

## TRAFFICKING INTO PROSTITUTION IN INDIA AND THE INDIAN JUDICIARY

KUMAR REGMI\*

### *I. Introduction*

India, one of the largest democracies in the world, has constitutionally prohibited traffic in human beings and has enshrined the right to be free from exploitation as a fundamental right of every person.<sup>1</sup> India also was one of the earliest parties to the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 1949,<sup>2</sup> and it claims to have implemented this treaty within its domestic legal system through the Suppression of Immoral Traffic in Women and Girls Act (hereinafter “SITA”) of 1956,<sup>3</sup> subsequently amended and renamed the Immoral

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\* Advocate, Supreme Court, Nepal; Adjunct Faculty Member, Kathmandu School of Law, Kathmandu, Nepal; B.L. (Nepal), LL.M. (Pune, India), LL.M. (Toronto). I would like to thank Professor Rebecca J. Cook, University of Toronto Faculty of Law, for her encouragement and support in completing this article as well as the National Law School of India University in Bangalore for providing me all of the facilities to undertake the research for this paper. I would also like to thank Narayan Sharma, LL.M. student of the National Law School of India University, and Sonali Regmi, my wife and colleague, for their invaluable input.

<sup>1</sup> INDIA CONST. art. 23.

<sup>2</sup> Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271, G.A. Res. 317 (IV), (entered into force July 25, 1951) [hereinafter Trafficking Convention]. India acceded to the Trafficking Convention on January 9, 1953, *cf.* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterVII/treaty11.asp> (last visited Mar. 25, 2006). On December 12, 2002, India signed, but it has not yet ratified the November 15, 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), *cf.* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty14.asp> (last visited Mar. 25, 2006).

<sup>3</sup> The Suppression of Immoral Traffic in Women and Girls Act, 1956, No. 104, Acts of Parliament, 1956, <http://www.helpline.law.com/bareact/index.php?dsp=immoral-traffic> (last visited Feb. 21, 2006)[hereinafter SITA].

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Traffic (Prevention) Act (hereinafter "ITPA") of 1986.<sup>4</sup> Still, it is widely reported that in India thousands of girls and women are trafficked every year for the purpose of commercial sexual exploitation, and they are forced to work and live in conditions of slavery.<sup>5</sup>

Most of these victims, some as young as 10 to 14 years old,<sup>6</sup> are from segments of society that are highly marginalized by caste and tribal discrimination, as well as socio-economic deprivation. Other victims are trafficked from neighboring countries, including Nepal<sup>7</sup> and Bangladesh.<sup>8</sup> The rapidly growing number of these victims living in brothels in India reflects rampant violations of domestic laws as well as India's commitments to international human rights treaties.

The Indian Supreme Court, known throughout the world for its judicial activism,<sup>9</sup> could address this problem more effectively by

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<sup>4</sup> The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44, Acts of Parliament, 1986 (now referred to as the shortform title "The Immoral Traffic (Prevention) Act"), <http://www.helplineaw.com/bareact/index.php?dsp=immoral-traffic> (last visited Feb. 21, 2006) [hereinafter ITPA].

<sup>5</sup> See CRS Report 98-649 C, *Trafficking in Women and Children: The U.S. and International Response*, 5, by Francis T. Miko and Grace Park (updated March 18, 2002), available at <http://fpc.state.gov/documents/organization/9107.pdf> [hereinafter *CRS Report on Trafficking*]; see also HUMAN RIGHTS WATCH, *THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS: NEPALI WOMEN AND GIRLS TRAFFICKED TO INDIA* (1995), [http://www.hrw.org/about/projects/womrep/General-138.htm#P2099\\_600041](http://www.hrw.org/about/projects/womrep/General-138.htm#P2099_600041) (last visited Feb. 18, 2006) [hereinafter *GLOBAL REPORT*].

<sup>6</sup> See Jubilee Action, *Child Prostitution in India*, May 31, 2002, available at <http://www.jubileeaction.co.uk/reports/CHILD%20PROSTITUTION%20IN%20INDIA.pdf> [hereinafter *Child Prostitution*]; see also Preda Foundation, *Children as Sex Workers in India*, Nov. 10, 1998, <http://www.preda.org/research/ecpat99051.htm> (last visited Feb. 18, 2006) [hereinafter *Child Sex Workers*].

<sup>7</sup> See HUMAN RIGHTS WATCH/ASIA, *RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN IN INDIA'S BROTHELS 1* (1995) available at <http://hrw.org/reports/pdfs/c/crd/india957.pdf> [hereinafter *TRAFFICKING OF NEPALI GIRLS*].

<sup>8</sup> See *CRS Report on Trafficking*, *supra* note 5, at 5.

<sup>9</sup> *Cf.* The Hon. Justice Michael Kirby, AC CMG, The Bar Ass'n of India, Australia-India Council, Bar Ass'n of India Lecture at the New Delhi Hilton Hotel, *Judicial Activism*, Jan. 6, 1997, [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_indialt.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_indialt.htm) (last visited Mar. 25, 2006) [hereinafter *Judicial*].

adopting a less biased attitude than it has shown to date. It could play a pivotal role in preventing this large-scale atrocity, as it could develop helpful solutions to the problem by interpreting international and domestic laws objectively and applying them accordingly.

This paper argues that the legally untenable and insensitive approach of the Indian Supreme Court has contributed to the marginalization of the problem of trafficking in women and girls. The Court's prejudicial attitude toward the victims of prostitution, and the discriminatory interpretation and application of existing laws needs to be changed. More objectivity in the Supreme Court's approach will likely bring us closer to the ideal of justice and the protection of the basic human rights of the victims.

## *II. Trafficking into Prostitution: A Contemporary Form of Slavery*

The inhumane buying and selling of women and girls into prostitution, their complete subordination by the perpetrators, and the subsequent physical and mental violence to which they are subjected constitute slavery or, at the very least, slavery-like practices. "[S]lavery occurs when one human being effectively 'owns' another, so the former person can exploit the latter with impunity."<sup>10</sup> In the same vein, servitude, a broader term than slavery, refers to other forms of egregious economic exploitation or dominance exercised by one person over another or slavery-like practices.<sup>11</sup> The buying and selling of women and girls into brothels in India,<sup>12</sup> and their forced

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*Activism*]; see generally FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH (S.K. Verma & Kusum eds., 2003).

<sup>10</sup> UNIVERSITY FOR PEACE, HUMAN RIGHTS REFERENCE HANDBOOK 1, 59 (2003), available at [www.africa.upeace.org/CDW/kampala/CDW\\_CD/Publications/HRReference%20Handbook.pdf](http://www.africa.upeace.org/CDW/kampala/CDW_CD/Publications/HRReference%20Handbook.pdf).

<sup>11</sup> *Id.* at 60.

<sup>12</sup> See TRAFFICKING OF NEPALI GIRLS, *supra* note 7, at 30. It is reported that brothel owners in India operate their sex trade with the illegal claim that they have bought girls by paying money between Rs. 15,000 to Rs. 50,000 (US\$ 500-1,666) to traffickers and so they have a right to use them in sex market to extract that money with interest and profit for their investment. Until that is achieved, girls are forced into prostitution for many years, during that time many are sold from one brothel to another according to their efficiency, nature of compliance, and beauty as these are the fundamental fetching grounds in the sex market.

confinement under inhuman working conditions, characterized by indiscriminate sexual exploitation by the traffickers, brothel owners, police and, pimps has been reported by Human Rights Watch<sup>13</sup> and other non-governmental organizations. However, “[c]ontemporary forms of female slavery do not exist within a neat international legal framework,” therefore it is possible that these conditions could satisfy the internationally agreed-upon definition of slavery or slavery-like practices.<sup>14</sup>

