

TEAM CODE:

KLE LAW COLLEGE 4th NATIONAL MOOT COURT COMPETITION

**BEFORE THE HON'BLE
SUPREME COURT OF INDICA**

WRIT PETITION NO. ____/2023

FILED UNDER ARTICLE 32 OF THE CONSTITUTION OF INDICA

IN THE MATTER OF

ASTITVA PETITIONER

v.

UNION OF INDICA.....RESPONDENT-1

TREE OF LIFE RESPONDENT-2

ON SUBMISSION TO THE HON'BLE SUPREME COURT OF INDICA

MOST RESPECTFULLY SUBMITTED

COUNSELS APPEARING ON BEHALF OF UNION OF INDIA & TREE OF LIFE

WRITTEN SUBMISSION ON BEHALF OF RESPONDENT

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3	The Indian Penal Code, 1860.
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TABLE OF ABBREVIATIONS AND SYMBOLS

ABBREVIATION	DEFINITION
&	And
@	Alias
¶	Paragraph
AIR	All India Reporter
Anr.	Another
Art.	Article
CrLJ	Criminal Law Journal
CRR	Crime Ratio Reports
Ed.	Edition
Govt.	Government
HC	The High Court
Hon'ble	Honorable
i.e.,	That is
ILR	Indian Law Reporter
ITPA	The Immoral Traffic (Prevention) Act, 1956
LGBTQ	Lesbian, Gay, Bisexual, Transgender, Queer
Ltd.	Limited
No.	Number
Ors.	Others
P.	Page
Pb.	Publication
R/w	Read With
S.	Section
S.No.	Serial Number
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
SITA	The Suppression of Immoral Traffic Act, 1956
ss.	Sections
The CrPC	The Code of Criminal Procedure, 1973
The IPC	The Indian Penal Code, 1860
u/s	Under Section
UOI	The Union of India
v.	Versus
Vol.	Volume

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STATEMENT OF JURISDICTION

The Respondent humbly submits before the Hon'ble Supreme Court of India, the counter to the petition filed by the petitioner herein under Article 32 of The Indian Constitution challenging the Constitutional Validity of The Commercial Sex Workers (Protection and Regulation) Act, 2021.

The present memorandum sets forth the facts, contentions, and arguments.

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STATEMENT OF FACTS

- [¶1] Indica is a federal, democratic, and republic that upholds the separation of powers and upholds the rule of law. Since time immemorial, Marriage is considered as a most sacred relationship for every Indican. It is regarded as a moral duty and ‘Samskara’ (sacrament) for every Indican to lead the life of a householder.
- [¶2] In Indica, prostitution took its form first in ancient time. Since then, there has been an upsurge in the prostitute industry. The primary piece of law created in response to the trafficking and solicitation of women in Indica was the *Immoral Traffic Prevention Act, 1956*. Prostitution is a grey area, when it is performed alone and in private as the Act does not make it illegal to do so. There has been a constant debate regarding the legalizing of prostitution in order to regulate the act of prostitution by enacting a law by parliament and to curb the violence by both clients and middlemen.
- [¶3] Both the legalization of prostitution by the government and the demands of the sex industry have been the subject of ongoing discussion. The Indican Government thought that bringing prostitution under the legal domain will make it easier to control criminal activity and also to regulate it as a profession. A large population engaged in this activity. However, due to a lack of adequate legislation, usage has reached an all-time high in Indica.
- [¶4] The *Indica Commercial Sex Workers Act, 2021* is a gender-neutral law that the Indican Parliament just passed to legalize prostitution as a legitimate profession. All genders are now subject to the legislation, which makes it necessary to register and get a license in order to engage in commercial sex. It has granted complete freedom for engaging in commercial sex in exchange for payment on registration, which requires the written consent of the spouse to the married persons. It also prescribed offences & penalties for engaging in specific acts.
- [¶5] It has generated ample revenue for the government as income tax is levied on the profession. The new legislation has legalized commercial sex due to which there is a dip in the cases of rape and sexual assault from past three months, as per the latest crime ratio reports. There is a reduction in sexually transmitted diseases in the country due to the mandatory and periodic medical assessment of the sex workers. The social stigma attached to this profession has faded due to the new legislation.
- [¶6] On the other hand, many single women are freely practicing this profession as the right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy. The LGBTQ community has taken a neutral stand over this issue. The transgender population in particular has welcomed this initiative as they are not given employment in other workplaces and the Act tries to regularize the profession, so they are not stigmatized or assaulted while practicing it.
- [¶7] Before the Supreme Court of Indica, a civil society group under the name of “Astitva” challenged the constitutionality of the Indica Commercial Sex Workers (Protection and Regulation) Act, 2021. The petition was accepted by the Supreme Court. An interim petition was filed by an NGO called “Tree of Life” on behalf of the commercial sex workers. The same was allowed, and a final hearing has been scheduled for the case.

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ISSUES RAISED

ISSUE-1: WHETHER SECTION 3 OF THE INDICAN COMMERCIAL SEX WORKERS (PROTECTION AND REGULATION) ACT, 2021 IS VIOLATIVE OF RIGHT TO PRIVACY?

ISSUE-2: WHETHER THE REQUIREMENT OF SPOUSAL CONSENT VIOLATES THE SANCTITY OF MARRIAGE AS ESPOUSED BY THE INDICAN SOCIETAL VALUES AND MORALITY?

ISSUE-3: WHETHER THE INDICAN COMMERCIAL SEX WORKERS (PROTECTION AND REGUALATION) ACT, 2021 IS AGAINST THE PUBLIC HELATH, SAFETY AND MORALITY AND IS LIABLE TO BE STRUCK DOWN?

SUMMARY OF ARGUMENTS

ISSUE 1: WHETHER SECTION 3 OF THE INDICAN COMMERCIAL SEX WORKERS (PROTECTION AND REGULATION) ACT, 2021 IS VIOLATIVE OF RIGHT TO PRIVACY?

