

## WOMEN: PROSTITUTION IN THE 21<sup>ST</sup> CENTURY'S INDIA

Rishabh Jain\* & Sanjum Bedi\*\*

### *Abstract*

*Gender-based violence is a phenomenon deeply rooted in gender inequality, and continues to be one of the most notable human rights violations within all societies. Gender-based violence is a violence directed against a person because of their gender. Women and men experience gender-based violence but the majority of victims are women and girls. Gender-based violence and violence against women are terms that are often used interchangeably as it has been widely acknowledged that most gender-based violence is inflicted on women and girls, by men.<sup>1</sup>*

*In India prostitution is legal in India but the other related activities such as soliciting, pimping and brothels are illegal. There are more than 20 million prostitutes in India if a Human Rights Watch report is to be believed — and as many as 35% of them enter at an age less than 18. Prostitution was once upon a time a theme of Indian literature and arts for centuries.*

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\* Student @ Amity Law School, Amity University Haryana (Gurugram)

\*\* Asst. Professor of Law @ Amity Law School, Amity University Haryana (Gurugram)

<sup>1</sup> GENDER SENSITIZATION MODULE, 'Gender Sensitization and Legal Awareness Programme in collaboration with Kendriya Vidyalaya Sangathan for Class 11<sup>th</sup> and 12<sup>th</sup> of Kendriya Vidyalayas', NATIONAL COMMISSION FOR WOMEN, NEW DELHI, September 2019, page 28. Available at: [http://ncw.nic.in/sites/default/files/Module-%20Gender%20Sensitization\\_0.pdf](http://ncw.nic.in/sites/default/files/Module-%20Gender%20Sensitization_0.pdf) (Accessed on: 01.09.2019)

## INTRODUCTION

The present world is changing dynamically, where the concept of rights and duties has achieved a new horizon. The psyche that all men are equal is disturbing as a concept because no two men can be equal, but one thing is forgotten here that men included women (all submissions hereinafter specifically distinguish man and woman *mutatis mutandis*). Therefore, in itself it is prejudiced when we consider the term 'women' inclusive in the term 'men'.

The development of human civilisation has been predominated by men and patriarchy, but eclectic concept of rights and duties of men and women, third gender and flora and fauna has gradually taken shape over the year which is influenced by the human psyche.

The submission of the phase of formation of human psyche unto the present scenario's mind-set of the society is based on my personal understanding and observation. Unfortunately, man has been seen as a provider, protector and procreator (three Ps)<sup>2</sup> of the rights and duties towards the family and the society, whereas woman is seen as a follower of these rights and duties who belong to the world of motherhood and wifehood, nurture and care, and to put her family's welfare before her own; be loving, compassionate, caring, nurturing, and sympathetic<sup>3</sup>.

## THE HISTORIC EVOLUTION OF THE HUMAN PSYCHE TOWARDS WOMEN

History suggests that ever since the beginning of the human civilisation into organised systems of political, cultural and social groups' men have moved out of houses to earn for the family and represent the family or a group on various platforms. The role of women has been seen on occasions where there is absence of man in the house and consequently the woman is bold enough to fight and speak for herself and the family, unfortunately the fight here is not against any enemy but it is with the allies defying the role of such women.

The point of question at this stage which must come in one's mind is that, what made this mind-set evolve since the onset of the society. The reason for formation of human psyche in such a way is generally not indicated by any research and study, whereas some development can be seen by differentiating the concepts of gender and sex. But the skewed answer to this

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<sup>2</sup> Ibid at page 12

<sup>3</sup> Ibid

question is that the society has evolved naturally in such a way. Unfortunately, the widely acknowledged theories of human existence also talks about such mind-set, it being the story of Adam and Eve or the concepts of Manusmriti where woman is considered inferior or rather dependent on man.

Scientifically, the western theory of evolution is based on biological genesis of man and woman through several stages of development, immediately preceding is the ape and chimpanzees, whereas “another view regarding the origin of man/woman is that Lord Brahma, the Creator of this universe, wished, “*EkohamBahushyama*” (I am One, let me be many)..... Thus, every human being is an incarnation of God; indeed, a constituent of the Total Consciousness. Swami Vivekananda argued unless each one is part of the whole and in continuous communication, how else can one transfer the thought to another?”<sup>4</sup> Therefore, it appears that the old concepts of human existence being it scientific or spiritual are even relevant today, but it is also true that the disparities in gender are framed by the humans for their self-development.