The lives of these trafficked victims are completely dominated by the brothel owners that they cannot refuse to have sexual intercourse with anyone, even if they know that the customer before them is chronically ill with an infectious disease.<sup>15</sup> Consequently, hundreds of women and girls enslaved in this manner are inflicted with various sexually transmitted diseases (STDs), including HIV/AIDS.<sup>16</sup> It is reported that these victims are kept in brothels without adequate food and minimal medicine.<sup>17</sup> Many Nepali girls who have returned from brothels in India have revealed that they were given only a single meal from the brothel owners and were forced to rely on tips from customers as their only means of obtaining a second meal.<sup>18</sup> These Nepali women and girls were required to satisfy 20-25 customers a day.<sup>19</sup> It was also reported that in some brothels the work day would start at 8 a.m. and continue up to 2 a.m. the following day, with a victim’s schedule varying according to customer demand.<sup>20</sup> These conditions are characteristic of an egregious form of slavery, in which the owner controls the life and fate of the enslaved woman. These reports demonstrate the various forms of exploitation directly violating the victims’ right to be free of slavery and servitude, a core human rights norm cherished

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<sup>13</sup> *Id.*

<sup>14</sup> See generally Anne Gallagher, *Contemporary Forms of Female Slavery*, in 2 WOMEN’S INTERNATIONAL HUMAN RIGHTS: A REFERENCE GUIDE 487, 500 (Kelly D. Askin & Dorean M. Koenig eds., 2000) [hereinafter *Contemporary Slavery*].

<sup>15</sup> See TRAFFICKING OF NEPALI GIRLS, *supra* note 7, at 51, 81.

<sup>16</sup> *Id.* at 80.

<sup>17</sup> *Id.* at 44-45, 48.

<sup>18</sup> *Id.* at 50-51.

<sup>19</sup> *Id.* at 42, 46, 48.

<sup>20</sup> *Id.* at 51-52.

by most of the world community.<sup>21</sup> Literally hundreds of thousands of women, mostly from developing countries, are tricked, sold, coerced or otherwise procured into a situation of prostitution from which they cannot escape and therefore are victims of contemporary forms of slavery.<sup>22</sup>

### *III. Human Trafficking and International Law*

Any and every form of contemporary female slavery is prohibited by Article 4 of the Universal Declaration of Human Rights, which says that “[n]o one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms.”<sup>23</sup> Additionally, Article 4(2) of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) declares the right to be free from slavery under Article 8 to be a non-derogable right.<sup>24</sup> It is a right that has acquired the status of *jus cogens* under customary international law.<sup>25</sup> ICCPR Article 8(1) and (2) respectively, states that “[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited,” and that “[n]o one shall be held in servitude.”<sup>26</sup> In its recent General Comment, the Human Rights Committee has addressed both trafficking in women and children and forced prostitution under Article 8 of the ICCPR and has asked states parties to furnish information regarding the measures being

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<sup>21</sup> See Trafficking Convention, *supra* note 2.

<sup>22</sup> See *Contemporary Slavery*, *supra* note 14, at 497; see also NGO: IMADR Consultation with UN/IGOs, *Trafficking and the Global Sex Industry: Need for Human Rights Framework*, at 9, June 21-22, 1999 available at <http://www.imadr.org/project/petw/seminarPETW.pdf>.

<sup>23</sup> Universal Declaration of Human Rights, art. 4, GA. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

<sup>24</sup> International Covenant on Civil and Political Rights, art. 4, § 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. India acceded to this Covenant on April 10, 1979, *cf.* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> (last visited Mar. 25, 2006).

<sup>25</sup> See 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmts. e and n (1987); Randall H. Cook, *Dynamic Content: The Strategic Contingency of International Law*, 14 DUKE J. COMP. & INT'L L. 89, 97-98 (2003).

<sup>26</sup> ICCPR, *supra* note 24, art. 8, §§ 1-2.

taken to eliminate these practices, both within and across borders.<sup>27</sup> Human trafficking has been addressed more thoroughly and specifically in international law in the Trafficking Convention.<sup>28</sup>

#### *IV. Indian National Law*

##### *A. The Constitution of India*

The Indian Constitution prohibits trafficking in persons and guarantees many of the internationally recognized human rights norms,<sup>29</sup> among them: the right to life and personal liberty,<sup>30</sup> the right to equality,<sup>31</sup> the right to freedom,<sup>32</sup> and the right to constitutional remedies.<sup>33</sup> These rights figure prominently in judicial decisions and academic discourse on the Indian Constitution.<sup>34</sup>

The right to be free from exploitation is also guaranteed as one of the fundamental rights of any person living in India.<sup>35</sup> Article 23(1) declares that “[t]raffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention

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<sup>27</sup> See U.N. Human Rights Committee [HRC], *Equality of Rights Between Men and Women (article 3)*, General Comment 28, U.N. Doc. CCPR/C/32/REV.1/ADD.10 (Mar. 29, 2000), <http://www.unhcr.ch/tbs/doc.nsf/0/13b02776122d4838802568b900360e80?Opendocument> (last visited Feb. 19, 2006).

<sup>28</sup> Trafficking Convention, *supra* note 2.

<sup>29</sup> INDIA CONST. art. 23 (Part III Fundamental Rights).

<sup>30</sup> *Id.* art. 21.

<sup>31</sup> *Id.* art. 14, 15.

<sup>32</sup> *Id.* art. 19.

<sup>33</sup> *Id.* art. 226. This article also provides separate power to the High Courts of India to issue to any person or authority, within its territorial jurisdiction, orders or writs for the enforcement of any of the rights conferred by the Part III of the Constitution and for any other purpose.

<sup>34</sup> See generally Vijayashri Sripati, *Freedom From Torture and Cruel, Inhuman and Degrading Treatment or Punishment: The Role of the Supreme Court of India*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, MYTH OR REALITY 107 (Mark Gibney et al. eds., 1999); Vijayashri Sripati, *Human Rights in Indian Fifty Years After Independence*, 26 DENV. J. INT’L L. & POL’Y 93 (1997); Robert B. Charles, *American Influence on the Indian Constitution: Focus on Equal Protection of the Laws*, 17 COLUM. HUM. RTS. L. REV. 189 (1986).

<sup>35</sup> INDIA CONST. art. 23.

of this provision shall be an offence punishable in accordance with law.”<sup>36</sup>

### *B. The Indian Penal Code*

When the Constitution of India was adopted in 1950, it incorporated many parts of the Indian Penal Code, (hereinafter “IPC”), which dated back to 1860. Interestingly enough, the issue of trafficking in persons was addressed in the IPC, which prohibited trafficking of women and girls into coercive prostitution in India and prescribed harsh punishment for offenders.<sup>37</sup> The IPC states that anyone who buys or sells or obtains possession of anyone under the age of 18 years for “the purpose of prostitution or illicit intercourse . . .” or for an “unlawful or immoral purpose . . .” or “knowing it to be likely that such person will at any age be employed or used for any such purpose . . .” is subject to imprisonment for up to ten years.<sup>38</sup> The IPC recognizes cross-border trafficking into prostitution and provides that

whoever imports into India from any country outside India any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.<sup>39</sup>

The provision pertaining to rape under the IPC applies also to rape of a brothel inmate. The IPC defines rape as the act of sexual intercourse with a woman when the act is against her will, without her permission, or with her consent, when her consent has been obtained by threats or fear of death or injury, or with her consent when she is incapable of understanding the consequence of her consent, or with or without her consent when she is below sixteen

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<sup>36</sup> *Id.* art. 23(1).

<sup>37</sup> INDIA PEN. CODE, 1860, § 366B.

<sup>38</sup> *Id.* §§ 372, 373.

<sup>39</sup> *Id.* § 366B.

years of age.<sup>40</sup> Under the IPC, the minimum term of imprisonment for rape is seven years.<sup>41</sup> These laws are directly applicable to brothel owners, brothel staff, and customers when they engage in sexual intercourse with children and minors, with or without their consent, or with those women who are kept in brothels under force or threat.