The Counsel on behalf of the Respondents humbly submits that Section 3 of The Indican Commercial Sex Workers (Protection and Regulation) Act, 2021 is not violative of Right to Privacy enshrined under Article 21 of Indican Constitution, as every Fundamental Right including Right to privacy under Article 21 is subject to various constitutional and statutory controls. The Right to Privacy is not an absolute right and can be limited in certain circumstances. The mandatory registration of Commercial sex workers is voluntary and informed which enables to identify commercial sex workers that helps in tracking the prevalence of sexually transmitted infections (STIs) or to facilitate access to health and social services and excludes unauthorized commercial sex workers.

ISSUE 2: WHETHER THE REQUIREMENT OF SPOUSAL CONSENT VIOLATES THE SANCTITY OF MARRIAGE AS ESPOUSED BY THE INDICAN SOCIETAL VALUES AND MORALITY?

The Counsel on behalf of the Respondents submits that the requirement of spousal consent does not violates the sanctity of marriage as espoused by the indican societal values and morals. In fact, it can be seen to uphold the values of mutual respect and partnership within a marriage. In Indican culture, marriage is often seen as a sacred bond between two individuals, and the concept of mutual respect and support is highly valued. Spousal consent reinforces the significance of mutual respect and collaboration in the relationship. In this context, spousal consent can be seen to ensure that both partners are on the same page and that decisions are made jointly, with each partner's perspective and input taken into account which can help to build a stronger and more fulfilling partnership, which can ultimately benefit both individuals involved.

ISSUE 3: WHETHER THE INDICAN COMMERCIAL SEX WORKERS (PROTECTION AND REGUALATION) ACT, 2021 IS AGAINST THE PUBLIC HELATH, SAFETY AND MORALITY AND IS LIABLE TO BE STRUCK DOWN?

The Counsel on behalf of the Respondents submits that The Indican Commercial Sex Workers (Protection and Regulation) Act, 2021 does not violate public health, safety, or morality because necessary safeguards have been taken. Regulating sex work can help to protect sex workers by giving them legal rights and protections and ensuring that they can work in a safe environment. It can also help to reduce the stigma attached to sex work, which can lead to social and psychological harm. Many sex workers are compelled to work in the industry due to poverty, a lack of economic opportunities, and discrimination. Decriminalizing and regulating sex work can increase their economic opportunities as well as their access to healthcare, education, and other social services. Therefore, the Act is considered to be valid and is not liable to be struck down.

ADVANCED ARGUMENTS

ISSUE-1: WHETHER SECTION 3 OF THE INDICAN COMMERCIAL SEX WORKERS (PROTECTION AND REGULATION) ACT, 2021 IS VIOLATIVE OF RIGHT TO PRIVACY?

- [¶1.] It is most respectfully submitted to the Hon'ble Supreme Court of Indica that Prostitution as defined by **Oxford Dictionary**¹ "*is the practice or occupation of engaging in sexual activity with someone for payment*". The term is used to emphasize the commonality between work in this industry and other, more conventional occupations. *Carol Leigh* coined the word "sex work", to start a movement to redefine the way people viewed sex work. It recognized sex work as work, rather than a status². *National Legal Services Authority v. Union of India and Others*³ *the court considered sex work as an occupation.*
- [¶2.] Prostitution is also mentioned in Vedic literature. Prostitution has been in existence in Indica from time immemorial. Prostitutes were referred to as "Veshya" at first and then "Beshya," which means one who can be touched by anybody⁴. Existence of prostitution can be seen in ancient Indican texts as well as in the texts of prominent British Indican writers. Indican laws also deal with prostitution. Prostitutes in ancient Indican society enjoyed some respect. Arthasatra says that human treatment is to be given to prostitutes. Dharmasatra also shows that prostitutes were treated with respect. Prostitutes in past, also had contribution in revenue. According to Arthasastra, a part of income from the prostitute's, quarter was paid as revenue. Also prostitutes had to pay a certain amount every month towards revenue, as income tax⁵. It is submitted that **S.C. Banarjee** put his opinion about secret and open prostitution⁶, which is an affirmation with the fact that prostitution was practiced in open, it can be inferred that it was legal and fine to practice prostitution without any objection.
- [¶3.] It is submitted that 'sex workers' do have Human Rights.⁷ The United Nations (UN) and regional human rights bodies, inter-governmental organizations, and influential nonprofit human rights organizations have institutionalized the concept of sex workers rights as human rights in

¹ Oxford English Dictionary, Second Edition, Volume III, Cham-Creeky.

² Jus Corpus Law Journal, vol. 2, issue 4, june – august 2022 pg – 268.

³ [2014] 3 MLJ 595.

⁴ Soham das and Ritika Ghosh, Prostitution in India: Protection of human rights of Sex Workers in India, Volume 3, International Journal of Law Management & Humanities.

⁵ Rajdeep Ghosh and Saswati Nag International Journal of Law Management & Humanities [Vol. 4 Iss 5; 1579].

⁶ S.C Banarjee "Crime & Sex in Ancient india", pg.- 84.

⁷ World Health org. Et al., implementing comprehensive HIV/STI programs with sex workers xiv (2013). Implementing comprehensive HIV/STI programs with sex workers xxi (2013).

direct response to global sex workers rights advocacy. the Universal Declaration of Human Rights, rests on several fundamental principles: **1)** all human beings are born with inherent rights, regardless of their social status; **2)** these rights are recognized in a series of binding international treaties, customary international law, and guiding principles, and states must respect, protect, and realize these rights; and **3)** monitoring and enforcement occur through diverse mechanisms, including the UN system and agencies, regional human rights bodies, and civil society organizations ⁸. The Sex workers are just as an ordinary citizen of Indica are also entitled to the above Human Rights and Fundamental Rights enshrined in Indican Constitution such as, **Art. 14** (Right to equality before law and equal protection of the law); **Art.19 (1)(g)** (i.e., Right to carry on any profession, occupation, trade or business); **Art. 21** (Right to life and personal liberty including Right to Live with Dignity and Right to Privacy); **Art. 23 (1)** (which prohibits traffic in human beings and beggars along with other similar forms of forced labor). Further, the *Immoral Traffic (Prevention) Act, 1956* also provides some Rights to the Prostitutes such as **Section 16** of the Act provides for the rescue of the Prostitutes if they are forced to indulge in this work.

