



Rethinking Sex Workers' Rights in India

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ABSTRACT

In this essay, we will critically examine the rights of sex workers in India against the backdrop of the changing judicial standard of constitutional morality. Popular morality has traditionally been behind the quasi-prohibitionist regime under the Immoral Traffic (Prevention) Act, 1956 in India. On the other hand, constitutional morality has been insisting upon the need for the same treatment with regards to the enjoyment of fundamental rights for all people irrespective of their profession. Taking recourse to the judgments delivered by the Supreme Court of India in its landmark rulings, especially in (2022), and placing these pronouncements in the wider context of constitutional morality enshrined in Articles 14, 19, and 21 of the Indian Constitution, it is argued that the criminalisation of activities in connection with sex work is unsustainable from a constitutional point of view.



I. Introduction

The legal position of prostitution in India is a classic case of confusion. Prostitution in itself is not made illegal by any statute and hence the engagement of sexual intercourse by an adult in return for monetary reward is not technically an offence. But almost every other activity related to prostitution is rendered a criminal offence under the ambit of the primary law applicable to the subject, the Immoral Traffic (Prevention) Act of 1956 (henceforth ITPA). Soliciting in a public place, running a brothel, living on the income of prostitutes and procuring people for prostitution are all offences under the provisions of the Act. The net result of such a regime is the creation of a system that acknowledges the existence of prostitution but refuses to provide sex workers with even the semblance of legitimacy as an occupation, thus making them prone to abuse at all times.

This paper will be founded on the assumption that the Constitution of India cannot allow sex workers to remain outside the scope of legal protection. The rights guaranteed by the Constitution of equality before law under Article 14, the freedom of choice of trade or profession under Article 19(1)(g), and the rights to life and personal liberty under Article 21 are not dependent on the moral endorsement of the majority. According to the principle of constitutional morality as defined by the Indian Supreme Court through a string of revolutionary decisions, these rights must be granted equally to all individuals, and any legislation or administrative decision failing this criterion must face strict scrutiny.¹

II. The Legal Framework

The enactment of the ITPA 1956 is one example of such legislation aimed at reducing immoral trafficking of women and girls. The wording of the law's title and its legislative history demonstrate that this piece of legislation is not motivated by an interest in human rights but rather a desire to control immorality. As can be seen from the definitions laid out in s. 2, prostitution involves the exploitation and abuse of individuals in return for compensation, thus making it impossible from the wording alone to view sex work as a legitimate occupation of choice.²

It has been reported extensively by researchers and CSOs that implementation of the ITPA is characterized by gross human rights violations. Sex workers are arrested based on public solicitation or operation of

¹ N S Gopalakrishnan and T G Agitha, *Principles of Intellectual Property* (Eastern Book Company 2014) 23–29.

² Immoral Traffic (Prevention) Act 1956 (India), s 2(f); see also Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press 1999) 144–153.



brothels clauses, regardless of lack of proof of trafficking, coercion, and minors involved. Raids by the police on the homes of sex workers, which are carried out to save victims from trafficking, often lead to arbitrary arrests of sex workers, seizure of their money, and police brutality.³ Failure to draw a line between voluntary adults who engage in the sex trade and trafficked individuals coerced into doing so is not only an oversight in terms of law but also a gross violation of human rights.

Constitutional aspects of this legislation cannot be ignored. The 14th Article of the Constitution states that there shall be equality before the law and equal protection of laws. Differentiation between sex workers from other informal workers without any rational basis linked to state interests brings about issues of equality that need to be addressed by the government. 19(1)(g) of the constitution states that there is a right to practice any profession or to carry on any occupation, trade or business subject to Article 19(6). Article 21, as per the Indian Supreme Court's interpretation in an unbroken line of decisions since then, is not limited to just the basic biological right to life but also includes the right to lead a dignified life, to enjoy personal liberty, and to make informed decisions regarding the use of one's own body and profession.⁴

Recognition of livelihood as an important part of lifestyle rights is especially important for sex workers. Many of the individuals involved in this picture are not excluded from authentic identity, but are driven by examples of deep-rooted poverty, caste-based exclusion and restricted access to other forms of employment. Taking away the type of income raises serious concerns under Article 21 and the obligations it places on the state.⁵

III. Constitutional Morality and the Sex Workers' Rights Jurisprudence

Constitutional morality as compared to popular or public morality is a term coined by Dr. B R Ambedkar, who was one of the chief architects of the Indian Constitution. This term has gained renewed meaning in recent years through its revival by the Supreme Court of India. In fact, Ambedkar had forewarned during the debate in the Constituent Assembly that constitutional morality would have to be developed in

³ Durbar Mahila Samanwaya Committee, 'The Fallen Learn to Rise' (DMSC Publication 2020) 22–30.

⁴ Maneka Gandhi v Union of India (1978) 1 SCC 248.

