directive principles of state policy:

“The State shall coordinate its strategies to ensure, inter alia, that men and women have an equal right to satisfactory methods for livelihood; that the welfare, health, and strength of workers shall not be abused; that citizens shall not be compelled by necessity to engage in occupations unsuited to their age and strength; that the State shall promote the education and economic interests of the weaker sections of society; and that it shall ensure that the weaker sections of society have access to the benefits of the State”.

Andhra Pradesh’s high court has ruled that citizens and Government have both rights and responsibilities under the Constitution. When citizens have a right, the state is responsible for upholding it, and when the state places a responsibility on a person, the citizen’s rightful possession of that right reverts to the state. Duties and rights that are proportional to one another.

3.2 Indian Penal Code, 1860

“The Criminal law (amendment) act, 2013, added a new section to the Indian Penal Code in response to rising crimes like sexual harassment against women. This section enumerates the acts that constitute the offence of sexual harassment and imposes punishments/penalties for such acts. Any such crime committed against women will result in a sentence of between one and three years in prison, a fine of up to one thousand Rupees, or both”.

Section 354 of the Indian Penal Code: “This Section of the Indian Penal Code ensures punishments and penalties for the offenders who commit crimes against women and sexual abuse of them by stating that the offender shall be fined or sentenced to 2 years of imprisonment or convicted with both when the offence is committed without the consent of the women”.

Further, “the Criminal intimidation, insult, or annoyance, commission act,; any kind of words used or intentional gestures to insult the modesty of a woman or to hurt her privacy in an offence which is cognisable, bailable, and triable by any magistrate and may be punished by way of fine or sentence up to 2 years of imprisonment or with both”.

As of this writing, there are at least 20 sections of the Indian Penal Code that make trafficking a crime. The majority of them discuss kidnapping for sexual exploitation, including unjust incarceration following kidnapping. Most of them include some form of sexual misconduct, such as having an improper relationship or being wrongfully detained after being kidnapped.

Although it does mention prostitution, the Indian Penal Code of 1860 only does so in relation to minors. However, it does its best to put a stop to activities like kidnapping for sexual purposes, kidnapping to seduce someone into sexual activity, bringing in a foreign lady for sexual purposes, and so on.

Furthermore, Article 23(1) of the Constitution forbids the use of forced labour, including human trafficking, begging, and other similar practises. Article 23(2) makes it clear that breaking this provision is a criminal that carries legal consequences.

3.3 *Immoral Traffic (Prevention) Act, 1956*

The Immoral Traffic (Prevention) Act of 1956 is the primary piece of legislation regulating sex trade (hereinafter ITPA). The Act criminalises pimping and other related activities, which introduces a commercial dimension to prostitution and has the potential to violate the human rights of the prostitute. While the sale of human flesh is outlawed under the Statute, the act does not criminalise prostitution in and of itself. A woman or girl must establish that she has given her body for sexual intercourse for hire in order to be convicted of prostitution. Any individual who operates a brothel or who knowingly permits another person to do so is subject to penalties under Section 3 of the International Trafficking in Persons Act (ITPA). Under this law, evidence of prostitution can be gathered from as little as one instance. From Section 3 through Section 9, ITPA lays out the many offences that are illegal. Several court rulings detail ITPA's ultimate goal of putting an end to women's trafficking for commercial benefits.¹³ The Gujarat High Court ruled against legalising prostitution in one case.¹⁴ This is due to the fact that legal recognition of this kind might easily be misconstrued as a basic human right and hence serve as an open invitation for women to be trafficked.

It was determined that the Act's section 7 was not discriminatory. Under the International Trafficking in Persons Act (ITPA), a Magistrate may order a prostitute's removal from any location if doing so would serve the public interest. The client is not punished in any way for this action, which is equally noteworthy. This rule makes clear that prostitutes can do their trade discretely but cannot do it in public. According to a BBC piece that has been widely circulated online, prostitution is illegal in India. However, sexual services performed for monetary compensation are not considered prostitution under Indian law. Customers risk arrest if they engage in sexual activity of any form while in public. Sexual services for money are legal up to a certain level, however a woman is not allowed to engage in this activity anywhere within 200 yards of a public area. Specialists in the field of sex are not covered by the typical framework of labour regulations. In any event, they are allowed to be rescued and rehabilitated if they so choose, and enjoy every right that would be delighted in a citizen.

