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# RECOGNIZING WOMEN'S WORTH: THE HUMAN RIGHTS ARGUMENT FOR ENDING PROSTITUTION IN INDIA

NICOLE J. KARLEBACH\*

INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA. By Geetanjali Gangoli. Hampshire, England: Ashgate Publishing Company. 2007. Pp. 149.

**Abstract:** In *Indian Feminisms: Law, Patriarchies and Violence in India*, Geetanjali Gangoli recounts how the Indian feminist movement, identifiable for its uniquely Indian concepts of womanhood and equal rights, has been effective in promoting equality for women. Gangoli attributes this success to the fact that Indian feminists have influenced legislation and dialogue within the country, while also recognizing the reality of intense divides among castes and religions. This book review examines the vague nature of Indian law in regard to prostitution, a topic that has been the source of extensive feminist debate. India should fully outlaw the practice of prostitution in order to protect the fundamental human rights of women. This ban must phase out prostitution and its related activities by providing education and commensurable profit-earning alternatives to women.

## INTRODUCTION

*All men feel hungry for sex. Prostitutes prevent women from good families from getting raped. If prostitutes were not there, women would not be able to walk on the road. Unmarried young men would attack any woman on the road. In fact in my opinion, prostitutes are social workers, next only to mothers and should be treated with respect.*

—Khairati Ram Bhola<sup>1</sup>

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<sup>1</sup> GEETANJALI GANGOLI, INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA 67 (2007). This is an excerpt from an August 1998 interview with Khairati Ram Bhola of the New Delhi Non-Governmental Organization, Bhartiya Patita Udhar Samiti, New Delhi. *Id.* at 67 n.10. This organization was founded in 1984 as a feminist-based social work organization to advocate for the right of prostitutes to practice legally. See Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sex Workers and the Law*, 21 B.C. THIRD WORLD L.J. 161, 178 (2001). This group and others like it have adopted an agenda to legalize, license, and levy taxes on prostitutes in order to monitor health and prevent the spread of disease. *Id.* at 179. These organizations further aim to reduce harassment by police; to abolish forced prostitution and child prostitution; and to help women become

Arguments against outlawing prostitution and its related activities in India come from two ends of a wide spectrum.<sup>2</sup> Geetanjali Gangoli explains the divergent strains of thought inherent in Indian feminism in her book, *Indian Feminisms: Law, Patriarchies and Violence in India*.<sup>3</sup> Some feminist commentators feel that an Indian man's carnal desire for sex is insatiable and subscribe to the view that legalization of prostitution protects society.<sup>4</sup> Alternatively, other Indian feminists believe the decision to enter prostitution represents a personal choice by a woman asserting her independence in a normally male-dominated society.<sup>5</sup> Both arguments for legalizing prostitution fail because they do not take into account the degraded role of women in Indian society or the flagrant human rights abuses that characterize the practice of prostitution in India.<sup>6</sup>

Legalization is not a panacea to the problems plaguing India as a result of its prostitution industry.<sup>7</sup> Neither, however, is stricter enforcement of India's existing statutes which are vaguely permissive of the practice.<sup>8</sup> As Gangoli demonstrates in her book, unclear laws on prostitution coupled with negative social attitudes toward women have made for arbitrary enforcement, unequal punishments, and a lack of transparency.<sup>9</sup> Given the inherent link between modern-day Indian prostitution, human sex trafficking, and sex slavery, ending the practice of prostitution is the only way to protect fundamental human rights.<sup>10</sup> In order to adhere to international conventions on human

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more economically independent. *Id.* See generally JEAN D'CUNHA, THE LEGALIZATION OF PROSTITUTION: A SOCIOLOGICAL INQUIRY INTO THE LAWS RELATING TO PROSTITUTION IN INDIA AND THE WEST 110–16 (1991) (opposing the legalization of prostitution and questioning the legitimacy of these groups). Concerns have been raised that the membership of groups like Bhartiya Patita Uddhar Samiti consist primarily of brothel-keepers and pimps who are connected to political parties and do not address the fundamental needs of prostitutes, including standard of living concerns and wages. See D'CUNHA, *supra*, at 113–14; Kotiswaran, *supra*, at 178–79.

<sup>2</sup> See Geetanjali Gangoli, *Silence, Hurt and Choice: Attitudes to Prostitution in India and the West*, 12–15 (Asia Research Centre Working Paper No. 6, 2002).

<sup>3</sup> See generally GANGOLI, *supra* note 1.

<sup>4</sup> See *id.* at 67.

<sup>5</sup> See Gangoli, *supra* note 2, at 17.

<sup>6</sup> See K. Jaishankar & Debarati Halder, *Prostitution in India: Issues and Trends*, EUR. & INT'L RESEARCH GROUP ON CRIME, ETHICS & SOC. PHIL. (Oct.–Dec. 2006), <http://www.erces.com/journal/articles/archives/volume3/v02/v03.htm>.

<sup>7</sup> See Nicholas D. Kristof, *Hitting Brothel Owners Where It Hurts*, N.Y. TIMES, Jan. 24, 2006, at A21.

<sup>8</sup> See GANGOLI, *supra* note 1, at 67.

<sup>9</sup> See *id.*

<sup>10</sup> See Kristof, *supra* note 7.

rights and combat human trafficking, India must pass new legislation outlawing prostitution entirely while simultaneously creating an implementation plan to phase out the practice.<sup>11</sup>

India heralds itself as a model for developing nations; it is the world's most populous democracy with technological industry and plants for nuclear energy.<sup>12</sup> Prime Minister Manmohan Singh embraced this sentiment in his Independence Day address on August, 15, 2007, saying, "India cannot become a nation with islands of high growth and vast areas untouched by development, where the benefits of growth accrue only to a few."<sup>13</sup> Despite new jobs and economic opportunities, well over two million women and girls in India remain employed in the world's "oldest profession"—prostitution.<sup>14</sup> The kingpins of the international sex trafficking industry are able to transport women and girls into India, exploit and enslave them, all without much fear of consequence.<sup>15</sup> Abuse is rampant in large part because current legislation turns a blind eye to the realities of the practice of prostitution in India, making this area of law ripe for change.<sup>16</sup>

The Immoral Traffic (Prevention) Act (PITA), India's legislation governing sex work, defines prostitution as the sexual exploitation or abuse of persons for commercial purposes.<sup>17</sup> The substance of the law straddles the line between fully eradicating prostitution and passively condoning the practice.<sup>18</sup> The language of PITA is vague, criminalizing activities associated with prostitution such as brothel keeping and soliciting in public places, while falling short of outlawing the practice itself.<sup>19</sup> As a result, prostitution is difficult, but not impossible, to conduct, and its practitioners possess few rights.<sup>20</sup>

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<sup>11</sup> See Geetanjali Gangoli, *Prostitution in India: Laws, Debates and Responses*, in INTERNATIONAL APPROACHES TO PROSTITUTION 115, 115–16 (Geetanjali Gangoli & Nicole Westmarland eds., 2006).

<sup>12</sup> Tom O'Neill, *Untouchable*, NAT'L GEOGRAPHIC MAG., June 2003, at 14.

<sup>13</sup> Somini Sengupta, *Economic Boom Fails to Generate Optimism in India*, N.Y. TIMES, Aug. 16, 2007, at A3.

<sup>14</sup> Coalition Against Trafficking in Women—Asia Pacific, Facts and Statistics: Trafficking and Prostitution in Asia and the Pacific, <http://www.catw-ap.org/facts.htm> (last visited Apr. 10, 2008).

<sup>15</sup> See Kotiswaran, *supra* note 1, at 169.

<sup>16</sup> See GANGOLI, *supra* note 1, at 67.

<sup>17</sup> The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44, Acts of Parliament, 1987, available at <http://socialwelfare.dehligovt.nic.in/immoraltraffact.htm>.

<sup>18</sup> See GANGOLI, *supra* note 1, at 67.

<sup>19</sup> See *id.*

<sup>20</sup> See The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44; GANGOLI, *supra* note 1, at 67.

If India's goal is to embrace globalization and equitably spread the benefits to the Indian population, lawmakers in India must give careful consideration to women, who constitute nearly half of the population.<sup>21</sup> Protecting and advocating for women's rights is a noble and important aspiration in a country where social and economic segregation thrives.<sup>22</sup> India is known for its deeply entrenched caste system, which is one of the longest surviving forms of social stratification in the world, dividing Indian society by class and profession.<sup>23</sup> Although the Indian Constitution theoretically guarantees equal protection to women, deep-seated gender discrimination is enmeshed at every level of Indian society, including in current law, policy, and social practice.<sup>24</sup> As the Indian gov-

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<sup>21</sup> See GANGOLI, *supra* note 1, at 67; HUMAN RIGHTS WATCH, *ATTACKS ON DALIT WOMEN: A PATTERN OF IMPUNITY* (1999), <http://www.hrw.org/reports/1999/india/India994-11.htm>.

<sup>22</sup> Human Rights Watch, *India: Hidden Apartheid of Discrimination Against Dalits*, HUMAN RIGHTS NEWS (Feb. 13, 2007), <http://hrw.org/english/docs/2007/02/13/india15303.htm>.

<sup>23</sup> See *id.* According to Hindu legend, groupings, or *varnas*, emerged from a primordial being. O'Neill, *supra* note 12, at 8-9. From the mouth of the being came the Brahmins, teachers and priests; from the arms came the Kshatriyas, rulers and soldiers; from the thighs, the merchants and traders, and from the feet, the Sudras or laborers. *Id.* A fifth group, the Untouchables, or Dalits, did not come from the being and were considered outcasts. *Id.* Untouchability is passed down by generation and today there are estimated to be 165 million Indian Dalits. See Human Rights Watch, *supra* note 22. While India's Constitution forbids caste discrimination, Hinduism is followed by almost eighty percent of India's population and encourages rigid social codes. O'Neill, *supra* note 12, at 9. Untouchables perform society's unclean jobs, including sewage work, cremating the dead, cleaning latrines, and removing dead animals from the road. See *id.* at 13. Untouchables are often denied access to temples, village water resources, and schools, and are discriminated against for jobs and housing. See *id.* at 14. If a Dalit is perceived to be defiant to those of higher castes, common revenge includes beating, burning, or parading women naked through towns. See Human Rights Watch, *supra* note 22. Caste-motivated killings and rapes are daily occurrences in India. See *id.* A 2005 government report states that a crime occurred against a Dalit every twenty minutes. *Id.* See generally ASIAN CTR. FOR HUMAN RIGHTS, *INDIA HUMAN RIGHTS REPORT* (Suhaz Chakma, ed.) (2005), available at <http://www.achrweb.org/reports/india/AR05/INDIA-AR2005.pdf> (describing the inadequate state of human rights in India). While these numbers are staggering, a majority of crimes against Dalits go unreported for fear of retaliation. See Human Rights Watch, *supra* note 22. Out of the crimes that were brought to trial between 1999 and 2001, eighty-nine percent resulted in acquittals. *Id.* The United Nations Committee on the Elimination of Discrimination Against Women stated in January 2007 that Dalit women in India suffer from "deeply rooted structural discrimination" resulting in abuses including sexual abuse, forced prostitution, and discrimination in employment and wages. Press Release, General Assembly, Anti-Discrimination Committee Urges India to Lift Convention Reservations, Takes Steps on Behalf of Sexual Violence Victims, Most-Marginalized Women, U.N. Doc. WOM/1594 (Jan. 18, 2007), available at <http://www.un.org/News/Press/docs//2007/wom1594.doc.htm>.