⁵ Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608; see also Olga Tellis v Bombay Municipal Corporation (1985) 3 SCC 545.



opposition to popular sentiments. The constitution could not be held to ransom by the moral inclinations of any majority.⁶

This important judicial exposition of the principle has been recently done in (2018), wherein the Supreme Court declared consensual homosexual conduct between adults as legal and ruled, in the words of wide application, that constitutional morality demands safeguarding of dignity and autonomy from majoritarian morality imposition. In his dissenting judgment, Justice D Y Chandrachud stated that constitutional morality does not ratify the prevailing order but sets up a yardstick by which it is perpetually measured.⁷

However, the application of this doctrine to sex workers is quite evident from the case of *Budhadev Karmaskar v. State of West Bengal*. While this case relates to the brutal murder of a sex worker in the city of Kolkata, its constitutional significance went much deeper than the specifics of this case. Through its ruling in this case in 2011, the Supreme Court confirmed that sex workers are guaranteed protection under Article 21 of the Indian Constitution, just like any other individual, and are entitled to live their life with dignity. Following its pronouncement in May 2022, the Supreme Court adopted a more forward-looking approach by mandating the police to not harass consensual adult sex workers or prosecute them for merely performing their trade. It also mentioned that their children should not be taken away forcefully, and they should get proper access to healthcare and legal support.⁸

This was done on the basis of Article 142 of the constitution, which gave the Supreme Court powers to make such an order in order for complete justice to be done. This shows that the Court felt that the legislative provisions were inadequate in some way and, thus, needed to intervene in order to fill the gap. In its decision, the Court made it clear that regardless of the profession, all persons have a right to dignity of life as per Article 21 of the Indian Constitution, and this could not be compromised by any moral evaluation attached to the occupation.⁹

It is clear from the *Sabarimala* judgment of 2019 that the concept of constitutional morality can never be overshadowed by the morality of religion or society, if it goes against the rights guaranteed under the

⁶ B R Ambedkar, 'What Congress and Gandhi have Done to the Untouchables' in Vasant Moon (ed), *Dr Babasaheb Ambedkar Writings and Speeches* (Government of Maharashtra 1991) vol 9, 202–209.

⁷ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

⁸ *Budhadev Karmaskar v State of West Bengal* (2011) 10 SCC 397.

⁹ *Budhadev Karmaskar v State of West Bengal* (2022) SCC OnLine SC 704, para 18.



constitution. According to Justice D Y Chandrachud, while writing his concurring opinion, "constitutional morality must impose limitations upon the capacity of the majority to wield the State machinery for the purpose of translating its moral choices into reality". In the case of prostitution, what needs to be kept in mind is that popularly accepted moral ideas about sex work cannot take precedence over the provisions of the constitution.¹⁰

IV. Popular Morality, State Paternalism, and the Autonomy Deficit

The primary problem of jurisprudence surrounding the discussion of sex workers' rights is the continued influence of popular morality as a sub-textual benchmark of constitutional legality. The entire history of the ITPA law, including its enactment, its administration, and the political unwillingness to change it, is indicative of society's understanding that sex work is morally reprehensible, and that as such, the State should be empowered to prohibit it. This notion of immorality, however, does not just apply culturally but also constitutionally through Article 19(2).¹¹

What is important to distinguish, however, is the difference between restrictions based on constitutional morality and those based on popular morality. According to the Supreme Court, even if popular morality is widely held by the population, this does not make it an automatic constitutional basis for the restriction of any fundamental right. Any restriction placed on exercising a fundamental right needs to meet the requirements of proportionality, which requires that it be necessary to fulfil a proper governmental goal; that it be rationally related to the goal; that it be the least restrictive alternative; and that its benefits exceed its burdens.¹²

ITPA comes out as a statute which cannot satisfy this constitutional requirement of legality in various ways. One of such reasons for this failure to pass this legal litmus test lies in the moral aim of preventing immoral traffic in women. In this case, while it can be true to say that this is a legitimate purpose for the state to pursue, what it fails to do so is to connect to it rationally and in a proportionate manner the imposition of penalties upon voluntary acts of adults.¹³

¹⁰ Indian Young Lawyers Association v State of Kerala (2019) 11 SCC 1 (Sabarimala case).

¹¹ Competition Commission of India v Steel Authority of India Ltd (2010) 10 SCC 744.

¹² Anuj Garg v Hotel Association of India (2008) 3 SCC 1.

¹³ Prabha Kotiswaran, 'Between Neo-Abolitionism and Legalisation: The Battle over Sex Work Policy in India' in Joanna Doezema and Kamala Kempadoo (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (Routledge 2018) 187–198.



With regards to the above discussion, the ruling of a nine-judge bench of the Supreme Court recognizing the right to privacy as a fundamental right in 2017 adds more weight to the debate. As stated in the ruling, privacy rights include informational privacy, personal autonomy, and personal liberty regarding one's own body. In addition, such rights require that any interference by the state be justifiable. It should also be mentioned that criminalization of the spaces, communities, and socio-economic environment in which sex workers operate poses serious issues. Many people have no choice but to engage in sex work for earning money, and this implies an unjustified interference with privacy rights concerning bodily autonomy and economic choices.¹⁴