The biggest problem with the law is not with the law itself, but with how it is being enforced. One major obstacle in this Act is the corruption that has plagued its execution. Because of this, the reach of the legislation in our nation is somewhat restricted. This is abundantly clear in places where the mentality of law enforcement and the courts has not altered. Rather of targeting brothel owners, authorities target prostitutes during raids. Police and other government personnel are plagued by pervasive corruption. Inadequate facilities for reform and rehabilitation of prostitutes are another issue. These shelters can't handle a significant influx of prostitutes who've been victimised. Many people have been affected, yet there are not enough dwellings to accommodate them. Because of this issue, many of them are unable to find stable housing, and they are forced to return to criminal behaviour from which they have previously benefited. Increasing the availability of housing and opportunities for personal growth is one possible response. They need to provide counselling and get them employment. The goal of decriminalisation is to shift responsibility for illegal sexual activity from sex workers to the proprietors of brothels.¹⁵

Several studies have shown that the number of reported crimes is far lower than the actual number of crimes that occur each year. A more direct translation would be that there are more crimes overall but fewer are actually recorded. They do not know their rights or the laws that protect them, and that's a big part of the problem. High levels of

corruption among government employees mean that not all of these incidents are being recorded. (Roughly 60%). The cops must be educated and made more sensitive to this issue.

4 The draft ‘anti-trafficking’ bill: does it protect sex workers in India?

If the police or Sarkar (government) were truly concerned about the victims’ well-being, they would have made arrangements for them to find other forms of employment or income. We are either confined to shelters or sent back to our hometowns.

Human Trafficking, a pernicious and shameful crime, is a global issue affecting multitude of lives of their dignity and trust in humanity. A crime which must have a zero-tolerance policy should be handled with a sleight of hand by the society and the government. Every year, hundreds of thousands of women, children are deceived, abducted, or sold into forced prostitution for the clan of men who victimise them into the horrors of sexual exploitation. Recently, the centre released the draft Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 which emphasise on criminalising and policing rather than proposing welfare measures.

The most displeased section with this draft is the community of sex workers. India is a hub of over 8 million sex workers according to a 2007 Ministry of Women and Child Development Report, majority of them being adults. When any raid and rescue operation is conducted, many women, who made consensual business agreement are also detained and sent back. The current draft nullifies the consent of the victim as irrelevant and immaterial which means that those who are willingly in this profession now feel threatened of being held for criminal charges. Framing trafficking as an issue of morality precariously put human rights at stake forging the stigma of woman not entering into sex work of her own violation.

The anti-trafficking discourse has been on International Regimes from the turn of 20th century. The adoption of ‘Palermo Protocol (United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons) in 2000’ triggered the recent spate of ‘trafficking’ in legal arena. Since then, the anti-trafficking initiatives have been expansive to sex work exceptionalism taking into realm the concepts of forced labour (Forced Labour Protocol 2014) and modern slavery (Walk Free Foundation 2015). By 2009,

“the visualisation of trafficking not just involved cross border movement but the re-invigorated focus was on internal migration and trafficking without movement (for, e.g., bonded labour). The elasticity in the concept of trafficking forces authorities and civil society to have a discursive view into the relationship between anti-sex work laws, general criminal laws, labour laws, corporate laws, and immigration laws”.

Unfortunately, the Indian government has taken recourse to conservative thinking, marked by sex work exceptionalism and less focus on forced and bonded labour.

4.1 Indian legislation at hand: The Draconian ITPA 1956

India’s primary law against human trafficking and prostitution is the Immoral Traffic Prevention Act of 1956. According to Section 370 of the Indian Penal Code, ‘any act of physical exploitation, sexual exploitation, slavery, or practises comparable to slavery and

servitude' is considered to be trafficking. There are many shortcomings with this archaic ITPA last amended in year 1986 and never reviewed since.

One, inclusion of the term 'immoral' creates a pathway to a morality aspect whereas handling of such cases should be purely legal in tandem with criminal laws. The interpretation at hand takes an anti-sex worker approach. Human Rights Watch supports the decriminalisation of consensual adult sex including commercial exchange of services. In their report, they have analysed the grave impacts of criminalisation: exposes vulnerability of sex workers, are subjected to abuse and exploitation by law enforcement officials, coerced into physical, verbal and sexual harassment, bribery and mental health issues. In a 2012 report of HRW, sex workers' mere possession of condoms is marked as evidence to put up charges, thus the practice of having unsafe sex leads to higher risk of contracting HIV-AIDS. Decriminalising sex work provides a sense of equality and maximises legal protection in terms of accessing justice and healthcare system and exercising other rights freely.

