Dear Readers

This is an early draft of what I hope will be a chapter in my book, provisionally titled, *The People's Constitution: Law and Everyday Life in the Indian Republic.* Please find a brief precis of the book project below.

On the 26th of January, 1950, the "people of India" gave unto themselves a constitution declaring the new state to be a sovereign democratic republic. Did this constitution make a difference? Critics have been deeply skeptical of the narrative of constitutional change, pointing to the continuation of many of the structures of colonial governance, including the police and the army; the circumscribing of individual rights by state interests and the conferment of broad emergency powers to the government. The constitution was easy to amend and vulnerable to electoral majoritarianism. Institutional design apart, the English language document was seen as an elite project, its ideals far removed from the lived experience and concerns of a majority of Indians. The Supreme Court's early decades have been described as its conservative period, where judgements favored the propertied over the proletariat.

This book presents a contrary argument, that the Indian constitution profoundly transformed everyday life in the Indian republic. Moreover, this process was led by some of India's most marginal citizens, rather than elite politicians and judges. It shows that the constitution, a document in English that was a product of elite consensus, came alive in the popular imagination such that ordinary people attributed meaning to its existence, took recourse to it and argued with it. *Litigious Citizens* draws upon the virtually unexplored archives at the Supreme Court, to map how the constitution emerged as a field of politics that came to dominate, structure, frame and constrain everyday life.

STRUCTURE

Each chapter is framed around a particular constitutional case and performs three tasks. First, it uncovers the deepening and reach of the Constitution in everyday life. The basis for each case is a challenge to an attempt to transform the daily life of the citizen, be it through

changing food practices, drinking habits, access to clothing or sexual behavior. Engaging with quotidian practices the chapters together uncover how the four major areas of governance were transformed during the transition from a colonial state to a constitutional republic, namely, urban spaces, the market, secularism and sexuality. Secondly, in recognition of the plurality of citizen interpretations of the Constitution; the focus is on a different citizen political subject in each case. For instance, the prostitutes challenge social workers' readings of the constitution while traditional traders chafe against the interpretations of economists. Finally, each chapter is also representative of a new form of legal strategy or technique that emerged within the period. The first decade witnessed a period of flux and experimentation as litigants, lawyers and judges, all sought to learn how to litigate under a new constitutional order. A variety of new strategies were tried, from test cases to mass mobilization.

I am very grateful for your time and am looking forward to comments!

Best Regards

Rohit De

HUSNA BAI'S PROFESSION: SEX, WORK AND FREEDOM IN THE INDIAN CONSTITUTION

The High Court at Allahabad exercises jurisdiction over Uttar Pradesh, the largest state in India. Housed in an elegant nineteenth-century neo-Romanesque building, the court has always been a hive of activity. However, even frequent visitors would agree, that on 1 May 11958 unusually large crowds had gathered in the courtroom of Justice Jagdish Sahai. The crowds were drawn there by the rare presence of a young female petitioner in the overwhelmingly masculine courtroom.

Adding to the notoriety of the case, the petitioner, a twenty four year old Muslim woman, Husna Bai (literally 'the beautiful one'), had openly stated that her profession was prostitution. Husna Bai's writ petition, filed under Article 226 of the Constitution, challenged the validity of the recently enforced Suppression of Immoral Traffic in Women and Girls Act, 1956 (hereinafter the 'SITA'). She demanded that the new law, enacted to meet the constitutional promise to ban trafficking in human beings, be declared *ultra vires* as it violated her fundamental right to practice her profession as a prostitute, which was guaranteed to her under Article 19 of the Constitution. She argued that by striking at her means of livelihood, the SITA "frustrated the purpose of the welfare state established by the Constitution in the country".[1]

Across India, Husna Bai's petition compelled attention quite out of proportion to the legal or practical significance of her case. In the event, her petition was dismissed within a month on technical grounds.[2] However, the case was covered extensively by newspapers in Delhi, Bombay and Calcutta. The newly formed Dancing Girls Union of Allahabad came out in support of it, as did prostitutes' associations as distant as Calcutta. Most significantly, her

[1] "Prostitute Files Writ Petition: Fundamental Right 'Offended'," *The Statesman*, 2 May 1958.
[2] "Premature Petition by Prostitute," *The Statesman*, 27 May 1958.

petition generated a series of anxious communications between bureaucrats and politicians in Delhi that left behind a voluminous paper trail.[3] The existence of a extensive correspondence over a minor petition in a provincial High Court is very surprising because even Supreme Court cases which had a greater impact on the government's fortunes did not generate this volume of bureaucratic correspondence The Home Ministry and the officials of the police both expressed their concern over the implications of such a petition, but the strongest condemnation came from female parliamentarians and social workers who had been leading the campaign for legislation against "immoral traffic".

These critics of Husna Bai's petition were particularly aghast at the invocation of constitutional principles by prostitutes, especially since this was followed by similar petitions t by other prostitutes before the High Courts of Delhi and Bombay. The fundamental-rights implications of the fight against prostitution had been brought home to legislators a few years before. In September 1954, almost four years before the first petition, Durgabai Deshmukh, the Chairperson of the Central Social Welfare Board and one of India's first women lawyers, had written to Prime Minister Nehru with some dismay on the findings of a survey of "social and moral hygiene" in India, noting that,

> "It was painful to social workers to hear an attempt made to invoke fundamental rights in argument to uphold the right to carry on prostitute or the business of brothel keeping… the Constitution must be reworded and our notions of freedom undergo a change".[4]

As a member of the Constituent Assembly, and as a campaigner against prostitution of over two decades' standing, Durgabai had been instrumental in having prohibitions enacted on

[3]"Writ Petition by a Prostitute", Ministry of Home Affairs: Police IV, File 3/7/58 (1958) [NAI].
[4] Letter from Durgabai to Nehru, 7 September 1954, Durgabai Deshmukh Papers, Nehru Memorial Museum and Library (hereinafter NMML).

human trafficking and forced labor. An advocate for greater civil liberties, she had played an active role in drafting the fundamental rights clauses.[5] For Durgabai and her colleagues, the Constitution represented an opportunity for women to take their places as equal citizens in free India. This would be achieved both through the institution of equal fundamental rights and a constitutional commitment to social reform. Article 20 of the Constitution, formally abolishing trafficking in human beings, was to these campaigners the symbol and instrument of their success.

Husna Bai's petition and the similar petitions that followed it were seen as an attack on the progressive agenda of the new republic. It was unimaginable to the authors of Article 20 that the very women, whom the Constitutional Assembly sought to free from the profession of prostitution, would assert their fundamental right to ply their trade and continue a "life of degradation". It particularly astonished commentators that poor Muslim prostitutes, a group believed to be exploited several times over, would not only choose to continue their vocation in the face of the remarkable progress offered them in the new Constitution, but would also use the same constitutional system to accomplish their aim.[6]

This forgotten episode challenges the 'commonplace knowledge' that the everyday practices of citizenship in India excluded the prostitutes from the domain of civil society.[7] The extensive body of scholarship on prostitution in India has focused on the colonial period,

[5] Durgabai Deshmukh had been active in social work and nationalist politics since her teenage years, rising to prominence during the Civil Disobedience Movement of 1932. She was one of India's first women lawyers and had built up a considerable criminal law practice in Madras by the mid 1940s. She was the first woman advocate before the Federal Court at Delhi. She was elected a member of the Constituent Assembly in 1946 and played a prominent role in the processes both of drafting and debating. After Independence, she was appointed a member of the Planning Commission and later became the Chairperson of the Central Social Welfare Board. See, Durgabai Deshmukh, *Chintaman and I* (New Delhi: Allied, 1980).

[6] The Constituent Assembly had already foreseen that the fundamental rights could come into conflict with some parts of the government's plan to bring about economic and social change. Assembly debates indicate that they imagined these challenges would come from vested interests representing the old order. Discussion mostly revolved around the possibility of the landed aristocracy challenging the proposed land reforms through the right to property. Additionally, the religious orthodoxy could challenge social reforms through the right to religion. In an attempt to stave off these challenges, both the right to property and the right to practice one's religion were accordingly circumscribed in the very text of the Constitution.

[7] Swati Ghosh, "The Shadow Lines of Citizenship: Prostitutes' Struggle over Workers' Rights," *Identity, Culture and Politics*, 5.1-2 (2004): 105-123.

dominated by concerns of health of British soldiers or on traffic in European prostitutes, (their importance often disproportionate to the actual numbers of British soldiers or European prostitutes)[8] or on the reformist concerns of early nationalists and feminists.[9] What happens to the question of prostitution, when questions of racial health or miscegenation become less important? What happens when nationalists and feminists control the arms of the state? These are questions Husnabai's petition will help answer.

What did it mean to be a woman in republican India? Scholars of citizenship have largely focused on two sets of state interventions, legislative reform in Hindu family law and the state led recovery of women abducted during the partition violence.[10] Both strands study fixing the place of the woman within a patriarchal household, but Husnabai forces us to look at the woman on the street.

Constituting Women in the New Republic

In 1950, the hundreds of thousands of Indians who flocked to the cinema every week were treated to a compulsory screening of a state produced documentary or newsreel before the start of any feature film.[11] These films, produced by the Films Division of India, were part of the state's pedagogic project to train its citizens. Cinemagoers in early 1950 would have watched

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9 Philippa Levine, *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire* (New York: Routledge, 2003); Janaki Nair, *Women and Law in Colonial India: a Social History* (New Delhi: Kali for Women in collaboration with the National Law School of India University, 1996); Kunal Parker, "'A Corporation of Superior Prostitutes': Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914," *Modern Asian Studies* 32.3 (1998): 559-633; Erica Wald, "From *Begums* and *Bibis* to Abandoned Females and Idle Women: Sexual Relationships, Venereal Disease and the Redefinition of Prostitution in Early Nineteenth-Century India," *Indian Economic Social History Review* 46.1 (2009): 5-25; Kalpana Muvalar Ramamirthammal, *Muvalur Ramamirthammal's Web of Deceit : Devadasi Reform in Colonial India* (New Delhi: Kali for Women, 2003); Ashwini Tambe, "The Elusive Ingénue: A Transnational Feminist Analysis of European Prostitution in Colonial Bombay," *Gender and Society* 19.2 (2005).

10 There is a considerable body of work on both these topics, but most recently on family law; See Eleanor Newbigin . *The Hindu family and the emergence of modern India: Law, Citizenship and Community*. Cambridge University Press, 2013. , Rochana Majumdar, *Marriage and Modernity: Family Values in Colonial Bengal*. Duke University Press, 2009 ; and on partition; Ritu Menon *Abducted Women, The State, and Questions of Honour: Three Perspectives on the Recovery Operation in Post-Partition India* (Canberra ACT Australia: Gender Relations Project Research School of Pacific Studies, 1993); Urvashi Butalia, *The Other Side of Silence: Voices from the Partition of India* (Duke, 2001).

11 Srirupa Roy, *Beyond Belief*, 33.

"Our Constitution" which sought to explain to the "common man of India, what the words of the constitution signified". The anglicized voiceover in the film outlined, with accompanying visuals, the new rights that the Constitution conferred upon citizens. However, moments after a shot of a policeman arresting a burglar (an illustration of the protection of life and liberty), the camera panned to a visual of an expensively dressed young woman, eyes downcast, leaning against a street pillar while the voiceover announced that the state had abolished traffic in human beings.

Source: *Our Constitution* (Films Division of India, 1950)

The abolition of trafficking and the emancipation of prostitutes were central to the imagination of freedom under the new Constitution. This becomes evident in the film as the image of the

prostitute is succeeded by images of a worker in a coal mine and a man being refused entrance to a temple, representing the two other categories of abolished acts of forms of oppression, forced labor and untouchability. Freedom was to be achieved not merely through self rule by Indians, but also by ensuring freedom to specific "unfree" populations i.e. prostitutes, untouchables and bonded labor. Thus, the Constitution was also an emancipation edict for millions of its citizens.

While questions of slavery (in the form of forced labor) had arisen during moments of Constitution making in other countries, the inclusion of prostitutes as a category is fairly unique to the framing of the Indian Constitution.[12] Unlike prohibition of alcohol, abolition of untouchability, abolition of cow slaughter, and imposition of economic planning, the regulation of prostitution was not a central plank of the Congress Party's agenda. Yet, Article 23 enshrined the ban on human trafficking as a fundamental right, while prohibition, cow slaughter and planning were only included as directive principles of state policy. How did the prostitute make the journey into the heart of the Constitution?

To understand this, we need to recognize that the 'prostitute' in India was entirely a creation of colonial law. While both ancient Indian texts and medieval sources referred to a class of prostitutes, the term became invested with legal consequences under the colonial state. Through the nineteenth century, women ranging from temple dancers, aristocratic concubines, courtesans, classical musicians and dancers, to widows, vagrant women and the more conventional sex workers found in the town *bazaars*, came to be categorized as prostitutes, and thus subject to state regulation and violence and marked as sources of immorality and disease.[13] For both the colonial state and the new Indian elite, sexuality could only be accepted within a

[12] A notable exception being the "Emancipation Edict for Female Performers and Prostitutes" proclaimed in Meiji Japan. For more, see Daniel V. Botsman, "Freedom without Slavery? 'Coolies', Prostitutes, and Outcastes in Meiji Japan's 'Emancipation Moment'," *The American Historical Review*, 116.5 (December 2011): 1323-1347.
[13] For an overview, see Wald (2009) and Tambe (2008).

heterosexual household. For the colonial state, the prostitute became the focus of concerns about venereal disease and racial intermixing, while for Indian nationalists she appeared as a threat to a national culture based on the ideal of middle class domesticity.

The 19th and early 20th century witnessed three phases of legal engagements with prostitution: regulationist (late nineteenth century), anti-trafficking (early twentieth century) and abolitionist (1920s and '30s).[14] In the regulationist phase, the laws were enacted on the basis of concern over the spread of venereal disease amongst soldiers, and sought to closely monitor brothels and supervise military prostitutes. In the anti-trafficking phase, the state was driven by internationalist anxieties of white slavery and miscegenation and therefore focused on the presence of European prostitutes in the colony. The final abolitionist phase was a product of the growing influence of Indian reformers and nationalists who saw prostitution as a threat to respectable public morals. Common to all three phases was a concern with the effect of prostitution on the public, and not with the prostitute herself.

What changed in the Constituent Assembly? Prostitution became a constiuttonal issue due the significant presence of women members in the assembly, many of whom had over two decades of experience in organizing.[15] Well before the proceedings of the Constituent Assembly began, its women members seized the initiative to present a comprehensive plan for women in the Indian republic. In December 1945, the AIWC President Hansa Mehta, reminded members that for Indian women, post-war reconstruction was not just a question of mere

[14] Ashwini Tambe, *Codes of Misconduct :Regulating Prostitution in Late Colonial Bombay* (Minneapolis: University of Minnesota Press, 2009) xxvi.

