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THE CONSENT CONUNDRUM, SEX WORK SURVIVAL, AND STATE INTERVENTION

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ABSTRACT

Sex work in India presents one of the most complex intersections of constitutional rights, criminal law, and social justice. While consensual adult sex work is not expressly criminalized, the surrounding legal framework, particularly the *Immoral Traffic (Prevention) Act, 1956*¹, continues to regulate associated activities, creating an uneasy balance between the protection of vulnerable individuals and the recognition of personal autonomy². This paper critically examines the "consent conundrum" by questioning whether consent given under conditions of structural vulnerability can truly be regarded as legally free and informed, or whether the law mistakes survival for autonomy³. It analyses the constitutional guarantees under Articles 14, 19, and 21⁴, the *Bharatiya Nyaya Sanhita, 2023*⁵, and the evolving judicial approach, particularly *Prajwala v. Union of India* (2026)⁶, to evaluate how Indian law distinguishes consensual adult sex work from trafficking and exploitation. The paper further explores the issue through feminist jurisprudence, intersectionality, and human rights principles, arguing that the prevailing legal discourse remains confined to the binary of criminalisation and legalisation while overlooking the deeper constitutional question of meaningful consent⁷. It advocates for a rights-based legal framework that safeguards dignity, agency, and substantive equality while strengthening protections against coercion and trafficking. The study concludes that meaningful legal reform requires the law to evaluate not only whether consent was given, but also the socio-economic conditions that shaped it.

¹ Immoral Traffic (Prevention) Act, No. 104 of 1956 (India).

² *Budhadev Karmaskar v. State of West Bengal*, (2022) 20 SCC 220.

³ Martha C. Nussbaum, *Sex and Social Justice* (Oxford Univ. Press 1999).

⁴ INDIA CONST. arts. 14, 19 & 21.

⁵ *Bharatiya Nyaya Sanhita*, No. 45 of 2023 (India).

⁶ *Prajwala v. Union of India*, 2026 INSC 609 (S.C.).

⁷ 7. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. Chi. Legal F. 139 (1989); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard Univ. Press 1989).

INTRODUCTION

The law has long believed that consent is the language of freedom. But what if, for millions, consent is simply the vocabulary of survival? This paper challenges one of the oldest assumptions in jurisprudence—that every "yes" carries the same meaning. In the context of sex work, consent is not merely a question of individual choice; it is shaped by poverty, gender inequality, caste, social exclusion, and the unequal distribution of opportunity⁸. This paper examines the "consent conundrum" by questioning whether consent given under conditions of structural vulnerability can truly be regarded as legally free and informed, or whether the law mistakes survival for autonomy. The law therefore confronts an uncomfortable paradox: Can it honour autonomy without becoming blind to inequality, or protect vulnerability without extinguishing agency?

The law has always sought comfort in binaries: consent or coercion, victim or offender, choice or compulsion. But sex work refuses to fit within these neat legal categories. It exists in the uncomfortable space where autonomy meets desperation, where dignity collides with deprivation, and where survival is too often mistaken for choice. In this space, the law's most trusted principle—consent—begins to lose its certainty.

If a person says "yes" because every other path leads to hunger, homelessness, or hopelessness, has the law protected autonomy by respecting that decision, or has it merely legitimised inequality? This is not simply a question about sex work; it is a question about the very meaning of freedom in a constitutional democracy.

This paper examines the "consent conundrum" by questioning whether consent given under conditions of structural vulnerability can truly be regarded as legally free and informed, or whether the law mistakes survival for autonomy. It analyses the *Immoral Traffic (Prevention) Act, 1956*, the *Bharatiya Nyaya Sanhita, 2023*, constitutional guarantees under Articles 14, 19 and 21, and the evolving judicial approach, particularly *Prajwala v. Union of India* (2026). It argues that the real challenge before the law is not to choose between legalisation and criminalization, but to develop a constitutional framework that protects individuals from exploitation without denying their agency. Ultimately, this paper contends that the true measure of justice is not whether the law can identify consent, but whether it can recognise the inequality that shapes it.

LEGAL FRAMEWORK GOVERNING SEX WORK IN INDIA

CONSTITUTIONAL FRAMEWORK

Constitution does not expressly regulate sex work, but several fundamental rights shape its legality and the rights of sex workers.