Two, the ITPA in its section 17(2) fosters the 'raid-rescue-rehabilitation' model which is highly backlashed in international regime. In India too, the norm of assuming sex work to be a result of trafficking with workers needing rescue has proven to be misleading.

Sex work in India is practically illegal and such laws are unintentionally putting a gordians' knot on human rights. These people are seen less of a worker and more of a victim or criminal. One-size-fits-all approach towards all sex workers leads to creation of a 'racket' where these 'rescued' individuals (mainly women and transgender) are detained into rehabilitation homes for years. Such places are funded by state and have harsh living conditions. Such forceful detainment is a blot on human rights as many have described living in such places as 'worse than a prison'.

Article 19(1)(g) of the constitution, 'which guarantees fundamental right to work is violated as there is no provision for the 'victims' if they do not want to get rehabilitated or accept repatriation.' The harsh reality is that the 'rescued and rehabilitated' women invariably return to sex work. And the reasons lie within the system, the societal stigmas do not let these workers to live in a safe space with full dignity. Their family members are being robbed of their reputation, forcing those workers to find a place and make a living on their own.

Three, the ITPA ignores the reality of bonded labour victims who are daily trafficked across borders under exploitative situations concerning terrific usage of young people for organ removal, girls and women for domestic servitude or forced marriage. The act fails to provide the much-needed attention in such draconian issues.

Four, the ITPA defines prostitution as 'the sexual exploitation or abuse of persons for commercial purposes'. The law essentially means that prostitution in general is sexual exploitation and abuse where consent has no role to play. But research has shown that the law is applied moralistically to punish more women hence more arrests are made of women soliciting in public. The authorities grossly misuse Section 8 of ITPA which prohibits soliciting harassing streetwalkers.

Five, Section 4 of the act says 'any anybody above the age of 18 who is reliant on the income of a sex worker will be penalised with imprisonment for a time which may extend to two years, or with fine which may extend to Rs.1000,' it reads under Section 4 of the Act. When applied to someone who is just out of school and cannot support themselves financially, this clause is meant to penalise the innocent.

The act does not prohibit sex work *prima facie* but keeping brothels, living on earnings of sex workers and soliciting in public places are considered criminal offences. The legitimisation of sex work in India has a long way to go and it cannot happen with only one archaic legal act which favours the criminals and puts victims, transgender community and migrant labours into a much more dilapidated position. What does the new draft say, or does it address the current issues?

4.2 Revised draft of 'anti-trafficking' Law 2021

The purpose of the Trafficking in Persons (Prevention, Care, and Rehabilitation) Bill, 2021 is to protect vulnerable populations from human trafficking, including women and children. This bill has been met with widespread support from anti-trafficking activists, attorneys, and researchers. Supportive legal, economic, and social conditions are established, and perpetrators are brought to justice while victims get treatment, protection, and rehabilitation.

The current law is the result of careful consideration of comments and critiques made on the 2018 draught. In this measure, human trafficking is recognised as a transnational organised crime. It rejects the conflation of human trafficking and sex work and defends the civil rights of victims to get rehabilitation and restitution outside of criminal processes. The National Investigation Agency is designated as the 'nodal agency to advise prevention and fight of trafficking in persons and other crimes under this act, as well as for investigation, prosecution, and coordination in cases of trafficking in persons'.

Although certain communities and activists have raised concerns about absence of community-based rehabilitation, funds for rehab homes, and a mechanised rescue protocol. Thus, the concern of victims being rescued unwillingly can lead to being held in remand homes for up to 3 years. The bill's heartless language also confuses the issues of trafficking and sex work. Human trafficking now includes 'prostitution and pornography' as forms of sexual exploitation and exploitation generally. According to Durbar's reps, 'victim consent is no longer a factor' (the largest sex workers collective based out of Kolkata).

People who engage in voluntary sex work usually come from a marginalised background surrounded by social stigmatisation and discrimination. They do not get access to job offers due to prevailing casteism and illiteracy. When these people are 'rescued/rehabilitated', their will to live dies with their dignity. First step into a better governance would be to normalise consensual sex between adults even for business purposes. Some measures to improve their situation would be to provide welfare measures such as financial aid, job training and opportunities, social services and information. The government has to address the sexual orientation, gender-discrimination and identity, race, ethnicity, or immigration status affecting sex workers.

