

Prakhar Ganguly & Udit Ghosh, *Locating Paradoxes in the Indian Supreme Court's Rendition of Gender Justice – An 'Opportunity Creation' Analysis Post the Charu Khurana Judgment*, 9(2) NLUJ L. Rev. 197 (2023).

**LOCATING PARADOXES IN THE INDIAN SUPREME
COURT'S RENDITION OF GENDER JUSTICE – AN
'OPPORTUNITY CREATION' ANALYSIS POST THE CHARU
KHURANA JUDGMENT.**

~Prakhar Ganguly & Udit Ghosh*

ABSTRACT

The Supreme Court of India in Charu Khurana v. Union of India (2015) 1 SCC 192. shattered a 100-year-old glass ceiling which prevented women from participating as make-up artists in the Bombay film industry. The judgment is posted under Cornell University's Women and Justice section. However, no real socio-economic analysis of the judgment has taken place. The judgment has been criticised as being an exercise in 'end without means'. While these criticisms are called for, does the judgment represent a classic liberal paradox which ends up doing

* Prakhar Ganguly is an Assistant Professor of Law at NALSAR University, Hyderabad, India. He is an incoming doctoral scholar at the Max Planck Institute For Legal Theory and Legal History, Frankfurt (Germany). He can be reached at prakhar1991@hotmail.com for comments and feedback. Udit Ghosh is an associate with Regunathan Fischer Advocates (India & Germany). She has completed her undergraduate from the University of Calcutta and can be reached at udit@regunathanfischer.com for feedback and comments.

more harm than good for the people it wishes to liberate? While Charu Khurana has gone ahead to prepare the likes of Shah Rukh Khan the residual impact of her upliftment, at least normatively, has not been analysed in depth. This paper aims to explain the impact of the much-bailed decision of the Supreme Court by deploying paradoxes of liberty, labour economics and scholarship on barriers to entry for women in the market. It challenges the basic presumption that seemingly beneficial legislation that prima facie uplifts the status of women should always render progressive outcomes for all women.

“How many more women there are who silently cherish similar aspirations, no one can possibly know; but there are abundant tokens how many would cherish them, were they not strenuously taught to repress them as contrary to the properties of their sex.”

~ John Stuart Mill (On The Subjection Of Women)

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I. INTRODUCTION

John Stuart Mill (“**Mill**”) in his classic work titled ‘On Subjection of Women’ presents some interesting thoughts. He claims that only if marriage is governed by the ideas of justice and equality that the society of humans shall benefit from the institution of marriage.¹ Prior to claiming that the very idea of infusing the relationship of man and woman in marriage with elements of equality is an end in itself, he scales out two benefits to the society at large in case women are no longer subjected to limitations of thought and can participate in the free engagement of their faculties - the influx of intellect to a supply deficit labour market and the degrading impact the relationship of superiority in marriage has on the man.² In a free market based on free individual participation, the benefits reaped are manifold - the society is not bereft of the intellect of one-half of humanity.³ Mill explained that this would cure the deficit supply of intellect in the market and, of course; men shall no longer be able to take as granted, on the premise of their privilege, what they should earn - respect. Where there is, thus, one person to benefit mankind there will then be two.⁴

Therefore, in an anti-liberal structure, it is with force, if not brute, that they are kept beyond participation in markets either as labourers or as commodities. There is no denying this idea or anticipated reality.

¹ John Stuart Mill, *The Subjection of Women*, THE PENNSYLVANIA STATE UNIVERSITY ELECTRONIC CLASSIC SERIES, (1869).

² *Id.* at 91.

³ *Id.*

⁴ Mill, *supra* note 1 at 119.

Furthermore, free and fair competition is the citadel of the liberal worldview - that there should be no embargoes on the free movement of goods, services and people. In doing so, the liberal perspective has often categorised government intervention as an embargo on the free exchange of commodities. In particular, these scholars have written extensively against the industrial protection of labour in poor countries as being based on beliefs that are based on rubbish.⁵ For the classical economic liberal, any form of intervention in the market reduces the standards of objectivity that the system boasts of. For some like Milton Friedman, the scope of the government must be limited.⁶ It is this economic stance that the political liberal might not agree with. The latter would want some basic protection for the working class (or classes which are generally considered to be backward) even at the risk of being branded paternalistic.⁷ Thus, according to classical political and economic liberals, it would be unjust to prevent women from participating in markets solely because they are women. However, the economic liberal should have a problem with the government intervening in the protection of a woman worker who is facing harsh working conditions or discrimination at work. For them, she would choose a different employer in case either persists. She is free in a sense to choose her servitude. The political liberal, on the other hand, would take a position

⁵ JAGDISH N. BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (Oxford University Press, 2004).