[15]The Indian Assembly had 15 women members, over two thirds of whom had been members of the All India Women's \conference. The constituent assembly of Pakistan, established in 1947, had two women members, Begum Jahanara Shahnawaz and Shaista Suhrawardy Ikramullah, representing the two largest provinces of the country, Punjab and Bengal. However, both resigned by the early 1950s and the assembly itself was dismissed by the Governor General in 1952. The second and third constituent assemblies in Pakistan did not have women members. The constituent assembly of Israel, set up two years later, had 12 women members but failed to enact a constitution.

adjustments here and there, but of reconstruction of "our entire national life".[16] Members were instructed to collect the relevant clauses dealing with women's rights from various constitutions.[17] In 1946, the AIWC adopted a 'Charter of Rights of and Duties for Indian Women' (hereinafter the 'AIWC Charter') and forwarded it to the Central and provincial governments, strongly urging that the fundamental rights and economic and social directives embodied in this Charter form "an integral part of the Constitution".[18] The AWIC charter arguing for complete civil and political equality also sought to expand the welfare functions of the state, as well as preserve the economic rights of women. It recognized that, in order to achieve the goals recounted above, total mobilization of the human and material resources of the nation was necessary, which could only be achieved through a network of specialized social service ministries. These ministries would be required to mobilize all available human resources to supplement the existing health, education and welfare services, and to this end would train teachers, doctors, nursing staff and social workers.[19]

Thus, in the vision of the AIWC, state instrumentalities would be harnessed for the purpose of social welfare, to assure the Indian woman her rightful place in society. Conversely, social welfare was also to cast as a special responsibility of women. Purnima Banerjee complained of the replacement of women members of the Constituent Assembly, on their deaths and resignations, by men; pointing out that "since the entire basis of the State has changed and it is no longer a police state, certain social functions such as education and health

[16] Bulletin of the Indian Women's Movement, January 1946, Printed Material, File No 7, Hansa Mehta Papers [NMML].
[17] Letter from Lakshmi N. Menon to Hansa Mehta, 11 October 1946, File 6, Hansa Mehta Papers [NMML].
[18] Draft Charter of Rights and Duties for Indian Women, Printed Material, File 9-A, Hansa Mehta Papers [NMML].
[19] AIWC Memorandum to Central and Provincial Governments, Printed Material, File No 7, Hansa Mehta Papers [NMML].

now feature among the major items of the State's development which made the association of women in the field of politics indispensable".[20]

Freedom thus held a distinct meaning for the women in the Constituent Assembly. Freedom in their view would not only mean formal equality between men and women, but include an active duty cast upon the state to intervene to bring about substantive equality. Article 15 of the Constitution, which guaranteed non-discrimination on the grounds of sex, race, caste, religion, or place of birth, also contained a proviso which provided that this would not restrain the state for making special provision for women and children. Action in the space protected by this proviso would require the creation of a welfare state apparatus directed towards the needs of women. It was natural in these circumstances that the state would feel impelled to intervene significantly to emancipate prostitutes. As a prominent leader of anationalist women's organization was to reminiscence, "democratic India, which upholds, the highest spiritual and moral values and looks at its women as the symbol of purity and unselfish love, cannot go on tolerating a section of its daughters being exploited and degraded through prostitution". [21] The goal of women's organizations after Independence was to "end such exploitation and to restore to the victims of such exploitation an honorable place as useful citizens with dignity and self confidence as the women and workers of a free India".[22]

The questions of regulation of prostitution and prevention of trafficking were pressing concerns for the women members of the Constituent Assembly and formed a significant part of their agenda. Article VI of the AIWC Charter had highlighted the role of women in maintaining moral standards. It had also noted with concern that poor social conditions and

[20] Sarojini Naidu died in 1949. Vijaylakshmi Pandit was appointed Ambassador to the USSR and then the UK, and Malati Choudhary resigned to engage in constructive work in Orissa. Purnima Banerjee (United Provinces), *Constituent Assembly Debates*, 11 October 1949, Volume 10, Page 4.
[21] *Social Health*, 1 (July 1962), p.7.
[22] *Id.*

economic distress has led to helpless and destitute women being enticed into immoral activities, and emphasized the need for laws to prevent trafficking. The AIWC demanded an equal moral standard for men and women and that the role of men in prostitution also be criminalized. Moreover, they wanted rescue homes to be established to rehabilitate women, which would be closely supervised by a government agency.[23] This new approach towards prostitution was dominated by the question, how did prostitutes come to become prostitutes? Studies were commissioned by women's organizations that focused on poverty, oppression within existing systems of family and disruption caused by the violence of the partition as leading causes.[24] Thus, the major women's focus of women's organizations, the reform of family law, provision of economic opportunities and the recovery and rehabilitation of abducted women were all framed by a fear of prostitution. Prostitution was seen as a product of external circumstances and not conscious choice.

As briefly discussed in the introductory passages of this chapter, the Constituent Assembly addressed the problem of prostitution through Article 20, which prohibited traffic in human beings and *begar* (forced labor). Though all the members of the Assembly agreed that prostitution was a "social evil", "a heinous practice" and degrading to women, some were wary about including it in the constitutional domain. T.T. Krishnamachari, the Finance Minister, cautioned against social reform questions being "imported into fundamental rights". In the eyes of this more section of the Assembly, prostitution in particular was a practice which would gradually disappear by legislation over the course of time, whereas incorporating it permanently into the Constitution would put "a blot on the fair name of India". Several members rose to counter Krishnamachari, and Bishwanath Das asked the Assembly not to be

[23] Draft Charter of Rights and Duties for Indian Women, Printed Material, File 9-A, Hansa Mehta Papers [NMML]
[24] I have discussed this process in some detail here, Rohit De, "The Birth of Site: Sex Work, Social Work and Social Science in the Indian Republic" in *Political Imaginaries of Modern India*, ed. Manu Goswami and Mrinalini Sinha (2017)

prudish and to "confess and admit that there existed a traffic in women for which men are responsible". The members of the Assembly made it clear that prostitution had no place in the new republic. While the inclusion of the Article 20 provision was relatively uncontroversial, as I will examine in the next section, it would take another six years before the women's lobby would convince the Central government to enact a law enforcing it.

How do we read the incorporation of Article 23 into the Constitution, especially given that it only came into operation with the enactment of the SITA in 1956, and was clearly unsuccessful in eradicating trafficking and emancipating prostitutes? The suppression of prostitution in postcolonial India was framed in terms of granting freedom to female citizens. As Gyan Prakash reminds us, freedom is never an innate human condition, but created through a range of historical practices. The common prostitute, like the bonded laborer of Prakash's study, emerged in the nineteenth century through the reconstitution of a variety of women who fell outside the heterosexual family.[25] Daniel Botsman has persuasively argued, in his work on the emancipation of Japanese prostitutes, that freedom needs to be understood as "an idea that has in modern times been used to reorder social relationships and constitute new frameworks for their management".[26] In making this argument, Botsman builds upon the idea of freedom as an integral part of the "reorganizing project of modern power".[27] The insertion of Article 23 into the Constitution needs to be understood as facilitating the democratic state's regulation of the sexuality of marginal women, the reimagining of prostitution as an economic problem central to the nation's development, the replacement of the discourse of penalization with that

[25] Gyan Prakash, *Bonded Histories: Genealogies of Labor Servitude in Colonial India* (Cambridge: Cambridge University Press, 1990), xxii.
[26] Botsman, 1344.
[27] David Scott, *Refashioning Futures: Criticism after Postcoloniality* (Princeton, N.J.: Princeton University Press, 1999), 82–83.

of rehabilitation, and the legitimization of the role of welfare agencies and women social workers in the process.

The Birth of the SITA: The Making of a Postcolonial Prostitution Law

The Suppression of Immoral Traffic in Women and Girls Act that Husna Bai challenged was enacted in 1956 but came into force only in 1958, several years after the commitment to end trafficking had been enshrined in the Constitution as a fundamental right. Unlike the case of cow slaughter, where the lack of governmental enthusiasm arose from Nehru's commitment to secularism and political compulsions, the delay in acting on Article 23 reflected the political disinterest of the Central government. "Prevention of Cow Slaughter" was only a directive principle of state policy, but abolition of trafficking was under the fundamental rights section, and the Constitution gave the Central government power to enforce Art 23 with legislation.[28] The traditional narrative of the SITA states that it was enacted to meet India's international legal obligations under the New York Convention for the suppression of immoral traffic.[29] I have demonstrated elsewhere that the SITA was actually the product of sustained lobbying by women's organizations and women politicians and reflected new conceptions of the state and social welfare.[30] To briefly summarize, leading figures of the Indian women's movement were able to forge new alliances and leverage existing networks to place the issue on the national agenda.

Durgabai Deshmukh, as member of the Planning Commission designated funds for setting up the Central Social Welfare Board which funded women's groups and commissioned a national survey on social and moral hygiene which became the basis for the SITA.[31] This

[28] Article 35 of the Constitution of India.
[29] Statements of Objects and Reasons, SITA, 1956.
[30] De (2017)
[31] Durgabai Deshmukh, *Chinaman and I* (New Delhi: Allied Press, 1980); Letter from Durgabai Deshmukh to G.B Pant, Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI].

survey was carried out by the Association for Social and Moral Hygiene (hereafter ASMH). The ASMH had been a leading abolitionist organization in London that had emerged in 1914 out of British abolitionists efforts to repeal the Contagious Diseases Act.[32]. Led in India by Meliscent Shepherd, an Englishwoman, from 1928 the ASMH had achieved some success in closing down military and public brothels.[33] It focused on generating pressure from London upon the colonial administration and building better linkages with colonial officers, thus being viewed with suspicion by nationalist organizations. However, the organization completely transformed after independence being led by Rameshwari Nehru, a prominent Gandhian social worker and legislator who was also the Prime Minister's aunt![34]. The postcolonial ASMH began an active membership drive and established a presence in all states and over a hundred and forty districts. Institutionally, it moved from being funded from London to being supported by the government through the Planning Commission. The promotion of welfare services was no longer the sole concern of unregulated private philanthropy, but was a chief concern of the welfare state.[35] The Second Five Year Plan addressed the abolition of prostitution as a question of national economic importance. Frustrated by the government's reluctance to bring in a national law to enforce the constitutional provisions, the ASMH reached out to women members of parliament and formed a cross party caucus comprising of Congress MPS and communists. They introduced private bills in both houses of parliament, castigated the government for its failure to legislate and made frequent visits to the Prime Minister and Home Minister, leading to the SITA being enacted in 1956. [36]

[32] Julia Laite, "The Association for Moral and Social Hygiene: Abolitionism and Prostitution Law in Britain (1915-1959)," *Women's History Review*, 17.2 (April 2008): 207-223.
[33] Stephen Legg, "An Intimate and Imperial Feminism: Meliscent Shephard and the Regulation of Prostitution in Colonial India," *Environment and Planning: Society and Space*, 28 (2010): 68-94.
[34] Indian Women Leaders: Mrs Rameshwari Nehru," *The Times of India*, 29 May 1953, p. 7
[35] Durgabai Deshmukh, *Presidential Address*, 1956, 5th All India Conference of the ASMH, ASMH Memorial, 72.
[36] It is notable that the Home Ministry's files on the SITA seem to have moved only before an impending visit by Mrs Nehru or Mrs Deshmukh. See for instance, Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI].

Why did suppression of trafficking require a national law? The key was uniformity. Surveying the range of existing provincial legislations, the ASMH expressed concern that the individual freedom of movement guaranteed in the Constitution complicated the state's plans, and the mobility of people across jurisdictions rendered the province powerless to deal with problems like immoral traffic.[37] Moreover, while several of the provinces of some form of legislation on immoral traffic, these were rarely implemented or enforced.[38]

Secondly, the activists advised the government that the while the law must be harsh to prostitution, "it must show a concern – nay – a tenderness to the prostitute".[39] Rather than targeting women, the law needed to aim at closing the entrances to the profession and opening several exits from it. The committee noted that in the course of their survey many people expressed a belief that prostitution could not be directly touched, as the Constitution of India recognized the fundamental right of a person to practice any profession. However, it argued that by destroying the machinery that sustained prostitution, i.e. the network of procurers, pimps, brothel keepers, rent laws and the regulation of public spaces, prostitution could be eradicated.

They were critical of fines and imprisonment as punishments, but this disagreement with the existing penalties was not motivated out of any liberal notion of the prostitute's rights. They argued that detention for women in rescue homes was more effective in rehabilitating

[37] Letter from Durgabai to Nehru, 7 September 1954, Durgabai Deshmukh Papers, (NMML).
[38] The Bombay Prevention of Prostitution Act, XI of 1923; The Madras Suppression of Immoral Traffic Act, V of 1930; The Bengal Suppression of Immoral Traffic Act, VI of 1933; The UP Suppression of Immoral Traffic Act, VII of 1933; The Punjab Suppression of Immoral Traffic Act, 1935; the Madhya Pradesh Suppression of Immoral Traffic Act of 1953; the Bihar Suppression of Immoral Traffic Act, 1948; the Mysore Suppression of Immoral Traffic Act, 1936; the Travancore-Cochin Suppression of Immoral Traffic Act, 1952; the Hyderabad Suppression of Immoral Traffic Act 1952; the Ajmer Prevention of Prostitution Act, 1953; Patiala Suppression of Immoral Traffic Act, 1940; and the Suppression of Immoral Traffic (Jammu and Kashmir) Act, 1934. The Bombay Devadasi Protection Act, 1934 and the Madras Devadasi Prevention of Dedication Act, 1938 were special statutes enacted to invalidate the dedication of women to temples. Finally, to check the practice of training minor girls in prostitution, the UP Naik Girls Protection Act, 1929 authorized the Magistrate to receive particulars for all girls under 18 years of age and restrict and regulate their movements.
[39] *ASMH Report* (19 34.

them than a short term in prison, after which they would return to their old life. They accordingly recommended that the courts should deny bail in most circumstances, on the assumption that the persons bailing the woman out were likely to be involved in the sex trade. They proposed a new criminal system that would place the burden of proof on the accused, and would provide for a speedy trial in camera. According to the committee, this modified legal process would be more humane to the woman arrested, and ensure her cooperation with the police, enabling them to capture the others involved in the case. Detention in a home would be compulsory for a woman found guilty, and only those 'hardened cases' who were likely to be 'an evil influence' would be sent to prison.

The ASMH high-level committee's approach to legislation differed from the existing laws addressing prostitution in two significant ways: it placed equal emphasis on rescue and rehabilitation, and it demanded that the state create a special bureaucracy which would be staffed by specialists and women social workers to deal with the problem.