*C. Domestic Legislation Subsequent to the Trafficking Convention:  
SITA (1956) and ITPA (1986)*

To give effect to these constitutional provisions and to provide coherence with the Trafficking Convention,<sup>42</sup> India enacted SITA,<sup>43</sup> which was later amended and renamed ITPA.<sup>44</sup> This is an interesting and important law because according to its preamble, the sole purpose of the ITPA is to give effect to the Trafficking Convention.<sup>45</sup> The preamble, as the gateway to the legislation, refers to the law as “[a]n Act to provide in pursuance of the International Convention signed at New York on the 9<sup>th</sup> day of May, 1950, for the prevention of immoral traffic” in women and girls, enacted by Parliament in Seventh Year of the Republic of India.<sup>46</sup> An Act with such an exclusive purpose, to give effect to an international convention by enabling legislation at the domestic level, is not found in the case of any other human rights concern in India. However, contrary to the Trafficking Convention, many provisions of SITA discriminated against victims of prostitution and punished the victims instead of perpetrators. It is the perpetrators who are the instigators and cause of the offenses, if any, committed by the victims.

Under the Trafficking Convention, victims of prostitution cannot be punished under any circumstances,<sup>47</sup> and Article 1 contains

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<sup>40</sup> *Id.* § 375.

<sup>41</sup> *Id.* 376(1)(2).

<sup>42</sup> *See generally* Trafficking Convention, *supra* note 2.

<sup>43</sup> SITA, *supra* note 3.

<sup>44</sup> ITPA, *supra* note 4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See generally* Trafficking Convention, *supra* note 2.

provisions “to punish any person who, to gratify the passions of another: (1) procures, entices or leads away, for purpose of prostitution, another person, even with the consent of that person; (2) [e]xploits the prostitution of another person, even with consent of that person.”<sup>48</sup> Under Article 2 of the Convention, the Parties to the Convention further “agree to punish any person who: (1) [k]eeps or manages, or knowingly finances or takes part in the financing of a brothel; (2) [k]nowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.”<sup>49</sup>

These are the only offenses enumerated under the Convention, and none of these provisions suggests that a victim of prostitution or a “prostitute” can be an offender. The clear intent is to punish those who are involved in procuring, enticing or trafficking anyone for the purpose of prostitution, or who are exploiting the prostitution of another person, even with the consent of the victim. The provision of consent mentioned can be construed in a way that denies traffickers or other perpetrators involved in business of prostitution the means to be absolved from culpability by clothing their crimes in the garb of victim consent. The treaty aims to discourage every form of sexual exploitation, thus prohibiting trafficking of persons into prostitution; however it does not prohibit prostitution or commercial sex work by individuals by their own choice.

In India, neither SITA, nor ITPA, prohibits prostitution, nor does either aim at the abolition of prostitution or make it *per se* a criminal offense.<sup>50</sup> However, many provisions of SITA discriminate against the victims and punish them, in direct contravention of the Trafficking Convention.<sup>51</sup> The following sentences detail the main features of SITA: Section 2(f) defined prostitution as “the act of a female who offered her body for promiscuous sexual intercourse for hire . . . .”<sup>52</sup> Under this definition prostitution can only be carried on by women or girls and not by men or boys. It provided punishment

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<sup>48</sup> *Id.* art. 1.

<sup>49</sup> *Id.* art. 2.

<sup>50</sup> TRAFFICKING OF NEPALI GIRLS, *supra* note 7, at 90.

<sup>51</sup> *Id.*

<sup>52</sup> SITA, *supra* note 3, § 2(f).

by imprisonment of up to three months for any woman or girl engaging in prostitution within a distance of two hundred yards of any public places.<sup>53</sup> There was a discriminatory sentencing provision under this law in which a woman arrested for soliciting could face imprisonment of up to one year, whereas for the same offense, a pimp could be imprisoned only up to three months.<sup>54</sup>

The biggest drawback of SITA was that it addressed only street prostitution and prostitution behind closed doors was left alone. No norms were prescribed for the protection of the rights of the inmates, an omission that had the effect of promoting the establishment of thousands of exploitative brothels in India.<sup>55</sup> Also, very minimal punishments were prescribed for the pimps, traffickers, and brothel owners.<sup>56</sup> Since closed-door prostitution was allowed without prescribing legal safeguards or imposing responsibility for the protection of inmates, thousands of girls were enslaved under the garb of their consent.<sup>57</sup>

Another provision which created controversy in the early 1960's relates to the removal of prostitutes from any place.<sup>58</sup> Under Section 20 of SITA, sweeping power was given to a magistrate to remove any woman/girl believed to be a prostitute from her home or any other place in the jurisdiction.<sup>59</sup> The woman could be removed to an unspecified destination, and the magistrate could prohibit her from reentering his jurisdiction.<sup>60</sup> This provision was challenged before various High Courts, and subsequently the matter reached the Supreme Court on the grounds that it violated Article 14 and Article 19(1)(d) and (e) of the Indian Constitution.

Article 14 of the Constitution of India guarantees the right to equality and ensures that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the

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<sup>53</sup> *Id.* art. 7(1).

<sup>54</sup> *Id.* art. 8(b); *TRAFFICKING OF NEPALI GIRLS*, *supra* note 7, at 90 n. 6..

<sup>55</sup> *TRAFFICKING OF NEPALI GIRLS*, *supra* note 7, at 90.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* § 20.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

territory of India.”<sup>61</sup> Article 19 protects the right to freedom; under 19(1)(d) and (e) “[a]ll citizens shall have the right . . . to move freely throughout the territory of India . . .” and “to reside and settle in any part of the territory of India . . .”<sup>62</sup> The following section discusses the Indian Cases that have challenged the provisions of SITA that violate the Indian Constitution as discussed above.

### *I. Cases Arising from SITA*

#### *a) Kaushailiya v. State*

In a 1963 case, *Kaushailiya v. State*,<sup>63</sup> the High Court had struck down Section 20 of SITA on the grounds that it infringed fundamental rights guaranteed by the Constitution.<sup>64</sup> Although the High Court did not look into the fundamental issues of prostitution or the various interests involved in it, Justice W. Broome declared that if a profession or trade that is an “inherently immoral activity like prostitution,” then “it is open to the state to impose a total ban; and no one can claim any fundamental right to carry on such an activity.”<sup>65</sup> Furthermore, Justice Broome suggested that Section 20 is not aimed directly at the business of prostitution, but instead seeks to control the movements and residence of prostitutes, and he added that:

[a] woman proceeded against under this section is not given the option of ceasing to carry on prostitution if she wishes to be allowed to reside within the magistrate’s jurisdiction. If the magistrate finds that she has worked as a prostitute in the past, he can expel her from the area controlled by him without further ado. Moreover, she may not only be removed from one town to another, but may be expelled from the whole district.<sup>66</sup>

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<sup>61</sup> INDIA CONST. art. 14.

<sup>62</sup> *Id.* art. 19.

<sup>63</sup> *Kaushailiya v. State*, A.I.R. 1963 ALL. 71 (on file with the author).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

He concluded that “the encroachment made by Section 20 on the fundamental rights of residence and free movement of the individual far outweighs the benefit likely to accrue to the public at large and cannot be deemed to be reasonable.”<sup>67</sup> In addition to this, Justice Broome also ruled that such an uncontrolled and unguided power should not be given to the magistrate because the restriction could be imposed on the magistrate’s “own sweet” discretion, that could end up allowing one prostitute to remain and another to be removed purely for his subjective satisfaction and this infringes Article 14 of the Constitution.<sup>68</sup>

*b) State of Uttar Pradesh v. Kaushaila*

In *State of Uttar Pradesh v. Kaushaila*,<sup>69</sup> six appeals, filed before the Full Bench of five Justices of the Supreme Court by the state government of Uttar Pradesh, raised the question of the contravention of these constitutional provisions by Section 20 of SITA.<sup>70</sup> The brief, stating the facts in the case, shows that the respondents were alleged prostitutes engaged in activities around the city of Kanpur.<sup>71</sup> The City Magistrate had issued a show cause notice to the respondents under Section 20, questioning as to why they should not be forced to be removed from the places of their residence and barred from reentering.<sup>72</sup> The City Magistrate rejected the respondents’ objection, and later the Additional Sessions Judge in Kanpur dismissed their revision petitions altogether.<sup>73</sup> Thereafter, the High Court in Allahabad allowed the revision petitions, and set aside proceedings pending a hearing before the Session Court and the City Magistrate on the grounds that Section 20 of SITA “abridged the fundamental rights of the respondents under Art. 14 and sub-cl. (d) and (e) Art. 19(1) of the Constitution.”<sup>74</sup> However, the Supreme

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<sup>67</sup> *Id.*

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

<sup>69</sup> *State of Uttar Pradesh v. Kaushaila*, (1964) 4 S.C.R. 1002 [hereinafter *State v. Kaushaila*].