<sup>24</sup> See HUMAN RIGHTS WATCH, *supra* note 21; Luisa Cabal, Letter to the Editor, *Abortion and Second-Class Citizenship in India*, N.Y. TIMES, July 16, 2007, at A18. Dalit women make up a majority of the landless laborers and scavengers in India. See HUMAN RIGHTS WATCH,

ernment welcomes a more westernized economy and industrial development, it must make strides toward implementing true gender equality at the national level.<sup>25</sup> Irrespective of the difficulties of achieving full equality for women in practice, the provision of basic human rights for all is essential and should be the minimum goal of India's government.<sup>26</sup> Incorporating even rudimentary human rights standards into law addressing prostitution would be a significant step toward reaching the extremely marginalized sex workers in India.<sup>27</sup>

The lack of gender equity in India is made evident in *Indian Feminisms: Law, Patriarchies and Violence in India*, which explores women's status in Indian society by examining the progress and discourse of the many feminist organizations that have developed in India since the 1970s.<sup>28</sup> Gangoli presents the general critique by Indian feminists that the country's law and judicial practice serve to legitimize women's subordination.<sup>29</sup> Support for this viewpoint is found in religious-based civil laws that continue to control marriage, divorce, and inheritance, as well as criminal laws that do not provide enforcement mechanisms to prosecute those guilty of rape, sexual assault, or domestic violence against women.<sup>30</sup>

In order to remedy the status of women, some Indian feminists argue that women must be recognized as full and equal citizens in soci-

*supra* note 21. These women are often forced into prostitution in rural areas or sold to urban brothels. *See id.*

<sup>25</sup> *See generally* NAT'L COMM'N FOR ENTERPRISES IN THE UNORGANIZED SECTOR, REPORT ON CONDITIONS OF WORK AND PROMOTIONS OF LIVELIHOODS IN THE UNORGANIZED SECTOR 75-92 (2007), available at [http://www.nceus.gov.in/Condition\\_of\\_workers\\_sep\\_2007.pdf](http://www.nceus.gov.in/Condition_of_workers_sep_2007.pdf) [hereinafter REPORT ON CONDITIONS] (describing working conditions and limited job prospects for women in the unorganized labor sector in India).

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See* GANGOLI, *supra* note 1, at 1. Gangoli examines the feminist movement's role in influencing policy and legislation on a national level in India. *See id.* at 38-39. She argues that despite strong resistance from right-wing elements in the Indian government, feminist thought and theory has been able to affect the development of new legislation from the 1970s to the present. *See id.* at 38-42. Gangoli makes clear that traditional views of women as the source of reproduction and as symbolically representative of family and community often relegate women to secluded, sexually controlled, and marginalized positions in Indian society. *See id.* at 48.

<sup>29</sup> *See id.* at 8.

<sup>30</sup> *See id.* Gangoli details the major social and religious divisions in Indian society, noting how they are reflected in the Indian feminist movement. *See id.* at 10-11. She chronicles the emergence of divergent minority feminist groups geared toward representing the interests of women of the lower castes and minority religions and explains the niche that they fill in addressing the unique concerns of women in the many sub-classes of Indian society. *See id.* at 27.

ety.<sup>31</sup> Gangoli notes that when women are viewed as equal citizens, they gain the otherwise unavailable opportunity to formally demand rights from the national government, thereby establishing an entry point into Indian politics and creating an avenue for advancement.<sup>32</sup> She admittedly fails to delve deeply into the consequences of this narrow focus for the most vulnerable within India's borders—"non-citizens," including those brought to India through the sex trade who may not qualify for Indian citizenship, and "shadow citizens," minority women who possess rights in the Constitution but have difficulty asserting them in daily life.<sup>33</sup> These women, especially those who are the victims of sex trafficking, are living in dire conditions and are entitled to be rescued from a far more immediate injustice: the deprivation of fundamental human rights.<sup>34</sup>

This book review argues that Indian law and practice keep women in a subordinate position, which conflicts with the equality guaranteed by the Indian Constitution and basic tenets of international human rights law.<sup>35</sup> India's law governing prostitution must be revised if it is to

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<sup>31</sup> See *id.* at 55. Other Indian feminists fear that limiting the debate on women's rights to issues of citizenship will fail to address those women brought to India by sex traffickers. See *id.* Feminists concerned with implications for non-citizen women argue that there should be explicit provisions of equal protection for all people within India's borders. *Id.* The flesh trade, consisting of the trafficking of humans from one country to another for purposes of exploitation, has brought many Nepalese women across the porous border with India to work in urban brothels. HUMAN RIGHTS WATCH, RAPE FOR PROFIT 2 (1995), available at [www.hrw.org/reports/pdfs/c/crd/india957.pdf](http://www.hrw.org/reports/pdfs/c/crd/india957.pdf). The trafficking of women from Nepal into India began during the Rana oligarchy in Nepal which lasted from 1846 to 1951. *Id.* at 8. Girls were recruited to serve as concubines for the royal family, which was considered a sign of social status. *Id.* In the last days of the Rana regime, Nepal and India agreed to open borders for travel and trade, thereby allowing the trafficking practice to continue without much regulation. *Id.* Today the manifestation of this practice is that women and girls from remote hill villages and poor Nepalese border towns are kidnapped, drugged, or lured to Indian brothels by recruiters, relatives, and neighbors who promise jobs and marriage, and forced to remain there under threat of torture or severe beatings. *Id.* at 1. Although there is legislation in both Nepal and India to curb this practice, neither government has taken a strong stand on the trafficking issue. See GANGOLI, *supra* note 1, at 52; HUMAN RIGHTS WATCH, *supra*, at 6.

<sup>32</sup> GANGOLI, *supra* note 1, at 123.

<sup>33</sup> *Id.* at 55, 123–24.

<sup>34</sup> See *id.* at 123–24.

<sup>35</sup> See MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 25 (2000). The Indian legal system is loosely modeled after the English common law system. Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177, 180–81 (2006). India's constitution, drafted in 1949, is a legal framework for ensuring fundamental rights. See *id.* The nation's common law criminal code was developed during British colonial rule. *Incorporating Sharia into Legal Systems*, BBC NEWS, Feb. 8, 2008, [http://news.bbc.co.uk/2/hi/in\\_depth/7235357.stm](http://news.bbc.co.uk/2/hi/in_depth/7235357.stm). India's civil and personal laws, however, do not

respect the dignity of women and fundamental human rights, including the right to life, liberty, and security of person; the right to be free from torture, cruel, inhuman, or degrading treatment; and the right to fair working conditions.<sup>36</sup> Because prostitution is tied to the sex trade in India, the passage of new legislation would allow the state to play a critical global role in helping to phase out the practice of sex trafficking.<sup>37</sup> Furthermore, India stands to benefit domestically by steering women away from careers in prostitution and into its growing industrial economy.<sup>38</sup> In addition to implementing legal reforms to end prostitution in its entirety, the Indian government must simultaneously develop policy aimed at community outreach, empowerment of women, and rehabilitation for former prostitutes.<sup>39</sup> India is at a critical juncture.<sup>40</sup>

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follow this mold in that they apply religious law to individuals. *See generally* GANGOLI, *supra* note 1, at 57–78 (detailing the practical outcomes for women of the application of personal laws to matters of rape, marriage and divorce). Each religious community in India controls matters of marriage, divorce, birth, death, and inheritance through its own civil laws. *Incorporating Sharia into Legal Systems, supra*. Muslim personal law, much of which is not codified, is applied by the regular court system to Indian Muslims. *See* Emory Law, Republic of India, <http://www.law.emory.edu/ifl/legal/india.htm> (last visited Apr. 16, 2008). The Muslim Personal Law Application Act of 1937 directs the application of religious law to issues including family disputes and inheritance. *See id.* Article 44 of the Indian Constitution states that its goal is to establish legal uniformity and do away with these different laws based on religious following. INDIA CONST. art. 44, *available at* [http://india.gov.in/govt/constitutions\\_india.php](http://india.gov.in/govt/constitutions_india.php). At present, however, there is no uniform civil law in India. *See MacNeil/Lehrer Productions: Marginal No More?* (PBS television broadcast Mar. 20, 1998), *available at* <http://www.pbs.org/newshour/forum/march98/india2.html>. Often, the push toward developing a uniform civil code is met with staunch resistance by those who wish to be governed by their own traditional religious law. *See id.*

<sup>36</sup> *See* Universal Declaration of Human Rights, G.A. Res. 217A, at art. 3, 5, 23, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]; GANGOLI, *supra* note 1, at 67.

<sup>37</sup> *See* GANGOLI, *supra* note 1, at 67.

<sup>38</sup> U.N. Office on Drugs & Crime, South Asia Regional Conference: Global Initiative to Fight Human Trafficking, at n.8 (2007), [http://www.giftasia.in/index.php?option=com\\_content&task=view&id=207&Itemid=34](http://www.giftasia.in/index.php?option=com_content&task=view&id=207&Itemid=34) (last visited Apr. 10, 2008) [hereinafter *Global Initiative*]. India is considered a country of high origin, transit, and destination for human trafficking, with millions of people involved in the practice. *See id.* Although close to ninety percent of India's sex trafficking is internal, India's neighbors Pakistan, Nepal, and Bangladesh all rank highly as either origin or destination countries as well. *See id.* Despite this fact, prosecutions for sex trafficking in India under current legislation remain low, with only 5908 crimes reported in 2005. *See id.*

<sup>39</sup> Jaishankar & Haldar, *supra* note 6; *see* Radha Rastogi, *The Traffic Does Not Stop*, INDIA TOGETHER (Feb. 15, 2002), <http://www.indiatogether.org/women/opinions/traffic.htm>.