⁸ Amartya Sen, *Development as Freedom* (Oxford Univ. Press 1999); Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard Univ. Press 2011).

- Article 14 – Equality before law and equal protection of laws.
- Article 15 – Protection against discrimination.
- Article 19(1)(g) – Freedom to practise any profession or occupation (subject to reasonable restrictions).
- Article 21 – Right to life, dignity, privacy, bodily autonomy, and livelihood.

KEY PROVISIONS OF THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956

- Section 3 – Keeping a Brothel: Punishes any person who owns, manages, or assists in running a brothel to curb organised sexual exploitation.
- Section 4 – Living on the Earnings of Prostitution: Penalises individuals who knowingly depend on the earnings of another person's prostitution, targeting exploitative intermediaries.
- Section 5 – Procuring or Inducing for Prostitution: Criminalises recruiting, inducing, transporting, or procuring any person for prostitution, forming the core anti-trafficking provision.
- Section 6 – Detaining a Person in Premises: Punishes the unlawful detention of a person in premises where prostitution is carried on, protecting individuals from coercion.
- Section 7 – Prostitution Near Public Places: Prohibits prostitution in or near notified public places such as schools, temples, hospitals, and other specified institutions.
- Section 8 – Soliciting for Prostitution: Historically criminalised soliciting in public for prostitution and has been widely criticised for disproportionately affecting sex workers rather than exploiters.

Although prostitution itself is not illegal in India, these provisions criminalise many activities associated with it, creating a legal distinction between voluntary adult sex work and trafficking or commercial sexual exploitation that remains the subject of ongoing constitutional and policy debate.

JUDICIAL INTERPRETATION: THE JOURNEY FROM PATERNALISM TO CONSTITUTIONAL AUTONOMY

The judicial approach to sex workers' rights in India has evolved significantly. Earlier decisions viewed sex workers primarily as victims requiring rescue and rehabilitation. Over time, constitutional jurisprudence shifted from a morality-based approach to one centred dignity, autonomy, and fundamental rights, recognising that constitutional protections cannot depend on a person's occupation.

PHASE I – THE ERA OF PATERNALISM: RESCUE BEFORE RIGHTS

Gaurav Jain v. Union of India

The Supreme Court focused on the rehabilitation of sex workers and the protection of their children through education and welfare measures. While progressive for child welfare, the judgment reflected a paternalistic view that prioritised rehabilitation over the agency of adult sex workers⁹.

Judicial approach: Welfare-oriented and morality-driven.

PHASE II – RECOGNITION OF DIGNITY

State of Maharashtra v. Madhukar Narayan Mardikar

The Court held that even a "woman of easy virtue" is entitled to privacy and legal protection. Although not directly about regulating sex work, the judgment affirmed that constitutional rights under Article 21 are not lost because of one's occupation¹⁰.

Judicial approach: Recognition of dignity and privacy.

PHASE III – FROM REHABILITATION TO RIGHTS

Budhadev Karmaskar v. State of West Bengal

The Supreme Court shifted the focus from whether prostitution should exist to how the Constitution should protect those engaged in sex work. It recognised their right to live with dignity and initiated measures to balance rehabilitation, anti-trafficking efforts, and protection of constitutional rights¹¹.

Judicial approach: Rights-based constitutional protection.

PHASE IV – CONSTITUTIONAL RECOGNITION

In its 2022 directions in the *Budhadev Karmaskar* proceedings, the Supreme Court directed that adult consensual sex workers should not be harassed solely for engaging in sex work. It also emphasised privacy, equal protection of the law, and access to welfare schemes, affirming that sex workers are rights-bearing citizens¹².

PHASE V – REFRAMING CONSENT

Prajwala v. Union of India

⁹ *Gaurav Jain v. Union of India*, (1997) 8 SCC 114; *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991)

¹⁰ *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57.

¹¹ . *Budhadev Karmaskar v. State of West Bengal*, (2011) 10 SCC 283.

¹² *Budhadev Karmaskar v. State of West Bengal*, (2022) 20 SCC 220.

The Court distinguished trafficking from consensual adult sex work, stressing that anti-trafficking measures must not override the autonomy of consenting adults. It recognised that respecting informed choice is essential to constitutional dignity while remaining vigilant against exploitation¹³.