Another query which touches my mind, every time I think of a utopian society<sup>5</sup>, is that whether we have developed theories based on our prejudices that man is superior to woman, or we are blindly following the traditions of the past which have been established out of practice without the incidence of logic. But in both the cases the present world does not accept any of the dichotomies because the archaic doctrines are evading.

In the present world there is no logical existence of the fact that man is superior or even woman is superior. The stories of god and goddess are mainly premised on principle of acceptance. A person accepts what suits her/him the best, which may be based on reasoning or the teachings she/he has got since her/his childhood. The acceptance by majority seemingly becomes the acceptance of all or evolves as a common notion widely accepted by people, and if a minority or an individual differs from the opinion then based on the system of the society either the old theory is bifurcated and a new theory emanates, or the group or the individual is rested into the death for peace.

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<sup>4</sup> Marmar Mukhopadhyay, Total Quality Management in Education, June 2002, p. 19

<sup>5</sup> In 1516 Sir Thomas More wrote the first ‘Utopia’. He coined the word ‘utopia’ from the Greek ou-topos meaning ‘no place’ or ‘nowhere’. But this was a pun - the almost identical Greek word eu-topos means a good place. So at the very heart of the word is a vital question: can a perfect world ever be realised? Available at: <http://www.bl.uk/learning/histcitizen/21cc/utopia/utopia.html> (Accessed on: 25.09.2019)

The theory of acceptance is based on the concept of influence, which may be political, social, cultural, linguistic etc. People accept the notions with which they are most influenced and pass the similar point of view to future generations due to which ongoing future mind-sets are always prejudiced. For a mind to think and evolve in the constant newness, it shall not be influenced or prejudice, otherwise liberalism will never evolve or its development will slow down. Fetters to liberalism are not only based on old thinking and psychology, but impediments in accepting a new theory or principle is a blockade to liberal development and evolution of future.

In the recent past the transnational organisations have also played an important role of influencing the world. The Seneca Falls Convention, 1848 marked the beginning of seeking rights for women, especially voting rights in America. The Seneca Falls Convention is considered the official beginning of the women's movement suffrage, but it is important to understand that the goal of early women's rights movement was not limited to the demand for suffrage<sup>6</sup>, but a greater autonomy and respect for women in terms of equality and liberty.

Similarly, the condition of women in today's world is better than what the history suggests, but the accepted notions of history that women are weak, she is a feeble creation of god to produce children and obey men, her labour at the time of giving birth is her destiny of past ill deeds, limitations due to impurity after giving birth and during menstruation, and many such other notions act as an influence and prejudice over the development and evolution of the condition of women even at present. It appears to be logical that certain limitations on women were put in past due to lack of awareness, knowledge and resources to deal with problems related to her biology, but with the evolution unfortunately the mind-set has not grown logically.

Fortunately, the world is changing but the change is slow as more than awareness it is difficult to change the mind-set. People may pose to aid women outside their house but behave in same way inside the closed doors.

## **THE REAL PROBLEMS**

The bigger question is whether there is a solution to such malady. Unfortunately, at the back of their mind women also somehow feel the same that they are to obey the dictates of men

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<sup>6</sup> Dr Mamta Rao, *Law Relating to Women and Children* 5 (Eastern Book Company, 2018).

until those dictates are severely against them and only men can raise their voices. One big reason is lack of independence of women and their dependency on men.

Another important question which came to my mind, while reading one of the leading political party's manifesto for 2014 elections in India, is that whether security of women is more important than their empowerment. The manifesto suggested that there is a need for women's security as a precondition to women's empowerment. By prioritising security over empowerment of women we are signifying that women is weak and therefore, before women is empowered an environment conducive for her empowerment is important. Therefore, we are prejudiced that a woman is weak and she cannot be empowered unless and until the environment is safe enough, whereas the actual notion should be that if a woman is taught to be strong than she is empowered.

But what about the conditions of prostitutes or the third gender? Why people are afraid to associate themselves with such segments of the society? And still many want the pleasure of their company behind the closed doors. The reason of such analogy is the regular working of the profit making industry.