A rights-based approach that facilitates sex work in a legal manner and criminalises those who are actually backfiring justice. The authorities such as police and politicians should also go through proper training to have an understanding of psychological mind-state of sex workers in India and those who have immigrated. Trafficking and migration are mutually dependent on the economic policies of a nation and shouldn't be overlooked creating high inequalities in the status quo.

5 Judicial trend related to commercial Sex-work in India

Belief that sex workers in India are criminals rather than citizens, contributes to the widespread violence they face. This has led to widespread and systemic violations of the human rights of sex workers, including the right to life, dignity, equality, equal protection under the law, and due process. There are a lot of factors that put those who work in the sex industry at danger of being violently attacked. They are at risk of intimate partner violence and family violence because of the shame connected with sex employment. It has become socially acceptable to use physical force as a means of retaliation against males who engage in sexual activity with other men.¹⁶

Stigma and prejudice towards sex workers are so pervasive and damaging that it is nearly impossible for them to advocate for their own health and safety. Their prior experiences of discrimination and stigma make them wary of disclosing their profession while seeking medical attention at public or private facilities. The privacy of women who work in the sex industry is violated when they are publicly ridiculed and criticised. They are not given accurate diagnoses, are made to undergo unnecessary HIV testing, are overpaid by private hospitals, are refused access to necessary medical services, including childbirth care, and have their privacy compromised. Workers in the sex industry claim that doctors discriminate against them and sometimes demand sexual favours from them before providing medical care. The already tenuous situation of sex workers is exacerbated in healthcare settings.

Confrontations involving blatant violations of privacy are routine for sex workers. Findings suggest that the police used the fear of publicity in publications and on television to coerce sex workers. The media coverage of sex workers is often one-sided, relying solely on official court documents or police reports without conducting independent interviews. Researchers found that even when rescued adult women testified that they entered sex work voluntarily, they were nevertheless remanded to penal facilities. These ladies, now adults, were taken in by their families with the understanding that they would not be allowed to work in the sex service sector while they were in their care. The ‘custody’ of an adult sex worker is often awarded to a parent or other family member based on moral considerations.¹⁷

In the case of *The State of Uttar Pradesh v. Kaushalya*¹⁸ As a result, some prostitutes were forced to leave their homes and relocate in order to keep Kanpur looking respectable. The Allahabad High Court of Judicature contended that Article 14 and clauses (d) and (e) of Article 19(1) of the Constitution provide the respondents certain fundamental rights that were violated by Section 20 of the Act. Since it was clear who constituted a nuisance and who did not, the Act was upheld as constitutional. This Act is consistent with its stated purpose of preserving social decorum.

In the case of *Budhadev vs. state of West Bengal*¹⁹ The appellant was found guilty, and the court also stated that the prostitutes were human beings who entitled to live a dignified life under Article 21. It also ordered the government to develop sex worker rehabilitation plans that include vocational training so that they can earn a living other than selling their bodies. It was also suggested that instead of looking down on prostitutes as inferior humans, people should sympathise with their plight because most women choose this business out of necessity rather than choice.

In the case *State Govt. NCT Delhi v. Pankaj Chaudhary & Ors*²⁰ the court acknowledged that even if a woman is a commercial sex worker, no one may take advantage of her and bring up about her character or claim that she is a lady of ‘easy

virtue'. The court noted that such women have the right to decline to consent to the sexual activity whenever she wants.

In the recent case of *Kajal and others V. State of Maharashtra*²¹ the Bombay high court held that prostitution is not illegal under the Immoral Traffic (Prevention) Act of 1956 and that a woman of legal age has the freedom to select her own occupation and cannot be kept against her will. A judge ordered the release of three sex workers serving prison sentences.

In a recent case *Budhadev Karmaskar V. State of West Bengal*²² the Supreme Court of India has ruled that sex work is not among the activities that are prohibited by Indian law. Operating a brothel, soliciting in a public place, benefiting financially from the labour of a sex worker, and keeping or frequently associating with a sex worker are all illegal under the Immoral Traffic (Prevention) Act or ITPA. As has been widely reported in the media, the SC does not consider sex work to be a legitimate occupation. What the Supreme Court of India is saying is that everyone, regardless of occupation, has a right to live a dignified life under the Indian Constitution and that this constitutional protection must be taken into account by authorities as they enforce immoral traffic prevention laws.