THE CONSENT CONUNDRUM: WHEN SURVIVAL BECOMES CHOICE

CONSENT UNDER CONDITIONS OF POVERTY

The law generally treats consent as a voluntary and informed choice. However, structural inequality theory suggests that poverty, caste, gender discrimination, and lack of employment opportunities can significantly constrain individual choices. While economic hardship does not automatically invalidate consent, it raises doubts about whether such consent is truly autonomous. Thus, the legal challenge is to distinguish economic necessity from coercion without denying the agency of consenting adults¹⁴.

LIBERAL FEMINISM V. RADICAL FEMINISM

The feminist debate on sex work is divided between two influential schools of thought. Liberal feminism views consensual adult sex work as an exercise of bodily autonomy and personal liberty, arguing that the State should protect, rather than criminalise, those who voluntarily engage in it. In contrast, radical feminism argues that prostitution is rooted in patriarchal power structures and that consent given under systemic inequality cannot be regarded as fully free. The debate ultimately reflects the tension between individual autonomy and structural oppression¹⁵.

CHOICE V. NECESSITY

A central issue is whether sex work represents a genuine choice or a survival strategy. The capability approach, developed by Amartya Sen and Martha Nussbaum, argues that true freedom exists only when individuals have meaningful alternatives. Where poverty leaves sex work as the only viable option, consent may be legally valid but remains constrained by limited capabilities¹⁶.

Agency v. Victimhood and the Role of the State

Modern constitutional jurisprudence rejects the assumption that all sex workers are either empowered individuals or helpless victims. A rights-based approach requires the State to respect the autonomy of consenting adults while intervening to prevent trafficking, coercion, and

¹³ *Prajwala v. Union of India*, 2026 INSC 609 (S.C.)

¹⁴ Amartya Sen, *Development as Freedom* (Oxford Univ. Press 1999); Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard Univ. Press 2011).

¹⁵ Martha C. Nussbaum, *Sex and Social Justice* (Oxford Univ. Press 1999).

¹⁶ Amartya Sen, *Development as Freedom* (Oxford Univ. Press 1999); Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard Univ. Press 2011).

exploitation. Accordingly, State intervention should be guided by the distinction between voluntary sex work and forced exploitation, ensuring both constitutional dignity and effective protection against abuse¹⁷.

CONSENT VERSUS COERCION: A LEGAL AND LIVED DIVIDE

The key distinction between trafficking and consensual sex work is consent. Trafficking involves force, fraud, coercion, or deception, depriving individuals of autonomy, whereas consensual adult sex workers voluntarily choose the profession, often due to economic necessity, while retaining agency.

- Trafficked persons experience exploitation through violence, debt bondage, confinement, and loss of control, making consent impossible.
- Consensual sex workers generally retain the ability to negotiate clients, working conditions, and safer sex practices.

However, anti-trafficking laws often fail to distinguish between the two, leading to raids, detention, and forced rehabilitation of voluntary sex workers. A Maharashtra study found that 79% of women rescued during anti-trafficking raids had entered sex work voluntarily and did not wish to be rescued, highlighting the gap between legal assumptions and lived realities.

IMPLEMENTATION OF LAWS AND GROUND REALITIES

Despite progressive judicial recognition of the rights of adult sex workers, the reality on the ground remains largely unchanged. Across many Indian states, anti-trafficking operations continue to treat all sex workers as victims, regardless of whether they entered the profession voluntarily. This failure to distinguish between trafficking and consensual adult sex work has resulted in repeated violations of constitutional rights.

Police raids conducted under the guise of "rescue" often lead to the detention of consenting adults, seizure of their earnings and identity documents, and their placement in protective or rehabilitation homes against their wishes. In states such as Maharashtra, West Bengal, Karnataka, Telangana, and Delhi, sex worker collectives have repeatedly documented instances where women rescued during anti-trafficking raids were neither trafficked nor seeking rehabilitation but instead lost their livelihoods, were separated from their children, and faced social stigma after release.