[¶4.] It is submitted that in the landmark judgement by the Supreme Court in **“Mr. X v. Hospital Z”**,⁹ the Court ruled that ***“the Right to Privacy was not absolute and might be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Since the Right to Life included the Right to a Healthy Life to enjoy all the facilities of the human body in prime condition”***. As per the judgement it can be understood that Section 3 of the Act¹⁰ prescribed the terms and conditions for registration as a commercial sex worker is not violative of the Right to Privacy because the requirements of Section 3 are to protect the health and safety of the registered sex worker. Registration is the legitimate means of regulating the sex industry.

[¶5.] It is submitted that in the case of **Budhadev Karmaskar v. State of West Bengal**¹¹, the Supreme Court of Indica observed that ***“sex workers are human beings, and no one has a Right to Assault or Murder them as they also have the Right to Live. The judgment also highlighted the plight of sex workers and empathizes that these women are compelled to indulge in prostitution***

⁸ U.N. OFFICE OF THE HIGH COMM’R OF HUMAN RIGHTS, <https://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> [https://perma.cc/Y3PL-6UJP] (last visited July 17, 2019); Overview of the Human Rights Framework, INT’L JUSTICE RES. CTR., <https://ijrcenter.org/ihr-reading-room/overview-of-thehuman-rights-framework/> [https://perma.cc/9YD5-TL7R] (last visited July 17, 2019).

⁹ AIR 1999 SC 495.

¹⁰ The Indica Commercial Sex Workers (protection and Regulation) Act, 2021.

¹¹ (2011) 10 SCC 283.

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not for pleasure but because of abject poverty and directed the Central Government and State Governments to open rehabilitation centers and impart technical and vocational skills like sewing so that they attain other means of livelihood". In cases of *Aarushi Dhasmana v. Union of India and others*¹², *Abdul Ghafoor & another v. State of Bihar*¹³, *A.C. Muthiah v. Board of Control for Cricket in India and another*¹⁴, *Renu Bansal v. U.T. Chandigarh*¹⁵ the Hon'ble courts observed that every individual has Right to Livelihood enshrined under Article 21 of Constitution. In the present case The Indican Commercial Sex Workers (Protection and Regulation) Act, 2021 provide livelihood for those involved in the industry. Further the Act led to protection and regulation of the industry, which can help prevents exploitation, abuse, and human trafficking.

[¶6.] In case of "*Unknown v. State of West Bengal*"¹⁶, Calcutta High Court held that "*sex workers are exploited for commercial sex*". In September 2020, the Bombay High Court in the case of "*Kajal Mukesh Singh and Ors v. State of Maharashtra*"¹⁷ ordered that prostitution was not regarded as a criminal offence under the Immoral Traffic (Prevention) Act 1956. It said, "there is no provision under the law, which makes prostitution per se a criminal offence or punishes a person because he indulges in prostitution," The Court also noted, "what is punishable under the Act is sexual exploitation or abuse of a person for commercial purpose and to earn the bread thereby. And where a person is carrying on prostitution in a public place or when a person is found soliciting or seducing another person as defined under the Act."¹⁸ The object of registration under "*The Indican Commercial Sex Workers (Protection and Regulation) Act, 2021*", is to curtail the exploitation and to regulate the prostitute activities without violating the public interest.

[¶7.] It is further submitted that **Justice J. Chelameswar**, opined that "*no legal right can be absolute. Every right has limitations*". This aspect of the matter was conceded at the bar. Therefore, even a Fundamental Right to Privacy has limitations. The limitations were to be identified on a case-to-case basis depending upon the nature of the privacy interest claimed. Having emphatically interpreted the Constitution's liberty guarantee to contain a Fundamental Right of Privacy, it was

¹² AIR 2013 SC 456.

¹³ AIR 2011 SC 1096.

¹⁴ (2011) 5 MLJ 484.

¹⁵ AIR 2009 P&H 144.

¹⁶ (2019) C.R.M No. 10431/2018.

¹⁷ Criminal W.P. No. 6065/2019.

¹⁸ 'Prostitution is not a criminal offence': Bombay HC orders release of 3 sex workers' (The Hindu, 26 September 2020) accessed 03 June 2022.

necessary to outline the way such a Right to Privacy could be limited.” To safeguard the rights of the prostitutes there must be legislations with rules and regulations supporting the same.

[¶8.] It is humbly submitted that in the case of *Justice K.S. Puttaswamy v. Union of India & Ors.*¹⁹ the constitution Bench in the judgement of Puttaswamy V. Union of India held that Right to Privacy is a Fundamental Right enshrined under Article 21 of the Indian Constitution, any restriction on such Fundamental Right has been held to be valid when it passes the muster of three-fold test -

- i. The existence of law.
- ii. A legitimate State interest and
- iii. Such law should pass the test of proportionality.