Police violence and harassment, which sex workers frequently face, form yet another aspect of the constitutional issue. The right to live without torture or degrading treatment is inherent in the right to dignity protected by Article 21, and the Supreme Court in *Prakash Singh v. Union of India* prescribed a set of guidelines for combating custodial violence and arbitrary detention. The non-application of these safeguards by the State to protect the rights of sex workers and the practice of police using the ITPA to extort money or harass sex workers, instead of using it for enforcement purposes, amount to a constitutional violation that has been recognized time and again by the judiciary but which it has not been able to correct through its orders alone.¹⁵

V. Towards Legislative Reform: A Rights-Based Framework

The directions handed down by the Supreme Court in its 2022 *Budhadev* judgment are an important move in the right direction, although far from enough as a long-term remedy. Article 142 directions are not legally binding directives and are thus contingent on the willingness of the executive to follow them, something which can never be taken for granted. In the absence of any constitutional protection, legislation is the only lasting solution to remedy the deficiency of the rights of sex workers.¹⁶

The legal architecture of sex work laws in India based on the human rights approach would have to accomplish a number of goals. First, such a legal architecture would have to differentiate between adult consensual sex work and trafficking/forced prostitution and apply criminal punishments only to the latter. Second, it would be required to decriminalize those practices connected with consensual adult sex work, namely the operation of premises and all those economic transactions that facilitate the sex worker's

¹⁴ *K S Puttaswamy v Union of India* (2017) 10 SCC 1.

¹⁵ *D K Basu v State of West Bengal* (1997) 1 SCC 416.

¹⁶ *National Human Rights Commission v State of Arunachal Pradesh* (1996) 1 SCC 742.



engagement in his/her occupation without risking her life. Finally, it would be required to include sex workers in the Unorganized Workers Social Security Act 2008 and similar welfare legislation, treating their occupation as a kind of informal labor protected by the law.¹⁷

The framework for regulating sex work that was adopted through the Prostitution Reform Act 2003 in New Zealand, whereby sex work between consenting adults was decriminalized while continuing to punish those involved in trafficking and exploitation of minors, has been used as a point of reference by those calling for reform of legislation in India. This model is not free from criticism either, and the debate about whether the regulation can be applied in India, which suffers far more from inequality and poverty than New Zealand and which is entrenched in a caste system that makes its people vulnerable, is a reasonable and pertinent question. But one thing that is certain about the current state of affairs in India is that it leads to the worst possible results, which are failure to stop the abuse, failure to protect voluntary sex workers, and failure to achieve the desired public health results.¹⁸

Decriminalisation does not mean a call to abandon the struggle to tackle trafficking, coercion, and the socio-economic context of exploitation within which many women choose to enter into sex work involuntarily. Instead, what it means is that the constitutional yardstick of morality, which the Supreme Court has rightly upheld as not capable of being subjected to public whims, necessitates that the State respects the humanity of those persons involved in sex work by choice, even as it works towards ensuring that those who do not wish to engage in such activities can choose other paths for themselves.¹⁹

Gender-based policing, health services without shame, legal support for sexually exploited persons who suffer from abuse, education opportunities for their children, and provision of social security benefits to those excluded from state welfare programs are all constitutional obligations under the guarantee to the right to life and dignity, and are all feasible within the current budgetary constraints of the Indian government. The fact that they have not been realized despite several pronouncements by the Supreme Court indicates an absence of political resolve that can be resolved only by legislation.²⁰

¹⁷ International Labour Organization, Recommendation No 204 Concerning the Transition from the Informal to the Formal Economy (ILO 2015) para 11.

¹⁸ Prabha Kotiswaran (n 11) 199–206; see also Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010) 143–151.

¹⁹ *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217.

²⁰ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.



VI. Conclusion

The rights of sex workers in India continue to be one of the most prominent examples of deep constitutional contradiction. The same Constitution, which protects equality, dignity, and the right to choose one's profession, has, through the interpretation of the provisions of the ITPA and their enforcement, denied these fundamental rights to one of the most marginalized communities in India. The notion of constitutional morality, as defined by the Supreme Court, has offered a potent doctrinal tool for overcoming the contradiction, and the 2022 directions in *Budhadev* are the most notable recognition by the judiciary that the constitutional rights of sex workers cannot be qualified by morality.

However, translating the promise of the constitution into a reality calls for legislative action that India has yet to take. The numerical statistics analyzed in this paper, such as the 40 per cent prevalence rate of workplace violence, the 10 per cent conviction rate of trafficked people, and the health risks of sex workers, are more than just social issues; they are constitutional deficiencies that the State is expected to redress. A criminal system that measures its legitimacy by the standard of constitutional morality cannot control the lives of mating workers with the help of a general of popular prejudice.²¹

The way forward would involve crafting legislation that separates out the issue of voluntary adult sexual services from that of trafficking and exploitation, that ensures the rights of sex workers are recognized through labour and social legislation, and finally that brings about some form of responsibility in relation to the police and other arms of the state who presently enjoy immunity from scrutiny. Without such a mechanism, the constitutionally guaranteed equality of dignity remains an unfulfilled promise.²²

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²¹*Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; see also *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 121.

²² US Department of State (n 7) 7–12; see also Ministry of Home Affairs, *Anti Human Trafficking Annual Report 2023–24* (National Crime Records Bureau 2024) 11–18.



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