⁶ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM 2* (The University of Chicago Press, 40th anniversary ed., 2002).

⁷ See John Rawls, 'Political Liberalism,' 47, *THE REVIEW OF METAPHYSICS*, 585–602 (1994).

that favours intervention by the state to protect certain basic rights of dignity, life, liberty, privacy, etc. in some or all spheres of her life.

Mill's work was cited in the landmark judgment of *Charu Khurana*.⁸ The trade union, in this case, prevented women from engaging in a particular trade. This restriction was essentially in practice for the past hundred years. The concerned trade union allowed women to work as hairdressers but prevented them from practising makeup art - the latter being reserved for male members of the trade union. Justice Dipak Mishra has quoted a specific line from Mill's classic,

in 1869, 'In Subjection of Women' Mill stated, "*the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.*"

The judgment has been criticised by some as being not sufficient enough - an end sought without the means employed.⁹ It conforms to the classical liberal paradox which calls for an ideal world order but know no means to attain the same. However, there were some positive reinforcements - that the year 2014 presented the Supreme Court as the site of the campaign for sex equality primarily owing to its decision in *NALSA*¹⁰ and *Charu Khurana*.¹¹ Perhaps, it is time to measure progress and identify the

⁸ Charu Khurana v. Union of India, (2015) 1 SCC 192.

⁹ Samarth Nayar, *Ends without Means or Reasons: Charu Khurana v/s Union of India*, LEGAL SERVICE INDIA, (4 March 2022) <https://www.legalserviceindia.com/legal/article-2714-ends-without-means-or-reasons-charu-khurana-v-s-union-of-india.html>.

¹⁰ National Legal Service Authority (NALSA) v. Union of India, AIR 2014 SC 1863.

¹¹ Jayna Kothari, *Rights Protection in 2014: A Review of the Indian Supreme Court*, Oxford Human Rights Hub, 29 January 2015, (March 4, 2022), <https://ohrh.law.ox.ac.uk/rights-protection-in-2014-a-review-of-the-indian-supreme-court>; *Khurana and Others v. Union of India and Others*, LEGAL INFORMATION INSTITUTE, (4 March 2022)

remaining challenges that women face in attaining decent work in the film industry specifically in the context of the said judgment.¹² Does this judgment promote developments within the specific labour market which would ensure that similar levels of progress are brought to women in general? Promoting gender justice in the realm of work would essentially mean removing barriers to entry.¹³ However, the real question is how has the judgment impacted the lives of the people engaged in the trade it wished to liberate from the ‘hundred-year-old embargo’. Any new gender policy approach calls for a broader framework for labour market information and analysis.¹⁴ Are judgments of similar kinds capable of making substantial improvement in the life of women attached to this category of work? For any legal solution to work, it ought to survive, at the bare minimum, an economic analysis.¹⁵ This article takes the judgment and its intended impact to the task. By employing basic economics of demand and supply this paper shows how a lack of understanding of the principles of gender and labour markets results in courts failing to improve gender equity in labour markets. While the judgment as a one-time rescue attempt by the Supreme Court is acceptable, does it enable the removal of entry barriers for women? This does not mean that this article supports an anti-Mill stance on the

https://www.law.cornell.edu/women-and-justice/resource/charu_khurana_and_others_v_union_of_india_and_others.

¹² WOMEN IN LABOUR MARKETS: MEASURING PROGRESS AND IDENTIFYING CHALLENGES, (Bureau international du travail ed., 2010).

¹³ *Id.* at xii.

¹⁴ *Id.* at xiii.