The Act does not violate the Right to Privacy as it passes the three-fold test. The three criteria to be met are: ‘legality’, ‘need’, and ‘proportionality’. the Act inherently meets ‘legality’, given that the Act was passed by Parliament with a majority of 312 out of 500. The Act meets the ‘need’ criteria. To ensure the effective implementation of the Act's objectives, the State has made a legitimate claim of registration to sex workers and safeguards the sex workers from Sexual exploitation, abuse, and human trafficking. The registration of sex workers would not turn India into a surveillance State rather it provides legitimate state interest. For the purpose of registration, the state obtains the minimal possible amount of data such as name, address, age etc. from sex workers the architecture of Registration of sex workers as well as the provisions of the Act are not conducive in creating a surveillance State. The Act meets the ‘proportionality’ criteria. ‘Proportionality’ requires that there exists a ‘rational nexus between the aim of a piece of legislation and the means adopted to achieve. the provision in the Act ensures that the means used are rationally proportional to the intended goal. The registration of commercial sex workers helps the disadvantaged Sections lead a dignified life. there is a need for balance between two conceptions of dignity – one based on the Right to Personal autonomy and other based on Right to Live a Dignified life. The Act, as a whole, maintains dignity. The Counsel on behalf of Respondent humbly submits that the Commercial Sex Workers Act, 2021 is valid as it passes the muster of three-fold test prescribed the honorable supreme court of India.

[¶9.] In the case of *Sahyog Mahila Mandal v. State of Gujarat*²⁰ the court held that prostitution carries an intensified risk of spread of sexually transmitted diseases especially HIV/AIDS, it has close connection with a high degree of drug abuses and crimes, such as assault, rape and even

¹⁹ AIR 2017 SC 4161, Para 366.

²⁰ (2004) 2 GLR 1764

murder and it is a frequent and persistent cause of public nuisance. If the Parliament in its wisdom enacted the provisions of the said Act to combat prostitution and eradicate immoral traffic in women and girls in order to prevent their sexual exploitation or abuse for commercial purpose, such minimal intrusion in privacy by legitimate search of the premises in respect of which there are reasonable grounds for believing that an offence punishable under the Act has been or is being committed in respect of a woman, girl or any other person living in such premises would be justified, proportionate and reasonable.

[¶10.] It is further submitted that the Hon'ble Supreme Court in a significant order recognized sex work as a "profession" whose practitioners are entitled to dignity and equal protection under the law, Supreme Court has directed that police should neither interfere nor take criminal action against adults and consenting sex workers.²¹ The court observed that *"it need not be again said that notwithstanding the profession, every individual in this country has a Right to a Dignified life under Article 21 of the constitution."*²² *"Prostitution is a profession like any other profession. Sex workers are entitled to equal status and equal protection under the law of the land. A three-judge bench headed by Justice L Nageswara Rao issued six guidelines. In the guidelines, the bench said, "Sex workers are also entitled to equal protection and dignity in the eyes of the law. A sex worker is an adult and is doing so subject to consent. In this case, the police will not be able to intervene unnecessarily. Article 21 of the Constitution gives every citizen of the country the Right to Live a Dignified life."* In cases of *State of Maharashtra & Anr. v. Indian Hotel & Restaurants Assn. & ors.*²³ *Navtej Singh Johar v. Union of India*²⁴ the court observed that the sex workers do have Right to a Dignified Life enshrined under Article 21 of Indian Constitution.

[¶11.] The Supreme Court in *Olga Tellis v. Bombay Municipal Corporation*²⁵, popularly known as the "Pavement Dwellers Case" a five-judge bench of the Court now implied that 'Right to Livelihood' is born out of the 'Right to Life', as no person can live without the means of living, that is, the means of Livelihood. Article 39(a)²⁶ suggests that citizens (men and women) shall have the right to an adequate means of livelihood. Thus, is indicative of the fact that the constitution-makers were aware of such a requirement and were ready to provide citizens with

²¹ Krishnadas Rajagopal, 'SC recognises sex work as a 'profession' (The Hindu, 25 May 2022) accessed 04 June 2022.

²² 'Voluntary sex work "is not illegal": SC' (NDTV, 27 May 2022) accessed 04 June 2022.

²³ (2013) 8 SCC 519

²⁴ AIR 2018 SC 4321

²⁵ AIR 1986 SC 180

²⁶ Indian Constitution, Article 39(a).

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basic livelihood necessities. The state has recognized prostitution as a profession, the sex workers registering under Section 3 of this enactment would get a means to livelihood.

[¶12.] It is submitted that in case of “**Sahyog Mahila Mandal and Anr. v. State of Gujarat and Ors.**”²⁷ “Prostitution is exercise of fundamental right of women to practice any profession or carry on any occupation, trade or business.” It is submitted that in the case of “**Shama bhai v. State of Uttar Pradesh**”²⁸, **Kajal Mukesh Singh and Ors. v. The State of Maharashtra**²⁹, where the court held that, under Article 19(1)(g), every person has normally got a Right to Practice any Profession or carry on any occupation, trade, or business of his choice. The work of a prostitute is a profession, occupation, or trade within the meaning of Article 19(1)(g) of the Constitution. The provisions of The Commercial Sex Workers (Protection and Regulation) Act, 2021 did not have the effect of stopping the profession or trade of a prostitute altogether.

[¶13.] It is submitted that, in test of reasonableness to Article 19(6)³⁰, The Supreme Court in the case of **Narendra Kumar v. Union of India**³¹, held that "In applying the test of reasonableness to restrict the profession, the court has to consider the question regarding the background of the facts and circumstances under which the order was made. In this regard, it is necessary to consider whether the restraint imposed by the law is excessive in the interests of the general public." The new legislation³² passed by the state has recognized and protected the Sex workers in the society.

[¶14.] It is further submitted that the Counsel on behalf of the Respondents contends that *the mere registration of sex worker does not necessarily violate the Right to Privacy if it is implemented in a way that respects human rights and privacy principles. At this juncture, it is pertinent to note that the Right to Privacy is not an absolute right and can be limited in certain circumstances, such as when it is necessary to protect the rights and freedoms of others or to advance a legitimate public interest. This means that the State may be justified in requiring sex workers to register to regulate the sex industry and protect public health, safety, and welfare.*

[¶15.] It is further submitted that any registration scheme must be designed and implemented in a way that respects the human rights of sex workers, including their Right to Privacy. This means that the collection, use, and storage of personal data must be limited to what is strictly necessary and

²⁷ (2004) 2 GLR 1764

²⁸ AIR 1959 All. 57

²⁹ Criminal W.P. No. 6065/2019

³⁰ Article 19 (6).