Their goal of feminizing the state set apart the ASMH and its associates from their contemporaries in the West. In her study of American reformers dealing with 'fallen women', Regina Kuenzel argues, that the professionalization of social work involved the 'masculinization' of an older ethic of female values. American social workers in the 1920s and '30s sought to encourage a greater male presence in positions of authority dealing with unmarried women, and specifically invited male speakers to conferences and appointed male advisors to rescue homes to reduce the femininity in the program.[40] The Indian reformers on the other hand were suspicious of male functionaries and campaigned for a greater deployment of women at every level of administration from the police to the judiciary. The emphasis here was not on feminine qualities, but on representativeness i.e. the belief that as women, the

[40] Regina Kuenzel, *Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work, 1890-1945* (Yale University Press: New Haven, 1993).

desired inductees into the state would better represent women and understand women's needs. With independence, women's activists had moved from being advocates of reform to actually implementing it.

Unlike the existing provincial SITA's that were concerned with regulation of proscribed acts and punishment of offences, the SITA 1956 provided an elaborate government program for the rescue and rehabilitation of prostitutes, attempted to set up safeguards against police excesses and laid the basis for a bureaucracy of social welfare staffed by women. The SITA had three broad sections, dealing with restrictive and punitive measures; executive and procedural questions; and reform and rehabilitation; respectively. While, the SITA did not seek to ban the practice of prostitution by an individual woman, but sought to suppress activities connected with prostitution, particularly brothel keeping, pimping and kidnapping. The first few sections made it at an offence to keep a brothel or to live off a woman's earnings from prostitution, and the second set of penal provisions sought to prohibit the kidnapping and detention of women, and inducing a woman to take up the profession of prostitution.

While not prohibiting prostitution outright, the SITA made it a criminal offence to practice prostitution within 200 yards of a place of religious worship, educational institution, hostel, hospital, nursing home or any other area notified by the police or a magistrate.[41] It also criminalized public soliciting for sex, i.e. by a person in a public place or within sight of a public place, through the use of words, gesture or "willful exposure of her person".[42]

The procedural sections of the SITA authorized the court to detain a person convicted of an offence under this statute in a protective home for a period between two to five years.[43] The courts did not have the discretion to release such offenders on probation. The SITA

[41] S.5, SITA, 1956.
[42] S.8, SITA, 1956.
[43] S.10(1)(a), SITA, 1956.

empowered magistrates to evict women their homes if they violated the 200 yard rule, as well as granting the magistrate wide powers to extern from his district any woman who the magistrate considered a danger to public morals.

The ASMH was convinced that the problem of prostitution could not be addressed through routine police administration, and successfully lobbied for the appointment of a special police officer by the State government. This officer would be assisted by women police officers and a non-official advisory body comprising leading social welfare workers, preferably women. These officers would have powers to arrest without warrant. He could also search premises without a warrant if he suspected they were being used for an offence, though he would have to be accompanied by two respectable witnesses, at least one of whom was a woman.

Finally, the SITA provided that the state would establish protective homes under the statute. It also provided that no other authority, including charitable organizations, could maintain a protective home unless licensed for the purpose by the state. The SITA was also accompanied by The Women and Children's Institutions (Licensing Act), 1956, drafted by ASMH member Dr Seeta Parmanand, which laid down extensive guidelines for state licensing of private institutions. It was the rehabilitative sections that really set the 1956 SITA apart from its provincial predecessors.

A Representative Prostitute: Husna Bai and Subaltern Legal Mobilization

The SITA finally came into force on 1 May 1958. Husna Bai moved the High Court of Allahabad on the same day. Her petition was unusual both in its timing and in the fact that the SITA had not yet been applied against her. Previous challenges by prostitutes to the legality of anti-trafficking laws and municipal regulations had only been made after the issue had been forced upon them, i.e. they had been arrested or had found themselves evicted from their

homes.[44] Therefore, their encounter with the courts was the result of an initial intervention by the police or the municipal government.

Husna Bai's petition was a radical departure from this pattern, and reveals her awareness of the implications of the legislation well before it came into force, and had the resources and strategy to attempt to counter it. Her petition in view of surrounding circumstances is similar to Bulsara's petition in the case of prohibition, though it was not described as a 'test case'. It was an individual petition filed to challenge a law on behalf of a larger group.

The press gave wide coverage to the enactment of the SITA and the debates leading up to it. The police and social workers, both groups that prostitutes would come into contact with, were involved in drafting this law. The ASMH survey had interviewed a number of prostitutes about the conditions of their profession. They found that the SITA had created fear in the minds of prostitutes. Mary, a prostitute interviewed in 1965, recalled that she left Delhi for Agra in 1958, where she had plied her trade on GB Road, because she was terribly worried and upset about police raids that were expected with the enforcement of the SITA.[45] Prostitutes, particularly in Uttar Pradesh, faced a harder time in the 1950s under Congress rule. As a number of prostitutes interviewed in the city of Kanpur pointed out, the number of their paying clients had declined after the departure of American troops, the abolition of *zamindari* (the landed aristocracy whose property was redistributed as a part of land reforms) and the migration of many rich patrons in the Partition.[46] The SITA was the last straw.

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[44] *In Re Shantibai Rani Benoor*, 1951 AIR (Bom) 337, *Smt Sona Bai and others* v. *Municipality of Agra*, AIR 1956 All 736.
[45] Mathur and Gupta, 189.
[46] Vidyadhar Agnihotri, *Fallen Women; A Study With Special Reference to Kanpur* (Kanpur: Maharaja Printers, 1954), 17.

Clearly, those involved in the prostitution trade were aware of the implications of the SITA. As the *Statesman* noted, funds were being collected from customers and local traders on G.B. Road and Kath Bazaar, in order to fight the statute in the courts.[47] The day before the SITA came into force, seventy five women claiming to be members of the Professional Singers and Dancers Association staged a silent demonstration outside Parliament. They spent the day on the grounds near the northern gates of Parliament and presented a memorandum stating that the suppression of their profession would lead to its spread to respectable areas.[48]

Meanwhile, on the day that Husna Bai filed her petition in Allahabad, around 450 singing and dancing girls, and women of 'ill fame' in the city, formed a union to fight against the Immoral Traffic in Women and Girls Act.[49] The Allahabad Dancing Girls Union announced that it would hold demonstrations in protest against the enforcement of this law and would take legal steps for its nullification, as "it was a clear encroachment on the right to carry on any profession guaranteed by the constitution".[50] Simultaneously, a group of prostitutes in Calcutta's red light area threatened to go on a hunger strike if the government did not provide them with alternative means of livelihood. Brojobala Dassi, a representative of the Calcutta organization convened a press conference and noted that the law would reduce 13,000 prostitutes to penury.[51] Within a week of Husna Bai filing her petition, Mahroo and Ram Pyari, two prostitutes from Delhi, filed a petition in words almost identical to Husna Bai's before the High Court at Delhi. Like Husna Bai's, the Delhi petition challenged the SITA for being *ultra vires* the rights guaranteed under Article 14 and 19 of the Constitution, and applied for an interim stay against the state and against eviction of the petitioners by their landlords.[52]

[47] "Brothel Owners Get Ready for Legal Battle: Implementation of Immoral Traffic Act Difficult," *The Statesman,* 25 April 1958.
[48] "Immoral Traffic Suppression Protest in Delhi," *The Times of India*, 30 April 1958.
[49] "Allahabad Dancing Girls Form Union," *Hindustan Times*, 3 May 1958.
[50] *Id.*
[51] "Prostitute Files Writ Petition: Fundamental Right Offended," *Statesman,* 2 May 1958.
[52] "Prostitutes Plea Rejected: Circuit Court Decision," *The Times of India*, 8 May 1958.

Moreover, the government was clearly expecting such a challenge. The Central Ministry of Home Affairs, which had authored the SITA, noted of Husna Bai's petition, "***as was expected***, a prostitute of Allahabad had filed a writ petition before the High Court challenging the validity of the SITA".[53] The circumstances suggest that Husna Bai's petition was not an isolated individual act, but part of a concerted set of actions by groups of prostitutes in North India to resist the SITA. The scale of these activities led to an editorial decrying "demonstrations, moves to form trade unions and threats of civil disobedience that have accompanied the promulgation of the SITA".[54]

How do we read Husna Bai's petition? Looking closely, it becomes clear that this is not an individual "heroic" act of resistance, but one part of a collective action by a loosely organized group engaged in the sex trade across India. It is clear that this new law added to pressures that those engaged in the sex trade were already facing and threatened to upset long standing practices. However, to understand the really radical nature of the challenge posed by her petition, it is useful to examine what other alternatives that existed for women engaged in prostitution to deal with an intrusive state.

Living with Regulations: Alternatives to Constitutional Litigation

How did prostitutes learn to live with repressive legislation prior to the SITA? There were several methods they used, often simultaneously; these included practices that evaded the law altogether, like bribing policemen and escaping physical surveillance; as well as practices that sought to engage with the legal system, like petitioning through political networks and evading legal categorization. That anti-prostitution laws generate economies of corruption is well documented.[55] Before the enactment of the SITA, prostitutes in India bought protection

[53] Note to Joint Secretary, Serial No 4, Ministry of Home Affairs: Police Branch IV, File 37/3/58, 1958 [NAI].
[54] "Immoral Traffic," *The Times of India*, 7 May 1958.
[55] Julia Laite, Common *Prostitutes and Ordinary Citizens: Commercial Sex in London, 1885-1960* (London: Palgrave Macmillan, 2010)

from policemen and state officials by paying bribes in cash or kind. Evidence of this practice dates back to the nineteenth century, when the Indian Contagious Diseases Act was passed in 1868. Prostitutes are known to have paid bribes to evade the medical examination mandated by this statute.[56]

Evasion of the subsisting laws through bribery was a practice that continued well after Independence. A 1962 social science study of the red light areas of Bombay noted that a majority of prostitutes described their relations with the police as very good, due in large part to cash bribes. The amount paid as a weekly bribe or *hafta* varied between two and five rupees a week, and was often in return for concessions by the police.[57] Due to this economy of purchasing official favor with money, only twenty two of the three hundred and fifty women interviewed had been arrested, and in a remarkably candid admission, the only respondent who had had multiple arrests stated that this was because she had persistently refused to bribe a local policeman.[58] Economic efficiency supported a culture of bribery, given that prostitutes could be fined amounts up to ten rupees or imprisoned upon arrest.

The enactment of colonial anti-prostitution laws and increased surveillance after various moral panics led to several prostitutes trying to evade the gaze of the state. The recorded number of prostitutes drops with the enactment of repressive legislation like the Contagious Diseases Act and increases upon its repeal.[59] While such legislation was in effect, women were less willing to identify themselves as prostitutes and went into hiding as it were, to avoid the gaze of the state. A report by the Deputy Registrar General of the Census of India in 1953 noted that the figures of prostitutes fell from 54,000 in 1931 to 28,000 in 1951.

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[56] Tambe, *Codes of Miscondcut* (2009), 39.
[57] The interviewers noted that questions regarding their relations with the police aroused suspicion and fear among the respondents and only a minority chose to respond. S.D. Dunekar and Kamala Rao, *A Study of Prostitutes in Bombay (With Reference to Family Background)* (Bombay: Allied Publishers Pvt Limited, 1962), 154.
[58] Dunekar and Rao, 152.
[59] Tambe , Codes of Misconduct (2009) 117.

He added a word of caution that the census only recorded as prostitutes the women who practiced this profession openly; it did not account for the larger number of 'clandestine prostitutes'. He opined in this regard that several women who stated their profession as 'dancing', and were accordingly classified as dancing girls, were actually prostitutes.[60]

Other women evaded the coercive apparatus of the state by physically removing themselves from its gaze. The state's toleration of red-light districts meant that such areas and their occupants were well known to the police. The police in cities like Bombay and Calcutta were able to maintain extensive registers of prostitutes that documented fairly intimate details such as age, address and history of venereal disease. Stricter anti-prostitution laws and moral panics, that led to periods of more intrusive policing, also witnessed several women moving out of the red-light areas and away from police information networks. The authors of the SITA were dismayed by these unintended consequences. The redoubtable Rameshwari Nehru, President of the ASMH and the moving force behind the SITA, wrote to the Home Minister six months after the implementation of the SITA noting that the new legislation had "put fright into the heart of prostitutes," and by clearing the red light areas of Delhi, like G.B. Road and Kath Bazaar, had served "some useful purpose".[61] However, the frequent prosecutions under the SITA only made the women engaged in prostitution leave their homes in panic to seek shelter in other parts of the city. Ironically, as long as the women lived in the red-light areas, which were known to the police, they could be prosecuted and punished for solicitation, but once they dispersed all over the city it was difficult for the police to trace them. Mrs Nehru noted with some alarm that since they had no other means of subsistence and knew no other trade, they were bound to stick to their old profession and would "exert themselves all the more" to attract new customers. This complaint was echoed by the Law

[60] "Prostitutes in Indian Censuses," Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI].
[61] Letter to G.B Pant, Home Minister, 10 January, Subject File 31, Rameshwari Nehru Papers [NMML].

Minister, Ashoke Sen, who noted the complaints by residents of respectable localities in Calcutta that prostitutes were moving into their neighborhood after the implementation of the SITA, thus frustrating the very aims behind the Act and bringing residential neighborhoods to disrepute.[62]

Prostitutes achieved limited successes in making direct appeals to governments; however, these were framed as demands for benevolence or exemption rather than as assertions of rights. In the nineteenth and early twentieth centuries, these were mostly petitions by individual prostitutes to government authorities asking for an exception to be made in their favor on the grounds of hardship.[63] Ironically, since colonial franchise was granted according to tax and property qualifications, prostitutes were amongst the few groups of women who could vote. Residing in segregated neighborhoods in some cities like Lucknow, they emerged as an influential political constituency, and were able to access certain political channels. However, these channels began to narrow with the Gandhian phase of the national movement, which emphasized the need to recruit respectable women to the struggle and urged them to maintain modesty and decorum.[64]

Reclassification as Resistance

While some prostitutes tried to minimize or invisibilize their physical presence, others contested the logic of enforcement, and attempted to become discursively illegible to the state, by denying that they fit the definition of a 'prostitute'. In the 19th century prostitutes in Bombay sought to evade registration by the state by claiming to be married.[65] Over 400 women engaged in prostitution got married within days of the Contagious Diseases Act being enforced in

[62] "Steps to Suppress Immoral Traffic: Dissatisfaction Voiced in Lok Sabha," *Times of India*, 24 September 1958.
[63] Petition from Bismillah, a prostitute formerly residing in Agra Cantonment, against her expulsion from that cantonment, Home: Legislative, 1918 [NAI].
[64] Nationalist politics were closed to prostitutes. Gandhi famously refused to allow 350 prostitutes from East Bengal, who were Congress membes and contributed to funds, from seeking organizational positions on the grounds that only those "who had pure hands" could lead the battle for Swaraj. See, Ashwini Tambe, "Gandhi's 'Fallen' Sisters: Difference and the National Body Politic," *Social Scientist* 37.1/2 (2009): 21-38.
[65] Tambe, Codes of Misconduct (2009), 39.