<sup>40</sup> *See* Sengupta, *supra* note 13.

As the state develops into a world political and economic leader, it has a responsibility to respect the tenets of international human rights law.<sup>41</sup>

Part I will analyze the current laws that apply to gender equality and sex work in India. Part II will provide a historical look at the practice of prostitution in India, followed by a description of modern problems that must be considered. Part III will argue that India's laws regarding prostitution must be made consistent with the numerous international commitments India has made to human rights. In particular, it will be asserted that in light of the slave-like conditions women in India's sex industry face, efforts to legalize prostitution in India are irreconcilable with human rights. New legislation, unlike present law, must ban prostitution in no uncertain terms and provide mechanisms for enforcement and rehabilitation.<sup>42</sup>

## I. IS SEX WORK ILLEGAL IN INDIA? IT REMAINS UNCLEAR

### A. *Equality: The Indian Conception*

The Indian Constitution is focused on achieving a qualified equality for all people through the elimination of systematic hierarchies, including gender-based hierarchies.<sup>43</sup> Article 14 of the Indian Constitution lays out the fundamental, but nonjusticiable, right that all women have to equality.<sup>44</sup> In practice, this right is difficult to enforce and merely provides a foundation on which future legislation may rely.<sup>45</sup> Various other provisions lay out the Indian Constitution's receptive attitude toward women, including the Article 15(1) prohibition against discrimination based on sex.<sup>46</sup> Article 16 requires equality of opportunity for all in matters of public employment and forbids discrimination based on sex.<sup>47</sup> These substantive rights are buttressed by Article 15(3), which posits that the State is empowered to take positive action to make "special provision[s] for women."<sup>48</sup> Article 23,

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<sup>41</sup> See U.N. Econ. & Soc. Comm'n for Asia & the Pacific, *Violence Against Women in South Asia*, 54, U.N. Doc. ST/ESCAP/2099 (2000), available at <http://www.unescap.org/esid/GAD/Publication/Violence.pdf> [hereinafter *Violence Against Women in South Asia*].

<sup>42</sup> See GANGOLI, *supra* note 1, at 67.

<sup>43</sup> See INDIA CONST. art. 14; NUSSBAUM, *supra* note 35, at 25.

<sup>44</sup> Art. 14.

<sup>45</sup> See NUSSBAUM, *supra* note 35, at 24.

<sup>46</sup> See INDIA CONST. art. 15, § 1. "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them." *Id.*

<sup>47</sup> Art. 16, §§ 1-2.

<sup>48</sup> Art. 15, § 3.

especially pertinent to the sex industry, prohibits traffic in human beings and all forms of forced labor.<sup>49</sup>

Beyond its basic articulation of rights, the Constitution contains Directive Principles of State Policy that impose obligations on the State to secure equality and eliminate discrimination.<sup>50</sup> The Principles are not enforceable in court but provide direction for state policy.<sup>51</sup> Particularly relevant is Article 39, which says that the State should secure an adequate means of livelihood for both men and women alike, ensure equal pay for equal work, promote health for workers, and prevent citizens from being forced, through economic necessity, to take on vocations inappropriate to age and strength.<sup>52</sup> Article 42 requires the State to secure just and humane working conditions and to provide maternity benefits.<sup>53</sup> Finally, the Constitution states that each citizen of India has a fundamental duty to renounce practices derogatory to the dignity of women.<sup>54</sup> These provisions encourage an emphasis on human rights and gender equality, and should guide future national legislation.<sup>55</sup>

India has passed various laws regarding equal protection and the treatment of women.<sup>56</sup> The 1976 Equal Remuneration Act guarantees equal rights.<sup>57</sup> The Indian Penal Code criminalizes physical and mental cruelty to a married woman by her husband or his relatives, and under the Hindu Succession Act, Hindu women have equal succession rights as compared to men.<sup>58</sup> In principle, India has made many commitments to afford women rights and privileges; in practice, these

<sup>49</sup> Art. 23, §§ 1–2.

<sup>50</sup> See generally arts. 36–51.

<sup>51</sup> See INDIA CONST. arts 36–51; Kotiswaran, *supra* note 1, at 167.

<sup>52</sup> Art. 39.

<sup>53</sup> See art. 42; Kotiswaran, *supra* note 1, at 167. “Provision for the just and humane conditions of work and maternity relief.—The State shall make provision for securing just and humane conditions of work and for maternity relief.” Art. 42.

<sup>54</sup> See art. 51A, § (e).

<sup>55</sup> See generally INDIA CONST.

<sup>56</sup> Gangoli, *supra* note 11, at 115–16.

<sup>57</sup> See Equal Remuneration Act, 1976, No. 25 Acts of Parliament (1976), available at [http://pblabour.gov.in/pdf/acts\\_rules/equal\\_remuneration\\_act\\_1976.pdf](http://pblabour.gov.in/pdf/acts_rules/equal_remuneration_act_1976.pdf). Other examples of statutory provisions guaranteeing equal rights include the 1976 Maternity Benefit Act and the 1961 Dowry Prohibition Act. See generally Maternity Benefit Act, 1961, No. 53 Acts of Parliament (1961), available at [http://pblabour.gov.in/pdf/acts\\_rules/maternity\\_benefit\\_act\\_1961.pdf](http://pblabour.gov.in/pdf/acts_rules/maternity_benefit_act_1961.pdf); Dowry Prohibition Act, 1961, No. 28 Acts of Parliament (1961), available at <http://socialwelfare.delhigovt.nic.in/dowryact.htm>.

<sup>58</sup> See INDIA PEN. CODE, No. 45 of 1860, INDIA CODE (2000) v. 20, available at <http://mha.nic.in/pdfs/IPC1860.pdf>; Gangoli, *supra* note 11, at 116.

guarantees are often not enforced and caste oppression, poverty, and tradition impede women from realizing the benefits of equality.<sup>59</sup>

### B. *The Immoral Traffic in Women and Children (Prevention) Act*

The Immoral Traffic in Women and Children (Prevention) Act (PITA), governing sex work and trafficking, was amended to its current form in 1986.<sup>60</sup> PITA's origins can be traced back to India's signatory status in the 1950 United Nations International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women.<sup>61</sup> After signing the Convention, India enacted the Suppression of Immoral Traffic in Women and Girls Act of 1956 (SITA), which tolerated prostitution, recognizing its necessity despite its evil.<sup>62</sup> The underlying aim of SITA was "to inhibit or abolish commercialized vice namely, the traffic in women and girls for the purpose of prostitution as an organized means of living."<sup>63</sup> The reference to "organized" in the statute es-

<sup>59</sup> Gangoli, *supra* note 11, at 117.

<sup>60</sup> The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44. The Indian Penal Code also contains provisions against the slavery of women and children, as do state-level statutes controlling health, public order, and the police. *See* INDIA PEN. CODE, §§ 366A, 367; Kotiswaran, *supra* note 1, at 167. The Code prohibits procurement of minor girls for illicit intercourse. § 366 cl. A. Additionally, it bans the importation of minors from another country for the purpose of intercourse. § 366 cl. B. Police Acts in the different states attempt to control indecent behavior and public nuisance. Kotiswaran, *supra* note 1, at 167. These Acts allow women to be put under arrest for obscenity. *See id.* PITA goes further, allowing state governments to frame rules for licensing and running protective homes for the victims of trafficking. *See* 27 INDIA A.I.R MANUAL 496; Kotiswaran, *supra* note 1, at 167. Ultimately these laws, PITA, the Indian Penal Code, and Police Acts, attempt to control prostitution and create provisions for finding adult women guilty of the offense. § 373; Kotiswaran, *supra* note 1, at 167.

<sup>61</sup> *See* The Suppression of Immoral Traffic in Women and Girls Bill, 1956, No. 58A, Acts of Parliament, (1956), available at <http://socialwelfare.delhigovt.nic.in/immoraltraffact.htm>; Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271; Ctr. for Feminist Legal Research, The Prevention of Human Trafficking Bill, (Oct. 2006) (draft), <http://www.cflr.org/Draft.htm>.

<sup>62</sup> *See* The Suppression of Immoral Traffic in Women and Girls Bill, 1956, No. 58A; Kotiswaran, *supra* note 1, at 168. Under SITA, prostitution is defined as: "the act of a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind and whether offered immediately or otherwise." § 2(f). Sections 7(i) and 8(b) of the 1956 Act penalize the practice of prostitution in or near a public place, including soliciting or seducing for prostitution. §§ 7(i), 8(b); Gangoli, *supra* note 11, at 118. SITA penalizes brothel owners for living off the earnings of a prostitute and for procuring, inducing or trafficking for prostitution. §§ 4, 5; Gangoli, *supra* note 11, at 119. Further, section 10 provides for the release of offenders on probation or after admonition. § 10.

<sup>63</sup> The Suppression of Immoral Traffic in Women and Girls Bill, 1956, No. 58A at pmbl.; Kotiswaran, *supra* note 1, at 168.

entially allows a woman to carry out prostitution privately without facing criminal penalties.<sup>64</sup>

In 1986, SITA was amended without fundamental difference to become PITA.<sup>65</sup> The stated objectives of the new Act were to move from suppression to prevention of prostitution.<sup>66</sup> Minor changes to the legislation did not alter its basic penal provisions or gender-biased outcomes.<sup>67</sup> Prohibitions against soliciting, seducing, procuring, detaining, brothel keeping, abetment to brothel keeping, renting premises for the purposes of prostitution, living off the earnings of a prostitute, and conducting activity in the vicinity of public places remained, although harsher penalties were introduced.<sup>68</sup> Substantively, the burden of proof for finding that a brothel—defined in the Act as “any place where sexual abuse occurs”—does not exist shifted to the owner or landlord.<sup>69</sup> Additionally, criminal provisions regarding child prostitution were added and male prostitution was recognized.<sup>70</sup> Furthermore, police power was expanded to enable trafficking officers to search any premises without a warrant.<sup>71</sup>

Even with these adjustments, PITA remains a vague and gender-biased law that condones the practice of prostitution, yet reviles its participants.<sup>72</sup> While PITA’s current form imposes more severe punishments and has a wider scope than the original legislation, it maintains SITA’s gender imbalances and overall tolerationist philosophy toward prostitution.<sup>73</sup> For example, adult women arrested for prostitution-

<sup>64</sup> The Suppression of Immoral Traffic in Women and Girls Bill, 1956, No. 58A at pmb1. In colonial India prostitution was viewed as a “necessary evil.” Gangoli, *supra* note 11, at 119. The implementation of SITA did not dramatically alter this attitude, maintaining India’s toleration of the practice. *See id.*

<sup>65</sup> Gangoli, *supra* note 11, at 119.