¹⁵ Jennifer Ring, *Mill's The Subjection of Women: The Methodological Limits of Liberal Feminism*, 47 REV POL 27 (1985).

subordinating relationship between men and women. As an end in itself, women and men ought to have equal opportunities to livelihood. But does this end itself justify the means? The means have to be assessed not by the end but by the means itself. The means utilised by this paper are simple.

In the *first* part, the paper presents a brief background, foreground and facts of the case. It draws the broader arguments taken by parties to the judgment and deduces the ratio decidendi. The *second* part explains the normative ideas forwarded by Mill in his classic - 'On Subjection of Women' and why the context in which it is employed by the court is fundamentally problematic. Both these parts explain why board liberal discourse on women's upliftment remains a 'ends without means' discourse. The *last* part presents the economics of a judgment. It questions, by employing basic demand and supply laws, whether in the long run such judgments are capable to emancipate the class it intends to emancipate. What are we to expect from this analysis? Each and every individual is owed justice by each individual. On the contrary, each individual is owed to justice. True justice must be put to the test and taken to task. The hypothesis forwarded is also the fundamental fulcrum of feminist methodology - challenging seemingly beneficial provisions of law as being rather detrimental to women.¹⁶

II. THE CHARU KHURANA JUDGMENT – THE FACTS, THE FACTUAL AND THE CONTEXTUAL

¹⁶ See generally Joanne Conaghan, *Labour Law and Feminist Method*, 33 I.J.C.L. 93 (2017).

The International Labour Organisation (“ILO”) has identified cultural norms, institutions, income level, etc. as one of the fundamental reasons why the levels of workforce participation by women is abysmally low and much progress has not been made.¹⁷ One such instance is this. The Supreme Court had to declare trade union rule, which prevented women from being occupied as make-up artists in the Mumbai film industry, as unconstitutional and illegal. The rule stated that in order for any person to practise in the industry they had to be a member of the trade union. Membership of the said union could only be obtained through residency in the state of Maharashtra for at least a period of five years. The Bollywood film industry is unorganised. The nature of the market is such that it thrives on the basis of mostly oral contracts which concretises into written ones as one moves up the ladder. Most workers who are at the bottom of the pyramid are daily wage or pro rata workers. Unions have a stronghold in matters concerning who is to be employed, how the work is to be distributed, etc. Furthermore, if the member was a male they could only practise as a make-up artist and in case the member was female then they could only be a hair-dressers. Outrightly, this is a direct case of a discriminatory institutional and cultural practise engaged by the trade union and creates barriers to free entry for women in the labour market.

The Supreme Court voyaged in search of voices in history which were raised in favour of women’s rights of employment and

¹⁷ WOMEN IN LABOUR MARKETS, *supra* note 12. at 16.

representation.¹⁸ It quoted Lord Denning's position on women's clarity of thought process, Kofi Annan's speech at the United Nations, Charles Fourier's work, etc.¹⁹ The judgment goes on to emphasize the importance of the Convention on Elimination of Discrimination Against Women ("CEDAW") and India's status post-ratification. It claims that in a political economy based on equality and the absence of discrimination against women a rule that prevents women from freely engaging in any profession or trade is inherently violative of fundamental rights and cannot be justified on any count. To this array of allegations, the position taken by the concerned union has been that the said rule was for the betterment of the association of workers.²⁰ Understandably, the court accepted no justification for the said rule.²¹ The Court premised its attempt to emancipate women from economic discrimination by premising its judgment on the guidelines laid down in the *Vishakha* judgment which involved the rape of a social worker at her workplace.²² In this case, women makeup artists would be harassed in case they chose to work without a union-certified identity card.²³ To this array of allegations, the union furthered their cause by claiming that the practice of not issuing an identity card of a make-up artist to a woman was to ensure that the male counterparts are not deprived of their livelihood.²⁴ While the petitioner had

¹⁸ Charu Khurana v. Union of India, (2015) 1 SCC 192, ¶199.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *See generally* Vishakha v. State of Rajasthan, AIR 1997 SC 3011.

²³ Charu Khurana v. Union of India, (2015) 1 SCC 192, ¶205.