Bombay. Similarly, when the Delhi municipality began evicting prostitutes from the red light areas in the 1920s, several women claimed that while they did exchange sexual favors for money, they were not public prostitutes as defined by the statute.[66] The key term to contest here was, that of a "common prostitute" or a "public prostitute".

These claims of existing and making a living outside the law's definition of prostitution reached the civil courts and enjoyed mixed success there. The High Court at Lahore ruled that women could earn their living by selling their bodies, and would be exempt from the anti-prostitution law, unless it was proved that they were public prostitutes, that is "[were] available at any times to the public at large".[67] Six women residing in Delhi had contested a notice of the municipality that sought to evict them for being public prostitutes. They lost their case before the District Judge but found the High Court more amenable to their reading of the facts. Mussamat Bandi Jan for instance was found living with one Chandu Lal as his mistress, and was being paid Rs 220 per month for her maintenance. The Court found that the fact that she remained content with one employer for several years suggested that she did not fall within the expression 'public prostitute', which would imply that she was letting her body out to hire to all visitors. Mussamat Moti Jan was also exempted, for though it was proved that she had lived with different lovers, it was clear that she was only with one person at a time. The Court held that it was clear that she was a prostitute, but doubtful whether she could be called a 'public prostitute'.[68]

The category of dancing girls created a certain ambiguity for the law. This ambiguity arose from the difficulties caused by transplanting the European category of "prostitute" to

[66] Stephen Legg, *Scales of Prostitution: International Governmentalities and Interwar India* (Durham: Duke University Press, 2014).
[67] *Municipal Committee of Delhi* v. *Moti Jan*, (1930) 123 IC 536, *Moti Jan* v. *Municipal Committee, Delhi* (1926) 93 I.C 827.
[68] *Id*

colonial India. As described above, this process led to most women who were outside the patriarchal household being marked as "prostitutes" as opposed to chaste housewives. These included courtesans, *nautch* girls and temple dancers, all of whom played important social roles in performing and maintaining artistic traditions, but also engaged in select sexual relations with patrons.[69] The "dancing girl" was a difficult category for Indian nationalists. To nationalists and reformers the old category of "dancing girl" represented the decadent old order that had to be cleansed from modern India, but singing and dancing as occupations came to enjoy a new respectability. Indian music and dance were cast as part of the nationalist project, with the discovery of "classical traditions", and posed as a challenge to the West's claim to cultural superiority.[70] Several women from courtesan backgrounds, such as Gauhar Jaan and M.S. Subbalakshmi, emerged as national cultural figures.[71] In independent India, classical traditions of music and dance were cast as integral elements of national culture. The decision taken by the prostitutes of Allahabad to name their union, the Dancing Girls Union in the aftermath of SITA in the 1950s was a strategic one. The courts had been holding for decades that carrying on the profession of a singer or dancer by women does not necessarily connote the business of prostitution.[72]

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[69] Erica Wald, "From *Begums* and *Bibis* to Abandoned Females and Idle Women: Sexual Relationships, Venereal Disease and the Redefinition of Prostitution in Early Nineteenth Century India," *Indian Economic and Social History Review* ; Veena Talwar-Oldenburg, "Lifestyle as Resistance: The Case of the Courtesans of Lucknow, India," *Feminist Studies* 16 (1990); Kunal Parker, "'A Corporation of Superior Prostitutes' Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914," *Modern Asian Studies* 32.3 (1998). Parker, Kunal M. "'A Corporation of Superior Prostitutes' Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914." *Modern Asian Studies* 32.3 (1998): 559-633.

[70] Amanda Weidman, *Singing the Classical, Voicing the Modern: The Postcolonial Politics of Music in South India* (Duke University Press, 2006).

[71] Amanda Weidman, "Stage Goddesses and Studio Divas: Agency and the Politics of Voice," in *Words, Worlds, and Material Girls: Essays on Language, Gender, Globalization*, ed. Bonnie McElhinny, (Mouton de Gruyter Press, 2007), 131-156; Vikram Sampath, *My Name is Gauhar Jaan: Life and Times of a Musician* (Delhi: Rupa and Co, 2010).

[72] *Parbatti Dassi* v. *King Emperor*, AIR 1934 Cal. 198.

Parbatti Dassi's case starkly evidences the advantages women could gain from representing themselves as dancers. Parbati Dassi, a middle aged woman living in Calcutta's notorious Bow Bazaar Street was arrested under the Calcutta SITA of 1923 for the offence of trafficking her minor daughter Lakshi. An anonymous informant had written to the police that Parbatti had brought her daughter to Calcutta for one Burman and engaged her in the sex trade. The police on raiding her house found her living in a building occupied by several prostitutes. Two prosecution witnesses came forward and admitted to having sexual relations with the daughter in return for money. Lakshi's testimony in court also revealed that her mother had previously been prosecuted in Rangoon for prostituting her daughter. Parbatti Dassi denied these allegations and asserted that Lakshi was a musical artist of some repute and that she had brought her daughter to Calcutta for the purpose of employment. In her statement to the court she produced a contract the daughter had with New Pearl Talkies, a cinema company, where she gave performances as a singer and a dancer.

The magistrate convicted Parbatti, stating that while Lakshi might have had an employment contract based on her dancing and singing abilities, it was a dual calling. It was "perfectly obvious" that her profession as a cinema actress and dancer did not clash with her "other less reputable calling". The magistrate, observing that Lakshi was exploited both as a "cinema actress and a woman of the town", also noted that it was "well known" that singing and dancing constituted the advertisement side of the trade of prostitution.

The High Court of Calcutta overturned the conviction and admonished the magistrate for assuming that a female professional dancer or singer must invariably be a person of loose moral character. The High Court recognized that actresses and actors are not always seen as respectable people, but noted that the circumstances of the profession had changed from the "middle ages" when they were deemed rogues and vagabonds. The court held that carrying on the profession of a singer or a dancer did not automatically connote engagement in prostitution.

The *Parbatti Dassi* decision was prominently featured in the commentaries and legal guides written on the Bombay Prevention of Prostitution Act 1923, the Bengal SITA 1923 and finally the SITA when it was enforced. Thus, a lawyer advising a client facing prosecution under any of these laws would turn to the textbook and find the *Parbatti Dassi* decision prominently featured.[73]

However, recognition as a dancing girl as distinct from a prostitute depended entirely on the worldview of the judge in question. The decision of the Allahabad High Court in the *Asghari Jaan* case was cited as strong precedent that a woman who carried on the life of music and dancing, and engaged in sexual intimacy in exchange for favors with one or two men, could not be presumed to be a 'public prostitute'.[74]

Yet a closer look at Asghari's case reveals the evidentiary perils a woman had to negotiate if she tried to argue that she was a 'dancing girl' and not a prostitute. In December 1927, Asghari Jaan, a fifteen year old who identified herself as "belonging to the prostitute caste", was served with a notice from the newly elected Municipal Board of Etah, directing her to cease practising her occupation as a prostitute at her place of residence, failing which legal action would be taken against her. The notice stated that she was in violation of the municipal bye-law that prohibited prostitutes from carrying on their occupation in houses near major roads. This information had been proclaimed to the public with the beat of the drum.[75]

Asghari and her mother Mt. Bismillah argued that the bye-law was not applicable to her, as she was a singing and dancing girl and not a 'public prostitute'. At the initiation of her suit, she claimed that she was '*virgo intacta*' and produced several witnesses who had

[73] Mazhar Husain, *The Suppression of Immoral Traffic in Women and Girls Act, 1956: With Commentary and Case Law* (Lucknow: Eastern Book Company, 1958), 5; B.R Beotra, *The Suppression of Immoral Traffic in Women and Girls Act, 1956 (with State Rules)* (Allahabad: Law Book Company, 1962), 12.
[74] The case was cited in *Razia* v. *The State of Uttar Pradesh*, AIR 1957 All 340 and *Balwant and Others* v. *Deputy Director* , AIR 1975 All 295.
[75] S.247, United Provinces Municipalities Act, 1917.

approached her mother to purchase her sexual favors but had been refused. Her statement was challenged by witnesses produced by the municipal board, who deposed that they "were on terms of intimacy with the plaintiff and had sexual connection with her". Asghari also refused to submit to medical examination of her hymen by a lady doctor, on the grounds that she had in the duration of the litigation lost her virginity to a patron whose mistress she had become. The case went through three levels of trial and appeal, at each of which the court arrived at a different determination of Asghari's occupation.[76]

The lowest court noted that Asghari had in her plaint identified herself as belonging to a caste of prostitutes. Asghari's mother had admitted to being a public prostitute in the past and most of her aunts also carried on the profession. The court noted that in India prostitutes who habitually allowed "the use of their person for sexual intercourse in lieu of hire" also cultivated the arts of singing and dancing, "for gain and as an additional attraction". Merely because some of the women earned more from music and dancing, the District Court ruled, it did not place them in a different category from public prostitutes.

On appeal, the court found that the case hinged on whether Asghari's chief business was public prostitution or singing and dancing. The municipality acknowledged that Asghari could sing and dance but argued that it was not her chief profession, while Asghari's lawyer argued that she practiced an art. In order to determine this, the court bizarrely sought to appoint an expert, paid for by Asghari, who would watch Asghari perform and then give evidence in court. A.A Jilani, a local lawyer, volunteered as the expert, and organized a performance of music by Asghari. She had to perform for four hours, till 1:30 a.m., before an audience of the "best educated singers in the city" who would hear her singing and assist Jilani as assessors. Jilani deposed in court that Asghari was a tolerably fair singer, that she was clearly trained in

[76] *Municipal Board, Etah* v. *Asghari Jaan and Mt. Bismillah*, AIR 1932 All 264.

the arts, and that he could identify seven special characteristics of her performance. He added that a girl who is habituated to promiscuous sex as a public prostitute, could not possibly "possess a melodious and sustained voice" as Asghari did.

Jilani's claims to expertise were dubious. He stated that while he wasn't trained in music himself, he had been watching performances by dancing girls for twelve years. He had also been appointed by the Municipal Board of Aligarh to survey the houses of prostitutes to assess their value. His claim was that this made him familiar with the lifestyles of several public prostitutes, who rarely had arrangements for singing. The High Court was horrified that the powers provided by the Civil Procedure Code for the establishment of a commission to examine accounts or to hold a local examination, had been used to direct a person to hear a woman sing and then report not only on her skill as a singer, but deduce her occupation from her musical talents.

The Allahabad High Court attempted to disregard Jilani's evidence and drew instead on 'common understandings' of a public prostitute. According to the High Court, a public prostitute was "a woman who usually and generally offers her person to sexual intercourse for hire and who openly advertises and acknowledges her occupation by word of mouth, deportment or conduct". The court noted that such a woman usually exhibited herself on a balcony or on the street to attract people. The High Court ruled that it would need evidence of a great degree of moral degradation before a woman could be evicted from her house, in which her family may live or where she might have invested her money. It even took account of Asghari's patron and noted that an exclusive patron suggested that the intimacy might assume the form of a "more lasting alliance". Thus, there was no presumption that she was a 'public prostitute'.

Asghari's case underscores that while it was possible to escape being hit by the laws targeting 'public prostitutes', the escape route from the mischief of the law was available only to women with certain resources. Civil litigation remained a lengthy and expensive process and had significant barriers to access. The Delhi litigation took five years and the decision in *Asghari Jaan* took four years. Only comparatively affluent women could sustain such litigation.

The maneuver of taking to the courts to contest categorization as a prostitute was often successful. However this strategy was based on an implicit *class differentiation* of prostitutes. For a woman to escape regulations targeting public prostitutes, she would have to demonstrate that she was sexually exclusive, or attached to a single man as 'a mistress' or a 'keep' at the relevant time. The courts privileged a certain kind of sexual commerce over others, reflecting a need to prevent the urban government from interfering with the sexual lives of upper class men, who would be the patrons of the 'exclusive' prostitutes.

Secondly, as the High Court decision in Asghari Jaan's case demonstrates, the court was reluctant to interfere with individual property rights, including rights to a home in which a woman might have invested her fortune, unless the municipality could show some extreme level of moral degradation. These categorizations allowed only wealthier prostitutes and those who belonged to established prostitute clans to evade regulations. The patterns of the courts' interpretations of law reinforced hierarchies and allowed the rights of one set of female reproductive laborers to be won at the expense of another, while also protecting the male need for sexual entertainment..[77]

[77] Feminist scholars caution against strategies that are predicated on the state distinguishing between good female behavior and bad female behavior, in this case between a courtesan and a prostitute. Prabha Kotiswaran, "Labours in Vice or Virtue? Neo-Liberalism, Sexual Commerce and the Case of Indian Bar Dancing," *Journal of Law and Society*, 37.1 (March 2010), 105-24.

The Prostitute as a Citizen: Disrupting Older Narratives

Many of the older methods of negotiation might have been available to Husna Bai or her lawyers, but she chose to radically break with them. Prostitutes had usually dealt with repressive laws by evading the state's gaze, Husna Bai on the other hand put herself firmly in view of the state. The act of filing a writ petition was an extremely public one, as is evident from the extensive coverage of Husna Bai's petition in the national media. In their petition before the Allahabad High Court, Husna Bai and her cousin Shama Bai named five respondents: the Union government, the government of the State of Uttar Pradesh, the District Magistrate of Allahabad and Husna Bai's landlords, two private individuals. The court proceedings therefore alerted the Home Ministry in Delhi, the State government under whose authority the police, operated as well as the local municipality of Husna Bai's presence.

In addition to her defiant 'publicity', Husna Bai departed from the prevalent strategies of her peers by taking advantage of the constitutional discourse, which allowed her to challenge the very fundamentals of the law. The previous history of litigation focused on women who argued that the categories criminalized by the state did not apply to them as individuals, whereas Husna Bai's petition sought to contest the categories themselves. Husna Bai claimed her right to trade and profession as guaranteed to her under the Constitution, by stating that prostitution was her hereditary trade and her only means of livelihood. She claimed freedom for her entire class, rather than asking for an individual exemption from the law.

Husna Bai's open declaration of her profession was no accident and was backed by sound legal advice. The courts had made it impossible for women who tried to evade being classified as prostitutes to challenge the constitutionality of anti-prostitution laws. In 1956, several women living in Agra were served notices of eviction by the Municipal Board, under a bye-law that sought to keep public prostitutes out of certain neighborhoods. Four women who had failed to comply with the eviction notice faced criminal proceedings. In the criminal case, the

women contended that they were singing girls and not public prostitutes, while their lawyer simultaneously filed a writ petition under Article 226 before the Allahabad High Court challenging the constitutionality of the bye-law on the ground that it infringed his clients' rights to freedom of trade and profession. The Allahabad High Court dismissed the petition on the grounds that if the women stated they were not public prostitutes, then they had no *locus standi* to challenge the bye-law in court.[78] Thus for Husna Bai to challenge the anti-prostitution law, she had to declare herself as a prostitute.