³¹ **Narendra Kumar v. Union of India**, AIR 1960 SC 430.

³² The INDICA COMMERCIAL SEX WORKERS (PROTECTION AND REGULATION) ACT, 2021.

should not be used for any discriminatory or punitive purposes. The information collected should be kept confidential and used only for the specific purposes of regulating the sex industry and protecting the rights and safety of sex workers. Furthermore, sex workers should be involved in the design and implementation of any registration scheme, and their informed consent should be obtained before their personal information is collected. They should be provided with information about how their data will be used and protected, and given the right to access, correct, or delete their information if needed. The registration process should also be designed in a way that minimizes the risk of stigmatization or discrimination against sex workers. In summary, while the registration of sex workers can potentially implicate the Right to Privacy, it may be justified if it is designed and implemented in a way that respects human rights and privacy principles, and is necessary to protect public health, safety, and welfare.

[¶16.] The Counsel on behalf of the Respondents respectfully submits that the contentions of the Petitioner are not at all maintainable either in fact or according to the law of the land. All the contentions raised by the petitioner before the Hon'ble Court are not substantial beyond doubt as such doesn't preserve any consideration as prayed by the petitioner, therefore liable to be Rejected.

ISSUE-2: WHETHER THE REQUIREMENT OF SPOUSAL CONSENT VIOLATES THE SANCTITY OF MARRIAGE AS ESPOUSED BY THE INDICAN SOCIETAL VALUES AND MORALITY?

[¶17.] The Counsel on behalf of the Respondents humbly submits that, the requirement of spousal consent does not violate sanctity of marriage. Certain legal and social matters, such as property transfers or adoption, is aimed at ensuring that decisions affecting the family unit which are made with the mutual agreement of both spouses. This can be seen to reinforce the value of marriage as a partnership between two equal individuals who share their lives together.

[¶18.] Rig Vedas refers the tradition of offering the present of slave girls to rishis by kings.³³ In Rig Vedic times there was a class of dancing girls.³⁴ It is pointing towards the existence of institution of prostitution in India during Vedic time. In Mahabharata there is a mention on apsaras named Urvashi, Menaca, Tilottama, Rambha and Ghritachee³⁵. The Devadasi system is that of the dedication of young girls to the service of God. The term devadasi means servant. Her duties

³³ Chandra, Moti, *The World of Courtesans*, Vikas Publishing House Pvt. Ltd. Delhi, 1973.

³⁴ Carey, W. H., *Good Old Days of Honorable John Company, R. Combay and Co. Calcutta, 1906*

³⁵ Geofferey May, *Prostitution Encyclopedia of Social Sciences (Vol. XI -XII)*

consist a combination of propriety, Ritual and Entertainment to assert positive fertility and prosperity. They are married to God or goddess.³⁶ The system which had initially started off as a purely religious practice soon come to be synonymous with prostitution.³⁷ During the Middle Ages, musicians and dancers known as tawaifs entertained Indica's nobility. This was a form of prostitution before it advanced to the point where prostitutes offered sexual services to the public. In the modern era, we call this prostitution.

[¶19.] The system though started in ancient India, has modern roots – natural disaster, poverty and illiteracy which make it stronger. They started earning through the prostitution as means of livelihood to overcome their poverty. These sectors of people are facing hardships throughout their life where they were not respected/recognized either by the law nor in the society. They are in a situation where not only their dignity is not respected; their fundamental needs for respect, reciprocity and freedom to be themselves are not accepted. They do not even have the time to develop an image of themselves because they are already classified as a sexual or commercial object either through hurtful words or violent acts. Health is a major concern of those women who are self-conscious of the risks of their occupation. Prostitutes were denied basic Fundamental Rights such as the Right to Live in Dignity, the Right to Work, and access to basic medical care. To reinforce these rights The Commercial Sex Workers (Protection and Regulation) Act, 2021 was enacted. This Act provides medical care and safety to sex workers and their families. The Act recognize prostitution as a profession which gives them social recognition.

[¶20.] The requirement of spousal consent under Section 3(vii) is made mandatory to safeguard the sanctity of marriage as one spouse should be aware of the other spouse's line of work. The spousal consent prevents other citizens (married) from making applications for registering under the Act which ultimately protects the sanctity of marriage as espoused by Indican societal values and morality.

[¶21.] The requirement of spousal consent was not new in Indican law. It already existed in adoption and in surrogacy legislation. In adoption³⁸ and surrogacy Acts the spousal consent is essential in order to respect the opinions of spouses and for the betterment of their family to live together. The spousal consent under sec 3(vii) of The Indican Commercial Sex Workers (Protection and Regulation) Act, 2021 was established to safeguard sacredness of the marriage which allow the

³⁶ Sinha, S. N., N. K. Basu, *History of Prostitution In India*, Cosmo Publications, Delhi, 1994

³⁷ Chakraborty Kakolee, *Women as Devadasis: Origin and Growth of The Devadasi Profession*, Deep and Deep Publication Pvt. Ltd., New Delhi, 2000.

³⁸ Sec 7 of Hindu Adoption and maintainance Act, 1956

couple to stay happy in their married life. So that there won't be any conflicts between them in the future as a result of one spouse's profession. The main object of the Act³⁹ is to safeguard the sanctity of marriage as well as the moral principles upheld by Indian society.

[¶22.] It is further submitted that prostitution is viewed as an act between two consenting individuals, where the State's involvement is to eradicate coercive prostitution. Prostitution is neither considered a crime nor a licensable activity, rather, it is recognized as an act between two adults. To prevent excessive exploitation and safeguard public health, the government can implement a limited number of preventative measures. Prostitutes in this culture have nearly the same rights as other residents and are not penalized for their trade. The object of The Commercial Sex Workers Act (Protection and Regulation) Act, 2021 is not to criminalize prostitution, but it is to criminalize the trafficking of women and girls for prostitution. In the case of **T. Jacob v. State of Kerala**⁴⁰ the court held that **“prostitution is no offence, but exploitation of the work is an offence”**.

