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Notes from Emma Degraffenried v. General Motors Assembly Division: Making a Case for Laws Curbing Discrimination for Indian Women

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ABSTRACT

The structures of discrimination have been built on the foundation of complex identities, there is no single variable which faces the ire of all the prejudices a society possesses, however, in 1989 Kimberle Crenshaw gave for the concept of intersectionality which examined the interconnected nature of identities on which an individual can be discriminated against, in words of black British Scholar and sociologist, how these variables articulated with one another, forming a complex identity, nowhere other than in the fields of employment and labour can such discrimination be observed, there have been countless instances around the world wherein marginalised women of their respective nation have been able to secure better rights as compared to their Indian counterparts, this paper will argue that Indian women, especially women who are prone to be marginalised due to their layered identities, are discriminated against, this paper will further propound as to how international conventions like CEDAW can help bring about development of a platform which might act as a catalyst for a more profound change in the framework of employment, this paper will take the example of working conditions during nightshift for women in order to illustrate the disparity in opportunities faced by oppressed genders.

Keywords: CEDAW, Intersectionality, Women, Dalit, Employment.

I. INTRODUCTION

Indian collective is not heterogeneous, there remain Nemours variables when the question of identity arises, it is also pertinent to note that the Indian cultural and religious values have the ideas of rigid hierarchies embedded in them, thus, the notion that discrimination is only faced on one variable, for example, on gender, would be a gross simplification, the variables of caste, religion, ethnicity and colour play a significant role in determining who will have a chance to live a liveable life and who will not.

Taking the example of *Emma Degraffenreid v. General Motors Assembly Division* (1976), Kimberle Crenshaw who was a lawyer and an activist demonstrated the fact how discrimination

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often comes overlapping with other forms of discrimination, in the aforementioned case, five African American women were employed by the General Motors, they subsequently sued general motors company for discrimination on the basis of gender and race, the court, however, came to the conclusion that there was no discrimination as General Motors also engaged African American men as workers, the court here looked at race and gender separately and being oblivious to the fact both variables in conjunction could result in discrimination, this experience of individuals who by sheer luck happen to form an association with two or more marginalised identities was first coined as a concept by Crenshaw as intersectionality, the term has now been used to define and understand the layered and complex nature of discrimination in most societies. Intersectionality has found its way into the mainstream of academics and through it, into our legal systems, perhaps it is one of the only ways through which complex questions can be approached without leading to simplistic conclusions which in the end lead up to absurd endings.

II. UNDERSTANDING INTERSECTIONALITY IN INDIA

The focal point of discrimination based on caste is Dalit women, who have to not only face hostility based on their caste, but also their gender. India is least to say a patriarchal, caste-based, and heteronormative society and the marginalisation of these women is an open secret to which the Indian civil society often turns a blind eye, thus, there is a layered form of discrimination which takes place on many levels and categories, one such category being employment. They face the ire of society as they are at the receiving end of violence, it can be verbal physical or sexual. This situation is further aggravated by insensitive police who are often untrained in order to handle such matters especially if the perpetrator is a member of an upper caste and further the situation is sullied by a lack of judicial intervention.

The International Dalit Solidarity Network surveyed 500 Dalit women from all over India who have experienced violence, 62.4%² said they have faced verbal abuse, 54.8% said they have faced physical abuse, 46.8%³ had faced sexual harassment as well as assault, 43% of them faced domestic violence, and lastly 23.2%⁴ was raped. It is pertinent to note that countless cases go unreported simply because of a lack of judicial intervention, and police discrimination, thus, the enormity of this problem cannot be accurately ascertained, but it will be a safe assumption that the number is unlikely to decrease.

² IDSN Survey, <https://idsn.org/key-issues/dalit-women/dalit-women-in-india/>.

³ *id.*

⁴ *Supra* at note 1.

Reports from the Human Rights Council suggest that only 1%⁵ of cases pertaining to violence against Dalit women end in conviction, and convictions in rape cases are below the 2% mark, while the conviction rate amongst women who belong to other castes and sects, though low, but is significantly higher than Dalit women at 27%⁶.