Thirdly, contrary to the official discourse of prostitution as 'unproductive labor', Husna Bai presented herself as a laboring citizen claiming economic rights. She represented herself as the main earner in her household, on whose earnings from prostitution her female cousin and two younger brothers were wholly dependent. Acknowledging that she had no other sources of livelihood and was unlikely to have marriage prospects, she contended that the SITA would render both her and her family destitute and therefore defeat the goal of the welfare state laid out in the Constitution. She pointed out that it was the law that rendered her an unproductive citizen and a burden upon the state, challenging the state's narrative of prostitution as unproductive employment.[79]

Husna Bai's self representation as a prostitute challenged the presumptions that framed the debates over prostitution, chief among which was the prostitute's position as a victim coerced by men or economic circumstances. [80] We should exercise caution in reading her petition as a representation of Husna Bai's reality; nevertheless it was a powerful discursive act, forcing the

[78] *Sona Bai and others* v. *Municipal Board, Agra*, 1956 AIR (All) 76.
[79] Since the 1920s, prostitutes had been categorized with other forms of unproductive labor in the Indian census. "Prostitutes in Indian Censuses", Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI].
[80] Rajeshwari Sundar Rajan, "The Prostitution Question(s): Female Agency, Sexuality and Work," in *Sex Work: Issues in Contemporary Indian Feminism*, ed. Prabha Kotiswaran (Delhi: Women Unlimited, 2011), 118-156, 130.

state to deal with the willing sex worker, and was possibly the first such articulation in the Indian public sphere, predating the sex- radical feminist position by several decades.

Finally, the writ petition Husna Bai filed required a minimal, fixed court fee, unlike the expenses that would have been incurred in a civil suit. Husna Bai's petition was heard directly by the Allahabad High Court and disposed of within two weeks unlike civil suits that took an average of five to six years. In contrast, the writ petitions by prostitutes, even ones that went through several stages of appeals to the Supreme Court, were disposed of within a year at most.[81] The potential effectiveness of the remedy and the availability of multiple forums to pursue it caused a degree of panic within the bureaucracy and social organizations.

Husna Bai's lawyers made a two pronged claim, both examined in separate sections below. First, they argued that various sections of the SITA were an unreasonable restriction her right to practice her trade and profession. Secondly, they targeted s.20 of the SITA which gave the magistrate wide powers to extern a woman who was suspected of being a prostitute, ie. remove her from the area under his jurisdiction. Both claims are examined in two separate sections that follow.

The Right to Practice the World's Oldest Profession

Husna Bai's first claim, and the one that caused the greatest amount of anxiety, was that the SITA violated her constitutional right to practice "her trade and profession". The Committee on Social and Moral Hygiene had been alerted to the extant understanding that as the Constitution recognized the fundamental right of any person to practice his profession, no authority could prohibit the act of prostitution without denying this right.[82] The drafters of the SITA had tried to get around this by allowing an individual woman to carry out prostitution

[81] For instance *Kamalabai Jethamal* v. *State of Maharasthra*, 1962 AIR (SC) 1189 and *State of Uttar Pradesh* v. *Kaushalya Devi*, 1964 AIR (SC) 416. Both took two years from the initiation of the petition before the High Court to the final disposal of the appeal by the Supreme Court.
[82] *ASMH Report*, 11.

provided she did not create a public nuisance, while criminalizing acts that supported organized prostitution, such as brothel keeping.

Husna Bai claimed that the SITA, in effect, illegally prohibited her from carrying on her trade by imposing unreasonable and illegal restrictions upon it. The Allahabad High Court had to first consider whether prostitution could be considered a profession. Justice Sahai reflected that the profession of a prostitute existed in all civilized nations from the earliest times. This hearkening back to the ancient origins of prostitution was feature common to most writing of prostitutes in this period, which established that the prostitute had always played a deplorable but important social role.[83] The strongest challenge to this school of thought came from women's activists, like Kamaladevi Chattopadhyaya, who argued that prostitution arose "from old habits of degrading customs, outmoded rotting vestiges of the past that cling to present social modes and needed to be swept away".[84] However, both narratives suggested that the existence of prostitution as a social fact had very little to do with the exercise of conscious choice by the woman involved.

In contrast, it was evident that a large number of prostitutes saw themselves as professionals, and sex as work. It has been noted that the colloquial terms for prostitution in vernacular languages, including *kaam*, *dhanda*, and *pesha*, translate as work, rather than pleasure. The Advisory Committee on Social and Moral Hygiene found that two large categories of prostitutes saw no shame in their profession and viewed it as a legitimate activity. The first of these were the hereditary prostitutes, or women who came from communities where daughters traditionally took up sex work to maintain the family, while the men were employed in ancillary occupations such as pimping or music. Such communities included the Gomantak

[83] See Mathur and Gupta (1965), 3, Agnihotri (1954), 3.
[84] Kamaladevi Chattopadhyay, Presidential Address, 4th All India Conference of the ASMH, ASMH Memorial, 61.

Maratha and Kolatis in Bombay and Goa, the Basavi and Koyi in Madras and the Nutts and Bedias in North India.[85] The other category were *devadasis,* or women who had been dedicated to temples as young girls and were sexually available to leading local men.

For many of these women, sex work was simply part of their larger repertoire of skills. The Advisory Committee interviewing a number of women in a North Indian brothel was taken aback when upon the conclusion of the interview, the women pleaded that the members of the Committee stay longer and watch their performances of singing and dance. What should one make of this insistence? Perhaps after a detailed examination by the Committee on the subjects of their entry to the profession, the conditions they lived in and whether they desired to leave, they felt it important to communicate this aspect of their work to the Committee. Studies showed that a large number of prostitutes entered the profession as a result of being born to a particular family or community, for instance, 54% of prostitutes in Kanpur belonged to prostitute families.[86]

For judges and other state actors, it was easier to reconcile oneself with the idea of singing and dancing girls as professionals –after all several received rigorous musical training, and supported large households. Claims to professional status made by women found in lower class brothels, who had little exposure to artistic training, were much harder for state authorities and women's organizations to comprehend. Lady Rama Rau presents a vignette, where three prostitutes who "could not sing, dance, nor had any education or general knowledge" told the committee that they preferred the life they lived in brothels to the conditions in the under-developed villages that they came from.

[85] *ASMH Report*, 4.
[86] Agnihotri, (1954), 8.

> "[T]here were three young lovely girls protected by three elderly, hideously ugly women, whom they claimed as their mothers, we asked questions and were told that these young women were very happy in town, for in the village they lived in the darkness, worked hard in the fields, ground corn on chakkis, which blistered their hands, were never able to buy new clothes, had no new entertainments such as cinema, motor drive and parties. They were never able to earn more than a few *annas* a day, but since they had moved to their city their income had gone upto Rs 1,000 a month, between them and they had to work for only 8 to 11 p.m leaving the rest of the day free for them to do what they liked. One of the girls told us that she had four young brothers in the villages, whom she could now afford to send to school, and in time she would like to buy her family more land in the village".[87]

With remarkable candor, Lady Rama Rau concluded, "the Committee could not find an adequate answer to their arguments". Contemporary surveys of prostitutes give us a sense of their earnings as well as of class differentiation between prostitutes. In the Kamathipura area of Bombay, the Committee's findings showed that two-thirds of the women earned between Rs 51-100 a month after paying a cuts to middlemen.[88] Another study from the interior industrial city of Kanpur revealed that a 53% of the prostitutes earned under Rs 50 a month, and another 33% earned between Rs 50-100. Thus, the average income for a better of prostitute would be Rs.68 per month, comparable to that of a junior government clerk.

[87] *ASMH Report*, 6.
[88] Punekar and Rao (1967), 142.

Justice Sahai settled the debate raised by Husna Bai by declaring that the state could not deny that prostitution was a trade for the purposes of Article 19(1)(g) of the Constitution, as the SITA itself referred to prostitution as a trade on several occasions.[89] Finally, he ruled that the use of the word "any" in Article 19 of the Constitution before the words, "profession, or to carry on any occupation, trade or business" clearly indicated that normally a citizen is free to carry on **any** trade. He noted that even under the Indian Penal Code, prostitution itself was not a crime, the code only prohibiting the sale or employment of a minor for the purpose of prostitution or illicit intercourse.[90]

Reasonable restriction of the right to freedom of trade and profession had been permitted by courts in general public interest.[91] However, it had been established by multiple cases that if the effect of a restrictive legislation were to **totally prevent** a citizen from carrying on a trade, business or profession, such a restriction would be unreasonable and void.[92] Justice Sahai reiterated that the key question was whether the restrictions imposed upon the trade of prostitution under SITA **were reasonable** in the interests of the general public, and did they in effect completely restrict the practice of prostitution.

Husna Bai's lawyer highlighted two major provisions of the SITA that indirectly limited her ability to practise prostitution even as an independent profession. These provisions defined brothels and criminalized living on the earnings of prostitution.

The SITA was aimed at destroying organized prostitution, therefore chief among its aims was the closure of brothels. Section 2(A) of the SITA defined a brothel as a house, room, place, or any portion of the same which were used for the purpose of prostitution from the gain

[89] S.7(2)(a), SITA, 1956.
[90] S.372, Indian Penal Code, 1875.
[91] *Chiranjit Lal Chowdhury* v. *Union of India*, AIR 1951 SC 41
[92] Justice Sahai cited *Rashid Ahmad* v. *Municipal Board, Kairana* , 1963 AIR SC 163, one of the early vegetable seller petitions, discussed in the introduction as precedent on this point.

of another person or for the mutual gain of two or more prostitutes. Thus, in effect, any place where more than one prostitute resided would be defined as a brothel. Women living in a brothel could be evicted by a magistrate and be externed from a district.[93] Husna Bai however lived with her extended family at No.54-A, Mohammad Ali Park. This included her cousin Shama Bai, a prostitute and a co-petitioner, and under the SITA automatically designated her home as a brothel. The petition by Mahroo and Ram Pyari, the prostitutes from Delhi also pointed out that the definition of the brothel was so wide and extensive that it prohibited any kind of association between prostitutes and prohibited their relations with their friends and family. It also prevented them from living with their adult children. Over half the prostitutes surveyed in Kanpur lived in a shared single room with two or three other women.[94] Several prostitutes who shared premises attempted to evade the law by putting up partition walls in their tiny rooms so that each woman would have her own residence, and thus the dwelling could avoid being classified as a brothel.[95]

The realities of a prostitute's life were also hit by S.4(2) of the SITA which criminalized living on the earnings of prostitution. This section provided that any person over the age of eighteen who knowingly lived on the earnings of prostitution of a woman or a girl would be subject to imprisonment for up to two years and a fine of a thousand rupees. The second part of the provision identified certain categories of people who were presumed to be living on the earnings of the prostitute, unless it was proven otherwise. These included persons acting as touts or pimps, those exercising control and influence over a prostitute's movements, and finally "any person" living with or habitually in the company of a prostitute. The provisions cited above were put in place to penalize pimps, brothel keepers and others who were believed to exploit women for prostitution. However, the phrase "any person" covered a wide range of

[93] S.18 and S.20 of the SITA, 1956.
[94] Agnihotri (1954), 97.
[95] *Id.*

people including the parents, brothers and sisters of prostitutes. If a prostitute were living with her family or associates an automatic presumption would be drawn against them.

S.4(2)(a) of the SITA had been deliberately crafted. The original governmental draft of the SITA had exempted the mother of the prostitute if she were infirm or over the age of 60 years of age, and children if they were under the age of 21. However, Lady Rama Rao persuaded the Home Ministry that the exemption for the mother should be removed and that for children lowered to eighteen years of age.[96] In an explanatory note, the AIWC explained that a mother as an adult is supposed to know better and be more responsible. Further, they believed that this would create an incentive for a prostitute to leave the trade to shield her parents from prosecution.[97] During their visits to brothels, the Committee for Social and Moral Hygiene had noted the presence of several elderly women who posed as relatives and friends of the prostitutes, taking care of them when they were ill, accompanying them to doctors and lending them money.[98] The Committee however viewed these older women with suspicion and were convinced that they were brothel mistresses who were living off the prostitutes like parasites.

Prostitution is often seen as an activity located outside the familial space of the home. However, as Ashwini Tambe points out, there exist strong continuities between families and brothels in their structures of affection, obligation and domination.[99] The empirical reality of prostitution, challenging the separateness of the domestic sphere in the abstract, was that many women engaged in prostitution lived with their extended families. Most prostitutes not only maintained their children and family establishments in the cities where they worked, they also

[96] Serials 8 and 9, Ministry of Home Affairs: Police IV, 37/3/58, 1958 [NAI].
[97] AIWC Opinion of Mrs Mithan J. Lam (Bill No 58 of 1954), File No 138, All India Women's Conference Papers, IV Installment [NMML].
[98] *ASMH Report*, 4.
[99] Ashwini Tambe, "Brothels as Families: Reflections on the History of Bombay's *Kothas*" *International Feminist Journal of Politics*, 8.2 (2006)): 219-214, 223.

sent remittances back to their families in villages. The Bombay survey showed that more than a third of prostitutes sent home between Rs 10 to 20 every month.[100] The organization of prostitution was diverse, though the SITA treated all prostitutes the same. For instance, only 36% of the prostitutes interviewed in Kamathipura in Bombay admitted to giving a commission to the brothel keeper, which usually amounted to half their income.[101]

Justice Sahai was quite persuaded by the Husna Bai's claim that S.4(2) (a) was an unreasonable restriction on her ability to practice her profession. He noted that, unlike other countries, in India it was common for members of a family to live together. He agreed with the petitioner's contention, that there must be hundreds of prostitutes whose parents and other family members live with them, and share household expenses, but may not in any manner be encouraging, abetting or helping them carry on prostitution. Unless it was specifically proved that such family members were living off the prostitute's income or encouraging her profession, Justice Sahai ruled, it would be "extremely risky and not free from danger" to presume otherwise and place the burden of presumption upon them. This subsection, it was accordingly held, was not reasonable and had no sufficiently close connection with the object of suppressing immoral traffic in women. This portion of the judgement generated some anxiety back back in Delhi. The Law Minister expressed concern that the court had declared that prostitution was "a profession, or at least a trade" and it could therefore not be banned but only reasonably restricted. He wrote to his advisors asking whether the government could make a distinction between trades that could be legitimately followed and others which may not amount to a crime but were opposed to public policy. He drew an analogy to telling a lie, which

[100] Punekar and Rao,(1967)144.
[101] Punekar and Rao, (1967) 144.

by itself was not an offence but could not be considered legitimate or proper.[102] Where did this anxiety emerge from?