The basic concept of management suggests that a business cannot run for long if it incur losses, wherefore the prostitution business and the buying and selling of women at brothels is constantly working and increasing<sup>7</sup>. Legality of any business is based on the interference of the State, but it does not intervene unless there is a vested interest. But why do women and men get involved in such business, is a bigger question, is it due to lack of resources or the pleasure principle or their worsen condition of livelihood. Well the limelight of porn stars is considered good on screens but there still exist the taboo, and certainly the reel life is different from the real life. Whether the occupation of buying and selling sex is fair, just and reasonable, if it is done with free will and consent, is also a bigger question? Whether it really works on the pleasure principle or the libido as suggested by Sigmund Freud<sup>8</sup>? In any way it is not important to answer these questions but the better part is to search for solutions if these are problems created by the system. Unfortunately, men and women have become the victims of their own created evils.

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<sup>7</sup> Gaurav Jain v. Union of India, 1990 AIR 292

<sup>8</sup> Chapter 2 – Self and Personality, Psychology, Class 12, NCERT, 2019 edition.

## PROSTITUTION IN PRACTISE: DEVELOPMENTS IN INDIA SINCE INDEPENDENCE

During the framing of the Indian Constitution it was said in the Constituent Assembly that, “..... *It is quite true that it is perhaps impossible to eradicate from the face of the earth for good and for ever these three vices the use of liquor in one shape or other by some few people, the evil of gambling and the evil of prostitution: but it shall be the endeavour of every civilised government to prevent all these three cankers of human society, if it is their object that society should be healthy and happy and moral.....*”<sup>9</sup> Even the framers of the Indian constitution suggested that prostitution was an evil which “...*is a very old institution as old as the hills and it cannot be abolished. The roots of this institution lie deep in our human nature. The only thing that we can do is to regulate it...*”<sup>10</sup> Therefore, the Indian Constitution makers were not clear on how to deal with the problem of prostitution? It is believed that prostitution has existed in our country from time immemorial.

The Constitution of India does not directly deal with the problem, whereas it is true that not every problem can be mentioned in a Constitution, but certainly prostitution is big problem. Consequently, Article 23 of the Constitution of India deals with the prohibition of traffic in human beings and forced labour, but what if prostitution is out of wish and will? Can it be a trade or business within the meaning of Article 19 (1) (g)? Certainly such situations came before the State, and efforts were made but not to improve the condition rather to suppress the oppressed, if not in legality then in the practical working of the system.

It is true that the State had made efforts to aware the people, for instance, during the initial few years, especially in 1950 (beginning of a new Constitution for India), the Films Division of India produced short documentary films for compulsory screening before the start of any feature film<sup>11</sup>, although the exhibitors complained about such compulsory screening and certain taxation policies<sup>12</sup> but the effort was fair enough to spread awareness in a new country with a new Constitution. One such visual in the State produced short films include an

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<sup>9</sup> Shri B. G. Kher, CONSTITUENT ASSEMBLY OF INDIA, VOLUME VII, Wednesday, 24<sup>th</sup> November 1948.

<sup>10</sup> Shri Brajeshwar Prasad, CONSTITUENT ASSEMBLY OF INDIA, VOLUME IX, Saturday, 3<sup>rd</sup> September 1949.

<sup>11</sup> Roy, Beyond Belief, p.33.

<sup>12</sup> ‘The film industry strike’ in Indian Documentary, Vol. 1, No. 3, 1949, p. 4. See also Karanjia, B. K., ‘Some Reflections on An Editorial’, in Indian Documentary, Vol. 1, No. 4, 1949, pp. 4-5. Available at: <https://digital.lib.hkbu.edu.hk/documentary-film/india.php> (Accessed on: 05.11.2019)

expensively dressed young woman with eyes downcast, leaning against a pillar and the anglicized voice-over announced that the State had abolished trafficking in human beings<sup>13</sup>.

The Suppression of Immoral Traffic in Women and Girls Act, 1956 or popular as SITA (now known as '*the Immoral Traffic (Prevention) Act, 1956*' after the amendment by Act 44 of 1986) was challenged at its very birth, even before it was really born, by a petition of a twenty four year old Muslim woman, Husna Bai, who openly advocated for her profession of a prostitute by filing a writ petition under Article 226 of the Indian Constitution in the Allahabad High Court. Her petition sought focus of the country as the news agencies covered her story, the Ministry of Home Affairs was tensed on the fact that if the Act is declared unconstitutional and the social rights activists especially women, were troubled by the idea as to if the Constitution permit prostitution to a trade and business. Husna Bai's petition was beyond the belief of lay man as the very idea that 'prostitution can be a wish' is horrifying, and also shattered the argument that the prostitute was a victim coerced by men or economic conditions.