<sup>70</sup> *Id.* at 1002.

<sup>71</sup> *Id.* at 1004.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1014.

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Court did not agree with the High Court and set aside its judgment, holding that restrictions imposed by Section 20 are “. . . reasonable restrictions imposed in the public interest.”<sup>75</sup>

Writing a unanimous decision of the Supreme Court, Justice Subba Rao dismissed many of the crucial and important grounds given by the High Court in support of their decision.<sup>76</sup> This Supreme Court decision discriminated against victims of prostitution on based on prejudice.<sup>77</sup> Justice Rao argued that Section 20 does not infringe on Article 14 of the Constitution, as it does not prohibit “reasonable classification for the purpose of legislation . . .” and stated that such classification is founded on “intelligible differentia” that must have “a rational relation to the object sought to be achieved by the said law.”<sup>78</sup>

Justice Rao further defined “intelligible differentia” in this case by simply stating: “[t]he differences between a woman who is a prostitute and one who is not certainly justify their being placed in different classes.”<sup>79</sup> He differentiated between

a prostitute who is a public nuisance and one who is not. A prostitute who carries on her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may not be so dangerous to public health as a prostitute who lives in a busy locality or in an over-crowded town or in a place within easy reach of public institutions.<sup>80</sup>

Justice Rao emphasized and further stated “[t]hough 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.”<sup>81</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *See generally Id.*

<sup>77</sup> *State v. Kaushaila*, (1964) 4 S.C.R. at 1010.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Therefore, he supported the imposition of restrictions on movement and even deportation for the public interest.<sup>82</sup>

Justice Rao suggested a similar argument to defend violation of Article 19(1)(d) and (e) of the Constitution by Section 20, as Article 19(5) of the Constitution allows reasonable restrictions against these rights in the public interest.<sup>83</sup> Using strong language, he grounded his arguments by stating “[i]f the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation.”<sup>84</sup> These unpersuasive, arbitrary, and insensitive arguments, presented by the justices in support of their decision to effectively curtail fundamental constitutional rights, should be scrutinized carefully.

In their arguments, the justices appear to be blindly convinced that the problem of prostitution is the sole creation of the prostitutes, and that once the prostitutes are suppressed or deported, the problem will be solved. The reasoning is as crude as to say that the best and easiest way of getting rid of poverty is to eliminate the poor. The arguments of “intelligible differentia” to support discrimination against prostitutes by showing their inferior and degraded status compared to that of non-prostitute women is wholly unintelligible, discriminatory, insensitive, and fallacious.

The justices should have kept in mind that SITA was enacted to give effect to the Trafficking Convention, which provides that prostitutes cannot be punished because they are on the receiving end of exploitation, and that the real culprits who actually harvest the benefits of exploitation must be punished in order to rectify the problem effectively.<sup>85</sup> Secondly, their reasoning of “intelligible differentia” cannot be regarded as intelligible when it forces a victim to leave her residence, without any choice, for an unknown destination, whereas those who organize, instigate and profit from it remain unaffected. A rational classification would have differentiated between prostitutes and those traffickers, pimps, police, brothel owners or all others who are actually benefiting from

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<sup>82</sup> *Id.* at 1014.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1013.

<sup>85</sup> See generally Trafficking Convention, *supra* note 2; SITA, *supra* note 3.

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their prostitution. It is unconscionable to compare a woman who has nothing to do with prostitution and a person who is at the receiving end of the physical, mental, and psychological violence of prostitution.

It is erroneous of the justices to suggest that street prostitution is more damaging than indoor prostitution. Also, the justices tend to tolerate the latter without examining the empirical facts pertaining to the physical and mental violence committed against victims enslaved in brothels. It would seem that the mass enslavement and horrible violence perpetrated by brothel owners against victims of indoor prostitution are viewed by the justices as immaterial or unnecessary facts. The suggestions made by the justices are completely subjective, heavily influenced by their indignation toward the victims of prostitution and their total disregard for the plight of the women confined in brothels.

Section 20 of SITA reserved the harshest punishments for the victims of prostitution.<sup>86</sup> There were other provisions under which brothel owners or traffickers or anyone profiting from the prostitution of women or girls could be punished, but none as severe as deportation from one's residence or restriction of movement.<sup>87</sup> In other words, there were no provisions imposing restrictions on any of the parties associated with prostitution except for the helpless victims already suffering from the exploitation.<sup>88</sup> This section certainly contravenes Article 14 of the Constitution, which guarantees equality and equal protection of the law to all, without any discrimination.<sup>89</sup>

It is apparent that prostitution of such a magnitude that it can be considered a detriment to public interest is not often run solely by a woman or girl. Instead, it is an organized criminal activity. Victims of prostitution are targeted by the law as providers of sexual services, but behind the scenes others benefit. The pimps, brothel owners, traffickers, and police who provide security for the exploitation, are immune from punishment. If the justices had not harbored prejudicial ideas about "prostitutes," and had looked

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<sup>86</sup> SITA, *supra* note 3, § 20.

<sup>87</sup> *See generally* SITA, *supra* note 3.

<sup>88</sup> *Id.*

<sup>89</sup> INDIA CONST. art. 14.

sensitively into the matter, they would certainly have found the flaws in the law. These flaws allow for women to be discriminated against and oppressed, while remaining blind towards those who are actually the primary actors.

c) *Begum v State*

In the appeal of *Begum v. State*,<sup>90</sup> Judge Patel touched the central nerve of the problem of prostitution in India. In the beginning of his judgment Judge Patel hints that instead of being insensitive toward victims of prostitution, the State should be looking at options to provide them alternatives.<sup>91</sup> He observed:

While dealing with the argument about reasonableness or otherwise, one must remember that women do not choose this vocation because they like it. It has been recognized that in a large measure they are forced in this vocation by social conditions and most often against their will. One may not therefore, judge these cases with any amount of harshness.<sup>92</sup>

Judge Patel dismissed the “threat to public peace and safety” argument against “prostitutes” and suggested that the threat is greater from “*goondas*” (hooligans) who are likely to resort to violence.<sup>93</sup>

However, the Supreme Court did not analyze or try to refute the arguments given by the High Courts in a logical manner; instead they quashed the decisions and wrongly upheld the law. The effect of this was to add to the discrimination and forceful suppression of the women and girls in prostitution. This reveals a lack of humanity on the part of the Supreme Court, as the High Court pointed out the arbitrariness of the removal provision, which not only violates Articles 14 and 19(1)(d) and (e) of the Constitution, but also Article

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<sup>90</sup> *Begum v State*, A.I.R. 1963 Bom. 17 [hereinafter *Begum*] (on file with the author).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

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21, which protects the “right to life and personal liberty of a person.”<sup>94</sup>

If the Supreme Court seriously felt that prostitution ought to be eradicated from society, then it should have nullified the legal provisions which support prostitution and totally banned the profession, as suggested by the High Court.<sup>95</sup> Furthermore, it should have suggested appropriate alternatives, with strict orders to implement criminal laws to punish all those benefiting from prostitution. However, the Supreme Court was not ready to take such a bold decision aimed at a long-term solution; instead it shifted the blame onto the victims of this vicious socio-economic and criminal nexus.