<sup>66</sup> The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44; Gangoli, *supra* note 11, at 119.

<sup>67</sup> *See* Gangoli, *supra* note 11, at 119–20.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 120.

<sup>70</sup> *Id.* at 121.

<sup>71</sup> *Id.* at 120–21.

<sup>72</sup> GANGOLI, *supra* note 1, at 67; Gangoli, *supra* note 11, at 120–21.

<sup>73</sup> GANGOLI, *supra* note 1, at 67. SITA and its later revision, PITA, adhere to the “tolerationist” approach to prostitution which acknowledges the practice as a necessary social evil. *See id.* India’s tolerationist system was adopted under SITA, which embodied a mix of policies including the suppression of promiscuity contrasted by the toleration of prostitution. *See* Gangoli, *supra* note 11, at 118; Kotiswaran, *supra* note 1, at 169. The tolerationist approach, reflected in current Indian law regulating prostitution, criminalizes all acts leading to prostitution, but retains the legality of the sexual act itself. *See* Kotiswaran, *supra* note 1, at 214. In so doing, existing law is criticized as failing to address the violence that accompanies prostitution or to provide avenues for redress. *See* Gangoli, *supra* note 11, at 117.

related offenses under PITA have the burden of proving their innocence, an obligation contrary to international law and Indian criminal law.<sup>74</sup> Additionally, the Act is enforced discriminatorily against female prostitutes, who are arrested more frequently than are pimps, brothel-keepers, and procurers.<sup>75</sup> Women face a penalty of up to six months in jail for offenses that men may receive only seven days to three months imprisonment for committing.<sup>76</sup> Perhaps the most detrimental aspect of the law, however, is its lack of clarity on the act of prostitution itself.<sup>77</sup> According to PITA, the act of soliciting money for sexual intercourse is not per se illegal, although all acts necessary to conduct prostitution on an organized scale are made criminal.<sup>78</sup> By failing to outlaw prostitution in its entirety, the door is left open for the practice to continue as long as it is done in private.<sup>79</sup> As a result, avenues for exploitation are preserved.<sup>80</sup>

There is growing consensus among aid workers and prostitutes alike that the existing laws are not effective, and there have been some efforts on the part of Indian legislators to improve the laws.<sup>81</sup> In 2006,

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<sup>74</sup> Gangoli, *supra* note 11, at 121.

<sup>75</sup> See Kotiswaran, *supra* note 1, at 169. Disproportionate enforcement of the law is attributable to a variety of factors, including a lack of national coordination of enforcement strategies, a lack of clarity in national law, corruption among police, the desire of Indian politicians to use red-light districts as areas for drumming up votes, and the difficulty in getting Indian women to speak about their life in the brothels. *Id.* Many times these women are threatened and told to say that the brothel management personnel are relatives, specifically aunts with whom they are staying. Dilmaz Boga, *To Hell and Back*, TIMES INDIA, May 8, 2002, available at <http://timesofindia.indiatimes.com/articleshow/9082479.cms>. The brothel inmates fear serious reprisal if they admit the truth and implicate the brothel in illegal activities. *See id.* The psychological trauma that these girls face is enormous and no systematized rehabilitation is in place for those rescued in police raids from the brothels. *See id.* Many former prostitutes may take months or years to fully recount their experience in the brothels, making it difficult for human rights organizations and others to conduct fact-finding missions. *See id.*

<sup>76</sup> Gangoli, *supra* note 11, at 120. PITA section 20 says that a magistrate can order the removal of a prostitute from any place within his jurisdiction if he deems it necessary in the interest of the general public. The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44 § 20; *see* Kotiswaran, *supra* note 1, at 167. In addition, the Act provides for the establishment of corrective institutions in which female offenders are detained and reformed, and envisages the appointment of Special Police Officers to enforce provisions. § 19, *see* Kotiswaran, *supra* note 1, at 167. In all of these sections, there is no punishment for the client. *See generally* The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44.

<sup>77</sup> *See* Kotiswaran, *supra* note 1, at 168.

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *See generally* The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44.

<sup>81</sup> *See* Gangoli, *supra* note 11, at 131.

the Immoral Traffic (Prevention) Amendment Bill (ITPA) was introduced to the Lok Shaba (Indian Parliament) as an amendment to PITA.<sup>82</sup> This legislation has been reviewed by a parliamentary committee, but is still pending.<sup>83</sup> If passed, it would strengthen India's stance against sex trafficking by providing for the return of persons trafficked into India to their country of origin.<sup>84</sup> The Bill also deletes provisions that punish prostitutes for soliciting clients, instead penalizing the clients who visit brothels for the purpose of the sexual exploitation of trafficking victims.<sup>85</sup> This proposed amendment is a positive first step toward cutting off the supply of women and girls to brothels, but an explicit ban on prostitution with respect to human rights principles must still be implemented.<sup>86</sup> India's anti-trafficking stance is developing through these initiatives, but by failing to outlaw prostitution entirely, India allows traffickers an opportunity to profit and permits human rights abuses.<sup>87</sup> Current legislation and proposals do not account for the disproportionate treatment of women in Indian society at large, or in the sex industry.<sup>88</sup> Nor do they provide remedies to counter the eco-

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<sup>82</sup> The Immoral Traffic (Prevention) Amendment Bill, 2006, No. 47, 2006, § 5(c) *available at* [http://www.prsindia.org/docs/bills/1167469313/1167469313\\_immoral\\_traffic\\_prevention\\_amendment\\_bill2006.pdf](http://www.prsindia.org/docs/bills/1167469313/1167469313_immoral_traffic_prevention_amendment_bill2006.pdf); *see also* Ctr. for Feminist Legal Research, *supra* note 61. The Indian government is in the drafting stage of a "Plan of Action" to combat trafficking and commercial sex exploitation with an emphasis on rescue, rehabilitation and reintegration. *Action Plan to Combat Trafficking*, HINDU, Oct. 10, 2007, <http://www.hindu.com/2007/10/10/stories/2007101055541300.htm>; *see also* Press Release, Rajya Sabha, Press Information Bureau, Government of India, Immoral Traffic Act to be Made More Stringent (July 31, 2006), *available at* <http://www.pib.nic.in/release/release.asp?relid=19267> (announcing the Indian Government's plan to more effectively crack down on traffickers, brothel keepers and sexual exploitation).

<sup>83</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 118 (2007), *available at* <http://www.state.gov/documents/organization/82902.pdf>.

<sup>84</sup> *Action Plan to Combat Trafficking*, *supra* note 82. The international community has expressed concern over sending trafficked victims back to their home country without proper protection for fear that they will again be targeted by traffickers. *See* Convention on Action Against Trafficking in Human Beings, Feb. 1, 2008, CETS no. 197, *available at* [http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF\\_Conv\\_197\\_Trafficking\\_E.pdf](http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf).

<sup>85</sup> The Immoral Traffic (Prevention) Amendment Bill, 2006, No. 47 § 5(c). ITPA provides greater protection for sex trafficked victims and more stringent penalties for traffickers and clients of prostitutes. U.S. DEP'T OF STATE, *supra* note 83, at 118. Prescribed penalties under ITPA range from seven years imprisonment to life, penalties which are commensurate with those for other grave crimes. *See id.*

<sup>86</sup> *See* Students.inlaw.com, The Immoral Traffic (Prevention) Amendment Bill, <http://students.inlaw.com/display.aspx?2219> (last visited Apr. 10, 2008).

<sup>87</sup> *See* Gangoli, *supra* note 11, at 120–31.

<sup>88</sup> *See id.* at 118–21.

conomic incentives for sex trafficking; until legislation confronts these issues, human rights concerns will remain.<sup>89</sup>

## II. PROSTITUTION IN INDIA: ORIGINS AND REALITIES

### A. *History of Prostitution in India*

The evolution of India's nuanced legal stance on prostitution can be traced back to the Brahminical period of 1500 B.C. when prostitution was an integral part of Indian society.<sup>90</sup> Beginning in the 1850s,

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<sup>89</sup> See *id.* at 121.

<sup>90</sup> See Kotiswaran, *supra* note 1, at 197. One form of prostitution that developed during this time was the religious Devadasi system. See Gangoli, *supra* note 11, at 115. Devadasi means God's female servant and is a term used to describe the ancient Indian practice of marrying off pre-pubescent girls to God or religious officials. See Zoya Zaidi, *Devadasi System in Indian Temples*, SIKH SPECTRUM, <http://www.sikhspectrum.com/052007/devadasi.htm> (last visited Apr. 10, 2008). This practice was carried on by devotees to the goddess Yellamma who turned their daughters over to a temple god. See Dean Owen, *Former Religious Prostitutes Help Those Still Trapped*, WORLD VISION ENEWS, [http://www.worldvision.org/about\\_us.nsf/child/eNews\\_india\\_051606](http://www.worldvision.org/about_us.nsf/child/eNews_india_051606) (last visited Apr. 10, 2008). The girls were then deemed unsuitable for marriage as they were married to God. See Sabin Russell, *The Role of Prostitution in South Asia's Epidemic*, S.F. CHRON., July 5, 2005, at A1. Devadasi were trained as sexual servants and served members of the community by giving sexual satisfaction. See *id.* The devadasi system is a form of prostitution that has been institutionalized over time in India. See A.K. PRASAD, *DEVADASI SYSTEM IN ANCIENT INDIA: A STUDY OF TEMPLE DANCING GIRLS OF SOUTH INDIA* 46 (1991). What was once a socially honorable position in the sixth century has today devolved to pure prostitution. Owen, *supra*. Today, devadasi women are often sold into urban brothels. See *id.* This practice was outlawed in India in 1947, but due to the financial incentive involved, cases still emerge of young girls being forcibly married away to serve as devadasi. See *id.*; *Minor Forced to Become Devadasi*, TIMES INDIA, Dec. 18, 2006, available at [http://timesofindia.indiatimes.com/NEWS/Cities/Bangalore/Minor\\_forced\\_to\\_become\\_Devadasi/articleshow/843185.cms](http://timesofindia.indiatimes.com/NEWS/Cities/Bangalore/Minor_forced_to_become_Devadasi/articleshow/843185.cms). Humanitarian organizations estimate that up to 5000 girls become devadasi each year with ritual "weddings" occurring in private homes in the middle of the night to ward off detection. Owen, *supra*.