The forms of violence also take myriad shapes when they are inflicted against Dalit women, they are subjected to listen to horrid verbal abuse, dismemberment, naked parading, forced to drink urine and eat faeces, proclaimed witches and murdered for it, branding etc, even more so, there are forms of abuse which are prolonged and which have been institutionalised, such as the devadasi system, rape threats and assaults not only by the men of the upper caste but also by the members of their community.

It becomes pertinent to discuss violence against Dalit women, not only to prove the fact that there are oppressed classes within oppressed classes but also to propound that the mere existence of these statistics ostensibly builds hesitation for women who seek employment, in 1991 all our governments regardless of which political party ran it brought about rapid liberalisation to the country claiming to provide jobs and better living conditions for the nation's citizens, however, it is rare wherein a free market brings about social change which aims at ending discrimination, on the other hand, it further aggravates it, the cultural evils seep into the private sector, which has taken over the means of production of the country, and wherein if any employment is even given to the marginalised, it menial work.

Now more than ever, when the wealth of nations in actuality depends upon the productivity of its citizens, it becomes ever more important to ensure that the widest possible number of individuals can stay productive, but the question arises if our courts and the legislature have recognised that layered discrimination exists at all far be it in the workplaces, to this extent the Supreme Court in the case of *Patan Jamal Vali v. The State of Andhra Pradesh* opined that:

*“When the **identity of a woman intersects with**, inter alia, her caste, class, **religion**, disability and sexual orientation, **she may face violence and discrimination due to two or more grounds.**”⁷*

It is also pertinent to note that before discussing discrimination in workplaces and the methods through which it can be curbed, there needs to be a mechanism to prevent all forms of discrimination, unless it is made a non-negotiable instrument within our legal system, to discuss

⁵ Human Rights Council, Eleventh Session, Agenda item 3, Report of Special Rapporteur on violence against women, its causes and consequences, by Yakin Ertürk.

⁶ *id.*

⁷ *Patan Jamal Vali v. The State of Andhra Pradesh*, SCC OnLine SC 343.

anti-discrimination would be a futile and superficial lip service to the idea, to which the Supreme Court in *NALSA v. Union of India* opined:

*“In international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to the arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (for example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws) but goes beyond remedying discrimination against groups suffering systematic discrimination in society. **In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.**”⁸*

The Delhi High Court in *Madhu v. Northern Railways* referring to *Jeeja Ghosh v. Union of India* goes as far as acknowledging that discrimination is intrinsic and systematic in our country:

“Equality not only implies preventing discrimination (for example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws) but goes beyond in remedying discrimination against groups suffering systematic discrimination in society.”⁹

The Supreme Court has laid down jurisprudence with respect to how anti-discriminative suits should proceed, Supreme Court in *Ravinder Kumar Dhariwal v. Union of India*, wherein disciplinary proceedings were initiated against a mentally differently abled person, referred to a judgement of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* laid:

“In British Columbia (Public Service Employee Relations Commission) v. BCGSEU 83, the Canadian Supreme Court held that once it is established that prima facie discrimination exists, the

⁸ *NALSA v. Union of India*, AIR 2014 SC 1863.

⁹ *Jeeja Ghosh v Union of India*, (2016) 7 SCC 761.

burden shifts on the employer to justify the discrimination, which involves proving that it provided reasonable accommodation. The court developed a three-stage test based on proportionality to determine whether an employer may use the bona fide occupational requirement.”¹⁰

Thereby shifting the *onus* onto the party which is alleged to have discriminated against the aggrieved party. These judgements given by the Supreme Court serve as a tribute to transformative constitutionalism.