Field studies by organisations working with sex worker communities have consistently shown that many adults in sex work oppose forced rescue. For example, research conducted in Maharashtra found that 79% of women rescued during anti-trafficking raids stated that they had entered sex work voluntarily and did not wish to be removed from their workplaces. Similar observations have been made by community organizations in West Bengal's Sonagachi, Karnataka, and Andhra

¹⁷ *Budhadev Karmaskar v. State of West Bengal*, (2022) 20 SCC 220.

Pradesh, where voluntary sex workers have argued that indiscriminate raids increase their vulnerability rather than protect them.

Another persistent concern is the uneven implementation of Supreme Court guidelines. Although courts have recognised that consenting adult sex workers are entitled to dignity, privacy, livelihood, and equal protection of the law, police practices often continue to be influenced by moral perceptions rather than legal principles. Many officers still presume that every person engaged in prostitution is a trafficking victim, leading to arbitrary detention, harassment, and criminalization of those who have committed no offence.

The 2023 Mumbai Sessions Court decision highlighted this gap by holding that consensual adult sex work is not illegal and ordering the release of detained sex workers, reaffirming their rights under Articles 19(1)(d) and 19(1)(e) of the Constitution. Yet, similar unlawful detentions and coercive rescue operations continue to occur across different jurisdictions.

Thus, the principal challenge today is not merely the absence of legal recognition but the failure to implement the law consistently. While judicial interpretation has increasingly distinguished consent from coercion, ground-level enforcement frequently continues to conflate trafficking with voluntary adult sex work, undermining the autonomy, dignity, and constitutional freedoms of adult sex workers.

Consent Versus Coercion: A Legal and Lived Divide

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ON-GROUND IMPACT AND LEGAL REALIGNMENT

The gradual shift in judicial thinking has not yet translated into uniform implementation on the ground. While courts have increasingly recognised the distinction between trafficking and consensual adult sex work, law enforcement agencies often continue to apply anti-trafficking

measures indiscriminately. This disconnect has created a significant gap between legal principles and lived realities.

ON-GROUND IMPACT

- Continued police raids and detention: In many states, including Maharashtra, Delhi, Karnataka, Telangana, and West Bengal, police raids frequently treat all persons engaged in sex work as trafficking victims. Consenting adults are often detained, their earnings confiscated, and they are sent to rehabilitation homes despite expressing a desire to continue their work.
- Loss of livelihood and family separation: Rescue operations often result in the closure of workplaces, loss of income, and separation of women from their children. Many sex workers report that the "rescue" process leaves them economically worse off than before.
- Increased vulnerability: Fear of raids pushes sex work further underground, making it more difficult for workers to negotiate safe working conditions, access healthcare, or seek police assistance when they become victims of violence or exploitation.
- Community evidence: Studies by sex worker collectives have consistently shown that a substantial number of adults rescued during anti-trafficking operations had entered sex work voluntarily. For instance, research in Maharashtra found that 79% of women rescued during raids did not wish to be rescued, highlighting the mismatch between legal intervention and individual choice.

LEGAL REALIGNMENT

Indian courts have increasingly sought to align the law with constitutional values by recognising consent, dignity, and autonomy as central to the legal treatment of adult sex workers.

- The Supreme Court's directions in *Budhadev Karmaskar* emphasised that adult sex workers are entitled to dignity, equal protection, and should not be harassed merely because of their occupation.
- In 2023, a Mumbai Sessions Court reaffirmed that consensual adult sex work is not an offence and ordered the release of detained women, holding that competent adults cannot be forced into rehabilitation against their will. The Court relied on Articles 19(1)(d) and 19(1)(e), recognising their freedom of movement and residence.
- Recent judicial developments reflect a rights-based approach, shifting the focus from moral policing to identifying actual trafficking victims while respecting the autonomy of consenting adults.

THE REMAINING CHALLENGE

Despite this legal realignment, implementation remains inconsistent. Police practices, administrative policies, and rescue mechanisms often continue to conflate trafficking with consensual sex work. Bridging this gap requires clear operational guidelines, specialised training for enforcement agencies, and strict adherence to constitutional principles, ensuring that anti-trafficking efforts protect victims of coercion without violating the rights of adults who voluntarily engage in sex work.