What it proposes is that people should not verbally or physically abuse sex workers or coerce them into performing sexual acts, even though they are widely reviled and stigmatised by society. The Supreme Court rules that people who work in the sex industry should be treated with respect. The court ordered that law enforcement officers refrain from interfering with or prosecuting sex workers who are adults and who have given their informed consent. Article 21 of the Constitution guarantees every citizen the right to a life worthy of his or her profession. The law should treat sex workers the same as any other profession. A uniform application of criminal law is required, regardless of age or level of consent. Since sex work is not yet illegal in India, the police should not interfere or take any criminal action against the worker if they are an adult and have given their informed consent.

6 Recognition of the rights of sex workers by Indian judiciary

The Supreme Court reaffirmed its ruling from *Budhadev Karmaskar* (2011), which held that sex workers have the same basic human rights as anyone else. In 2011, SC convened a panel to investigate how best to protect sex workers from exploitation, help those who have been trafficked recover, and create a supportive environment for those who want to keep working in the sex industry.

The government has published a bill titled 'The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill' in 2016, 2018, and 2021, but has taken no further action on it despite having reservations about four of the panel's ten recommendations. So, until new legislation is introduced on the subject, the court issued an order mandating the immediate implementation of the six recommendations with which the central government has no objections.

- 1 The law should treat sex workers the same as any other worker. Both the age of majority and the presence of informed consent must be treated equally under the law. The police have no right to intervene or undertake any kind of illegal activity if it is obvious that the sex worker is an adult and is giving informed consent.

- 2 Many people fear that police have a biased attitude toward sex workers. When a sex worker reports a crime, sexual assault, or other violation, the police must investigate the allegation thoroughly and take appropriate action.
- 3 'Any sex worker who is a victim of sexual assault should be given all the facilities available to a survivor of sexual assault, including immediate medical assistance, in accordance with 'Guidelines and Protocols: Medico-legal care for survivor/victims of sexual violence,' Ministry of Health and Family Welfare, and Section 357C of the Code of Criminal Procedure, 1973.' (March 2014).
- 4 Since it is only the business of running a brothel that is criminal, sex workers should not be detained during a raid on the establishment.
- 5 State governments may be asked to survey all ITPA Protective Homes, with the goal of expediting the review and release of cases involving women held against their will as adults.
- 6 It is been reported that law enforcement's treatment of sex workers is frequently violent and hostile. As if they belong to some unrecognised group whose rights are ignored. All sex workers have the same constitutionally protected rights as any other citizen, and the police and other law enforcement agencies should be trained to respect those rights. The police should not verbally or physically abuse sex workers, force them to engage in sexual activity, or subject them to any form of violence.
- 7 'The Press Council of India should be urged to issue guidelines urging the media to exercise extreme caution when reporting on sex workers' identities in the wake of the arrest, raid, and rescue operations, whether the workers are victims or suspects, and when publishing or airing photographs that could reveal their identities. In addition, the media should be punished for broadcasting photos of sex workers with their clients under the guise of documenting a rescue operation in violation of the recently enacted Section 354C, IPC, which makes voyeurism a criminal offence'.
- 8 Precautions taken by sex workers to ensure their own safety on the job (such as the use of condoms, etc.) must not be considered illegal or evidence of criminal behaviour.
- 9 When making decisions about sex work, the federal and state governments should consult with sex workers and/or their representatives. This includes the creation of new policies and programs for sex workers as well as the revision or overhaul of existing legislation. They can be consulted before any decision that could affect them is made, or they can be given a voice on the decision-making panel.
- 10 'The National Legal Services Authority, State Legal Services Authority, and District Legal Services Authority of the Central Government and the State Governments should host workshops to inform sex workers of their rights in regards to the legality of sex work, the rights and obligations of the police, and what is permitted/prohibited under the law.' Providers of sexual services should be educated on their rights under the law and given the tools they need to effectively exercise those rights in order to safeguard themselves from traffickers and law enforcement.

