

Marriage among Muslims is an agreement between two adults reflecting offer and acceptance before two witnesses. The ceremonial aspect is only optional. This offer and acceptance need not necessarily be before the "QAZI". For the reasons best known to the then rulers of India the concept of "QAZI" performing the marriage was introduced and enforced which has given a handle to most of the unscrupulous "QAZIS" to set up a cupboard for marriages irrespective of age of a Girl who may be 13 and 14 years virtually forced to accept a Saudi or a Gulf Shaik of 70 to 75 years. The certificate or a book of Marriage performed by a QAZI has neither religious nor legal sanctity because a Contract of Offer and Acceptance is an agreement and nothing more. The flourishing market opened by the touts under the patronage of Qazis attracted day in and day out sexually hungry Shaiks and other affluent members of Muslim Society to enter into unscrupulously arranged and aided freak marriages followed by disastrous consequences in the life of innocent Minor girls.

When the Registration of marriage before a Competent Authority irrespective of

Religion, region, caste and creed are made mandatory for all practical purpose the menace of child marriage which are freak and capricious will come under control. Nationality cannot and should not be controlled by individual's faith in a particular type of Marriage. To be religious is not a crime or an offence. Certainly not giving preference to Nationality over and above the religion is Anti-National, which is more heinous than crime and offence. It is to be noted that every one has got a right to get marriage performed according to their religion, custom and family convention. But the marriage to be recognized by the Nation as such, should come into operation only if it is Registered by Competent Authority. Hence after the usual ceremonial marriage according to individual's religion the Registration of the same for obtaining marriage Identity to approach various Authorities including Courts for any remedial measures cannot be treated as interference in individual's personal law. Opposing Registration of Marriage will reflect and speak upon individual's Anti-national outlook. The earlier it is made mandatory the better for achieving National outlook, which is presently limping.

VICTIMLESS CRIMES AND HUMAN TRAFFICKING

By

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Victimless crimes are of a special nature. The recent trend towards a de-criminalisation is pronounced in the present social structure. The class of activities to which all participants consent is not co-extensive with the class of activities whose effects never harm or victimise the participants. An activity is a victimless crime if it is prohibited by the criminal court and made subject to penalty or punishment. But at the same time involves the exchange

or transaction of goods and services among consenting adults who regard themselves as un-armed by the activity. Accordingly the participants would not willingly inform the authorities of their participation in the crime. Victimless crimes are also known as 'complaint less crimes' Bedau terms it as 'self-judged' harmlessness.¹

1. Edwin M. Schur and Hugo Adam Bedau, victimless crimes, p-6, 10, 68

In Victimless crimes no complaint would be lodged by the participant, because for some reason they regard the transaction concerned is harmless. As Sutherland an eminent criminologist pointed out: Laws have accumulated because the mores have been weak and inconsistent; and because the laws have not had the support of the mores they have been relatively ineffective as a means of control. When the mores are adequate, laws are unnecessary; when the mores are inadequate, the laws are ineffective.²

Victimless crimes are created when we attempt to ban through criminal legislation the exchange between willing partners of strongly desired goods or services. The "offence" in such a situation, then, consists of a consensual transaction-one person gives or sells another person something he or she wants. Abortion, the sale of illicit drugs, illegal gambling, the sale of pornography, prostitution and indeed virtually all proscribed sexual behaviour involving willing partners are major examples.

As *Richard Quinney* has perceptively noted in one sense all crimes must have victims: "Acts, in fact, are defined as criminal because someone or something is conceived of as a victim. A 'victimless' crime can only be one that is defined after the fact by an outside observer".