An alternate form of prostitution during the Brahminical period was the tawaf system, characterized by hierarchical levels of prostitutes who, at the highest end, were schooled in classical dance and music. See Gangoli, *supra* note 11, at 115. Prostitutes at this time were grouped into three types: Kumbhadasi, Rupajiva, and Ganika. See Kotiswaran, *supra* note 1, at 197. The Kumbhadasi were the lowest class, usually a servant who gave sexual services to the head of household. *Id.* The Rupajivas were usually very aesthetically pleasing and skilled in dance and the arts. See Karuna Sharma, *The Social World of Prostitutes and Devadasis: A Study of the Social Structure and Its Politics in Early Modern India*, 9 J. OF INT'L WOMEN'S STUDIES 297, 300 (2007). While some Rupajivas were born into prostitution, many entered voluntarily to seek riches or escape unhappy married life. *Id.* The most highly respected were the Ganikas for whom prostitution was an occupation and whose practice was regulated by state law. See Kotiswaran, *supra* note 1, at 197. Ganikas were very talented and accomplished and were considered a source of good luck, sometimes providing blessings over brides at weddings. *Id.* Ganika rates were fixed by the government and

perceptions regarding the morality of prostitution changed, leading to an increased criminalization of the practice.<sup>91</sup> Simultaneously, the British saw prostitution as an evil necessary to satiate the “natural sexual desire” of their troops and sought to control the practice by ordering that Indian women be available in the cantonments for soldiers, thus giving birth to the brothel system and red-light districts that exist in urban India today.<sup>92</sup>

In order to protect soldiers, the British administration regulated the health of prostitutes through medical inspections resulting in arrest and confinement for those who were found to be infected with disease.<sup>93</sup> Later requirements included registration of all prostitutes with the Superintendent of Police, mandatory weekly health check-ups, and the issuance of identity cards to all prostitutes.<sup>94</sup> These measures, passed under the guise of public health necessities, were driven not by an interest in maintaining the health and welfare of prostitutes, but rather were meant to protect clients.<sup>95</sup> Such edicts laid the foundation for the prostitution system that exists in India today and shed light on the discrepancies that underlie current legislation.<sup>96</sup>

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they received government salaries. *Id.* They retained the right to organize and voice concerns and were taken care of when sick. *Id.* at 199. Prostitutes from this hierarchy eventually formed guilds, held meetings, and demanded civic and domestic rights. *See id.* at 197.

<sup>91</sup> Kotiswaran, *supra* note 1, at 202.

<sup>92</sup> *Id.* at 204–05. When the British arrived in India, they were shocked by India’s tolerance toward prostitution and the way in which the practice was treated like any other occupation. Gangoli, *supra* note 11, at 115; Kotiswaran, *supra* note 1, at 203. Under British rule, however, conditions changed. *See* Kotiswaran, *supra* note 1, at 203. The Indian economy took a turn for the worse and many women were forced to leave traditional occupations to go to urban areas, ultimately finding themselves engaged in prostitution to make a living. *See id.* Increasingly madams would seek out women, often through deception, to service British soldiers. *See id.* at 205. These women then found themselves in government-run brothels, known as *chaklas*, with high walls and barred windows that limited possibility of escape. *Id.* at 205–06. Prostitutes in these brothels were subject to physical and sexual abuse by soldiers, as well as starvation. *Id.*

<sup>93</sup> Kotiswaran, *supra* note 1, at 206.

<sup>94</sup> *See id.* at 207.

<sup>95</sup> *Id.* at 208.

<sup>96</sup> *Id.*

### B. *Prostitution in India Today: A Dangerous Business*

*While the law intended to prevent commercial exploitation of sex, what actually resulted is corruption in the enforcement machinery and wider exploitation in more surreptitious ways often with the protection of the so called law enforcement apparatus! The problem now is with the law and the manner of its enforcement, [rather] than with prostitution and its related vices. At the same time, manifestations of prostitution in contemporary times are posing serious threats to human dignity, public health and morality and to women's rights.*

—Professor N.R. Madhava Menon<sup>97</sup>

Sex work continues to be viewed by many in India as a profession that protects society from the uncontrollable sexual urges of men.<sup>98</sup> While prostitution is not a category that the Indian government reports as part of its labor statistics or in its review of formal economy occupations, this industry is the source of income for over two million women and countless others who profit from the jobs the industry spawns.<sup>99</sup> This reliance is highly problematic as the world of prostitution in India is linked with sex trafficking, sex slavery, child prostitution, and myriad health and economic inequities.<sup>100</sup> AIDS and cyclical poverty are social ills which, given a legal regime that inadvertently permits prostitution, are difficult, if not impossible, for women in sex work to avoid or overcome.<sup>101</sup>

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<sup>97</sup> Gangoli, *supra* note 11, at 126. Professor Menon is the Director of the National Judicial Academy, an institute for training judges, and Coordinator for the Law Reform Project. *Id.*

<sup>98</sup> *See id.* at 67; Meena Menon, *A Twilight Zone for Women Red-Light Workers Along Indian Highways*, HINDU, Mar. 9, 1999, available at <http://www.hartford-hwp.com/archives/52a/061.html>. Some legislative proposals over the last two decades have taken the approach that sex work is a profession. *See* Gangoli, *supra* note 11, at 129. Nonetheless, such approaches have retained moral undertones, defining "sex worker" as a woman who has taken to prostitution voluntarily and is practicing it as an occupation. *See id.* While this definition can be seen as empowering women, it can also be critiqued as further stigmatizing prostitutes by showing them to have voluntarily given up their morality. *See id.* Further, it fails to address the millions of women who are forced into the profession. *See id.*

<sup>99</sup> *See* REPORT ON CONDITIONS, *supra* note 25, at 86. It is important to note that most women engaged in prostitution earn minimal amounts of money and many never see their earnings as they are in debt to their brothels. *See id.*

<sup>100</sup> *See generally* Gangoli, *supra* note 11, at 115–21.

<sup>101</sup> *See id.* Even if one considers prostitution to be historically sanctioned in India, the effects of sex trafficking, internally regulated brothels, and the remnants of the devadasi system prove that its women participants are no longer viewed with the same respect. *See id.* at 115–16. *See generally* Universal Declaration of Human Rights, *supra* note 36 (standing for the proposition that all people are entitled to certain universal human rights which include the right to be free from cruel, inhuman or degrading treatment).

The highly-skilled, government-protected prostitutes of the pre-colonial era are now non-existent; the majority of sex workers are women and girls from lower castes or rural villages who are illiterate and unskilled.<sup>102</sup> The average age of a sex worker in India today is fourteen and many are brought to the trade pre-menstruation.<sup>103</sup> Globalization, the concentration of poverty among women in India, and poorly regulated borders in South Asia, have each contributed to an increase in human trafficking in the last decade.<sup>104</sup> It is estimated that at least 150,000 women and girls are trafficked yearly from South Asian countries to work as prostitutes in India.<sup>105</sup> Trafficking from Nepalese border towns into India is especially prevalent throughout the “hungry months” of July and August, during which time people wait for the harvest and experience exceptionally high levels of poverty.<sup>106</sup> Nepalese families are forced to seek employment and income elsewhere and the situation leads to a noticeable rise in girls who disappear to India.<sup>107</sup> The victims of trafficking who end up working as prostitutes find themselves in this situation as a result of trickery, deceit, desperation, a lack of alternatives, or compulsion—they almost never affirmatively choose or aspire to become prostitutes.<sup>108</sup>

While cross-border trafficking represents a major concern, it is estimated that ninety percent of trafficking for sexual exploitation occurs within India itself.<sup>109</sup> Societal factors play a significant role in pushing women into the sex trade.<sup>110</sup> Earning potential for women is generally low in India.<sup>111</sup> Women are highly controlled by family and commu-

<sup>102</sup> See Kotiswaran, *supra* note 1, at 197.

<sup>103</sup> Donald G. McNeil, Jr., *Sex Slaves Returning Home Raise AIDS Risks, Study Says*, N.Y. TIMES, Aug. 1, 2007, at A9.

<sup>104</sup> See HUMAN RIGHTS WATCH, *supra* note 31, at 2; Rastogi, *supra* note 39.

<sup>105</sup> See Jay G. Silverman et al., *HIV Prevalence and Predictors of Infection in Sex-Trafficked Nepalese Girls and Women*, 298 JAMA 536, 536 (2007); McNeil, *supra* note 103.

<sup>106</sup> See HUMAN RIGHTS WATCH, *supra* note 31, at 12, 27.

<sup>107</sup> See *id.* at 27.

<sup>108</sup> See *id.*; see also *supra* note 31 and accompanying text.

<sup>109</sup> U.S. DEP'T OF STATE, *supra* note 83, at 117.

<sup>110</sup> See Gangoli, *supra* note 11, at 116.