- 11 As was earlier suggested 'in the 6th interim Report dated 22.03.2012, no child of a sex worker should be removed from the mother on the sole premise that she is in the sex trade.' A minor's association with a brothel or sex workers does not always point to trafficking.
- 12 Children should not be taken from a sex worker who says the kid is her son or daughter without first having the allegation verified by DNA testing. In his presentation, Mr. Jayant Sud, the learned ASG, provided evidence that the Government of India had certain qualms regarding the panel's recommendations (with the exception of paragraphs 2, 4, 5, 6, 7, and 9). The relevant authorities under the Immoral Traffic (Prevention) Act, 1956 are therefore enjoined to enforce the provisions of that Act, in addition to executing the panel's recommendations as detailed above. The suggestions in paragraphs 2, 4, 5, 6, 7, and 9 must be followed to the letter.
- 13 Article 21 of the Indian Constitution guarantees every citizen the right to a dignified life, regardless of one's occupation. Authorities tasked with enforcing the Immoral Traffic (Prevention) Act, 1956 must do so with respect for the constitutional rights guaranteed to every citizen. After the summer break, we'll get to work on the rest of the panel's suggestions.

7 Conclusions and suggestions

Now it is high time to legalise prostitution in India. Finally, based on the analysis, it may be concluded that there is no need for any specific treatment for a problem like prostitution, such as criminalising, decriminalising, or sanctioning it. It is difficult to deny that legalising prostitution has both negative and beneficial consequences, based on previous research. As a result, simply legalising prostitution will not be enough to tackle the problem; instead, a unified rule governing its administration in our country is required. Prostitution regulation will aid in the protection of sex workers and their children from exploitation. Not only will it preserve the health of sex workers and society as a whole, but it will also protect the rights of sex workers.

It is time to realise that getting rid of people who work in prostitution and outlawing prostitution practices won't end the plight of people who work in prostitution; instead, it will only make their conditions worse because they will be forced to work in secret and will be mistreated in all situations because the act of prostitution won't be recognised by the law. Since the act of prostitution won't be recognised by the law, there is no legal status that will facilitate benefiting from and correcting the wrongs, in conclusion, the rehiring of people who have been exploited in the sex industry, whether they are prostitutes, sex workers, or victims of the sex trade, is a matter of right and not of sympathy or privilege.

7.1 Suggestions

Other than the obvious benefits to the prostitutes themselves, there are compelling arguments for legalising prostitution. To begin, there is a fundamental inequality in their treatment under the law. Prostitutes would gain privileges if prostitution were legalised, and the government would get benefits as well. In our country, prostitution dates back

hundreds of years. The majority of Indians hold moralistic preconceptions, whether they are religiously motivated or the result of an idealised feminism that refuses to discuss concerns like these. Sex is the most essential component of a woman's and her husband's lives in traditional gender roles, when women are expected to care for the home and their families. That's why there are so many women involved in the prostitute trade. However, the tides are turning. The Immoral Trafficking in Persons Act of 1956 (Immoral Trafficking in Persons Act) addresses the issue of unlawful trafficking in persons, namely women, but does not address the issue of legalising prostitution.

The impact on the persons who engage in these activities should be considered by the governments that outlaw them. Many of them would be able to escape the cycle of poverty if prostitution were legalised, and vice versa. Even though prostitution is illegal, trafficking still occurs. When people try to operate these enterprises illegally, hundreds of people fall prey to trafficking every year.

Furthermore, we must inquire as to the causes of such violent acts against prostitutes. This is so because the offender has a greater possibility of avoiding punishment. But such folks usually buy off police by paying them a lot of money.

The state's economy would likely improve if prostitution were legalised. In certain countries, like as Germany, a prostitute is subject to taxation. The state's coffers would overflow with more cash if prostitution were taxed. When the cost of doing something rises, fewer people will want to partake in it. There will be less interest in an activity if it costs more. If individuals have to pay to participate, it makes it harder for them to participate in their normal lives. The following are quick explanations of some of the other factors:

- 1 One of the primary motivating factors for prostitution is the need to supplement a low income. They haven't been able to afford school because they're poor. Due to their inability to hold a steady job due to their lack of education, many turn to prostitution to support themselves. Individuals in this situation are impoverished and have nowhere else to turn for financial support. A few do it because they want to, while the others have to in order to support their families. (Think: kiddos.) The second type of individuals are those that splurge on their loved ones despite the fact that they have no means of providing for them, mostly women without husbands or parents. And occasionally the compensation is very inadequate in relation to the value of the service rendered. When prostitution is legalised, prostitutes may support themselves and their families. These prostitutes would be able to improve their standard of living if their pricing were regulated.
- 2 It is important to keep in mind that for every right there is an equal and opposite responsibility. They are norms of rightness or liberalism in society. When a set of privileges is codified into law, they are referred to as rights. Both moral and legal rights exist. When we say that someone has the right to do something, we mean that no one else can legally prevent them from doing it. Both parties have rights and responsibilities in this situation. If prostitution were legalised, prostitutes would get protections. If prostitution were legalised, its workers would no longer be in the dark about calling the police if something went wrong. If it were still illegal, they would be too fearful, preventing them from calling any expert, and the number of assaults and murders would continue to rise.