It is also observed that some of the victimless crime laws produce secondary crime. In other words, these laws create 'new criminals'; many of them might have been otherwise law abiding individuals. It is further argued that as victimless crime laws are more discretionary, they encourage corruption, misuse and exploitation and the entire criminal justice system is put into a stake and disrepute. Morris and Hawkins have gone even to the extent of asserting "when criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the

cost of neglecting its primary tasks. This unwarranted extension is expansive, ineffective, and criminogenic. The sociologists and criminologists have catalogued the victimless crimes in the rubric as abortion, homosexuality, human trafficking drug-addiction, private fighting, crimes of vice such as gambling, smoking, Marajuane, narcotics, fornication, loitering, public drunkenness, pornography and obscenity.³

One of the Heinous crimes among victimless crimes is commercial exploitation of women and children in human trafficking. It is of great contemporary relevance and of great national importance. It is a universal melody. It is not peculiar to any area or state. It is assuming gigantic preparations day by day. In fact, every civilized society is not beset with this problem today women excel men in many a front. It is heartening to note that women brought laurels to the country than men by participating in more numbers and by winning medals regardless of the fact that it is gold, silver or bronze in international arena. Notwithstanding the same, women are being exploited commercially which is indeed an act of shame.

Hindu mythology placed the woman in high pedestal and has given a pride of place. In our country by custom or by practice, woman is highly respected. Despite the same, this obnoxious melody of trafficking women and girl children is on the ascending line. History belies the famous saying of *William Shakespeare* in his great work 'Hamlet' - "Frailty, thy name is woman".

Constitutional Provisions:—Our Constitution *inter alia* provides certain guarantees. Article 14 provides for equality in general. Article 15 prohibits discrimination on the grounds of religious race, caste, sex or place of birth, or of any of them. Article 15(3) provides for special protective discrimination in favour of woman and child relieving them

2. Edwin M. Schur. Crimes without Victims P-3-7

3. Edwin M. Schur – Victimless crimes, P73, 111.

from the moribund of formal equality. It states that “nothing in this article shall prevent the State from making any special provision for women and children”. Article 16(1) covers equality of opportunity in matters of public employment. Article 21 guarantees right to life and liberty. Article 23 prohibits traffic in human beings and forced labour. Article 24 prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age.

Article 38 enjoins the State to secure and protect, as effectively as it may, a social order in which justice - social, economic and political, shall inform all the institutions of national life. It enjoins, by appropriate statutory or administrative actions, that the State should minimize the inequalities in status and provide facilities and opportunities to make equal results. Article 39 provides that the children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 46 directs the State to promote the educational and economic interests of the women and weaker sections of the people and that it shall protect them from social injustice and all forms of exploitation. Article 45 makes provision for free and compulsory education for children, which is now transformed as a fundamental right under Article 21-A to the children upto the age of 14 years. Article 45 also mandates that facilities and opportunities for higher educational avenues be provided to them. The social justice and economic empowerment are firmly held as fundamental rights of every citizen.

The object of Directive Principles is to embody the concept of a welfare State⁴. Although the initial view was that the Directive Principles do not confer enforceable rights and their alleged breach does not invalidate a

law, nor does it entitle a citizen to complain of its violation by the State so as to seek mandatory relief against the State, later, has been elevated and held by many a Judgment of the Apex Court that they would supplement fundamental rights in achieving the welfare State. It is obligatory on the part of the State to secure a social order for the promotion of welfare of the people and the State is obligated to follow certain principles of policy, notable among them and germane in the context, are clauses (e) and (f) of Article 39 which postulate that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Long prior to the advent of the Constitution, certain penal provisions have been incorporated in the Indian Penal Code to curb this menace of human trafficking such as Sections 366-A, 366-B, 372, and 373 dealing with procurement of minor girl, importation of girl from foreign country, selling of minor for purposes of prostitution *etc.*, and buying minor for purposes of prostitution *etc.*, respectively. After India had become independent, Parliament passed an enactment entitled ‘Suppression of Immoral Traffic in Women and Girls Act, 1956’ which was later renamed as Immoral Traffic (Prevention) Act, 1956. Insofar as the children are concerned, Juvenile Justice Act had been enacted which has been repealed and replaced by Juvenile Justice (Care and Protection of Children) Act, 2000.