## 2. ITPA

As state above, SITA was amended and renamed ITPA in 1986.<sup>96</sup> The most important difference is the substitution for “women or girls” by “persons,” making the new law more gender-neutral than SITA.<sup>97</sup> Irrespective of this substitution, Section 20 remains largely unchanged, except that now any person thought to be a prostitute in the eyes of a magistrate can be removed or deported from his/her residence or locality to any unspecified place.<sup>98</sup> The important point to be noted here is that the Full Bench decision of the Supreme Court in *State of Uttar Pradesh v. Kaushaliya* is still the law of the land under Article 141 of the Constitution, because the enabling Act related to this provision has not been repealed or amended, nor has it been overruled by the Supreme Court in any subsequent decision.<sup>99</sup>

In addition to making anti-trafficking laws more gender-neutral, ITPA addresses the issue of under-age prostitution.<sup>100</sup> It

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<sup>94</sup> INDIA CONST. art. 14, art. 19(1)(d), art. 19(1)(e), and art. 21.

<sup>95</sup> *Begum v. State*, A.I.R. 1963 Bom.

<sup>96</sup> *See generally* ITPA, *supra* note 4.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* § 20.

<sup>99</sup> *See generally* *State v. Kaushaila*, (1964) 4 S.C.R. 1002; *see also* INDIA CONST. art. 14.

<sup>100</sup> *See generally* ITPA, *supra* note 4.

defines “minor” and “child,” and prescribes severe punishment for those who profit from their sexual exploitation.<sup>101</sup> The Act defines anyone who is under 16 years as a child, anyone between 16 to 18 years as a minor, and anyone older than 18 years as major.<sup>102</sup> The Act provides rigorous imprisonment from 7 years to life for the said offenses against a child,<sup>103</sup> while offenses against a minor may result into 7 to 14 years imprisonment.<sup>104</sup> In the case of a person promoting child/minor prostitution in a public place, the imprisonment is not to be less than 7 years, which may extend to life.<sup>105</sup>

ITPA comprises detailed provisions regarding trafficking and prostitution. This law describes keeping a brothel or allowing premises to be used as a brothel,<sup>106</sup> living on the earnings of prostitution,<sup>107</sup> procuring, inducing or taking (a person) for the sake of prostitution,<sup>108</sup> detaining a person in premises where prostitution is occurring,<sup>109</sup> prostitution in or on the vicinity of public place,<sup>110</sup> seducing or soliciting for the purpose of prostitution,<sup>111</sup> and seduction of a person in custody<sup>112</sup> as punishable offenses. Any person convicted of any of these offenses may be punished with imprisonment and a fine.<sup>113</sup> This also includes any person who keeps or manages, or acts or assists in the keeping or management of a

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<sup>101</sup> *Id.*

<sup>102</sup> ITPA, *supra* note 4, §§ 2(aa), 2(ca), 2(cb).

<sup>103</sup> *Id.* § 5(1)(d)(i).

<sup>104</sup> *Id.* § 5(1)(d)(ii)

<sup>105</sup> *Id.* § 7 (1-A)

<sup>106</sup> *Id.* § 3. Any person who keeps or manages a brothel, or acts or assists in the keeping or management of a brothel, shall be punished on the first conviction with rigorous imprisonment from one to three years, and for second and subsequent conviction, from two to five years with minimum fine of C.A.D. \$ 45.

<sup>107</sup> *Id.* § 4. Any person who is 18 years who knowingly lives, in part or in full, on the earnings of prostitution of any other person shall be punished with imprisonment up to 2 years, or fined to the extent of U.S. \$15, or both. If such earnings relate to the prostitution of a child or a minor, imprisonment shall range from 7 years to 10 years.

<sup>108</sup> *Id.* § 5.

<sup>109</sup> *Id.* § 6.

<sup>110</sup> *Id.* § 7.

<sup>111</sup> *Id.* § 8.

<sup>112</sup> *Id.* § 9.

<sup>113</sup> *See generally* ITPA, *supra* note 4.

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brothel is to be punishable on first conviction with rigorous imprisonment from one to three years, and for second and subsequent conviction from two to five years with fines of up to U.S.\$ 30.00.<sup>114</sup>

However, in seducing and soliciting in public for the purpose of prostitution,<sup>115</sup> women are given more severe punishment than men.<sup>116</sup> For example, women can get 6 months to one year imprisonment for this offence, whereas men can get 7 days to 3 months imprisonment,<sup>117</sup> which explicitly shows the remaining discriminatory provision in the law, inconsistent with Article 14 of the Constitution.<sup>118</sup> There are provisions for the rehabilitation of the victims rescued or escaped from brothels, or for those who have left prostitution voluntarily and have sought shelter.<sup>119</sup> Under the law, state governments are obligated to establish and properly maintain protective homes or rehabilitation centers.<sup>120</sup>

Except for the discriminatory provision previously mentioned, by and large all other provisions indicate the good intention of the legislature; however, there is a huge gap between the law on the books and the law in practice. If these provisions had been implemented effectively, thousands of innocent girls and women could have been saved from enslavement in innumerable brothels in India. If the government were to decide to implement these provisions, hundreds of victims rescued or escaped from brothels in India could undoubtedly be found who would be able to provide details of life in brothels and the atrocities committed against inmates.

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<sup>114</sup> *Id.* § 3 (1).

<sup>115</sup> *Id.* §§ 7(1), 8.

<sup>116</sup> *Id.* § 8(b).

<sup>117</sup> *Id.*

<sup>118</sup> INDIA CONST. art. 14.

<sup>119</sup> ITPA, *supra* note 4, § 21.

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

### 3. *Recent Public Interest Litigation under SITA and ITPA*

#### a) *Upendra Baxi and Lotika Sarkar v. State of Uttar Pradesh:*

##### *The Agra Home Case*

The widely reported boom in sex slavery of small girls and women in Indian sex markets, and the plight of these victims on the streets and in brothels, have not only challenged the sanctity of the Indian Constitution and legislation but also the capacity and sensitivity of the Indian judiciary, often extolled for its activism for having addressed socio-political malice prevailing in Indian politics. However, it is a sad but real fact that the extensive legal provisions against trafficking and prostitution have rarely been implemented in India, and as a result there are very few judicial decisions available on this issue. Some of the available decisions are provoked and initiated by public-spirited persons, who have found female slavery to be unacceptable.

The public interest litigation case of *Upendra Baxi and Lotika Sarkar v. State of Uttar Pradesh*, concerned the deplorable conditions found in a Protective Home established and working under Sections 17, 19 and 21 of SITA in Agra, India.<sup>121</sup> The case, which spanned a period of 16 years, beginning under SITA and continuing until 1997, eleven years after the implementation of ITPA, began after a letter was written by Upendra Baxi and Lotika Sarkar, both at the time professors at Delhi University, to a justice of the Supreme Court of India, Justice P.N. Bhagwati. The letter was a Letter to the Editor, published in a daily newspaper called the INDIAN EXPRESS, that revealed a shocking picture of the Agra Protective Home (hereinafter "Home"). The Supreme Court converted the letter into a writ petition and ordered the superintendent of the Home to furnish explanations regarding the allegations presented in the writ petition.<sup>122</sup> The Home, purported to be corrective and protective of

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<sup>121</sup> *Upendra Baxi and Lotika Sarkar v. State of Uttar Pradesh*, (1983) 2 S.C.C. 308 [hereinafter *Baxi v. State*] (on file with the author).