<sup>111</sup> See *id.* India's culture often prevents women from working in stores, factories, and the public sector. See JOHN E. DUNLOP & VICTORIA A. VELKOFF, U.S. DEP'T OF COMMERCE, WOMEN AND THE ECONOMY IN INDIA 2 (1999), available at <http://www.census.gov/ipc/prod/wid-9802.pdf>. When hired for the same jobs as men in 1999, women earned about eighty percent of what men earned. See *id.* While this percentage is higher than in most developing countries, it still places women in a subordinate position in the workforce and society. *Id.* Additionally, the vast majority of Indian women work in the informal sector as domestic servants, artisans, or field laborers in jobs that are low-paying and provide no benefits. *Id.* Regardless of the job, employment does not guarantee women independence

nity.<sup>112</sup> In 2006, only one in three women reported being able to go to the market alone and only one in four could visit relatives without being accompanied.<sup>113</sup> Overall, women are less educated than men.<sup>114</sup> Women generally enter marriage earlier than men, and one in five women in India reports having experienced domestic violence by age fifteen.<sup>115</sup> Women have little choice over their own healthcare and reproductive decisions.<sup>116</sup> Additionally, dowry demands take a significant economic toll on families, often driving them to sacrifice daughters to the sex industry.<sup>117</sup>

Women and girls are sold by friends, relatives, and neighbors to brokers for as little as \$4.00, with higher prices paid for younger girls and virgins.<sup>118</sup> They are then resold for a profit to brothel owners for up to \$1300 and forced to work indefinitely to pay off their "debt."<sup>119</sup> The women are able to charge between \$2.00 and \$10.00 per client, depending on the service provided and amount of time spent.<sup>120</sup> Generally, the brothels provide prostitutes with two meals a day and allow them to keep only the tips they earn (typically five to fifteen cents per customer) to pay for any personal expenses.<sup>121</sup> Medical care and other items such as clothing are occasionally provided by the brothel owners,

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or control over their earnings, since traditionally women are expected to devote their time, energy, and earnings to the family. *Id.*

<sup>112</sup> See Gangoli, *supra* note 11, at 116.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* In 1991, only thirty-nine percent of Indian women and sixty-four percent of Indian men were literate and the majority of those who were literate had only a primary education, or less. See Dunlop & Velkoff, *supra* note 111, at 5. For men, higher levels of education translate into a greater share of the workforce, whereas for women, higher education does not necessarily mean more job opportunities until they earn a post-high school education. See *id.* Even then, only twenty-eight percent of women with undergraduate degrees are employed. See *id.* Not until women specialize during their post-secondary education do they see significant improvements in employment opportunities. See *id.*

<sup>115</sup> See Gangoli, *supra* note 11, at 116–17.

<sup>116</sup> See *id.* at 116.

<sup>117</sup> See *id.* at 117.

<sup>118</sup> See HUMAN RIGHTS WATCH, *supra* note 31, at 2.

<sup>119</sup> See *id.* The prostitute's "debt" is the price paid by the brothel owner for her purchase plus approximately ten percent interest. *Id.* The process of paying off debt can go on indefinitely. *Id.*

<sup>120</sup> See Russell, *supra* note 90. In contrast, women working outside brothels are often able to get only \$1.00 for their services. See *id.*

<sup>121</sup> See HUMAN RIGHTS WATCH, *supra* note 31, at 18–19. These tips are the only way that prostitutes can buy food, clothing, and other provisions. *Id.*

but the costs of such provisions are added to an inmate's debt with interest.<sup>122</sup>

The client base for sex workers in India has also changed over time.<sup>123</sup> Today, those seeking the services of prostitutes in India's informal brothels are overwhelmingly migrant laborers, cab and rickshaw drivers, or truckers who may not be educated on HIV/AIDS and who travel great distances, potentially liaising with many prostitutes, thereby spreading disease around the population.<sup>124</sup> Women may service anywhere from four to fifteen or more of these clients per day, resulting in extensive damage to their physical and mental well-being.<sup>125</sup>

The venereal diseases of the colonial period that threatened those who socialized with prostitutes have now given way to a far more threatening epidemic: AIDS.<sup>126</sup> Prostitution is deeply connected with

<sup>122</sup> See *id.* Inhabitants of the brothels are sometimes referred to as inmates to highlight their slave-like condition. See *id.* at 2, 18.

<sup>123</sup> See Peter Goodspeed, *Dying of Ignorance*, NAT'L POST CANADA, Aug. 5, 2006, available at <http://www.nationalpost.com/news/story.html?id=9a8ee994-d8bc-4842-a8fa-98116a3816d5&k=71185>.

<sup>124</sup> See *id.* Prostitution is booming in India's urban commercial centers which are the temporary home to millions of migrant workers who provide the primary client base for brothels. *Frontline World: Interview with Raney Aronson: Red-Light Reporting?*, (PBS television broadcast June 2004), available at <http://www.pbs.org/frontlineworld/stories/india304/aronson.html> (last visited Apr. 10, 2008) [hereinafter *Raney Aronson*].

<sup>125</sup> Prabha S. Chandra et al., *A Cry from the Darkness: Women with Severe Mental Illness in India Reveal Their Experiences with Sexual Coercion*, 66 PSYCHIATRY 323, 328–31 (2003). Sexual coercion is linked to many severe mental disorders found in women in India. *Id.* A former prostitute from one of India's red-light districts recalled her personal experience of being sold into prostitution at age twelve and explained that a woman's dignity is shattered in these circumstances. See Asma, *The Basic Difference Is Dignity*, RED LIGHT DESPATCH (Jan. 2, 2007), at 1, 2, available at [http://www.euroquality.se/pdf/redlight\\_vol4.pdf](http://www.euroquality.se/pdf/redlight_vol4.pdf). From a medical perspective, many of those forced into prostitution are young girls who have immature genital tracts. See Silverman et al., *supra* note 105, at 540. Repeated sexual trauma at such a young age can cause increased biological vulnerability to HIV infection and other sexually transmitted diseases. See *id.*

<sup>126</sup> Russell, *supra* note 90. By 2016, India is expected to have more than sixteen million people living with HIV/AIDS, a number which, beyond the human tragedy involved, is potentially damaging to economic growth. See Menon, *supra* note 98. Infection rates this high may discourage the \$235 million in investment that the country needs to continue on its development track. See *id.* The extra spending needed for healthcare as a result of the epidemic will decrease national savings. See *id.* At present, the HIV/AIDS epidemic is one of the most serious and deadly consequences of sex work in India. See *id.* On the one hand, the onslaught of AIDS has caused international aid organizations such as the Bill and Melinda Gates Foundation and, even more recently, the Indian government to intervene in some of the red-light districts to promote condom use and safe sex training, including teaching women how to refuse a client who will not wear a condom. See *id.* On the other hand, India has some of the highest rates of the spread of AIDS in the world and the numbers do not appear to be decreasing. See *id.*; Kotiswaran, *supra* note 1, at 177. Prostitutes who are found to be HIV positive are thrown out of brothels, forced to fend for them-

the rapid rise in rates of HIV/AIDS in India, as well as other venereal diseases.<sup>127</sup> In 2004, over fifty-four percent of prostitutes in Bombay tested positive for the disease.<sup>128</sup> These high numbers have resulted in increased screening for the virus to the point where women and girls in brothels exhibiting symptoms may be tested without their consent or knowledge.<sup>129</sup> Those who test positive are often dismissed to the streets, where some are too sick or weak to take care of themselves.<sup>130</sup> Due to social stigma, many hospitals are unwilling to treat prostitutes, specifically those suspected of having HIV/AIDS.<sup>131</sup>

Contemporary motivations for entering sex work and the consequences of a life of prostitution in India are completely different than they were in earlier periods.<sup>132</sup> Ancient commercial sex and its religiously sanctioned counterparts which were enmeshed in Indian social

selves, and commonly have difficulty seeking medical treatment. *See* HUMAN RIGHTS WATCH, *supra* note 31, at 78. The HIV/AIDS epidemic, while destroying the lives of those engaged in prostitution, has also spurred an increase in the demand for fresh, "clean" girls and virgins, thus causing a flurry of new girls to be brought into the brothels. *Id.* at 80. Aid organizations have set up shelters for women rescued from brothels or expelled by them due to their HIV positive status. *See* Russell, *supra* note 90.

<sup>127</sup> *See id.* As of 2004, India's government estimated that at least 5,134,000 people in India were living with AIDS. *Id.* Sex workers are considered one of the highest risk categories. *Id.* India's HIV/AIDS epidemic, measured by the number of people infected with the virus, is overshadowed only by South Africa and Nigeria. Silverman et al., *supra* note 105, at 536. Adding to the problem, AIDS patients are often denied access to healthcare and education due to social stigma. *See New Bill to Protect AIDS Patients*, TIMES INDIA, Nov. 28, 2006, available at [http://timesofindia.indiatimes.com/NEWS/India/New\\_Bill\\_to\\_protect\\_AIDS\\_patients/articleshow/609085.cms](http://timesofindia.indiatimes.com/NEWS/India/New_Bill_to_protect_AIDS_patients/articleshow/609085.cms). India's government is considering legislation to reduce this discrimination but reports of abuse continue. *See id.*

<sup>128</sup> *See* Russell, *supra* note 90.

<sup>129</sup> *See id.* Compulsory testing for diseases such as HIV requires the removal of bodily fluids, which, according to the World Health Organization (WHO) guidelines, is illegal. *See generally* Stuart Rennie & Frieda Behets, *Desperately Seeking Targets: The Ethics of Routine HIV Testing in Low-Income Countries*, 84 BULL. WORLD HEALTH ORG. 52 (2006), available at <http://www.who.int/bulletin/volumes/84/1/52.pdf>; Geetanjali Gangoli, *Unmet Needs: Sex Workers & Healthcare*, SOC. SCIENTIST, May-June 2002, at 79, 85. The WHO advocates that HIV testing should be confidential because there is no public health rationale for routine testing of specific risk groups. *See* Gangoli, *supra*, at 85-86; Rennie & Behers, *supra*, at 53. Isolating sex workers and labeling them as "carriers" of disease is unethical and counterproductive in the fight against AIDS. Gangoli, *supra*, at 96. This stigmatization only serves to increase violence against women found to be infected, decrease women's ability to assert themselves, limit women's ability to demand safe sex, and create a false sense of security. *See generally* Gangoli, *supra*.

<sup>130</sup> *See* Gangoli, *supra* note 129, at 85; *see also* Shashavva & Padma, *Women from Red-Light Area Run Free Kitchen for Friends*, RED LIGHT DESPATCH, Jan. 2, 2007, at 1, 4, available at [http://www.euroquality.se/pdf/redlight\\_vol4.pdf](http://www.euroquality.se/pdf/redlight_vol4.pdf).

<sup>131</sup> *See* Gangoli, *supra* note 129, at 95, 97.

<sup>132</sup> *See id.*

and religious traditions have evolved to become abusive and dangerous manifestations of sex slavery.<sup>133</sup> The intense poverty and trickery that characterizes entry into prostitution today does not resemble the social acceptance and reverence that attached to motivations for participation in the past.<sup>134</sup> Instead, today's prostitutes are trapped in an endless cycle of poverty, stigmatization, and disease.<sup>135</sup> Even when women are able to escape prostitution, they have difficulty rejoining society because of the stigma attached to them.<sup>136</sup>

These changed circumstances have rendered obsolete any argument sanctioning contemporary prostitution as a legitimate practice necessary to satisfy the uncontrollable desire for sex of Indian men.<sup>137</sup> Those who argue that in order to control men's sexual desires it is necessary to allow prostitution cannot rationally contend that such an objective is more worthwhile than protecting fundamental human rights.<sup>138</sup> The practice of prostitution in India traps women in perpetual poverty and puts them at risk for contracting deadly diseases.<sup>139</sup> Condoning and enabling prostitution as a profession ignores the reality that women have the opportunity, capacity, and capability to become better educated, participate in the growing workforce, and help further India's blossoming economy in alternative ways.<sup>140</sup>

### III. CHOOSING HUMAN RIGHTS

The prostitution that is carried out in India today is born out of intense poverty and thrives on deception, force, and plain cruelty to women.<sup>141</sup> Since its independence, India has made repeated commitments to international human rights law, which conflicts sharply with the abusive trafficking and prostitution system being carried on within its borders.<sup>142</sup> India has the power to effect change and to stand as a model for South Asia in the fight against trafficking and exploitation of

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<sup>133</sup> See KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES 11 (2007); Russell, *supra* note 90.