[¶23.] It is submitted that in the case of **Navtej Singh Johar v. Union of India**⁴¹, the Supreme Court of India held that, ***“Social morality also changes from age to age. The law copes with life and accordingly change takes place. The morality that public perceives, the Constitution may not conceive of. The individual autonomy and also individual orientation cannot be atrophied unless the restriction is regarded as reasonable to yield to the morality of the Constitution.”*** In the present case, the Spousal Consent enshrined under The Commercial Sex Workers (Protection and Regulation), Act, 2021 does not violate the sanctity of marriage as espoused by the Indian Societal values and morals because these societal morals cannot prevail over the constitutional morals and the social moralities of India which are perceived by the public may not be conceived by the constitution.

[¶24.] It is submitted that according to the report by **International Journal of Law Management & Humanities**⁴², “We people move towards Modernization. Today many traditional communities are heading up in the world who opposes these emerging concepts of live-in relationships, same sex marriage and sexual autonomy. ***They found it against their religious concerns and social foundations. But it must be understood that the emotional bindings and relationships can never be pressed by power.*** Though live-in relationship is against societal morals the law has

³⁹ The Indian Commercial Sex Workers (Protection and Regulation) Act, 2021

⁴⁰ AIR 1971 Ker. 166

⁴¹ AIR 2018 SC 4321

⁴² International Journal of Law Management & Humanities. [ISSN 2581-5369] Volume 4 | Issue 2 2021 © 2021 International Journal of Law Management & Humanities.

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recognised live in relationship. The spousal consent under this Act may appear against the societal morals but the object of this provision is to protect the sanctity of marriage.

[¶25.] There have been repeated judicial pronouncements holding that Constitutional morality shall for all cases prevail over the societal morality and that Constitutional courts shall not be driven or guided by societal morality. It is submitted that, in the case of **Haji Ali Dargah Trust v. Dr. Noorjehan Safia Niaz and Ors**⁴³ the hon'ble court held that "the exclusion of women from the inner sanctum of the Haji Ali Dargah by the Dargah Trust violated not only their fundamental right to religious freedom but also their Right to Equality and non-discrimination under the Indian Constitution". And in holding that women were entitled to police protection, if needed, to exercise their Right to Equal access, the court placed the state firmly on the spot for effectively guaranteeing and enforcing the constitutional rights of individuals, even against their own communities. *As the court reinforced the rights of women by overruling the age-old customs, by saying constitutional rights are over any other societal values.* The same was observed in cases of **Indian Young Lawyers Association v. The State of Kerala**⁴⁴ famously known as *Sabarimala case*, **Animal Welfare Board of India v. A. Nagaraja & Ors**⁴⁵ famously known as *Jallikattu case*, **Naz Foundation v. Government of NCT of Delhi & Ors.**⁴⁶, the courts considered constitutional morality prevails over societal morality.

[¶26.] It is humbly submitted that if the sex workers are interested by themselves in working as a sex worker after their marriage or if they have done this work since before their marriage does not violate the sanctity of marriage. It would be more sin full if the spouse is performing this Act without the knowledge of the other spouse. Later if the spouse finds out about the involvement of the other spouse in this activity which would ultimately lead to adultery⁴⁷ and bigamy⁴⁸ then result to divorce and diminishes the sanctity of marriage.

[¶27.] It is submitted that while it may be argued that spousal consent could be seen as an infringement on individual autonomy, it can also be viewed to promote healthy communication and cooperation within a marriage. By requiring both partners to be involved in major decisions, it can help prevent one partner from dominating the decision-making process or making unilateral choices that could negatively impact the relationship.

⁴³ (2016) SCC OnLine SC 1199

⁴⁴ (2019) 11 SCC 1

⁴⁵ (2014) 7 SCC 547

⁴⁶ (2014) 1 SCC 1

⁴⁷ Section 10 in The Indian Divorce Act, 1869.

⁴⁸ Section 17 in Hindu marriage Act, 1955 and section 494 and 495 of Indian Penal Code, 1860.

[¶28.] The Counsel on behalf of the Respondents submits that the requirement of spousal consent does not violate the sanctity of marriage as espoused by the Indian societal values and morals. In fact, it can be seen to uphold the values of mutual respect and partnership within a marriage. In Indian culture, marriage is often seen as a sacred bond between two individuals, and the concept of mutual respect and support is highly valued. Spousal consent reinforces the significance of mutual respect and collaboration in the relationship. In this context, spousal consent can be seen to ensure that both partners are on the same page and that decisions are made jointly, with each partner's perspective and input taken into account which can help to build a stronger and more fulfilling partnership, which can ultimately benefit both individuals involved.

ISSUE-3: WHETHER THE INDIAN COMMERCIAL SEX WORKER (PROTECTION AND REGULATION) ACT, 2021 IS AGAINST THE PUBLIC HEALTH, SAFETY AND MORALITY AND IS LIABLE TO BE STRUCK DOWN?

[¶29.] The Counsel on behalf of the Respondents humbly submits that, *The Indian Commercial Sex Workers (Protection and Regulation) Act, 2021* is inherently not against public health, safety, and morality. Commercializing Sex work removes criminal penalties for certain incidents of buying and selling of sexual acts complied with relevant regulations. This Act⁴⁹ improves public health and safety while increasing economic stability for sex workers. Some countries, such as the Netherlands and New Zealand,⁵⁰ have legalized and regulated prostitution.

[¶30.] The sex workers enter sex industry for livelihood or for temporary survival for short-term revenue.⁵¹ Regardless of their reasons for engaging in sex work and the nature of their work, all people should be treated with respect and dignity. Sex work should be acknowledged as work and sex workers must be entitled to the Fundamental Right to work, to support themselves and their families. The Commercial Sex Workers Act, 2021 recognizes the commercial sex work as an occupation and means of livelihood to the sex workers.