<sup>122</sup> *Id.*

women rescued or escaped from prostitution, had been a “hell house” for the inmates, the letter alleged.<sup>123</sup> The letter described that

the average strength of the Home varies between 100-125 women. The building, a rented one, has two underground cellars about twelve feet by twelve feet. The rooms lack ventilation and drainage facilities. There is only one latrine with a flush. There is no bathroom and the kitchen is without wire gauze. The girls live like animals.<sup>124</sup>

The letter also alleged that many were being held illegally, and that others had been physically and mentally ill for many years without having received medical care.<sup>125</sup> From 1981 to 1997, the Supreme Court monitored this case and found serious abuses and omissions in the functioning of the protective home, but never implemented a concrete decision to punish the responsible persons.<sup>126</sup> Instead of ordering administrators to furnish reports and giving tall instructions, the Supreme Court failed to take material action in the case.<sup>127</sup>

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<sup>123</sup> See Letter titled “Home for the girls or Jail?” from Dr. R.S. Sodi to the Editor of the INDIAN EXPRESS, Apr. 6, 1981 (on file with the author) [hereinafter Home for the Girls]. The conditions of the protective homes in others places are similar or worst. It is reported that many inmates in Liluah protective home sleep under beds and floors because of lack of space and furniture. The Nepali girls who have been rescued from Bombay brothels have reported that the conditions in the protected homes are worst than that of the brothel.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* “The panel of the doctors in their report to the Court pointed out that out of fifty inmates examined, twenty-one were suffering from extra-pulmonary tuberculosis, eleven were suffering from secondary syphilis, twenty from bacterial vaginitis, one from vaginal venereal warts, one from chancroid, two from herpes proenitalis, one from scabies and four from suspected syphilis. Many of them were below eighteen years.” As regards to the mental conditions of these inmates, “ten were found to be suffering from severe mental retardation, two from profound mental retardation, four from mild retardation, two from inadequate personality, three from mild anxiety, eight from moderate mental retardation, and four from borderline mental retardation.”

<sup>126</sup> Baxi v. State, (1983) 2 S.C.C 308.

<sup>127</sup> *Id.* The Supreme Court, itself, agreed on this point as it has observed in its 22 September 1997 decision on the continuing hearing of the Agra Home case that “the facts beyond controversy indicate a total apathy on behalf of the State Government and the concerned authorities towards the continuing serious

In one outrageous act, the Superintendent of the Home discharged 19 inmates soon after the Supreme Court began hearings in the case.<sup>128</sup> A report by a doctor, included in the memorandum submitted to the Supreme Court claimed that the released inmates had “become insane or were of deranged mind.”<sup>129</sup> The allegations further suggested that these inmates had been in the Home for many years, some since 1972.<sup>130</sup> The justices found it difficult to understand “how suddenly at or around the time of making of our order dated April 16, 1981, these 19 inmates took it into their heads to apply for being discharged and were in fact discharged.”<sup>131</sup> The justices stated that they “cannot help entertaining an uneasy feeling that these 19 inmates came to be discharged from the Home merely in order to avoid an enquiry by this Court.”<sup>132</sup> Based upon this rational suspicion, the Supreme Court should have ordered an immediate investigation and searched out those inmates who, as the judges themselves suspect, may have gone out “in the open world without any protection or care,” in some cases without the resources to survive.<sup>133</sup>

It was suspected that the superintendent had hurriedly released the victims to unknown destinations in order to cover up misdeeds practiced in the Home. The Supreme Court had been alerted and had appropriate opportunities to investigate possible administrative malpractices, corruption, and physical violence in the Home. Such action would have probably prevented such abuses from happening in the future. However, the Supreme Court took no initiative in that direction and, depressingly, took no steps beyond asking the superintendent to furnish answers to its concerns in an upcoming hearing.<sup>134</sup> The whereabouts of the mentally ill victims

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problems in the Agra Protective Home. Repeated directions of this court have also not received the consideration necessary from the concerned authorities. This situation is continuing ever since the commencement of these proceedings in the year 1981.”

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

are still unknown, because, regrettably, the justices did not inquire further into the matter in subsequent hearings, nor did the superintendent or any other government official furnish an explanation.

Nineteen lives seem to have disappeared into oblivion in front of the justices' eyes; however, the judges did take the opportunity to state in their unfinished discourse that the inmates in the Home should not "continue to live in inhuman and degrading conditions and that the right to live with dignity enshrined in Article 21 of the Constitution is made real and meaningful for them."<sup>135</sup>

Another disturbing issue pertaining to this decision is the prejudice of the justices toward the victims of prostitution, and their apparent indifference to the discriminatory application of law. This is strange, especially when one considers the fact that the judgment was written by one of the most respected and renowned justices of the Supreme Court of India, Justice P.N. Bhagwati. While defending the segregation of minor and major inmates in the Home, Justice Bhagwati used abusive language in referring to victims living in the Home. He suggested "it is not at all desirable" that minor girls between the ages of 7 and 18 should be allowed to continue to remain in the protective home in the company of "hardened prostitutes" or "women suffering from diseases."<sup>136</sup>

From what source did the justice come to know that these women victims at the Home were "hardened prostitutes?" What is the definition of "hardened prostitutes?" What authority or right did Justice Bhagwati have to brand these helpless victims of severe exploitation in such abusive terms? It is obvious that "hardened prostitutes" would not have sought shelter in a protective home, but would have continued to ply their trade on the outside.<sup>137</sup> Instead of branding them in insensitive and derogatory terms, Justice Bhagwati should have behaved professionally and respectfully toward these victims, and he should have tried to understand that the women

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

accepted the inhuman living conditions of the Home as their only alternative to prostitution.

The distinction of age also seems to be hypothetical and arbitrary. What would happen if an inmate happened to be below 18 years of age but a “hardened prostitute?” Would she enjoy underage privilege or still remain “dangerous” to other girls and need to be segregated from them? Irrespective of all these failures on the part of the Court, it is not that nothing has happened or that no improvements have been made to the physical facilities of the Home. Continued monitoring and orders of the Court have kept the problem of the Agra Protective Home in the national limelight, which has surely helped it to get more attention, and resulting in improved physical facilities for inmates.<sup>138</sup>

Moreover, the fact remains that meager action has been taken against authorities who have failed to take the Court’s orders seriously, and the Court has not been willing to hold them officially responsible for failing to obey the law. Instead of vigorously exercising its constitutional authority to implement the law for the benefit of the weakest members of the weaker classes of Indian society, suddenly in 1997 the Supreme Court decided to transfer this case to the National Human Rights Commission (NHRC) for future monitoring and removed this case from Supreme Court supervision without obtaining satisfactory results, after its extensive period of monitoring.<sup>139</sup> NHRC, a statutory body having only recommendatory power, lacks the supreme judiciary’s authority; nothing more can be expected from the NHRC than what was seen from the Supreme Court. If one of the most powerful tribunals in the world could not improve conditions of a protective home run by the state satisfactorily, and allowed the Home to continue its abuses after 16 years of monitoring, a layman can presume the conditions that undoubtedly exist in other protective homes where no such monitoring has taken place.<sup>140</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

*b) Visal Jeet v. Union of India (1990)*

Another immensely important public interest litigation filed before the Supreme Court, *Visal Jeet v. Union of India*, addressed the root causes of the burgeoning sex slavery in India.<sup>141</sup> The petitioner, an advocate, entered a writ petition before the Supreme Court requesting for “issuance of certain directions, directing the Central Bureau of Investigation [CBI] (1) to institute an enquiry against those police officers under whose jurisdiction Red Light areas . . . are flourishing and to take necessary action against such erring police officers and law breakers.”<sup>142</sup> This provided an opportunity for the Supreme Court to look at the failure of the anti-trafficking law in India, and to hold the culprits, including corrupt police officers, accountable. However, instead of addressing the principal demand of the petitioner, the Supreme Court went on to discuss the moral harm of the prostitution to society.<sup>143</sup> This reflected the same antiquated attitude of the Supreme Court as seen in the 1960s. The Supreme Court refused to issue directives, observing that “[t]his malady is not only a social but also a socioeconomic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.”<sup>144</sup> In spite of that insight, it went on to say that “prostitution always remains as a running sore in the body of civilisation and destroys all moral values.”<sup>145</sup> Cloaked under the garb of subjective moralist discussion, the justices again put aside many legal questions arising before them and did not find a violation of the constitutional and legal rights of individual victims.

The justices in this case appeared concerned with the destruction of human civilization because of prostitution, without considering the role of society in maintaining prostitution, choosing instead to put the blame squarely on the victims. Throughout the judgment the Supreme Court contradicted itself as it struggled to maintain some semblance of humanity to cover an obvious apathy

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<sup>141</sup> *Visal Jeet v. Union of India*, (1990) S.C.R. 861 [hereinafter *Visal Jeet v. Union*].