The Geography of Freedom: Eviction and the Freedom of Movement

Husna Bai's second major challenge was to S.20 of the SITA. As a contemporary legal expert described it, "section 20 finishes the entire business of prostitution".[103] It gave the magistrate power to remove any woman or girl from the limits of his jurisdiction, upon receiving information that she is a prostitute. If the woman concerned failed to comply with the court's order, both she and any party that harbored or concealed her were liable to steep fines.[104] This was in addition to the restriction instituted by S.7 of the SITA, which prevented prostitution being carried out within 200 yards of any place of public religious worship, educational institution, hospital or nursing home.

Since the nineteenth century, the movement of prostitutes had come under the intense scrutiny of the state, linked to its concern with the spread of venereal diseases. Several scholars have demonstrated that colonial intervention in public health and hygiene was spatial, through the creation and monitoring of new geographies.[105] The Cantonment Acts of 1864 and 1889, and the Indian Contagious Diseases Act, 1868 were all enacted over concerns over the rising rates of venereal diseases amongst British troops, and sought to bring about compulsory registration of brothels and prostitutes, regular medical exams and mandatory treatment of infected women. Women who refused to comply with the regulations were expelled from cantonments and regimental *bazaars* where their main business was leading to the creation of

[102] Note by B.N Data, Minister for Law and Justice, Ministry of Home Affairs: Police IV, 37/3/58, 1958 [NAI].
[103] Mazhar Hussein (1958), *SITA*, 62.
[104] S.20, SITA.
[105] Alishon Bashford, *Imperial Hygiene: A Critical History of Colonialism, Nationalism and Public Health* (Basingstoke: Palgrave Macmillan, 2004).

segregated red light areas in Indian cities.[106] Military authorities remained concerned about the presence of women outside the cantonment who were not within the ambit of the Cantonment Act. Rather than extend military powers to cities, the colonial government suggested that the problem be resolved through the use of municipal laws. Since the entire town could not be declared out of bounds for soldiers, municipalities drew on both common law principles and new powers to segregate prostitutes. New municipal and police laws gave the city authorities the power to evict prostitutes and keepers of brothels, and punish women for soliciting in a public place. The state did not use these powers to abolish prostitution, but to push prostitutes into 'tolerated zones'. Specific red-light areas like Grant Road and Kamathipura in Bombay, G.B Road in Delhi and Sonagachi in Calcutta emerged after this shift in law and policing.

Despite the colonial origins of the municipal administration system, with the political reforms of 1909 and 1919, there was greater Indian involvement in municipal government which brought about changes in municipal governance. For instance, the Delhi Municipal Corporation received an increasing number of petitions from citizens in Delhi demanding the eviction of prostitutes from specific commercial areas.[107] As municipal governments came to be dominated by elected representations, abolitionist campaigns were launched against red light areas. For instance, in *Asghari Jaan's* case the chief complainant was Pundit Shiva Datt, the Vice Chairman of the Municipal Board of Etah, and the chief witnesses for the prosecution included a servant of the Chairman of the Municipal Board and the cousins of a municipal contractor.[108]

With Independence, popularly elected municipalities began to exercise greater vigilance and challenged the very geography of toleration that they had previously created.

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[106] Stephen Legg, "Stimulation, Segregation and Scandal: Geographies of Prostitution Regulation in British India, between Registration (1988) and Suppression (1923)," *Modern Asian Studies* (2012 forthcoming).
[107] DSA/Chief Commissioners Files/Local Self Government/1940 (2) (97): Note with Regard to Action Taken by the DMC in Connection with the Removal of Prostitutes from Prohibited Areas of Delhi, 9 October 1940 [DSA].
[108] *Municipal Board, Etah* v. *Asghari Jaan and Mt. Bismillah*, AIR 1932 All 264.

Prostitutes and brothel keepers were forced to grapple with this shift in the register of governance. *Kachanmala Dassi's* case is an instance.[109]. Lilabati Debi, the tenant of 8th Latu Mullick Lane was served a notice of eviction by the owner of the property, Kanchanamal Dassi and the Commissioner of Police, Calcutta for using the premises as a brothel and causing a nuisance or annoyance to the occupiers of neighboring premises. Lilabati Debi readily conceded that she was using the house as a brothel, though her witnesses did argue that it was a "very peaceful brothel" where only teetotalers and nonsmokers were allowed. The ready admission suggested that this was indeed a practice that was recognized and tolerated for years. Her chief defence was that Latu Mullick Lane had two other brothels and was part of the brothel quarter. It was also in proximity to the large red light area of Rambagan. In her argument, citizens who live in the brothel quarter are not entitled to object to a house being used as a brothel. Her lawyer, even attempted a modernist argument that the free association of men and women outside marriage was quite moral according to the standards of a progressive society. The court rejected both contentions, holding that 'respectable people' in a red light area have the right to complain if the brothel causes them annoyance; in this case, people coming at odd hours of the night and going away in the morning was annoyance enough. The court further ruled that in deciding a test of morality, it goes neither by the private morality of the judge, nor the "fanciful morality of persons who happen to be propounding a new sociology or advanced philosophy of morals", but by the ordinary and normal standards of morality prevailing and accepted in the society.[110]

Under the new constitutional order, even sovereign guarantees of long standing could be overturned. The municipality served notices of eviction to several women belonging to the Kanchan community who resided in the prostitute quarters in the old city of Malerkotla. The

[109] *Kachanmala Dassi* v. *Lilabati Debi*, AIR 1951 Cal 164.
[110] *Id.*

women had been granted permission by a royal *firman* of the Nawab of Malerkota in 1913 to reside in the Sunami Gate area. However, the High Court held that the decision of a former sovereign could not bind the rights of a sovereign legislature.[111]

Common to all sets of regulations, whether in the 'segregationist' or 'abolitionist' phase, was a lack of interest in the prostitute or her wellbeing. The governing principle behind tolerating and evicting prostitutes was a concern with disease, public health and morals. The prostitute herself was a figure to be tossed around according to the prevalent logic of governmentality. Section 20 of the SITA elevated this power of local government and granted it uniformly to magistrates across the country. However, it did sit rather discordantly within a legislation that was seeking to rescue and rehabilitate the prostitute, rather than maintain public order.

Husna Bai's petition attacked S. 20 of the SITA on three grounds. The first was that the section infringed upon her right to move freely through the territory of India and her right to reside and settle in any part of India as guaranteed under Article19(1)(d) and Article 19(1)(e) of the Constitution. Secondly, it infringed her right to equality under Article14 of the Constitution, inasmusch as it conferred unrestricted powers upon the magistrate and provided no reasonable basis for classifying prostitutes. Finally, it was contended that these powers were not a reasonable restriction on her right to practice her trade and business as contemplated under Article19(6) of the Constitution.

Husna Bai's concern about eviction becomes clear through the list of respondents. As respondents 4 and 5, she names Abdul Hameed Khan and Abdul Hameed. Abdul Hameed, a wealthy businessman and proprietor of the Lal Biri Works at Allahabad was the owner of No.54-A, Mohammad Ali Park, the address at which Husna Bai resided. Abdul Hameed Khan

[111] *Municipal Committee, Malerkotla* v. *Mohd. Mustaq and others*, AIR 1960 Punjab and Haryana 18.

was the tenant of this address from whom Husna Bai had subtleased her room. She prayed that they both be restrained from taking any action for forcible eviction of her from the premises where she lived and carried out her profession.

Justice Sahai was quite emphatic that there was some force in the objection to the constitutionality of S.20 of the SITA on the ground that it violated a citizen's right to move freely and settle in any part of the territory of India. He noted that under this provision, the magistrate had the power to remove a prostitute from a place for **all time to come**. There was no time fixed for the period she could be removed or prohibited from re-entering. The court noted that this could not be seen as a reasonable restriction as it seemed to have no connection with the object in view, i.e. the suppression of traffic in persons and exploitation of others. Evicting a prostitute from a locality merely prevented prostitution in that particular locality and shifted the activity to another location; it did not liberate any woman from the profession, nor did it allow the possibility for reform.

There was already precedent for a ruling like Justice Sahai's. The Bombay High Court in 1950 had struck down an analogous provision of the Bombay Prevention of Prostitution Act, 1923 on the grounds that it violated Article 19(1)(d) and (e) of the Constitution. In *Shantabai Rani Benoor's* case, the petitioner had been served an order by the Additional District Magistrate of Poona, directing her to remove herself from Poona City to a place beyond the radius of five miles from Poona City within a period of a month.[112] All the notice required the petitioner to do was to remove herself from Poona City to somewhere beyond the radius of five miles from the Poona Post Office. The High Court noted, "the dominion of India was very vast," and there seemed no way to enforce the order, or for the policeman to know where the woman would have to be taken. Whereas only sixteen women had approached the High Court,

[112] *In Re Shantabai Rani Benoor*, 1951 AIR (Bom) 337.

the judgment invalidated the notices issued to three hundred and forty women in Poona, emphasizing the connection between individual writs and their larger effects.[113]

Both Justice Sahai's decision in *Husna Bai* and the Bombay High Court decision in *Shantibai* relied on a decision of the Bombay High Court in a case involving externment orders under the Bombay Public Security Measures Act, 1947.[114] The petitioner in this case had been evicted because of his political actions from the city limits of Ahmedabad in 1948. On the commencement of the Constitution, he challenged the orders and the law as a violation of his rights under Article 19(1)(d) and (e). The court rejected the contention that such a restriction was reasonable as it permitted the citizen to be anywhere in the vast territory of the Union of India, except only for the city of Ahmedabad. The state conception of populations that could be moved around as required came to be challenged profoundly through the Constitution. As Durgabai Deshmukh had presciently warned Nehru, "the individual freedom of movement which the Constitution guaranteed complicated the state's plans. The state was powerless to check the flows of people."[115]

Justice Sahai took seriously Husna Bai's claim that S.20 was arbitrary and conferred wide discretion on the magistrate in deciding which prostitute to remove outside his jurisdiction. As he noted, "it is left to the sweet will of the magistrate to remove one prostitute and not another though her case may be quite similar to the case of one who is being removed". There were no guidelines to determine in which cases, "it became necessary in the interest of the general public" that a woman would be required to remove herself.

It's worth considering why Husna Bai's lawyer chose to frame his argument in terms of the constitution, whereas the idea of rational classification and equality of treatment within

[113] "Order on Poona Women Void: Case under Prevention of Prostitution Act," *The Times of India*, 29 November 1950.
[114] *Jesinghbhai Ishwarlal* v. *King Emperor*, AIR 1950 Bom 363.
[115] Letter from Durgabai to Nehru, 7 September 1954, Durgabai Deshmukh Papers, (NMML).

the same class had been prevalent in cases involving prostitutes even before the Constitution. In 1931, several challenges were made to bye-laws enacted by municipalities under the UP Municipalities which sought to prohibit prostitutes from residing in certain areas or conversely to limit prostitutes to certain localities. Chanchal, a prostitute in Hathras was arrested and fined for violating a bye-law, that had listed thirteen streets and localities where no public prostitute was to be permitted to reside. This prohibition exempted all prostitutes who already owned homes or resided in these areas at the end of 1925, and applied only to 'newcomers'. The Allahabad High Court acquitted Chanchal and struck down the bye-law as *ultra vires* the governing UP Municipalities Act, as it did not amount to the prohibition of public prostitutes but merely a prohibition of an arbitrary class of prostitutes.[116] Justice Sulaiman ruled that this arbitrariness created an "invidious distinction" that benefited one class of prostitutes and injured another. The court ruled that it was illegal for the municipal board to single out a particular prostitutes or a group of prostitutes and prohibit her or them from residing in a particular area. Such discrimination would defeat the object of framing such a bye-law and not meet the requirements of the "maintenance of health, safety and convenience of the inhabitants of the town", the grounds on which the municipality was delegated this power. The High Court of Allahabad proceeded to strike down similar bye-laws that were enacted by the municipality of Agra, holding that a prohibition must be general and of universal application and could not make an exception in favor of a particular group.[117] While there existed an older precedent of the Allahabad High Court requiring equal treatment within a class to meet the purpose of the legislation, both Husna Bai's lawyers chose to draw upon new constitutional jurisprudence under Article 14.

[116] *Mt Chanchal* v. *King Emperor*, AIR 1932 All 70.
[117] *Mt Muhammadi* v *King Emperor*, AIR 1932 All 110; *Mt Naziran* v. *King Emperor*, AIR 1932 All 537.

The Supreme Court of India had held in 1952 that the principle of equal protection under the law permitted reasonable classification for the purpose of legislation. However, for a law to pass the test of valid classification, it must be founded on an intelligible differentia which distinguishes the persons affected from those that are not, and such classification must have a rational nexus with the object the law sought to achieve.[118]

According to Justice Sahai in the *Husna Bai* case, S.20 of the SITA failed to meet this test of valid classification. He pointed out that the provisions of the SITA provided no guiding principles which a magistrate could use to determine whether a prostitute should be removed. The preamble to the SITA only noted that the Act was "in pursuance of the International Convention signed in New York on 9th May, 1950, for the suppression of immoral traffic in women and girls". The magistrate was given "a naked and arbitrary power" in Justice Sahai's words, and a law that gave uncontrolled authority to discriminate violated Article 14 of the Constitution. Justice Sahai approvingly quoted the decision of the US Supreme Court on the Equal Protection Clause holding that, "if a statute does not disclose a definite policy or objective and confers authority on an administrative body to make the selection at its pleasure, the statute would be held to be discriminatory irrespective of how it is applied".[119]

Critical to his judgment was his identification of the magistrate's office as an executive authority. The magistrate in colonial India was a civil servant appointed by the government who exercised a wide range of powers. Nationalists had argued that this made magistrates less likely to be neutral when serving in a judicial capacity and had campaigned for the complete separation of the judiciary from the executive. Article 50 of the Constitution placed a duty upon the state to achieve complete separation of the judiciary from the executive in the public

[118] *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75. Rohit De."Rebellion, Dacoity, and Equality The Emergence of the Constitutional Field in Postcolonial India." *Comparative Studies of South Asia, Africa and the Middle East* 34, no. 2 (2014): 260-278.
[119] *Yick Wo* v. *Hopkins* (1886) 118 US 356 (J).

services of the state. However, administrative reforms were slow and the complete separation would not be achieved till the 1970s.[120]

The striking down of S.20 of the SITA caused considerable consternation to the bureaucrats at the Home Ministry. The drafters of this statute believed they had been careful in avoiding charges of arbitrariness. They had learnt from the experience of the Bombay government in *Shantabai Rani Benoor'*s case in which the court had declared void the clause conferring the power to extern under the Bombay Prevention of Prostitution Act because it did not give the affected person an opportunity to be heard.[121] Taking this into consideration, S.20 of the SITA explicitly required that the magistrate give the girl or woman in question an opportunity to provide evidence before determining that she was a prostitute and needed to be removed from the area.[122] The Law Minister asserted that this clause was sufficient to meet the test for arbitrary classification.[123]

The debate over S.20 of the SITA and the power to extern more generally reflected tensions between older colonial ethics of government and a new vision of governance that was opened up through the Constitution. For the Home Ministry bureaucrats, the powers of the magistrate under S.20 were not unusual, as Lokur said, "such discretion was often vested with judicial officers".[124] However, the argument made by Husna Bai relied on a new standard of citizens rights echoed in a series of court decisions, all of which reflected Justice Bose's belief that the test for arbitrariness was whether, "the collective conscience of a sovereign democratic republic as reflected in the views of fair-minded, reasonable, unbiased men, who are not swayed by emotion or prejudice, can consider the impugned laws as reasonable, just and fair

[120] "Proposed Law Minister Conference- Separation of Judiciary from the Executive", Ministry of Home Affairs, File 9/1/60- JII [NAI].
[121] Bombay Prevention of Prostitution Act, Ministry of Home Affairs: Police II, File 13/13/55-P II, 1955[NAI].
[122] S.20(2), SITA, 1956.
[123] Note by Minister for Law and Justice to Minister for Home Affairs, 17 September 1958, Ministry of Home Affairs: Police IV, File 37/3/58, 1958.
[124] *Id.*

and regard them as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today".[125]

It was not, therefore, surprising that Husna Bai chose to rely on the new constitutional jurisprudence on equality rather than citing the older Allahabad cases which dealt with rational classification. The decisions in *Chanchal's* and *Naziran's* cases had struck down the impugned bye-laws on the ground that they discriminated between different prostitutes and defeated their own purpose, which was to end prostitution. While both Chanchal and Naziran were acquitted and excused from paying the fine, the Court's recommendation to the municipality was to redraft the bye-law to make the prohibition general and not "leave other prostitutes free to ply their trade". The central concern motivating the constitutional jurisprudence was not the efficacy of the laws, but the restrictions on the rights of the citizen. The courts conceded that rights could be restricted, but insisted that such restriction was to be strictly scrutinized.