²⁴ Charu Khurana v. Union of India, (2015) 1 SCC 192.

no objection to men seeking employment as hair-dressers and women seeking employment as either, the union had an objection to women seeking employment as make-up artists. It wanted women to work only as hair-dressers. Both the restrictions placed by the union have to be read together - one had to be a resident of the state of Maharashtra for a minimum duration of 5 years to be a member of the union and a male member shall be able to get X work and a female union member shall be able to get Y work. This was a classic case of restrictive distribution in a surplus labour market. Trade unions themselves are institutions that impose restrictive conditions of work. The restriction imposed by the first rule imposes an initial hurdle while the second distributes the opportunities among those who have crossed the hurdle. The position taken by the plaintiff was clear - both rules had to go.²⁵ The Court obliged.

The Court also focused on the importance of trade union rules confining within the tenants of the constitution. In other words, when a trade union is constituted under the Trade Union Act 1926, it has to adhere to its rules and owing to unions being constituted and subjected to the Constitution of India, there can be no rules that promote discrimination.²⁶ There were references to universal principles and statements made by scholarly figures in history or in the recent past.²⁷ It quotes fundamental rights from the Indian Constitution, refers to the directives as the soul of the constitution and places reliance on fundamental duties - specifically on

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

scientific temper and humanism. The reference to the directives displays the tendency of the courts to go beyond the language of the statute.²⁸ This kind of interpretation is often visible in disputes concerning labour, minority rights, etc. and has aided these backward social classes to secure the protection of rights. With constant reference to abstract principles in the Constitution, these kinds of judgments writing often indicate the Court's attempt at justifying a final outcome that may not be legally sound but is aimed at doing greater justice. In cases concerning the absorption of contract labour in regular service of the employer, this kind of interpretation has aided the courts to read into the legislation rights which were not originally enshrined in the Act itself.²⁹ In this method of interpretation the judge often finds within the directives and other abstract principles a mandate to do complete justice. If analysed closely, the rule as it was, concerned with questions of participation of women in the labour market and easing barriers of entry for women in the specific market. The judgment removed these barriers by declaring the rule to be bad and unconstitutional. However, has the judgment been able to stand up against its broad criticism as being a 'means without ends' discourse? What are the methodological limitations of such judgments and are these limitations akin to the limitations of any discourse of liberal feminism?

²⁸ *Id.*

²⁹ *See generally* Air India Statutory Corporation and Others v. United Labour Union, AIR 1997 SC 645.

III. MILL AND MISHRA: CLOSE BEDFELLOWS IN METHODOLOGY AND IDEOLOGY?

This judgment specifically catered to an upper-middle class woman who, as of now, runs her own academy and has courses that may reach up to rupees one lac.³⁰ *Charu Khurana* has gone on to prepare the stalwarts of the Bollywood film industry. She has had her training in makeup from the West and is an educated woman from the middle or the upper-middle class in Indian society. Is it mere coincidence that the court cites Mill or are there deeper methodological connections and limitations associated both with Mill's work and the underlying thought process in this judgment? Mill's work is often taken as an inspiration to destroy any anti-women social norm or law or custom. It is a remarkable document for its time.³¹ This is irrespective of the fact that his work is riddled with methodological paradoxes - his argument is riddled with preconceptions to which he does not want to admit.³² 'On the Subjection of Women' was one of the most significant anti-institution pleas on the participation of women in occupation, education and their suffrage.³³ It was written in a specific time frame, about a specific institution and had a context to it. Mill's work was on the despotic institution of the Christian family and how it affected the mental predicates of the man in marriage. It targeted the institution of the

³⁰ CHARU KHURANA, <http://www.charukhurana.com/advanced-make-up> (**Khurana**).

³¹ Mary Lyndon Shanley, *Marital Slavery and Friendship: John Stuart Mill's The Subjection of Women*, 9 *Political Theory* 229 (1981).

³² Ring, *supra* note 15 at 32.

³³ Ring, *supra* note 15 at 27, 35.