- 3 The health of those who work in the sex industry would improve greatly if prostitution were legalised. The BBC conducted a study which indicated that when sex workers ask their clients to wear condoms, the clients often reject and get abusive. The result is an increase in the transmission of sexually transmitted illnesses like HIV/AIDS. If this were legalised, sex service providers could receive routine condom checks, and clients would be required to use them. Sexual healthcare providers in Nevada are required to get tested for HIV/AIDS monthly and for Gonorrhoea and Chlamydia weekly. It also mandates the use of condoms during sexual activity in brothels. According to a study done in Australia, the rate of STI transmission in unlawful street prostitution is 80 times higher than in legitimately run brothels. Cause for this is that brothels actively promote their patronage.
- 4 Fourthly, tax revenue: the state stands to gain as much as the people and sex workers from legalisation. Taxing brothels would reduce demand and generate revenue for the government. The annual cost of prostitution is projected to be 21 lakh crore. When costs are too high, fewer people are willing to pay them, and as demand drops, the number of people engaging in these pursuits inevitably decreases. It has been argued by Richard Posner that when these kinds of activities are subject to taxation, the demand for them falls. High pricing led to less interest. He thinks the best way to deal with illegal activity is to commit tax fraud or engage in price manipulation. As a result, crimes like human trafficking, rape, and so forth, would drop as well.
- 5 The legalisation of prostitution has been shown to lessen human trafficking and the violence perpetrated against prostitutes (including rape, murder, forced sex, and other forms of sexual abuse). Economics provides a lens through which to comprehend this. Because of the risk of prosecution, criminalisation of prostitution will reduce deliberate prostitution. Even while the victim takes on the brunt of the criminal penalties in the event of an arraignment, the trafficker only stands to lose out on potential earnings. Prostitution's illegality will reduce the demand for it, increasing the trafficker's profits. Therefore, criminalisation is unlikely to reduce people trafficking and is likely to increase it. As the criminalisation of prostitution continues, prostitutes and johns will be less likely to report human trafficking out of fear of repercussions.
- 6 Increased access to healthcare and a decrease in sexual assaults against women are two ways in which legalising prostitution might boost living standards for prostitutes.
- 7 Seventh, when prostitution is legalised, the police will be able to protect those who need it in times of crisis. Prostitutes who break the law confront several challenges. The ladies are in a pickle. Further, these disadvantaged ladies have nowhere to turn for aid. Providing security would discourage aggressive behaviour and shield prostitutes from abusive clients. Pimps are in control of illegal prostitutes because these women are poor and have nowhere else to turn for support. Moreover, they face difficulties obtaining medical attention. On the other hand, prostitutes who operate legally receive health benefits and have easier access to other services.

Prostitution is generally frowned upon in India, a country with many different social components. Sexual service providers tend to cluster together. Studies show that the general public, the prostitutes themselves, and the state as a whole would all reap the

rewards of legalising prostitution. Prostitution has been a part of our culture for quite some time, although it is still widely stigmatised. The state would profit financially, which would allow for greater regulation of the industry, while the prostitutes would benefit from increased access to healthcare, the imposition of rights and responsibilities, and improved working conditions. It also gives the state the authority to regulate these activities and imposes the right to govern them. As a result of legalisation, fewer issues will arise for sex workers. Trafficking, a major type of crime, would be greatly diminished. It is important to differentiate between sex workers who have chosen this career path and those who have been coerced into it. Both industries need protection, and new rules controlling them must be enacted. Prostitution must be legalised in order to provide employees in the sex industry with benefits like life insurance and a guaranteed minimum wage. In most situations, it is the brothel owners, not the prostitutes, who should be penalised for the illegal activities that take place within their establishments. It is proposed that the state should aid in the rehabilitation of sex workers, and that such economically disadvantaged women should be given enough compensation and redirected to a different industry where they may receive the training and advancement opportunities they deserve.