At the International level several Universal Declarations and Covenants have also been passed to eradicate this universal melody. Notable among them are

4. *Vide-Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

1. International Convention for the Suppression of the Traffic in Women and Children, 1921;
 2. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children,
 3. Child Prostitution and Child Pornography;
 4. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention on Transnational Organized Crime (2000);
 5. Unohchr Recommended Principles and Guidelines on Human Rights and Human Trafficking;
 6. International Convention on Civil and Political Rights (1966);
 7. Worst Forms of Child Labour Convention, 1999;
 8. Convention on the Elimination of all Forms of Discrimination against Women (1979) (CEDAW).
- organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations and associations *etc.*, the main objects of the Advisory Committee being to make suggestions of:
- (a) the measures to be taken in eradicating the child prostitution, and
 - (b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.
- (3) All the State Governments and the Governments of Union territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.
- (4) The Union Government should set up a committee of its own in the line, we have suggested under direction No.(2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation *etc. etc.* of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

Judicial Response:—In *Vishal Jeet v. Union of India*⁵ the Apex Court after bestowing its deep and anxious consideration on this matter felt that it would be appropriate to make the following directions:

(1) All the State Governments and the Governments of Union territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.

(2) The State Governments and the Governments of Union territories should set up a separate Advisory Committee within their respective zones consisting of the Secretary of the Social Welfare Department or Board, the Secretary of the Law Department, Sociologists, Criminologists, members of the women's

(5) The Central Government and the Governments of States and Union territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

(6) The Advisory Committee can also go deep into Devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the government could do in that regard.

(7) The copies of the affidavits and the list containing the names of 9 girls are directed

5. AIR 1990 SC 1412

to be forwarded to the Commissioner of Police, Delhi for necessary action.

In *Gaurav Jain v. Union of India and others*,⁶ the Apex Court held that the traffic in human beings includes devdasis also.

In *Gaurav Jain v. Union of India and Others*⁷ (second case) the Apex Court dealt extensively the melody of human trafficking with reference to various constitutional provisions, international covenants and universal declarations. While referring to the reports of *V.C. Mahajan*, Advocate, it evolved certain guidelines. The Supreme Court further held that children of prostitutes have right to equality of opportunity, dignity, care, protection and rehabilitation so as to be part of main stream of social life without any previous stigma attached to them. The Apex Court further held that the children of prostitutes including prostitutes should be treated as neglected juveniles and they be removed to juvenile homes for a short stay to relieve them from the trauma they may have suffered and there after they should be rehabilitated in an appropriate manner. It was further held that it is the State's mandatory obligation to establish juvenile homes and to constitute Juvenile Welfare Board.

In *Madhu Kishwar v. State of Bihar*⁸ the Apex Court considered the provisions of Vienna Convention on the Elimination of All forms of Discrimination Against Women, 1979 (CEDAW) and held the same to be the integral scheme of fundamental rights and directive principles. Article 2(e) of CEDAW enjoins the State Parties to breathe life into dry bones of the Constitution, International Conventions and Protection of Human Rights Act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights. Article 2(f) read with Articles

3, 14 and 15 of the CEDAW embodies concomitant right to development as an integral scheme of the Indian Constitution and the Human Rights Act. Justice *Bhagwati* in *Lakshmi Kant Pandey v. Union of India*⁹ while emphasizing the importance of children, has expressed his view thus:

“It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a ‘supremely important national asset’ and the future well-being of the national depends on how its children grow and develop.”

Conclusion :—In spite of various enactments and conventions on the subject of Human Trafficking no desirable results could be achieved. There has been a failure on the part of the state to evolve a policy in time with the constitutional objectives and directions. The various suggestions made by the Apex court in *Vishal Jeet* case are germane and should be implemented in all earnestness. Ours is a welfare state. The preamble is an integral part of the constitution. It pledges to secure socio-economic justice to all its citizens with stated liberties, ‘equality of status and of opportunity’, ‘assuring ‘fraternity’ and ‘dignity’ of the individual in a united and integrated Bharat. Undoubtedly the fallen women too are part of our citizenry. Although prostitution is not an unknown phenomenon in the society and is of ancient origin, its manifestation in various forms with varied degrees is unfounded on so-called social sanctions. The victims of the trap are always the poor, illiterate and ignorant sections of the society. They too have the basic human rights. And every effort should be made by one and all to eliminate the victimless crime of human trafficking in India.

6. AIR 1990 SC 292

7. AIR 1997 SC 3021

8. (1996) 5 SCC 125

9. (1984) 2 SCC 244