Christian family with a specific purpose - the emancipation of women. It located the precise reason why women are restricted outside their four walls - it being the source of all kinds of domination inside them.³⁴ In other words, women are institutionally dominated outside the family for the male to dominate them inside of it.³⁵ Men simply could not comprehend a world where they had to survive with equals.³⁶ This form of domination enables the man to take the role of a despot with absolute power over his subjects thereby disabling the woman. How is the man endowed with such enormous power? Simply by being born!³⁷ Mill justifies the incorporation of justice in this institution of Christian marriage both as a means and an end. As the latter, Mill would suggest that justice is due to each individual and, as the former, he suggests that liberation of women from the despotic husband would necessarily mean the incorporation of half of the human population into the labour force and the market. This has, as Mill states, its benefits as competition would increase. This would generally benefit women and citizens would owing to greater availability of services and intellect.³⁸ The average supply-deficit labour market would be booming because men alone shall not be entitled to provide services. In order to justify this, Mill destroys the popular beliefs held against women - of them being mentally inferior,³⁹ or that of religiosity in the wife's obedience to the

³⁴ Mill, *supra* note 1.

³⁵ *Id.* at 58.

³⁶ Ring, *supra* note 15 at 236.

³⁷ *See generally*, Mill, *supra* note 1.

³⁸ *Id.* at 91.

³⁹ *Id.* at 58.

husband!⁴⁰ The broader perceptions of what women were and what women were not, as he writes, are nothing but mere perceptions.⁴¹ Mill furthers this proposition by mostly taking those attributes, like greater nervous susceptibilities, which were believed to be shortcomings of women and showing that these were considered to be advantages when men showcased them.⁴² Mill premises all of this on the conditions of the marriage contract - which is the destiny for all women unless she is ugly!⁴³ His analysis of the Christian marriage contract leads him to conclude that the wife is a slave to a greater length than a slave is towards the master.⁴⁴ The marriage allows the man to nurture his baser (and true) characteristics because all other social institutions prevent him from doing so.⁴⁵ Mill's work was fundamentally about the corruption of male-female relationships in marriage with the hope to establish friendship within this institution.⁴⁶ It challenged the Victorian notion that marriages were essentially based on consent wherein he claimed that such consent derived from the 'natural' way of domination and subversion creates much more troubles for the society at large. For Mill, the woman in a Christian marriage represented a chattel in multiple ways - the legal personality merged with that of the husband, the absence of choice when it came to not marrying and the

⁴⁰ *Id.* at 36.

⁴¹ *Id.* at 58.

⁴² *Id.* at 70.

⁴³ *Id.* at 36.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Ring, *supra* note 15 at 27, 35.

abuses of human dignity in the institution of marriage itself.⁴⁷ This kind of domination is perpetuated by the fact that under common law the wife could not refuse the husband the ‘last familiarity’ and she had no right to judicial separation even if she had a useless husband.⁴⁸ He understands that this amount of negation of a woman might lead some to perceive that seeking power is the solution. He warns of such radicalism as he writes - the absence of justice cannot justify the clamouring for power for that would lead to similar conclusions only that the roles would be reversed.⁴⁹ Albeit, Mill concluded that there is a possibility, where two individuals in the institution of Christian marriage hold justice to each other, of a marriage based on free consent. Mill’s work is radical to the extent that it suggests that this kind of marital structure diminishes the ability of the man to participate in vibrant public debates.⁵⁰

Justice Dipak Mishra’s understanding of the issue in question was similar. He traced lone and vocal voices in history, who had protested in favour of gender equality, similar to how Mill had relied on women’s role in history.⁵¹ Bereft of an economic analysis, the reference to the principles of the constitution envisions the limitations of any liberal feminist approach – that it cannot go beyond any form of empiricism and analyse the actual costs of a judgment. Critiques of Mill have placed serious reservations on how he relied on empiricism thereby grounding his theory and his inability

⁴⁷ Ring, *supra* note 15 at 231.

⁴⁸ *Id.* at 233.

⁴⁹ Mill, *supra* note 1 at 36.

⁵⁰ *Id.* at 239.

⁵¹ Charu Khurana, *supra* note 8 at 198.

to go beyond it.⁵² Thus, for Justice Mishra, any understanding of gender justice has to be comprehensible within the existing framework of the constitution, legislations, international conventions and judicial precedents. In referring to various precedents Justice Mishra points out at the social utility of gender equality. He quotes Valsamma Paul⁵³ and other judgments which indicate the social, political and economic context of human rights. The importance lies in the fact that they are inalienable, integral and are needed for the full development of the personality of women.⁵⁴ This is similar to Mill's understanding of gender quality as well - that a gender-equal society would enable greater services to be generally available.⁵⁵ Justice Mishra's reliance on empiricism in ideology is bolstered when he writes that the facts of this specific case have to be scrutinized in the backdrop of this ideological understanding of gender justice.