<sup>134</sup> See Russell, *supra* note 90.

<sup>135</sup> See HUMAN RIGHTS WATCH, *supra* note 31, at 1–2.

<sup>136</sup> See *id.*

<sup>137</sup> See Kristof, *supra* note 7.

<sup>138</sup> See *id.*

<sup>139</sup> See HUMAN RIGHTS WATCH, *supra* note 31, at 25, 80.

<sup>140</sup> See generally NUSSBAUM, *supra* note 35, at 70–86 (discussing why the cultural relativist argument may fall short when fundamental human rights are at issue).

<sup>141</sup> See Russell, *supra* note 90.

<sup>142</sup> HUMAN RIGHTS WATCH, *supra* note 31, at 2.

women and children.<sup>143</sup> Legislation must focus on protecting human rights and ending the tolerationist approach to prostitution found in current law.<sup>144</sup> Concurrently, legislators must develop a phase out policy with the two-pronged goal of helping existing prostitutes leave the profession, while simultaneously preventing young girls from being forced into the trade.<sup>145</sup>

#### A. Human Rights and Prostitution: Irreconcilable Differences

*[I]n India, we are not talking of sex workers who have voluntarily opted for prostitution, but of poverty-stricken, kidnapped and battered women who are made to perform for Rs. 15 [.38 US] an encounter. Legalisation will only make the trade immensely convenient and more profitable for the pimps and enable them to expand their operations.*

—Neelam Gorhe<sup>146</sup>

The protection of human rights and the practice of prostitution in India cannot be reconciled.<sup>147</sup> Forced prostitution and sex slavery de-

<sup>143</sup> *Global Initiative*, *supra* note 38. On February 1, 2008, the Council of Europe Convention on Action against Trafficking in Human Beings entered into force. See Council of Europe, *1st February 2008: The Council of Europe Convention on Action Against Trafficking in Human Beings*, [CETS no. 197] Entered into Force, available at [http://www.coe.int/t/dg2/trafficking/campaign/Docs/NewArtFeb08\\_en.asp](http://www.coe.int/t/dg2/trafficking/campaign/Docs/NewArtFeb08_en.asp). The Convention takes a human rights approach to ending the practice of human trafficking, which it states often results in slavery for victims. Convention on Action against Trafficking in Human Beings, *supra* note 84, at 7. While this Convention currently has only Council of Europe members, it is open to non-member states as well and recognizes that human trafficking is a global problem in need of solutions that extend beyond the geographical scope of Europe. Maud de Boer-Buquicchio, Deputy Sec't General of the Council of Europe, Address at UNODC Panel, Vienna, The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation, (Feb. 15, 2008), available at [http://www.coe.int/t/dg2/trafficking/campaign/Docs/News/DSGVienna2\\_en.asp](http://www.coe.int/t/dg2/trafficking/campaign/Docs/News/DSGVienna2_en.asp). India, being a country of high origin, transit, and destination for human trafficking, specifically for sexual exploitation, should be targeted as an important partner in international conventions on trafficking, and should be helped to meet the requirements of accession. See *Global Initiative*, *supra* note 38.

<sup>144</sup> See The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44; Gangoli, *supra* note 11, at 127–32. Progress was made when the Indian Supreme Court ruled in July 2006 that the Maharashtra government could proceed with a plan to seal brothels under the Immoral Trafficking Prevention Act (ITPA). See The Immoral Traffic (Prevention) Amendment Bill, 2006, No. 47; U.S. DEP'T OF STATE, *supra* note 83, at 118.

<sup>145</sup> See Menon, *supra* note 98; Upasana Bhat, *Prostitution 'Increases' in India*, BBC NEWS, July 3, 2007, [http://news.bbc.co.uk/1/hi/world/south\\_asia/5140526.stm](http://news.bbc.co.uk/1/hi/world/south_asia/5140526.stm).

<sup>146</sup> Gangoli, *supra* note 2, at 12 (citing interview with Neelam Gorhe, President of the State Adhar Kendra in the state of Maharashtra, a group that opposes the legalization of prostitution).

<sup>147</sup> See Kristof, *supra* note 7.

fine the industry such that nothing short of ending the practice will adequately protect the human rights of women.<sup>148</sup> Two main arguments exist against outlawing prostitution and its related activities.<sup>149</sup> First, a number of feminists argue that prostitution should be viewed as an active choice made by Indian women in order to earn a living instead of being destitute, begging, or working in the poorly paid informal sector.<sup>150</sup> This argument is bolstered by the fact that married women in India are not afforded many rights and must defer to their husbands.<sup>151</sup> Feminists contend that women who reject this normative lifestyle should be seen as taking control over their own lives.<sup>152</sup> The second argument in favor of legalizing prostitution assumes a cultural relativist position stating that male sexuality is uncontrollable, and prostitution is an evil necessary to protect society.<sup>153</sup> Many prostitutes themselves adhere to this latter position, arguing that they work hard and serve men just as social workers serve the needy and nurses help those who are infirm.<sup>154</sup>

Both of these arguments fail in light of the reality that fundamental human rights are being denied to women and children in India as a result of the laws on prostitution.<sup>155</sup> The free choice inherent in the feminist argument is an elusive concept when one considers that the majority of women entering prostitution are seeking to escape poverty.<sup>156</sup> The freedom to choose seems dubious when those entering prostitution have had limited educational opportunities, little exposure to other work opportunities, and have few female role models to emulate in positions of power in society or in professional capacities.<sup>157</sup> Finally, the rates of trafficking, deception, and forced servitude that characterize this industry indicate that a vast number of India's prostitutes did not come to the profession of their own volition.<sup>158</sup>

<sup>148</sup> *See id.*

<sup>149</sup> *See* Gangoli, *supra* note 2, at 12–15.

<sup>150</sup> *See id.* at 13. Often it is hard to persuade devadasi to seek alternate employment because some can earn 5000 rupees (\$120.00 US) per day. *See* Owen, *supra* note 90.

<sup>151</sup> Gangoli, *supra* note 2, at 17.

<sup>152</sup> *Id.*

<sup>153</sup> *See* GANGOLI, *supra* note 1, at 67.

<sup>154</sup> Gangoli, *supra* note 2, at 19.

<sup>155</sup> Jaishankar & Halder, *supra* note 6.

<sup>156</sup> *See id.*; HUMAN RIGHTS WATCH, *supra* note 31, at 11.

<sup>157</sup> NUSSBAUM, *supra* note 35, at 63.

<sup>158</sup> HUMAN RIGHTS WATCH, *supra* note 31, at 1 n.1, 36, 38. Modes of entry into the profession have implications for the level of respect prostitutes receive. *See* Raney Aronson, *supra* note 124. The example of Mumbai's sex workers reveals that many are sold into prostitution as young girls and do not enter the trade by choice. *See id.* This fact affects the

It is difficult to fully embrace the notion that prostitutes are akin to social workers.<sup>159</sup> While social workers may bear emotional and psychological burdens as a result of their work, it is hard to fathom someone in this profession being forced day after day under threat of abuse to service clients at the risk of contracting disease.<sup>160</sup> While some may feel that prostitutes are doing men a service, this attitude relies on the acceptance of the manufactured norm that men must be provided with sexual satisfaction or else all of society is at risk.<sup>161</sup> It is no longer acceptable, particularly in an age when upwards of sixty percent of all prostitutes in some Indian cities are infected with HIV/AIDS, to allow the sacrifice of the life of one human being for the pleasure of another.<sup>162</sup>

Supporting the argument against legalization is the fact that, thus far, legislation introduced to legalize and control prostitution has only protected the trade of prostitution, not the prostitutes themselves, and thereby has failed to address human rights concerns.<sup>163</sup> To date, legislative proposals in favor of legalization have been driven by morality concerns, a desire to control vice, and a concern for the safety of the client and the client's family.<sup>164</sup> Although these legislative schemes claim to address public health problems, it is clear that they are for the benefit of the male clients, not the female prostitutes.<sup>165</sup> For example, in 1994, the Protection of Commercial Sex Workers Bill was presented to the Maharashtra Legislature.<sup>166</sup> The Bill would have recognized commercial sex work as a legitimate commercial activity but would have man-

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Mumbai sex worker's ability to demand that clients use condoms, as these women often garner very little respect. *Id.* The situation is slightly different in Calcutta, where most female prostitutes are born into the practice, leaving them no choice but to be sex workers, while at the same time granting them slightly more respect and the ability to demand safe sex practices. *Id.*

<sup>159</sup> Gangoli, *supra* note 2, at 19.

<sup>160</sup> *See id.*; Kristof, *supra* note 7.

<sup>161</sup> Gangoli, *supra* note 2, at 19.

<sup>162</sup> Gangoli, *supra* note 129, at 83.

<sup>163</sup> *See* Gangoli, *supra* note 11, at 123–24. A 1988 bill before the Maharashtra Legislative Assembly attempted to curb the spread of AIDS and venereal diseases by compulsive registration of all prostitutes, a requirement that brothel owners display the age of prostitutes, and a minimum age for prostitution of twenty-one years. *See id.* at 123–24. Additionally, every registered woman was to be medically examined once every three months. *See id.* at 124. No provisions were laid out for who would cover the expense of procedures, what would happen to those who were found to have contracted disease, or what types of procedures were legal to conduct on prostitute women. *See id.*

<sup>164</sup> *See id.* at 125.