From Husna Bai to Kaushalya Devi: The Legacy of a Court Decision

Despite the excitement raised by Husna Bai's petition, and the contentions that were accepted by the Court, Justice Sahai's final decision was mild. While noting that he found "some substance in the submissions of the petition" that section 20 and section 4 of the SITA were unconstitutional, he declined to express any final opinion. As Husna Bai's rights had not yet been infringed upon, he held that the petition had been filed prematurely and could not be entertained. In this, he was relying on a series of cases which had held that to make a case for the relief of a writ, "it is incumbent upon the petitioner to establish that the law complained of… affects or invades his fundamental rights as guaranteed by the constitutions, and cannot be merely declaratory in nature".[126] Husna Bai attempted to argue that there was a real

[125] *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75.
[126] *Chiranjit Lal Chowdhury* v. *Union of India*, AIR 1951 SC 41 (P), (pp. 52-53).

possibility that her landlords might threaten her with legal proceedings, but she could provide no 'tangible evidence' of the same. Therefore his determination that prostitutes had the fundamental right to carry out their trade, and that the definition of the brothel and S.4(2)(a) in the SITA were unconstitutional, did not have legal force and was only in the nature of *obiter dicta*.

The newspaper headlines portrayed this as Husna Bai's defeat – as the *Times of India* declared, "SITA held Valid: Woman's Plea Fails".[127] Though the court had noted that several sections of the SITA were unconstitutional, what remained with the dismissal of the petition on technical grounds, were non-binding observations of a single judge of the Allahabad High Court. Thus, in the ordinary course of events, this should not have been a cause of concern for the government.

The Home Ministry under whose jurisdiction the SITA came, had followed Husna Bai's petition closely. Following the decision, the Home Minister asked for a detailed opinion from the law ministry on the possible impact of the amendment. After three months of consultations the Law Minister was able to assure him that the comments made by Justice Sahai were only in the nature of obiter, there was no serious risk of the provisions being struck down as unconstitutional, and no immediate action was required.[128]

Nevertheless, the decision in Husna Bai began to take on a life of its own. As one of the earliest cases on the SITA, decided within two weeks of the act coming into force, the decision was reproduced in all leading commentaries on the act. Mazhar Hussein's popular commentary on the SITA published in 1958 reproduced a newspaper article that described Justice Sahai's decision as the case had not yet been published in any law journals.[129] In an

[127] "Suppression of Immoral Traffic Act Held Valid: Woman's Plea Fails," *The Times of India*, 27 May 1958.
[128] Note by S. Balakrishna, Assistant Legal Advisor, Ministry of Home Affairs: Police IV, File 37/3/58, 1958.
[129] Mazhar Hussein (1958), 62.

introduction, Hussein noted that Justice Sahai had observed that sections 20 and 4(A) placed unreasonable restrictions and were hit by Articles 15 and 19 of the Constitution. Mazhar Hussein was a lawyer based in Lucknow and was the author of several treatises. His commentary on the SITA remains the leading textbook for practitioners, and till 1960 was the only work on the subject. The question of the possible impact of the fundamental rights upon the SITA had troubled both the government and women's groups for a few years, and Justice Sahai's obiter provided the roadmap for lawyers.

SITA cases rarely went up to appellate courts and therefore leave few traces in the judicial record.

One of this small number of reported High Court decisions under the SITA was a complaint before the Bombay High Court, against a prostitute living in Radhabai Building in Bombay. She faced proceedings under SITA for practicing her profession near schools, temples and hospitals. The woman admitted to being a prostitute but denied soliciting customers in public. The High Court dismissed the complaint, holding that a woman's right to practice her profession could only be restricted "in the interests of the general public", and as the residents of the locality had not complained about the woman and did not mind if she carried on the profession inside her room, no case under the SITA could be made out.[130]

The older municipal regulations that sought to regulate prostitution also came to face constitutional challenges, and while courts differed in their decisions, some did consider the arguments for reasonable classification and arbitrariness laid down in Justice Sahai's decision. For instance, the Sessions Court of Malerkotla acquitted thirteen persons who had been charged with violating municipal prohibitions on practicing prostitution in the old city of Malerkota. The judge expressed the view that the municipal resolution was not a reasonable restriction on

[130] "States' Appeal Dismissed: Case Against Prostitute," *The Times of India*, 13 July 1960, p. 8.

the practice of trade and occupation guaranteed in the Constitution. Although this acquittal was reversed by the High Court, it was because evidence was produced that the municipality had marked several areas including Satta Bazaar, Quila Rehmatganj, the Railway station and the area outside the walled city. The courts accepted that restrictions on prostitution could not be absolute.[131] Similarly, Kamla China, a prostitute residing in G.B Road, Delhi's notorious red light area, on being externed from the neighborhood contested her conviction in court. The Sessions Judge acquitted her, explicitly citing Justice Sahai's assessment of the constitutionality of S.20 of the SITA[132]. Even though some of these decisions were ultimately reversed on appeal, it shows that the constitutional discussion

The next few years saw repeated contestation of the SITA before High Courts, usually arising from the criminal cases of women arrested for prostitution or for refusing to heed an eviction order. The High Courts of Bombay and Uttar Pradesh struck down S.20 of the SITA as unconstitutional, while the High Court of Andhra Pradesh upheld the law. Not only did all the courts address Justice Sahai's decision, the women's lawyers made complex arguments on the relationship between prostitution and the new postcolonial state.

Begum Do Husain Saheb Kalawat, a prostitute living in the town of Barsi, in Bombay State, was served with a notice by a magistrate asking her to remove herself from the city and go to Osmanabad within three days. He made the order after receiving several complaints that she was carrying on her profession within 80 feet of the municipal school, her behavior was indecent, young girls had to go past her house to go to school and that she often advertised herself by standing on the public road. Prima facie, the magistrate found that she fit into the category of prostitutes who ought to be removed in the interests of the general public. Begum Kalawat moved the High Court and argued based that S.20 was *ultra vires* Article 14 and

[131] *Municipal Committee, Malterkotla i Mod Mushtaq*, AIR 1960 P & H 18.
[132] *Kamla China* v. *State of Delhi*, AIR 1963 P & H 36.

19(1)(d) and (e) of the Constitution. The court, in striking down S.20 as unconstitutional, noted that in order to determine whether the restrictions on fundamental rights were reasonable in the interests of the general public,

> "one must remember that women do not choose their vocation because they like it. It has been recognized that in a large measure they are forced into this vocation by social conditions and most often against their will. One may not, therefore judge these cases with any amount of harshness". [133]

The High Court however refused to accept the contention that the law violated Begum Kalawat's right to practice her trade and profession. Her lawyer, U.R. Lalit conceded that restrictions of her right under Article 19(1)(g) had to be read with Article 23 which prohibited traffic in human beings. Moreover, the Supreme Court in a case involving auctioning of alcohol licenses had observed, "that it could not be denied that the state has the power to prohibit trades that are illegal or immoral or injurious to the health of the public …laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be unconstitutional because they enact a complete prohibition".[134]

Reflecting on the *Shantabai* decision which held the Bombay Prevention of Prostitution Act, 1923 was struck down as unconstitutional, the Advisory Committee on Social and Moral Hygiene expressed an apprehension that similar challenges under Article 19 might be raised against any effort to regulate prostitution unless Article 19 was made subject to some restrictions in the interests of public decency, public morality or public health.[135]

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[133] *Begum Do Hussain Saheb Kalawat and another* v. *State of Bombay*, 1963 (1) CrLJ 148.
[134] *Cooverjee* v. *Excise Commissioner, Ajmer*, AIR 1954 SC 220.
[135] *ASMH Report*, 32.

The Allahabad High Court, too, refused to accept that the SITA encroached upon a woman's right to carry out her trade and profession. Noting that the women rested their claim on the obiter observations made by Justice Sahai in *Husna Bai*, the High Court ruled that prostitution, like gambling, touting and other "inherently immoral" occupations could not be put on par with normal respectable professions.[136] The words "any profession" provided under Article 19(1)(g) could not, in the court's view, be interpreted as 'any profession that a citizen may adopt' regardless of the effect on public interest.[137]

However, the court found that the petitioners, six prostitutes from Kanpur who faced an externment order, were on 'surer ground' when they relied on Articles 19(d) and (e), i.e. their right to freely move in the country. Justice Broome highlighted the fact that S.20 sought to control the movements and residence of prostitutes, rather than bring prostitution to an end. He did not require her to give up her trade, but merely to remove herself from the limits of the local jurisdiction. This, the court held, was not a reasonable restriction on the petitioner's right of movement. In determining whether a restriction of reasonable, the Supreme Court had recently held it would take into account the "nature of evil that was sought to be remedied, the ratio of harm caused to individual citizens and the beneficial effect reasonably expected to result for the general public".[138] Following this, Justice Broome found that a woman proceeded against under S.20 did not have the option to cease to be a prostitute and continue to reside in the neighborhood. Past history as a prostitute could still be used as grounds to expel a woman in the present and there was no time limit on the period of her expulsion from the district.

The court carefully distinguished the case at hand from a recent Supreme Court decision on the Bombay Police Act which had upheld the power to extern *goondas* or dangerous thugs

[136] *Kaushalya* v. *State of Uttar Pradesh*, AIR 1963 All 71.
[137] Following the precedent of *Phool Din.* v. *State of Uttar Pradesh*, AIR 1952 All 491.
[138] *Narenda Kumar* v. *Union of India*, AIR 1960 SC 430.

from the district, on the grounds that the state could put fetters on an individual's freedom in the larger interests of society.[139] Broome distinguished the threats *goondas* and prostitutes posed to the community: *goondas* were likely to commit violence and posed a greater threat to the community, justifying drastic measures limiting their rights; prostitutes on the other hand presented at worst a threat of the contamination of morals.

Justice Broome echoed the reasoning in *Husna Bai* in attacking the "unguided and unfettered power" delegated to the subordinate magistrate, by pointing out that in the absence of guidelines, he could make the determination of abridging fundamental rights at his own sweet will, and this decision was not subject to scrutiny of a higher authority.[140] Central to Justice Broome's objection was the exercise of this power of determination by an executive authority. Even the lawyer for the state of UP conceded that if S.20 were to be construed as conferring powers on the executive, it must held to be unconstitutional. The Court rejected the contention that the magistrate's powers under S.20 were in his judicial capacity, observing that the procedure described in the SITA, given the absence of cross examination or the requirement for a reasoned decision, could not be equated with a judicial trial before a court of law by "any stretch of imagination".[141] The court accordingly declared S.20 of the SITA unconstitutional and quashed proceedings against the six women.

The Andhra Pradesh High Court adopted a divergent view upholding the constitutionality of S.20.[142] There were two important points of difference between the Andhra Pradesh decision and the cases before the Allahabad and Bombay High Courts, discussed above. Firstly, the Andhra Pradesh High Court emphasized that the SITA was passed long after the advent of the Constitution and was necessary to enforce Article 23 of the Constitution, and

[139] *Hari Khemu Gawali* v. *Deputy Commissioner of Police, Bombay*, AIR 1956 SC 559.
[140] "Curbs Held Void; Women's Petitions Allowed," *The Times of India*, 20 November 1961, p. 7.
[141] *Kaushalya* v. *State of Uttar Pradesh*, AIR 1963 All 71
[142] *Vanga Seetharamamma* v. *Chitta Sambasiva Rao and another*, AIR 1964 AP 400.

thus enjoyed a greater presumption of constitutionality. The judge disagreed with the decisions in *Husna Bai* and *Begum Kalawat* by holding that the restrictions imposed by S.20 were reasonable in light of the object to be achieved. He defended the absence of any limit to the prostitute's possible externment, on the grounds that it was difficult for a magistrate to "divine at the time of the order how long it would take for the woman to be rid of such tendencies as are likely to pollute the atmosphere".[143]

Secondly, he held that the magistrate did not have unchecked discretion or arbitrary powers under the act. He went through the procedure step by step to demonstrate that the process described was a judicial process. However, the empirical distinction between Andhra Pradesh and the states of UP and Bombay was that post independence reforms had been successful in separating the judiciary from the executive at the level of the magistrate. The court ruled that the discretion exercised by a magistrate in a state where there has is separation of the judiciary from the executive cannot be deemed to be the exercise of discretion by an executive authority. The discretion that would be disallowed in an administrative or executive authority would be permitted in a judicial body.

Whether the courts upheld the constitutionality of SITA or chose to strike it down, the debate gradually shifted emphasis from the rights of a prostitute to the process that the state must follow. The decisions increasingly turned on the question of discretion given to a magistrate, a figure that came to be viewed differently as the postcolonial state sough to separate the judiciary from the executive.

Faced with conflicting decisions across the country, the Supreme Court admitted the UP government's appeal in the *Kaushalya* case. A constitutional bench of the Supreme Court was convened to hear the petition, which saw heated arguments from both sides. The court

[143] *Id.*

ruled to uphold the validity of S.20 and expressly overruled the decisions in *Husna Bai* and *Begum Kalawat.*[144] The court went through the procedure laid down under S.20 and noted that it approximated the process of a judicial enquiry. The fact that the state had given the prostitute an opportunity to be heard on the charges preferred against her and to adduce evidence to the contrary, *necessarily implied* a right to a public enquiry. She could engage an advocate, ask for examination of the informant and cross examine witnesses as well as adduce her own evidence. Further, the Supreme Court settled the question of the magistrate's role, holding that it was a judicial one and therefore subject to revisions by the Sessions Court and High Court.