Notes

- 1 Das, S. and Ghosh, R. (2022) 'Prostitution in India: protection of human rights of sex workers in India', *International Journal of Law Management and Humanities*, Vol. 3 [online] <https://www.ijlmh.com/wp-content/uploads/Prostitution-in-India-Protection-of-human-rights-of-Sex-Workers-in-India.pdf> (accessed 15 September 2022).
- 2 Arora, R. (2022) 'Prostitution in India and it is legal analysis', *LAWYERSCLUB INDIA*, [online] <https://www.lawyersclubindia.com/articles/prostitution-in-india-and-it-s-legal-analysis--9151.asp> (accessed 15 September 2022)
- 3 Arora, R. (2022) 'Prostitution in India and it is legal analysis', *LAWYERSCLUB INDIA*, [online] <https://www.lawyersclubindia.com/articles/prostitution-in-india-and-it-s-legal-analysis--9151.asp> (accessed 15 September 2022).
- 4 Arora, R. (2022) 'Prostitution in India and it is legal analysis', *LAWYERSCLUB INDIA*, [online] <https://www.lawyersclubindia.com/articles/prostitution-in-india-and-it-s-legal-analysis--9151.asp> (accessed 15 September 2022)
- 5 Section 2(f), Immoral traffic (prevention) act, 1956.
- 6 National AIDS Control Organisation, Phase 3 Program estimated between 831677 – 1242819 people in sex work in India
- 7 Sahni, R. and Shankar, V.K. (2013) *Sex work and its linkages with informal labor markets in India: Finding from the first Pan - India Survey of Female Sex Workers*, Institute of Development Studies Working Paper, February 2013, Vol. 2013 No. 416 [online] <http://www.ids.ac.uk/publication/sex-work-and-its-linkages-with-informal-labour-markets-in-india> (accessed 15 September 2022).
- 8 Verma, R.K., Halli, S.S., Swain, S.N. and Singh, R. (2011) '2/3rd of the mobile sex workers reported economic reasons for entering sex work. Saggurti N1, motivation for entry into sex work and HIV risk among mobile sex workers in India', *J. Biosoc. Sci.*, September, Vol. 43, No. 5, pp.535–554 [online] <http://www.ncbi.nlm.nih.gov/pubmed/21729360> (accessed 15 September 2022).

- 9 Verma, R.K., Halli, S.S., Swain, S.N. and Singh, R. (2011) '2/3rd of the mobile sex workers reported economic reasons for entering sex work. Saggurti N1, motivation for entry into sex work and HIV risk among mobile sex workers in India', *J. Biosoc. Sci.*, September, Vol. 43, No. 5, pp.535–554 [online] <http://www.ncbi.nlm.nih.gov/pubmed/21729360> (accessed 15 September 2022).
- 10 Silver, M. (2006) *Temple/Sacred Prostitution in Ancient Mesopotamia Revisited*, Religion in the Economy.
- 11 Hereinafter referred as the ITPA
- 12 Darji, P. (2022) *Prostitution in India*, Myadvo [online] <https://www.myadvo.in/blog/prostitution-in-india-read-its-causes-legality-and-law/> (accessed 15 September 2022).
- 13 Ratnamala and Another v. Respondent AIR (1962) *Madras 31*.
- 14 Sahyog Mahila Mandal v. State of Gujarat (2002) 2 *GRL 1764*.
- 15 Farely, M. (2004) 'Bad for the body , bad for the heart'; prostitution harms women even if legalised or discriminalised', *Violence Against Women*, Vol. 10, No. 10, pp.1087–1090.
- 16 Violation Faced by sex workers in India [online] <https://www.uprinfo.org/sites/default/files/document/india/session27-may2017/js9upr27indemain.pdf>, (accessed 15 September 2022).
- 17 Violation Faced by sex workers in India [online] <https://www.uprinfo.org/sites/default/files/document/india/session27-may2017/js9upr27indemain.pdf>, (accessed 15 September 2022).
- 18 The State of Uttar Pradesh V. Kaushalya (1964) AIR 416.
- 19 Budhadev Karmaskar V. state of West Bengal (2011) (8) SC 289
- 20 State of NCT of Delhi V. Pankaj Chaudhary (2018) SC 2256.
- 21 Kajal Mukesh Singh and Ors. V. The State of Maharashtra (2020) SCC 954.
- 22 Budhadev Karmaskar V. state of West Bengal (2022) SCC OnLine SC 704.