[¶31.] In the case of *Christian Medical College Vellore Association v. Union Of India*⁵² and in

⁴⁹ The Indian Commercial Sex Workers (Protection and Regulation) Act, 2021.

⁵⁰ New Zealand Ministry of Justice (2003) Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act, available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-reviewcommittee/publications/plrc-report/documents/report.pdf>.

⁵¹ Devine et al. (2010) Pathways to sex-work in Nagaland, India: Implications for HIV prevention and community Mobilization, *AIDS Care* 22: 228 -237.

⁵² AIR 2020 SC 272.

Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh⁵³ the courts held that the state has a constitutional obligation to maintain and improve public health, as well as to provide health care and medical services. This Act⁵⁴ was enacted with a view to improve public health.

[¶32.] It is submitted that in some countries, registered sex workers are required to undergo regular health screenings for sexually transmitted infections, which can help to prevent the spread of disease. They may also have access to counseling and other support services. Commercializing sex work provides legitimate means of regulating the industry and protecting the health and safety of both workers and clients. Further, it can be beneficiary for sex workers by providing them with access to healthcare services, legal protection, and other benefits. By legalizing and regulating sex work, government can require sex workers to undergo regular health checkups to help prevent the spread of sexually transmitted infections. In this regard The Commercial Sex Workers (Protection and Regulation) Act, 2021 ensures and safeguards public health.

[¶33.] It is humbly submitted that in the case of **Budhadev Karmaskar v. State of West Bengal & Ors.**⁵⁵, the Supreme Court held that “*Sex workers are entitled to equal protection of law and police must refrain from interfering or taking any criminal action.*” **The Indica Commercial Sex Workers (Protection and Regulation) Act, 2021** ensure ***Safety*** to the sex workers. Where sex work is criminalized, police wield power over sex workers in the form of threats of arrest and public humiliation. They use this power to coerce, extort from, and physically abuse sex workers. In Central and Eastern Europe and Central Asia, a high proportion of sex workers have reported suffering sexual assault by police.⁵⁶ Sex workers are particularly susceptible to physical and sexual abuse in prisons, pretrial detention facilities, and police lockups, with dire health and human rights consequences.⁵⁷ Most sex workers don’t report violence because they fear that they may be arrested or punished in other ways, such as losing custody of their children, losing their lawful employment, or being stigmatized for their association with sex work.⁵⁸ Commercializing sex work solves all the problems of police abuse and misconduct, it can empower sex workers to

⁵³ AIR 2009 SC 2432

⁵⁴ The Indica Commercial Sex workers (Protection and Regulation) Act, 2021.

⁵⁵ (2011) 10 SCC 283

⁵⁶ Sex Workers’ Rights Advocacy Network (SWAN) (2009). Arrest the Violence: Human Rights Violations Against Sex Workers in Central and Eastern Europe and Central Asia, available at [http:// www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/human-rights-violations-200912](http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/human-rights-violations-200912).

⁵⁷ Shannon K and Csete J. Violence, condom negotiation and HIV/STI risk among sex workers. Journal of the American Medical Association 304(5):573-74.

⁵⁸ Bedford v. Canada, 2010 ONSC 4264.

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come forward to register complaints against police who act unlawfully.⁵⁹

[¶34.] It is humbly submitted that in many cases *Kalyan Sundaram and Ors. v. State by Inspector of Police law and order Palayamkottai*,⁶⁰ *Renu Bansal v. U.T. Chandigarh*⁶¹ the hon'ble courts observed that “*Prostitution leads to sexual exploitation or abuse of persons for commercial purposes*”. Due to lack of regularization of prostitution, it can create an environment where sex workers are more vulnerable to exploitation and abuse. But this Act⁶² help to combat human trafficking and other forms of exploitation in the sex industry by providing a way to identify and monitor those who are engaging in sex work. By registering the sex workers, authorities can ensure that they are of legal age, consenting to their work, and not being coerced or exploited.

[¶35.] It is submitted that *The Indica Commercial Sex workers (Protection and Regulation) Act, 2021* regulates and provide protection for those who engage in the sex trade. By legalizing prostitution, governments can undercut the black market for sex work and reduce the power of criminal organizations that often control the industry. This leads to lessen the human trafficking⁶³ and additionally decreases viciousness against them such as assault, murder, constrained sex and would enable sex workers to work in safer conditions, reducing the risk of violence and exploitation.⁶⁴ By acknowledging sex work as a legitimate profession, society can reduce the stigma and discrimination that sex workers often face. This can help to promote more positive attitudes towards sex workers and reduce the social exclusion and marginalization that they often experience. The new Act⁶⁵ ensure **Safety** to the sex workers.

[¶36.] It is humbly submitted that Prostitution is not immoral and is in fact morally permissible, as per *Seriol Morgan* said that “*the consent is necessary for the moral permissibility of a sexual act.*” sexual ethical theorists believe that consent is a necessary feature of sexual morality.⁶⁶ Prostitution, as such, is not coercive or immoral, so long as valid consent is obtained. Indeed, any sex act that occurs between freely, informed consenting adults is morally acceptable.⁶⁷ Prostitution has also been recommended to be decriminalized by the Aristotelian natural law

⁵⁹ New Zealand Ministry of Justice (2003). Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act. Available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-reviewcommittee/publications/plrc-report/documents/report.pdf>.

⁶⁰ AIR 1994 Mad. 340

⁶¹ AIR 2009 P&H 144

⁶² The Indican Commercial Sex Workers (Protection and Regulation) Act, 2021.

⁶³ United States Department of State, Trafficking in Persons Report (2010), available at <http://www.state.gov/g/tip/rls/tiprpt/2010/index.htm>.