III. UNDERSTANDING CEDAW

CEDAW, that is, the Convention on the Elimination of All Forms of Discrimination was sanctioned by the United Nations on 18th December 1979, it was termed an “international bill of rights for Women”, it is segregated into six sections, with a total of 30 articles, in 1981 it was ratified by 189 UN member states, while 50 nations ratified the convention with subjecting it to various exceptions through declaration, which included 38 countries which rejected the application of article 29 of the convention which gave for the redressal mechanisms. While the convention seeks to ensure equality, the procedural and substantive provisions of the convention have been omitted through partial adoption of the convention, article 29 of the convention is an operative part of the convention which sets up mechanisms through which the goals of the convention can be achieved, however, India has still refrained from ratifying article 29 which turns CEDAW into a mere shell of a convention with noble goals with no execution to achieve them.

India ratified CEDAW (Convention on the Elimination of Discrimination Against Women) in July 1993 intending to firstly incorporate the principle of equality amongst men and women in legal systems, abolish all forms of discriminatory laws and enforce laws prohibiting discrimination, secondly, establish tribunals and myriad public institutions to ensure that effective protection measures are taken to protect women from discrimination, and thirdly, eradicate all forms of discriminatory acts against women by persons, organisations, or enterprises. The latter is of essential importance when it comes to the prevention of discrimination against women in the workplace, however, even in 2022 discrimination based on gender remains a reality in private enterprises, simply the fact that the constitutional protections can only be availed against a government or state entities, thereby, implementation of the optional protocol of CEDAW are of paramount importance, this optional protocol of

¹⁰ Ravindra Kumar Dhariwal v. Union of India, 2021 SCC OnLine SC 1293.

CEDAW includes communications procedure wherein individuals and groups of women would have the right to protest against the violation of the convention to the Committee on the Elimination of Discrimination Against Women, an Inquiry procedure which would empower the said committee to investigate the said discriminatory acts under Article 8 of the Protocol.

IV. EXAMPLE OF WOMEN WORKING NIGHT SHIFTS

India benefitted from the wave of call centre jobs in the 2000s when foreign companies gave thousands of jobs to our citizens for services, however, due to the time differences, most call centre workers had to work during the night in order to assist the customers during the day in their countries, apart from call centres there are many other jobs in the nation that require the employees to work throughout the night, the night shift (10:00 p.m. to 6:00 a.m.) allowance is 350 INR an hour, however, due to many factors women are precluded from working night-shifts, 47%¹¹ of women find sexual harassment to be a topmost issue at the workplace, many cases are unreported due to the passive nature of such harassment, and the fear of harassment turning into assault. The biggest element of fear from working on the night shift stems from the commute itself, it was evident and validated in the 2012 Delhi gang rape case, in 2014 when a rape case was filed against an Uber driver, and yet again in 2019 when Priyanka Reddy a veterinarian was raped and murdered when she was returning home on her scooter at 9 pm, it further does not help that the prospects of working the night shift are also tainted by some legislations themselves, the Shops and Establishment Act of 1953 refrains women from working on the premises after 9:30 pm, the Mines Act of 1952 only allows women to work on-site from 6 am to 7 pm, these are discriminatory laws which prevent women from enjoying the benefit of working the night shift, and earning more.

V. CONCLUSION

India lags behind substantially with respect to anti-discrimination laws, the jurisprudence of the courts in this matter has not evolved enough to comprehensively address the issues faced by a majority of people who are facing discrimination as a result of association with more than one oppressed identity, women working in nightshifts is merely one example of the complex and layered nature of discrimination which is not only harboured but also perpetuated through generations, it is not enough that women working at night shift are discriminated against, abused, but as statistics show that this issue is aggravated when the angle of caste, religion and

¹¹ Richa Sharma, *47% of Indian Women find sexual harassment at the workplace a big issue*, BUSINESS INSIDER (Nov. 7, 2014, 17:43 IST), <https://www.businessinsider.in/47-of-indian-women-find-sexual-harassment-at-the-workplace-a-big-issue/articleshow/45070664.cms>.

sexual orientation is introduced. India is in dire need of a comprehensive law which holistically builds on the principle of intersectionality to curb discrimination in both, public and private sectors.

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