<sup>165</sup> *See id.*

<sup>166</sup> *See id.* at 124–25.

dated prostitutes to register with the government; failure to register would carry a punishment of seven years imprisonment.<sup>167</sup> Registered prostitutes were to be tested periodically for sexually transmitted diseases and, if found positive, were to be branded, quarantined, and fined.<sup>168</sup> Instead of valuing their professional choice, the Bill, if passed, would have stigmatized women and failed to provide them with vital protections.<sup>169</sup> Legislation that regulates prostitutes through compulsory medical testing represents a clear violation of widely held notions of human rights.<sup>170</sup>

Another impediment to legalization is the Indian government's inability to enforce existing laws governing prostitution.<sup>171</sup> Enforcement of PITA has always been a challenge due to a lack of resources and political will, along with high levels of poverty-fueled corruption.<sup>172</sup> Increased regulations and monitoring provisions that would necessarily accompany a plan to legalize prostitution would be similarly doomed to fail.<sup>173</sup>

Apart from the shortcomings of legislation, the practical limitations of legalization are already evident.<sup>174</sup> Preliminary attempts to unionize prostitutes in the red-light district of Shonagachi, Calcutta have proven that legalization is not an effective strategy.<sup>175</sup> Shonagachi prostitutes were provided with condoms and were educated on HIV/AIDS in order to empower them to take protective measures against disease.<sup>176</sup> Rates of HIV/AIDS have only increased in Shonagachi since the union was formed however, and some prostitutes contend that it is merely a front for brothel owners to gain protection from law enforcement raids.<sup>177</sup>

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<sup>167</sup> See *id.* Registration would qualify sex workers for welfare benefits. See *id.*

<sup>168</sup> See Gangoli, *supra* note 11, at 124–25.

<sup>169</sup> See *id.* at 125.

<sup>170</sup> See *id.*

<sup>171</sup> U.S. DEP'T OF STATE, *supra* note 83, at 118–19. India's lack of national coordination in addressing trafficking and prostitution problems, accompanied by high levels of corruption fueled by poverty, make enforcement of any laws on the issue extremely difficult. See *id.*

<sup>172</sup> *Id.*

<sup>173</sup> See Kristof, *supra* note 7.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* Similarly, in Mumbai, many of the brothels are run by local Indian mafia who deny advocacy groups the opportunity to work with prostitutes to prevent HIV/AIDS. See Raney Aronson, *supra* note 124.

Conversely, when India has focused on reigning in abusive prostitution, rather than on legalization, some progress has been achieved.<sup>178</sup> In 2007, the United Nations Office on Drugs and Crime, Regional Office for South Asia in partnership with the Ministry of Home Affairs, Government of India, established Anti Human Trafficking Units (AHTUs) across several states in the country.<sup>179</sup> The AHTUs combine representatives from police departments, state government, and civil society in the fight against human trafficking.<sup>180</sup> They have significantly increased the number of trafficking crimes registered, victims rescued, and clients and traffickers arrested, thereby reducing the supply and demand for India's brothels.<sup>181</sup> Similarly, as a result of increased raids by police, the city of Mumbai has seen a noticeable decline in the number of operating brothels.<sup>182</sup>

Combining this anti-trafficking work with national legislation outlawing prostitution is the most effective way to address the human rights problems faced by prostitutes in India.<sup>183</sup> Forced prostitution is so ingrained in India's sex industry that an argument for legalization

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<sup>178</sup> See Kristof, *supra* note 7. In March 2008, New Delhi Police, with the help of the NGO Stop Trafficking, Oppression and Prostitution (STOP), rescued seven girls, including five minors, and caught six persons involved in a sex racket being run out of a restaurant in south Delhi. See S. Dehli Sex Racket Busted, Seven Girls Rescued, TIMES INDIA, Mar. 21, 2008, at 5. The racket provided foreign clients with minor girls, primarily trafficked to Delhi from rural areas in Orissa and West Bengal. *Id.* After receiving information regarding illegal trafficking, STOP contacted the crime branch of the local Delhi Police, who set up a trap to arrest the pimps and rescue the girls. *Id.* Two women were arrested as well for luring teenage girls into the racket by promising good money and jobs. *Id.* This example is part of a developing movement in India, which reportedly conducted forty-three rescue operations, releasing 275 victims of commercial sex trafficking in 2007. U.S. DEP'T OF STATE, *supra* note 83, at 119. Additionally, the government has provided funds to increase awareness among police and prosecutors in Maharashtra, Goa, West Bengal, and Andhra Pradesh states. *Id.* Despite these rescues, prosecution and conviction rates remain very low. *Id.*

<sup>179</sup> U.N. Office on Drugs & Crime, Anti Human Trafficking Units (AHTUs) in India, [http://www.giftasia.in/iahtu\\_launch.php](http://www.giftasia.in/iahtu_launch.php) (last visited May 12, 2008).

<sup>180</sup> See *id.*

<sup>181</sup> See U.N. Office on Drugs & Crime, Achievement of Anti Human Trafficking Units, [http://www.giftasia.in/iahtu\\_achievement.php/](http://www.giftasia.in/iahtu_achievement.php/) (last visited May 12, 2008). In 2007, 592 trafficking crimes were registered and 419 customers and 1295 traffickers were arrested, four of whom were convicted of criminal offenses. *Id.* The initiative has helped rescue victims of sex trafficking and takes a human rights approach to ending trafficking by treating victims as victims, rather than as offenders or solicitors. *Id.* It has also begun to reduce demand for the victims of trafficking. *Id.*

<sup>182</sup> See Kristof, *supra* note 7. A positive association has been observed between duration of brothel servitude and HIV status, indicating that intervention to release sex-trafficked women and girls and others caught in forced prostitution with a focus on preventing them from being caught up in the trafficking system again, can be an effective HIV prevention strategy. Silverman et al., *supra* note 105, at 540.

<sup>183</sup> See Kristof, *supra* note 7; Raney Aronson, *supra* note 124.

only condones trafficking and abuse of women without solving the problems that plague female prostitutes.<sup>184</sup> By passing national legislation to uniformly outlaw the practice of prostitution in its entirety however, state-level governments and local police authorities will have more clear direction in regard to enforcement plans and the Ministry of Home Affairs could be better equipped to coordinate national prevention strategies across state lines, both in regard to trafficking and prostitution.<sup>185</sup>

### B. *Human Rights Are Universal*

Given the dire circumstances of women and girls forced into the sex industry in India, legalization is not the answer.<sup>186</sup> Prostitution in India cannot continue to be tolerated by society and law, nor can it be condoned through cultural relativist arguments that would permit it to continue.<sup>187</sup> The cultural relativist stance loses credibility when one considers that the ideas of political liberty, sex equality, and non-discrimination were, despite sharp political and caste divides that existed at independence, included by overwhelming consensus in the Indian Constitution.<sup>188</sup> While cultural diversity should not be trivialized, some traditional practices are harmful to the well-being of individuals and therefore must be scrutinized with respect to fundamental rights.<sup>189</sup>

India's formal stance on human rights is evidenced by its participation in numerous treaties and international agreements related to human rights.<sup>190</sup> The International Convention for the Suppression of the Traffic in Persons, to which India is a signatory, provided the impetus for the introduction of the original Immoral Traffic Prevention Act in 1956.<sup>191</sup> India is also a signatory to the International Covenant on Civil and Political Rights and the Abolition of Forced Labor Con-

<sup>184</sup> See Kristof, *supra* note 7.

<sup>185</sup> See U.S. DEP'T OF STATE, *supra* note 83, at 119.

<sup>186</sup> See Gangoli, *supra* note 11, at 121.

<sup>187</sup> See NUSSBAUM, *supra* note 35, at 38–39. Cultural relativism is the idea that normative criteria must come from within the society to which they are applied. *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See id.* at 59.

<sup>190</sup> *See id.*

<sup>191</sup> *See generally* Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271, available at <http://www.unhchr.ch/html/menu3/b/33.htm>; Ctr. for Feminist Legal Research, *supra* note 61.

vention.<sup>192</sup> Moreover, the government has ratified the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, which obligate member states to protect against discrimination and to suppress all forms of trafficking in women and children.<sup>193</sup>

India was a primary contributor to the creation of the United Nations Declaration of Human Rights.<sup>194</sup> Hansa Mehta, a woman, served as India's delegate to the Human Rights Commission and helped draft the Declaration.<sup>195</sup> This document lays out the fundamental human rights that should be afforded to every person, including the right to life, liberty and security of person; the right to be free from torture and cruel, inhuman or degrading treatment; and the right to fair working conditions.<sup>196</sup> These provisions reflect India's input and stance on human rights.<sup>197</sup> It is appropriate to demand that these aspirations be translated into anti-prostitution legislation with justiciable commitments to the human rights of women generally.<sup>198</sup>

### CONCLUSION

Prostitution in India today is essentially sexual slavery fueled by intense poverty. Trafficking victims are tricked, drugged, or betrayed by friends, family, or strangers hoping to turn a profit. Those who enter prostitution of their own volition are often impoverished, controlled or abused in marital or family life, uneducated, or without access to alternative opportunities. For these reasons, the push to legalize prostitution fails to address the structural inequalities that plague women and

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<sup>192</sup> See generally International Covenant on Civil and Political Rights, *opened for signature* Dec. 16 1966, 999 U.N.T.S. 171, *available at* <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>; Abolition of Forced Labour Convention, *adopted* June 25, 1957, 320 U.N.T.S. 291, *available at* <http://www.unhchr.ch/html/menu3/b/32.htm>; HUMAN RIGHTS WATCH, *supra* note 31, at 84.

<sup>193</sup> See generally Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Sept. 3, 1981), *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Sept. 2, 1990), *available at* <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

<sup>194</sup> See MARY ANN GLENDON, *A WORLD MADE NEW* 41 (2001).

<sup>195</sup> See *id.* Ms. Mehta, a member of the Brahmin caste, was dedicated to women's rights and national self-determination. See *id.* at 38. She and her husband were both imprisoned for civil disobedience in India. See *id.*

<sup>196</sup> See Universal Declaration of Human Rights, *supra* note 36, at arts. 3, 5, 23.

<sup>197</sup> See GLENDON, *supra* note 195, at 40.

<sup>198</sup> See generally Universal Declaration of Human Rights, *supra* note 36 (establishing that all individuals are entitled to certain fundamental human rights).

girls in Indian society and thereby does women a disservice. As India develops and becomes a viable global economic power, it must recognize the international commitments it has made to its women and to human rights. India must pass new legislation that protects women's rights by outlawing prostitution and trafficking entirely. Such legislation should be accompanied by a phase-out plan to combat poverty, rescue, rehabilitate, educate, and train India's women and girls to become active and full members of their society.