<sup>142</sup> *Id.* at 863.

<sup>143</sup> *Id.* at 864-65.

<sup>144</sup> *Id.* at 867.

<sup>145</sup> *Id.* at 864.

toward this problem. The justices did not hesitate to observe that “[i]t is highly deplorable and heartrending to note that many poverty-stricken children and girls in the prime of youth are taken to ‘flesh markets’ and forcibly pushed into the ‘flesh trade,’” but termed that act as “being carried on in utter violation of all cannons [sic] of morality, decency and dignity of humankind,” neglecting to recognize that these acts are also in violation of national and international law.<sup>146</sup>

The reluctance of the Supreme Court to identify the nature of this problem is clearly reinforced by the above statement. In a single statement, the justices find that victims of the flesh trade are forcibly taken into the sex market for trading, which is clearly nothing but the selling and buying human persons, but then declare not that this is a violation of law, but of “morality, decency and dignity of humankind.”<sup>147</sup> This underlines the height of misrepresentation of the issue. In effect, the justices of the Supreme Court disregarded constitutional and legal provisions by rendering legally untenable interpretations so as not to reach the facts directly addressed by the law. Such an approach is deeply discouraging for the victims and for anyone who advocates for them. They have to face the fact that grave injustice has prevailed. Instead of interpreting the business of trafficking and forced prostitution as a moral issue, the Supreme Court should have followed the available laws and declared the trafficking to be in violation of Article 23 of the Constitution and sections 3,4,5,6,7, and 8 of ITPA and sections 373, 376, 366 (B), and 375 of the IPC.<sup>148</sup>

Furthermore, the petitioner in this case had demanded an inquiry into the involvement of police, pimps, traffickers, and brothel owners.<sup>149</sup> However, the Supreme Court did not even mention the actual role that the police should have been expected to play, in contrast to the role that they actually did play, as participants in the

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<sup>146</sup> *Id.* at 865.

<sup>147</sup> *Id.*

<sup>148</sup> INDIA CONST. art. 23; ITPA, *supra* note 4, §§ 3, 4, 5, 6, 7 and 8; INDIA PEN. CODE, 1860, §§ 366(B), 373, 375 and 376..

<sup>149</sup> *Visal Jeet v. Union*, (1990) S.C.R. at 862.

crime.<sup>150</sup> Additionally, they gave a fallacious interpretation to the petition by analyzing its content as if it sought the prosecution of the victims of prostitution themselves.<sup>151</sup> This can be seen from the arguments. After refusing to initiate a CBI inquiry, the Supreme Court states that “this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout.”<sup>152</sup>

The petitioner had not sought punishment for the victims, but rather for those “public servants,” such as police and others who were benefiting from the exploitation of the unfortunate women.<sup>153</sup> The judgment seems to have been written according to the whim and fancy of the justices, as it contradicts itself in several places, where they have accepted the violation of law, but have refused to provide legal protection.

The statement quoted above also accepts that many of victims in prostitution are “unwilling participants and involuntary victims.”<sup>154</sup> This is indicative of coercion and exploitation of others into prostitution, a crime statutorily punishable by rigorous imprisonment from seven years to life.<sup>155</sup> In this case, the expected course of the Supreme Court would have been to adhere to the clear legal provisions against this form of trafficking, rather than giving misleading interpretation to the petitioner. Furthermore, it should be expected that the Court would order investigation of those who were alleged to be responsible for keeping unwilling and involuntary victims in prostitution, the demand actually made by the petition.<sup>156</sup>

The request of the petitioner in this case was clear and urgent. If the Supreme Court had exercised its power and responsibility in

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<sup>150</sup> *See generally Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 867.

<sup>153</sup> *Id.* at 863.

<sup>154</sup> *Id.* at 867.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

the cause of justice, it would have accepted the petitioner's request and ordered the CBI inquiry. This would have revealed the police complacency, or worse, their participation, and begun the end of their impunity. It is well known that there is police involvement in organized prostitution in India.<sup>157</sup> There are damaging reports published pointing to a direct link attached to the police in the process of trafficking and keeping brothels running in India.<sup>158</sup> Human Rights Watch has suggested that the Indian police openly take money from traffickers, brothel owners and pimps, and allow brothels to continue to function.<sup>159</sup> It is reported that there is a registration process that takes place with the new arrival of trafficked girls.<sup>160</sup>

The GLOBAL REPORT ON WOMEN describes the situation as a process in which the madam would "notify the police of the arrival of a new victim in her establishment, and pay a bribe for their silence. A madam routinely paid between Rs. 5000 and Rs. 25,000 (U.S.\$166 to U.S.\$833) to the police station depending on the price she paid for the woman."<sup>161</sup> When the trafficked girl is a minor, the police take more money, because the punishment under the law is more severe in cases of the prostitution of minors. In some cases, police also provided falsified documents attesting to a higher age of the minors to save madams from prosecution, because under ITPA, voluntary prostitution of adults in private places is not considered a crime.<sup>162</sup>

Thus, the harsh punishment prescribed by law against the perpetrators has become a bonanza of corruption for the police. A report revealed that no other area in Bombay has the intensive police presence as that found in the red light districts.<sup>163</sup> Contrary to the expectation one would hold with this degree of police presence, illegal trafficking and exploitation of women and girls continues unabatedly. Police presence should have stopped many criminal

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<sup>157</sup> See *TRAFFICKING OF NEPALI GIRLS*, *supra* note 7, at 53.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 54.

<sup>161</sup> GLOBAL REPORT, *supra* note 5.

<sup>162</sup> ITPA, *supra* note 4, at § 7.

<sup>163</sup> See *generally* *TRAFFICKING OF NEPALI GIRLS*, *supra* note 7.

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activities ongoing in these areas, and might have, if their presence were not simply for the purpose of collecting their “share” from brothel owners.<sup>164</sup>

In spite of these reports, the Supreme Court found the issue of police involvement in prostitution not worthy of CBI inquiry, the implication being that the plight of these women was of insufficient concern to warrant prosecution of their traffickers. This observation is further supported by the reasoning of the Supreme Court when it said that “[i]n our view, it is neither practicable and possible nor desirable to make a roving enquiry through the CBI through-out the length and breadth of this country and no useful purpose will be served by issuing any such direction, as requested by the petitioner.”<sup>165</sup> These are biased and discriminatory reasons of the Court. Nothing could have been a more purposeful cause for CBI inquiry than this, because in any civilized society, the buying and selling of young girls and women as if they were cattle is seen as an unacceptable crime.

The refusal of the Supreme Court to accept violence suffered by the brothel inmates as worthy of investigation is clear in this case. Thus, it highlights the deep insensitivity and indifference of the judges toward the victims of one of the most oppressive forms of contemporary slavery in India. The attitude of the Supreme Court toward addressing the problems of trafficking and prostitution has seriously undermined the existing statutory legal provisions.<sup>166</sup> This attitude may have sprung from personal feelings of revulsion concerning the practice of prostitution; however, it is absolutely unconscionable for justices to disregard the laws of the land based on personal beliefs pertaining to sexual morality.

At the end of this case, the Supreme Court ludicrously ordered every state government to compose an advisory committee to give suggestions for measures to be taken toward eradicating the problem of prostitution.<sup>167</sup> Instead of feeling the urgency of the matter and applying available laws, the Court sidestepped the law

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<sup>164</sup> *Id.* at 53.

<sup>165</sup> Visal Jeet, (1990) S.C.R. at 867.

<sup>166</sup> See generally ITPA, *supra* note 4.

<sup>167</sup> Visal Jeet, (1990) S.C.R. at 868-69.

and helped to divert state governments from taking immediate action to prevent sexual slavery.