⁶⁴ Csete J and Cohen J (2010). Health benefits of legal services for criminalized populations: The case of people who use drugs, sex workers and sexual and gender minorities. *Journal of Law, Medicine and Ethics*, 38: 816-828.

⁶⁵ The Indica Commercial Sex workers (Protection and Regulation) Act, 2021.

⁶⁶ Seriol Morgan, —Dark Desires, | *Ethical Theory and Moral Practice* 6 no.4 (2003): 377.

⁶⁷ Igor Primoratz, —Sexual Morality: Is Consent Enough? 201.

doctrines which signify that prostitution is not immoral and prostitutes should not be regarded as morally wrong.

[¶37.] It is humbly submitted that Prostitution is a matter of personal choice and consenting adults should be free to engage in sexual activity which is morally permissible. It should be seen as work, just like other forms of work in society. If any person enters prostitution with free will, then he/she should not be stopped by anybody. Lawrence v. Texas (2003)⁶⁸ the court held that, adults *should have the right to engage in consensual sexual conduct of their choice, including paid sex work*.

[¶38.] It is humbly submitted that **Article 43** of Indian Constitution guarantees employment for livelihood. But as it is a Directive principle of State Policy which is not enforceable by law. Most of the people in the country are facing unemployment due to illiteracy and poverty. As means of livelihood for bread and butter some of them choose prostitution as their profession.

[¶39.] According to **Article 19(1)(g)** every person has the Right to Practice any profession or carry on any occupation, trade, or business of his choice. Prostitution is a profession, occupation, or trade within the meaning of Article 19(1)(g) of the Constitution which was held in “Shama bhai v. State of Uttar Pradesh”⁶⁹ and “Sahyog Mahila Mandal and Anr. v. State of Gujarat and Ors.”⁷⁰ The State can't restrict any profession unless it's against public policy and public health where Prostitution as a profession is not against public policy and public health and is considered moral. In the case of State of Gujarat v. Mirzapur Moti Kureshi Kasab Jamat,⁷¹ the Supreme Court has held that the expression in the interest of ‘general public’ in Article 19(6) is of wide importance comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in **Part IV** of the Constitution.

[¶40.] It is submitted that Prostitution law (2002)⁷² of Germany, legalized prostitution in 2002, and *the country's highest court upheld the law in 2016, rejecting arguments that it violated the country's moral values*. With the above references It is humbly submitted that The Act⁷³ is moral.

[¶41.] It is submitted that; the term public order is described under Chapter XIV of Indian Penal Code 1860. public order is synonymous with public safety and tranquility, the definition of public

⁶⁸ 539 U.S. 558, 123 S. Ct. 2472 (2003).

⁶⁹ AIR 1959 All 57

⁷⁰ (2004) 2 GLR 1764

⁷¹ (2005) 8 SCC 534

⁷² "Forschungsauftrag, Forschungsfeld, Forschungsgegenstand und Methodik - 1 Basisinformationen zum Prostitutionsgesetz" Federal Ministry of Family Affairs, Senior Citizens, Women and Youth.

⁷³ The Indica Commercial Sex Workers (Protection and Regulation) Act, 2021.

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order is given in case of **Dr. Ram Manohar Lohia v. State of Bihar & Ors.**⁷⁴ “*it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.*” and in the case of **Brij Bhushan v. State of Delhi**⁷⁵ held that “*anything which affects public tranquility within the State, or the province will also affect public order and the State Legislature is therefore competent to frame laws on matters relating to public tranquility and public order.*” The Act⁷⁶ was passed with the intention of maintaining public order and safety; by regulating and protecting sex workers, it does not endanger these goals but instead makes society safer by rapidly reducing crimes against women. As evidenced by the sharp decline⁷⁷ in rape, kidnapping, and other horrible crimes against women, this Act⁷⁸ is clearly promoting public safety.

[¶42.] The Counsel on behalf of the Respondents humbly submits that, decriminalizing, or legalizing the sex industry would enable sex workers to work in safer conditions, reducing the risk of violence and exploitation. This could also lead to better access to health care, including STI testing and treatment.⁷⁹ Therefore, ***The Indica Commercial Sex Workers (Protection and Regulation) Act, 2021*** is inherently not against public health, safety, and morality and is not liable to struck down.

⁷⁴ AIR 1966 SC 740

⁷⁵ AIR 1950 SC 129

⁷⁶ The Indica Commercial Sex Workers (Protection and Regulation) Act, 2021.

⁷⁷ Fact sheet Para 3

⁷⁸ The Indica Commercial Sex Workers (Protection and Regulation) Act, 2021.

⁷⁹ UNAIDS Guidance Note on HIV and Sex Work (2009), at p 12, available at [http://data.unaids.org/pub/ Base Document/2009/jc1696_guidance_note_hiv_and_sexwork_en.pdf](http://data.unaids.org/pub/Base Document/2009/jc1696_guidance_note_hiv_and_sexwork_en.pdf).

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PRAYER

Wherefore in the light of the issues raised, arguments advanced, and authorities cited, it is humbly prayed that this hon'ble court may be pleased to:

1. That the Commercial Sex workers (Protection and Regulation) Act, 2021 is Constitutional and is not violative of Right to Privacy.
2. That the requirement of spousal consent under Section 3(vii) of The Indian Commercial Sex Workers (Protection and Regulation) Act, 2021 does not violate the sanctity of marriage as espoused by the Indian societal values and morality.
3. That The Indian Commercial Sex workers (Protection and Regulation) Act, 2021 is not liable to be struck down.

The Respondent humbly prays the Hon'ble court to *dismiss the petition* as it is not maintainable & uphold the validity of the impugned enactment namely the Commercial Sex Workers (Protection and Regulation) Act, 2021.

And pass any order, direction, or relief that this Hon'ble Court may deem fit in the interests of justice, equity, and good conscience.

AND FOR THIS ACT OF KINDNESS THE RESPONDENT SHALL DUTY BOUND EVER PRAY

COUNSELS FOR THE RESPONDENT