Kaushalya's lawyers had argued that S.20 violated the principle of reasonable classification required by Article 14, on the grounds that it allowed the magistrate to discriminate between different prostitutes who lived in the jurisdiction. Chief Justice Subbarao held that the reasonable classification test was founded on the idea of intelligible differentia that had a rational nexus with the object sought to be achieved by the law. The court held that there was an obvious difference between a prostitute who carried on her trade on the sly or lived in a sparsely populated area of the town, and one who lived in a busy locality within easy reach of public, religious and educational institutions. Chief Justice Subbarao explained,

> "Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded -locality or in the vicinity of public institutions not only helps to demoralise the public morals, but, what is worse, to spread diseases not only affecting

[144] *The State of Uttar Pradesh* v. *Kaushaliya and Others*, AIR 1964 SC 416.

> the present generation, but also the future ones. Such trade in public may also lead to scandals and unseemly broils."

The Supreme Court accepted the claim that the prostitute has a fundamental right to move freely and reside throughout the territory of India, and S.20 of the SITA was clearly a restriction of this right. However, the court also held that the "reasonableness" of such a restriction depended upon the "values of life in a society …and the degree and urgency of the evil sought to be controlled". Departing from the earlier more neutral descriptions of prostitution, the court noted that the magnitude of the evil and opined that the urgency of the reform may require drastic remedies like deporting the worst prostitutes from their area of operation. The prostitutes' contention that this would lead to a situation where they were tossed about the country through consecutive orders of various magistrates was rejected by the Supreme Court as "bordering on a fantasy". The court went onto state that if the presence of a prostitute in a locality has a demoralizing influence on the public, (having regard to the density of the population, the existence of schools, colleges and other public institutions) the order of deportation was necessary to curb the evil of prostitution and to improve the public morals.

With the decision of the Supreme Court in *Kaushalya*, the constitutionality of the SITA was settled, and no further constitutional challenges would arise for the next fifty years.[145] However, can we write off this entire process of litigation as a complete victory for the state? What does the litigation reveal about the changing vocabulary of prostitutes and ways of organizing? How did the Constitution come to matter in the lives of prostitutes?

Conclusion

"*Even a depraved woman cannot be deprived of her right except for good reasons*"

[145] *Sahyog Mahila Mandal* v. *State of Gujarat*, (2004) 2 GLR 1764

Chief Justice Subbarao[146]

The enactment of the constitution transformed the everyday regulation of prostitution in India. First, by abolishing trafficking through the Constitution, the authors sought to create conditions of freedom – from individual exploiters – for prostitutes, while also providing a legitimate basis for the state to regulate the daily life of these newly free subjects. This process of abolition and rescue by the bureaucracy of social welfare, in contrast to its colonial predecessor, became marked as an arena where women could play a role in public life. Secondly, the litigious prostitute in the Indian republic was able to represent herself as an economic actor asserting her rights in a public space. Central to such prostitutes' claims was the redefinition of the idea of the productive citizen, challenging claims made by elite women that prostitution was unproductive work.

How does one evaluate the process of litigation that began with Husna Bai's petition? What insights does it offer into the relationship between women and a postcolonial constitutional republic? If one adopts a doctrinal approach, the process of litigation initiated by Husna Bai stands defeated in the Supreme Court's decision in *Kaushalya Devi*. The Supreme Court declared the SITA to be constitutionally sound and held that the rights of prostitutes could be restricted in the interests of the general public. This reading would echo readings by Indian feminists, who have argued that law is a hegemonic project of patriarchy and modernity, legitimizing only particular ways of being and doing, and that rights lose their transformative potential when institutionalized by law.[147] Such a reading would also find favor with American critics of the right's revolution, who have argued that courts have limited powers to achieve

[146] *The State of Uttar Pradesh* v. *Kaushaliya and Others*, AIR 1964 SC 416
[147] Nivedita Menon, *Subversive Sites: Feminist Politics Beyond the Law* (Chicago: University of Illinois Press, 2004)

social change and the costs of litigation are not worthy the small judicial victories that can be achieved[148]. Prabha Kottiswaran, a legal ethnographer of the contemporary sex work industry in India, argues that sex workers are unlikely to participate in bourgeoisie civil society mechanisms like litigation, winning greater victories through their participation in 'political society'.[149]

This skepticism of law is a valuable corrective to triumphant accounts of legal liberalism. However, viewing the success or failure of legal mobilization purely in terms of a judicial verdict severely limits our understanding of the role of law in society.

Legal practices and rights discourses develop lives outside formal state institutions.[150] It is remarkable that prior to Husna Bai's petition, there existed in the popular imagination of prostitutes the belief that the right to work in the Constitution meant that the state could not abolish prostitution. The argument was made several times to the members on the Advisory Committee of Social and Moral Hygiene, so that they had to recognize the fact in the beginning of the report. Prostitutes talked back to middle class women's groups in the language of rights. A bemused Rameshwari Nehru would recount how a number of prostitutes marched to her house, "to claim the freedom given to them by the constitution to ply their trade unharrassed by police for earning their livelihood".[151]

Any interpretation of these cases must begin by acknowledging the significance of the number of prostitutes who became litigants and the confident assertion of their rights. This challenges us to rethink the belief that the courts in India were the exclusive domain of the

[148] The classic statements of this position can be found in, Stuart A. Schiengold, *The Politics of Rights: Lawyers, Public Policy and Social Change* (New Haven: Yale University Press, 1974) and Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (Chicago: University of Chicago Press, 1990).
[149] Prabha Kottiswaran, "Sword or Shield? The Role of Law in the Indian Sex Worker's Movement," *Interventions International Journal of Postcolonial Studies (forthcoming).*
[150] Martha Minow, "Interpreting Rights: An Essay for Robert Cover," *Yale Law Journal*, 96(1987) :1860-915
[151] Rameshwari Nehru, Presidential Address, 8th All India Conference on Social and Moral Hygiene, 1960, 110

bourgeoisie. Muslim women prostitutes like Husna Bai faced several degrees of marginalization and do not fit easily with other "oppressed groups" whose presence in the colonial courtroom has recently been studied. Nita Verma Prasad and Mitra Sharafi attribute to legal successes forged by Hindu widows and Muslim wives to "liberal judges" and "chivalric imperialism" respectively. [152] But destitute widows and abandoned wives were easier objects of sympathy when compared to prostitutes, whose disruptive presence was recognized even by judges who gave favorable hearings.

I would argue that the presence of prostitutes in courts and their legal consciousness are both products of their marginalization. Prostitutes became subject of intense state scrutiny and regulation since the mid-nineteenth century. Their lives and movements were often circumscribed by regulations, the breach of which subjected them to harassment from state authorities. Prostitutes had multiple points of contact with state agencies, ranging from policemen and doctors to social workers. Their experience with the criminal justice system would bring them into contact with lawyers. Thus, they would have greater awareness of the laws that affected them than middle class or elite women, who little few direct contact with the state. Direct evidence for this hypothesis exists in fragments. Mary, a prostitute based in Agra, on being interviewed in 1958, noted, "the brothel keeper and the inmates knew that the SITA, 1956 would soon be implemented in Delhi… they had good knowledge of the provisions of the law and they were very clear the Act forbade commercialized prostitution but not prostitution itself".[153] As Veena Oldenburg's research shows, prostitutes were among the few groups of women who owned property and appeared as taxpayers in colonial registers, exercising some of the basic requirements for citizenship.

[152] Mitra Sharafi, "The Semi-autonomous Judge in Colonial India: Chivalric Imperialism Meets Anglo- Islamic Dower and Divorce," *IESHR*, 46.1 (2009): pp. 57–81.
[153] Mathur and Gupta (1958), 189.

More significantly, prostitutes rarely acted alone. Almost all the cases that appeared before court had multiple petitioners, and even in Husna Bai's case, it becomes clear that her petition was being supported by other prostitutes in the city. The role of associations in supporting legal mobilization has been emphasized.[154] Living in geographically restricted areas and linked to each other with kinship and caste ties, prostitute organizations appeared in the 1950s. The Allahabad Dancing Girls Union and the Calcutta organizations had been discussed above. As professional associations, these organizations were distinct from charitable groups that worked with prostitutes. The Punekar and Rao study of the Bombay red light areas contrasted the Gomatak Maratha Samaj, an organization led by middle class men who sought to prevent the dedication of girls of the Naik community, and the activities of the Association of Tawaifs and Deredars, which ostensibly promoted music and provided facilities to its members for training in music and dance. While the Maratha Samaj was praised for its success in providing matrimonial opportunities to Naik girls, the Tawaif Association was described a "shield to protect the unscrupulous from law enforcing activities".[155] The role of caste in this process cannot be overemphasized, it provided a resource for organizing and the existence of a "hereditary" group of prostitutes complicated a narrative framed by trafficking. Despite the efforts of colonial law to homogenize all non-conformist sexual practices as prostitution, the courts were able draw upon the cultural memory of categories such as courtesans. Dancing girls, devadasis which did not neatly fit the narrative of exploitation. It is striking that no other common law jurisdiction recognized or sustained arguments defending the right to practice prostitution as a profession. It is this recognition of cultural categories that has allowed for the Supreme Court of India, Pakistan and Bangladesh to recognize rights of sexual autonomy for

[154] Michal McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).
[155] Punekar and Rao (1962), 179.

transgenders (hijra's and kwajasarahs) while rejecting claims by gay men and lesbian women.[156]

Studies of legal mobilization emphasize that every culture offers only a limited stock of resources and practices from which citizens draw to construct meaning and negotiate social interactions[157]. The enactment of the Constitution created a powerful new resource and added to this stock of resources. The ability of prostitutes to mobilize these resources was limited by the biases the figure of the prostitute evoked in the judicial system. This interplay becomes clear when we notice what arguments get greater legal traction. Husna Bai's claim that the SITA restricted her freedom to practice her profession is more easily dismissed than her complaint that powers of externment granted to the magistrate were arbitrary and violated her right of free movement. The prostitutes were successful to the extent that they were able to show that the SITA adversely affected society at large, for instance, in granting unregulated powers to a magistrate. As McCann observes,

> "To take advantage of contradictions, to open up silences, to turn the rules against the rulers, to work for change within existing cultural traditions- these generally are the most effective strategies available to traditionally oppressed and marginal groups".[158]

This recognition by the court was not insignificant, and till the decision in *Kaushalya*, it operated as a precedent in almost all cases. Even after the decision in *Kaushalya*, the judgments in *Husna Bai* and *Begum Kalaat* circulated in legal textbooks and commentaries and continue to be used by lawyers. .

[156] National Legal Services Authority v. Union of India, Writ Petition 604 of 2013;
[157] McCann (1994), 305.
[158] McCann (1994), 308.

Litigation as a strategy was also one of those rare moments when a subaltern would *appear* to speak. This remained its most discomfiting feature, particularly for women leaders who had carved a role for themselves within the postcolonial state, speaking on behalf of these marginalized women. This form of speech also manifested itself in petitions of habeas corpus brought by women who were confined to rehabilitation and rescue homes, seeking to free themselves of the state's interference. These moves drove editorials to sarcastically remark, "that primary assumption behind the rescue of fallen women now being systematically undertaken in the country in obedience to the STIA is that the fallen women are anxious to be rescued"; however, the escape of women from rescue homes and their challenges to their confinement should compel sociologists and psychologists to address themselves to the "mystery of certain women's prejudice against respectability".[159] I am not suggesting that this was the authentic voice of the prostitutes, indeed by the very conditions of subalternity it was precluded to be, however, the constitutional space allowed for a voice that represented the prostitute to become visible in a public domain.

Unsurprisingly, women's groups were extremely critical of representations by prostitutes as authentic and unmediated speech. In its report to the government, the Advisory Committee on Social and Moral Hygiene warned, " if every adult woman must be taken at her word, and her statement in court, while still under the influence of her pimp must be accepted as incontrovertible, no charge can be driven home in a court of law".[160] Durgabai Deshmukh at various points stated that she was "deeply concerned to hear that the beggar and the prostitute have asserted their right under our constitution to carry out their ancient professions".[161] The solution to her and her contemporaries lay in having the courage to amend the freedoms in the

[159] "Voluntary Vice," *The Times of India*, 11 December 1959, p. 8.
[160] *Report of the Advisory Committee on Social and Moral Hygiene* (Bombay: Central Social Welfare Board, 1958), 33.
[161] Durgabai Deshmukh, President Address, 5 Annual Meeting of the ASMH, 1956, p. 18.

Constitution and "not sacrifice the welfare of the community as a whole to the vagaries of a dissolute few".[162] The ASMH's response to the court's findings was even stronger. Rameshwari Nehru argued that there needed to be a total abolition of prostitution, which would require even individual and voluntary prostitution by adult women to be made illegal. In order to further this goal, she argued that the Constitution should be amended to abrogate the freedom to trade and profession.[163] Despite judicial victories, the experience of litigation brought a degree of wariness to the state, as can be seen in demands for greater clarity to law to prevent resort to court on 'frivolous grounds'. As Rameshwari Nehru lamented, "the uncertainty of law" deterred social work.[164]

Since the early 1990s, scholars and activists have increasingly being paying attention to sex worker mobilization in India and other developing countries for decriminalization and access to welfare. However, this is held to be catalyzed by the rise of transnational NGO's and the concerns over HIV, which lead to greater engagement with the needs of sex workers. [165] The argument that sex work is work, is need as a radical position emerging in the West in the 1980s. What Husnabai case reveals is a long history of sex worker organizing in India, and a rights narrative shaped by engagements with the Indian constitution, contrary to the vision of the Indian women's movement. Despite judicial pronouncements, the belief that the right to work in the Indian constitution guarantees sex work continue to be made by sex workers organizations. In 2012, four decades after *Kaushalya*, the Darbar Mahila Samanwaya Committee, a labor union of sex workers in Kolkata, would distribute pamphlets to their members which open with Article 19 of the Indian constitution.

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[162] Letter from Durgabai Deshmukh to G.B. Pant, Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI].
[163] Letter to G.B Pant, Home Minister, 10January, Subject File 31, Rameshwari Nehru Papers [NMML].
[164] Letter to G.B. Pant, Home Minister, 10 January, Subject File 31, Rameshwari Nehru Papers [NMML].
[165] Chaitanya Lakkimsetti., 2014. "HIV Is Our Friend": Prostitution, Biopower, and the State in Postcolonial India. *Signs*, *40*(1), pp.201-226; Nag, Moni. "Sex workers in Sonagachi: Pioneers of a revolution."*Economic and Political Weekly* (2005): 5151-5156.