SITA was enacted in 1956 but came into force only on 1<sup>st</sup> May, 1958, many years after the commitment to end trafficking had been enshrined in the Constitution of India as a fundamental right, delay in acting on Article 23 reflected the political disinterest of the central government. The SITA is believed to have been implemented to meet India's international legal obligations under the New York convention for the suppression of immoral traffic<sup>14</sup>. Another important reason for the need of SITA which was also discussed during the Constituent Assembly Debates was a need to develop a unified system for the whole country. Before SITA, there were many municipal laws governing the prostitute and the prostitution, but they faced challenges by the prostitutes based on the working of the municipalities.

Husna Bai's petition has challenged the SITA mainly on two grounds; first is that she had no other source of livelihood other than prostitution and was unlikely to have marriage prospects, she contended that SITA would render her trade to be illegal which is unconstitutional from the prospect of Article 19 (1) (g) and will defeat the goal of welfare State as laid in the Constitution, and secondly, she challenged section 20 of SITA which gave

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<sup>13</sup> Rohit De, A People's Constitution: The Everyday Life of Law in the Indian Republic, p. 171.

<sup>14</sup> Statements of Objectives and Reasons, SITA, 1956.

power to the magistrate to remove any women or girl from the limits of his jurisdiction upon receiving information, which she contended was arbitrary.

Unfortunately for Husna Bai, Justice Jagdish Sahai opined in her favour, but her petition was dismissed on technical grounds within two weeks of filing, whereas even during those days it took five to six years for a civil petition to be decided. The reason for dismissal was that her petition was premature as SITA has not been applied on her, and the challenges could be entertained only after the issue had been forced on her—that is, she had been arrested or had found herself evicted from their homes. Thus, the oppressed was rested to face suppression and then seek for justice.

Even though her petition did not had any legal force and was only in the nature of an obiter dictum, it was referred as an important precedent in most of the cases<sup>15</sup> because it echoed the voice the community of prostitutes wanted. And in other cases of the High Court the decision was acknowledged and consequently Section 20 of SITA was held unconstitutional<sup>16</sup>.

Another prostitute, Begum Kalawat, challenged Section 20 of SITA in the Bombay High Court, wherein the Court held Section 20 as unconstitutional noting that, “one must remember that women do not choose their vocation because they like it. It has been recognised that in a large measure they are forced into this vocation by social conditions and most often against their will. One may not, therefore, judge these cases with any amount of harshness.”<sup>17</sup>

The Andhra Pradesh High Court adopted a divergent opinion<sup>18</sup> by upholding the constitutionality of Section 20 of SITA. The logic of Andhra High Court included two points; firstly the SITA has been passed in order to enforce Article 23 of the Constitution, and thus hold a superior presumption of constitutionality, and secondly the magistrate did not have unchecked discretionary and arbitrary powers under the Act and there is prescribed procedure which is to followed in all the cases.

The unsettled constitutionality of SITA was settled by the Supreme Court of India in case of *State of Uttar Pradesh v. Kaushaliya & Others*<sup>19</sup>. The Supreme Court upheld the validity of

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<sup>15</sup> *Supra* note 13, p. 203

<sup>16</sup> *Kaushalya v. State of Uttar Pradesh*, AIR 1954 All 71.

<sup>17</sup> *Begum Do Hussain Saheb Kalawat and Another v. State of Bombay*, 1963 (1) CrLJ 148

<sup>18</sup> *Vanga Seetharamamma v. Chitta Sambasiva Rao & Another*, AIR 1964 AP 400

<sup>19</sup> AIR 1964 SC 416



the Section 20 of SITA and clarified that powers provided to the magistrate were neither discretionary nor arbitrary. Chief Justice Koka Subbarao held that the reasonable-classification test was founded on the idea of an intelligible difference that had a rational nexus with the law's objective. The court distinguished between a prostitute living in a sparsely populated area and one living in a busy locality within easy reach of public institutions. Chief Justice Koka Subbarao explained:

*"Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralize the public morals, but, what is worse, to spread diseases not only affecting the present generation but also the future ones."*<sup>20</sup>

*"Even a depraved woman cannot be deprived of her rights except for good reasons."*<sup>21</sup>

Although the Supreme Court of India settled the legal preposition by upholding the SITA, but the Immoral Trafficking (Prevention) Act, 1956 has been implemented in a highly moralistic sense which has resulted in further victimization of trafficked women. The objective of the Act, i.e. the punishment of those involved in trafficking has not been met.<sup>22</sup>

In a study commissioned by the Government of India and UNICEF, in 1998, researchers found that 83% of sex workers came from regions with "low developmental indicators, limited economic opportunities and ineffective developmental interventions".<sup>23</sup>

In a recent *Gaurav Jain v. Union of India*,<sup>24</sup> the Supreme Court has said that women in the flesh trade are victims of adverse social-economic circumstances rather than offenders in the society. The children of prostitutes do have the right to equality, dignity, care, protection and rehabilitation so as to be a part of the mainstream of social life without any pre-stigma attached on them.

It is difficult to determine whether there is a need of a stronger ardent legislation or the requirement is to create mechanisms where the attitude or mind-set improves, in order to curb

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Nishant Anand, Women in India: The Problem of Missing Girl Child, p. 47.

<sup>23</sup> Available at: [https://www.ebc-india.com/lawyer/articles/2005\\_plw\\_1.html](https://www.ebc-india.com/lawyer/articles/2005_plw_1.html); (Accessed on:15.11.2019)

<sup>24</sup> (1997) 8 SCC 114; AIR 1997 SC 3021

prostitution. In *Dimple Singla v. Union of India*<sup>25</sup> the Delhi High Court expressed its concern that until the attitude changes, elimination of discrimination against women cannot be achieved.

The government established National Commission for Women on 31<sup>st</sup> January, 1992 under the National Commission for Women Act, 1990 to deal with issues regarding the female exploitation and disparities. The Commission has undertaken steps to raise the bar for women, but social system is too complex that negative motivation towards ill deeds grows at a faster rate before the preventive steps are taken.

The Mission statement of the National Commission for Women reads as: “To strive towards enabling women to achieve equality and equal participation in all spheres of life by securing her due rights and entitlements through suitable policy formulation, legislative measures, effective enforcement of laws, implementation of schemes/policies and devising strategies for solution of specific problems/situations arising out of discrimination and atrocities against women.”<sup>26</sup>

The Vision statement of the National Commission for Women reads as: “The Indian Woman, secure in her home and outside, fully empowered to access all her rights and entitlements, with opportunity to contribute equally in all walks of life.”<sup>27</sup>

## CONCLUSION: THE UPSETTING CONDITION OF WOMEN

It is incontrovertible that problems of unfair treatment and personal bias exist for every individual, even within the males. The substantive question is whether we have solution to curb ill deeds followed from time immemorial?

In ancient India education had a different meaning; it was based on the principles of morality and spirituality. If those were the golden days then what made the business of prostitution evolve at this pace. There is a phase of history which the scholars and publicists have not touched because the unrevealed history is better to guess than the written documents proving the reality. The reality is yet unknown, like why the women are considered impure during menstruation, whether there is some logic or a myth, due to lack of resources during those days, have evolved into a practice?

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<sup>25</sup> (2002) 2 SLJ 161

<sup>26</sup> Available at: <http://ncw.nic.in/mission-and-vision/vision> (Accessed on: 30.09.2019)

<sup>27</sup> *ibid*

The biggest reason, as mentioned earlier, is the passing of fettered mind-set to future generations without allowing them to think. Therefore, liberalism in physical sense may be evident because it is ensured by the Constitution but the cynical and parochial view towards any-thing is dangerous like it is said half knowledge is a dangerous thing, similarly predetermined and prejudiced mind fails to form and evolve in a novel manner.

Lately there have been questions rising with the growing importance of the mandate of legalizing prostitution in India. While that is certainly not a great solution for the given problems which require more of a paradigm shift in the mindset of people, but given the clandestine nature and no regulation of industry, it would certainly be a step towards damage control. Legalizing would pave way for licenses and registration, whereby workers would have their own identity, access to public facilities, and other services. A serious check on the spread of HIV/AIDS will help in controlling the other related activities which have associated with the prostitution etc.