VOICES OF SEX WORKER COLLECTIVES & NGOS ORGANISATIONS

representing sex workers like Durbar Mahila Samanwaya Committee (DMSC) and Veshya Anyay Mukti Parishad (VAMP) argue for differentiation in legal treatment:

- Sex workers' input on the Trafficking Bill (2016) emphasized that consenting adults should not be automatically classified as "victims", and their consent must be recognized in any rescue intervention.
- Leaders from Durbar, based in Sonagachi, stress that sex work is work, demanding legal recognition, occupational rights, and social safety nets. Their grassroots work offers vocational training, financial inclusion, and healthcare to thousands of sex workers.

CONCLUSION AND THE ROAD AHEAD

The journey of Indian jurisprudence on sex work reflects a gradual but significant transformation in the understanding of consent. Earlier legal approaches viewed sex workers primarily through the lenses of morality, public order, and rescue, often treating them as passive victims or offenders. Over time, however, constitutional jurisprudence has shifted the discourse towards autonomy, dignity, privacy, equality, and the right to livelihood, recognising that consent cannot be ignored merely because an individual is engaged in sex work.

Through decisions such as *State of Maharashtra v. Madhukar Narayan Mardikar*, *Budhadev Karmaskar v. State of West Bengal*, and subsequent Supreme Court directions, the judiciary has progressively distinguished consensual adult sex work from human trafficking. These decisions acknowledge that while trafficking is founded on force, fraud, coercion, and exploitation, consensual adult sex work is a matter of individual agency. This judicial evolution represents a move from paternalism towards a constitutional, rights-based framework that places the individual—not moral assumptions—at the centre of legal protection.

Yet, the research demonstrates that judicial recognition alone has not transformed ground realities. The continued operation of the Immoral Traffic (Prevention) Act, 1956, coupled with inconsistent enforcement, often blurs the distinction between trafficking and voluntary sex work. Police raids, involuntary detention, forced rehabilitation, confiscation of earnings, and social stigma continue to affect consenting adult sex workers despite constitutional protections. The gap between judicial principles and everyday implementation remains one of the greatest challenges in this area of law.

The study therefore argues that the future of sex work regulation in India lies not in greater criminalisation but in legal realignment. Legislative reform must clearly separate trafficking from consensual adult sex work, ensuring that anti-trafficking laws remain focused on combating exploitation while respecting the autonomy of competent adults. Simultaneously, implementation mechanisms must be strengthened through police sensitisation, judicial training, access to legal aid, healthcare, housing, financial services, and meaningful participation of sex worker collectives in policy formulation.

Ultimately, the debate surrounding sex work is not merely about prostitution; it is about the constitutional meaning of consent. A legal system committed to dignity, equality, and personal liberty cannot presume the absence of consent solely because an individual engages in sex work. Protecting victims of trafficking and respecting the autonomy of consenting adults are complementary—not contradictory—objectives. The true measure of India's constitutional democracy will lie in its ability to protect both. By recognising consent as the defining legal distinction, the law can move beyond moral regulation towards a framework grounded in justice, human rights, and constitutional values.

NEED FOR LEGISLATIVE REFORM

The time is ripe for parliamentary action. Decriminalization—not just non-prosecution—is essential. India must move towards:

- Amending or repealing the ITPA, replacing it with a rights-based, labour-focused framework;
- Legally distinguishing sex work from trafficking, ensuring that anti-trafficking laws are not weaponized against consenting adults;
- Guaranteeing social protections, such as access to health, housing, banking, and welfare services, regardless of one's profession. International models like New Zealand's Prostitution Reform Act (2003) and Canada's harm reduction approaches offer compelling precedents where consensual sex work has been recognized and regulated without moral condemnation. Sensitization and Structural Change Laws are only as effective as their implementation. Therefore, judicial pronouncements must be complemented by:
- Police sensitization and accountability mechanisms, to prevent harassment and unlawful detention;
- Training for lower judiciary and legal aid officers, to adopt a non-discriminatory approach; • Public awareness campaigns to reduce stigma and normalize respectful engagement with sex workers as citizens;
- Integration of sex workers in policy-making, ensuring their lived experiences guide the creation of just and inclusive laws. The Role of Civil Society and Collectives Organizations such as DMSC (Durbar Mahila Samanwaya Committee), SANGRAM, and VAMP have long advocated for sex

workers' rights, often with limited state support. The judiciary's recent recognition of these voices signals the importance of collaboration between the legal system, civil society, and affected communities.

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