*c) Gaurav Jain v. Union of India and Others (1997)*

In another recent and rather bizarre case, *Gaurav Jain v. Union of India, and others*,<sup>168</sup> an overly enthusiastic Justice of the Supreme Court from the Division Bench passed an order singly, in defiance of the Constitution which requires a majority vote before judgment is issued.<sup>169</sup> The order stated that the prostitutes were to be rehabilitated through self-employment schemes, and that the children should be provided with “adequate safety, protection and rehabilitation in the juvenile homes manned by qualified trained social workers or homes run by NGOs with the aid and financial assistance given by Government of India or State Government.”<sup>170</sup> This decision was later to be overruled by the three justice bench of the Supreme Court.<sup>171</sup> In this case, Justice K. Ramaswamy, after discussing various facets of prostitution in India, issued an order under Article 142 of the Constitution.<sup>172</sup> According to Article 142, any order or decree passed by the Supreme Court shall have force of law and “shall be enforceable throughout the territory of India . . . .”<sup>173</sup> However, the power of Court under Article 142 is subject to Article 145(5) of the Constitution, under which “[n]o judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case . . . .”<sup>174</sup> In a Division Bench when two justices differ on an opinion, neither opinion forms the majority opinion, and in such a case the matter is to be referred to the Chief Justice, who then places the matter before a higher bench to resolve the disputed matter.<sup>175</sup>

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<sup>168</sup> See generally *Gaurav Jain I v Union of India*, (1997) 8 S.C.C. 114 [hereinafter *Gaurav Jain I*].

<sup>169</sup> INDIA CONST. art. 145 § 5.

<sup>170</sup> See generally *Gaurav Jain I*, (1997) 8 S.C.C. 114.

<sup>171</sup> *Gaurav Jain II v Union of India and others*, 1998, 4 S.C.C. 277.

<sup>172</sup> See generally *Gaurav Jain I*, (1997) 8 S.C.C. 114; see also INDIA CONST. art. 142.

<sup>173</sup> INDIA CONST. art. 142, 145 §5.

<sup>174</sup> *Id.* art. 145 § 5.

<sup>175</sup> See Supreme Court Rules, 1996, Part I, Order VII, Rules 1, 2.

Justice Ramaswamy, after stating that “[w]hen there is a dissent [in a two judge panel], the majority opinion forms binding precedent,” singly ordered from the Division Bench to the Union of India as well as all State Governments to evolve, after in-depth discussion at ministerial level, conferences, procedures and principles or programs which would help rescue and rehabilitate the fallen women.<sup>176</sup> Otherwise, the Justice observed, “the fundamental and human rights remain pious platitudes to these miserable souls crushed in the cruel flesh trade with grinding poverty in the evening of their lives.”<sup>177</sup> The second justice, Justice Wadhwa, dissented and observed that the issues surrounding the eradication of women’s prostitution and their rehabilitation were not the issues raised in the writ petition, and further, that these issues were extremely profound involving the Union and all state governments.<sup>178</sup> Therefore, he was not ready to be a part of that section of order, pending further hearings. However, Justice Wadhwa concurred with Justice Ramaswamy on the issue of the children of prostitutes, including their rescue and rehabilitation, and the need for juvenile homes, which, in his view reflected the issues rose in the petition and the hearing before the Supreme Court.<sup>179</sup>

In his 28-page deliberation, Justice Ramaswamy went through the whole gamut of issues, from socio-economic problems to the violations of constitutional and legal rights as well as human rights guaranteed under the international law.<sup>180</sup> He even accepted the police complicity in trafficking into prostitution by observing that “[t]he victims of the trap are poor, illiterate and ignorant sections of the society and are the target group in the flesh trade; rich communities exploit them and harvest at their misery and ignominy in an organised gangsterism, in particular with police nexus.”<sup>181</sup> With this explicit observation of the roots of the problem, one would

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<sup>176</sup> Gaurav Jain I, 1997 8 S.C.C. at 114.

<sup>177</sup> *Id.*

<sup>178</sup> *See generally* Gaurav Jain I v. Union of India and others, (1997) 8 S.C.C. 114 (dissenting opinion of Judge Wadhwa) [hereinafter Wadhwa Dissent].

<sup>179</sup> *Id.*

<sup>180</sup> *See generally* Gaurav Jain I, (1997) 8 S.C.C. 114.

<sup>181</sup> *Id.*

expect a results-oriented order from the Court aimed at punishing those guilty of exploiting the victims with impunity.

However, at the end Justice Ramaswamy did not employ the existing laws in order to give immediate justice to victims, but instead ordered the formulating of procedures and programs to rescue and rehabilitate.<sup>182</sup> It is not that rescue and rehabilitation should not be the part of the government's efforts to eradicate prostitution, but these means alone cannot achieve that objective. Instead, the prevention and deterrence of the crime of trafficking into prostitution should be the first priority by which women and girls are saved from sexual slavery. Swift investigation and severe punishment for all those benefiting from the prostitution of others ought to be the top priorities of state, and especially of the judiciary, for achieving the long-term goal of the eradication of prostitution.

Throughout his judgment, Justice Ramaswamy refers to victims of prostitution as "fallen women," as if they are not respectable or complete women in the Justice's eyes.<sup>183</sup> It is highly inappropriate for a judge to use such derogatory language from the bench of the Supreme Court, and even more reprehensible when this language is aimed at victims of such a crime. Although at first glance it appears that Justice Ramaswamy seems more sympathetic and concerned with the problems of prostitution, Justice Wadhwa is actually correct in this case. Justice Wadhwa does not disagree that the evil of prostitution must be curbed, but he raises the concern that simply passing an order would not eradicate the problem. He focuses on collecting the resources to be employed, suggesting discussion with the Union and state governments in order to develop a coherent methodology for dealing with the problem.<sup>184</sup>

This judgment is just one of many that reinforce the fact of the Supreme Court's failure to address the inhumanity inherent in prostitution in India, contrary to its reputation for being an activist judiciary.<sup>185</sup> The Supreme Court has largely ignored the crimes committed against the victims of trafficking, thereby remains a

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<sup>182</sup> *Id.*

<sup>183</sup> *See generally* Gaurav Jain I, (1997) 8 S.C.C. 114.

<sup>184</sup> Wadhwa Dissent, (1997) 8 S.C.C. 114.

<sup>185</sup> *See Judicial Activism, supra* note 9.

spectator of the government's emphasis on punishing victims, sex workers, for their work, without investigating the circumstances under which they have been forced to adopt that profession. The deep prejudice and discriminatory attitude of the justices against victims of prostitution have prompted them to play an indifferent role.

#### *V. Conclusion*

The purpose of this article is to expose a dark side of the Supreme Court of India, otherwise known for its humanism, with regards to its approach on the issue of prostitution in general and victims of prostitution in particular. From the early 1960s, the highest court has worked quite discriminatorily, and has been overly protective of all people participating in prostitution except for the victims. This comes at a heavy price to the real victims of prostitution, and has considerably hampered the possibility of appropriate justice for this marginalized group of women. The Supreme Court's refusal to analyze this problem adequately without prejudice and to apply existing laws to bring the perpetrators to justice is inexcusable.

It is imperative for the success of laws and policies aimed at the eradication of enslavement and exploitation that the justices see the victims or "prostitutes" as oppressed and unwilling participants, who must be treated as equal human beings. These women are entitled to the enjoyment of all rights, including equality, freedom, and liberty, guaranteed by the Constitution. Furthermore, as victims of the socio-legal discrimination largely prevalent in India, they must be afforded the protection of the State, with the respect and concern that are consistent with an order of human dignity.

The Supreme Court should lead the nation in taking action, with sensitivity and concern toward victims. It should protect the various rights of the trafficked women and girls, such as freedom of movement, the right to life, the right not to be deported, the right not to be discriminated against or stigmatized, and the right to essential services. The Supreme Court should effectively direct the implementation of existing laws by upholding constitutional norms, and recommend changes if existing laws are inadequate. The poorest

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of the poor and the weakest of the weak must also get the justice that is their due. The Court's lack of urgency or seriousness and its hesitation to employ available laws to prevent massive exploitation through prostitution are both morally wrong and legally untenable.