To the extent Mill tried to come out with a solution, he suggested that a true union of individuals based on friendship is the key! Furthermore, in a society of equals the ruler and the ruled can be altered. Mill's ideas were different because others at the same time around were suggesting the natural subjection of women whereas he suggested that there was no real basis as the highest predicates of women and men were no different.⁵⁶ Mill's means were problematic - he seems to suggest that in case, out of friendship

⁵² Ring, *supra* note 15 at 27.

⁵³ Charu Khurana v. Union of India, (2015) 1 SCC 192; *see also* Valsamma Paul v. Cochin University, (1996) 3 SCC 545.

⁵⁴ *Id.*

⁵⁵ Ring, *supra* note 15 at 40.

⁵⁶ *Id.*

between two equal individuals, the woman chose to take responsibility for housework and the man for earning there would be no better arrangement.⁵⁷ To some this kind of criticism is unfounded as Mill never suggested this partition of responsibilities as a one-size fits all solution as it was a proposition made by him subject to demonstration as a working principle.⁵⁸ This kind of feminism is problematic in itself owing to its reliance on rationality as the basis for participation in non-private life.⁵⁹ Justice Mishra's understanding of gender justice was similarly limited in methodology. To the extent he intended on removing barriers of entry he was spot on but his reliance on existing norms disabled him to actually looking into the impact of the solution he provides. Can the outcome of the judgment pass the felicific calculus? Does it do the greatest good for greatest numbers?

IV. ANALYSIS OF 'OPPORTUNITY-CREATION' POST THE CHARU KHURANA JUDGMENT – ANOTHER BRICK IN THE WALL?

It seems that to the extent Mill's reliance on empiricism has been criticised or liberal feminism, in general, has been criticised, the same holds true for *Charu Khurana* - it caters to educated middle-class or upper-class women. Liberalism, in general, is premised on the rational individual and

⁵⁷ *Id.* at 240.

⁵⁸ *Id.* at 242.

⁵⁹ *See generally* EISENSTEIN, ZILLA R, THE RADICAL FUTURE OF LIBERAL FEMINISM (Northeastern University Press, 1993).

thus *Charu Khurana* in this case fits the bill. But how does this judgment impact the general working-class women in the Bollywood film industry—the ones left behind? A judgment that removes barriers to entry for women to a specific trade ought to raise their conditions of work and economic stability in general. There ought to be an increase in opportunities available to women make-up artists post this judgment. This is examined through an analysis in probability to securing the job pre and post judgment.

The law of demand states the following:

“Ceteris paribus, with an increase in price, there shall be a fall in demand and with a decrease in price, there shall be a rise in demand”. Contrary to this, the law of supply states:

“Ceteris paribus, with the increase in price, there shall be a rise in supply and with a decrease in price, there shall be a fall in the quantity supplied”.

Labour, in the market, is treated as a factor of production in a world *as it is* and, thus, labour operates through the basic laws of demand and supply. Where there is surplus supply of labour i.e., more than what has been demanded, there would be a downward pressure on its price i.e., wages. The contrary also stands true. The economics prior to the judgment can be written down in simple terms:

$f(d)L: f(w, n\dots)$

Where ‘w’ represents wages, ‘L’ represents quantity demanded for labour and ‘n’ represents other factors like price of substitutes, taste preferences, etc. Following the function, assuming there were 30 vacancies for the position of make-up artists and 15 for the position of hairdressers. Furthermore, assuming that there were 60 males applying and 30 females

applying, the total number of unemployed would be 30 men and 15 women. Here the union is strict about its rules and continues to regulate the supply of labour by not being generous while granting licences to professionals who have not stayed in the state of Maharashtra for at least a period of 5 years. Here, because of rights-distribution, a portion of women's right to livelihood is guaranteed. Men and women have distinct demand and supply curves which does not overlap. The probability of women having a job is much higher. However, this would inevitably call for a ban on their participation in the makeup industry.

$\text{Probability of women getting the job} = \frac{\text{Total number of positions available}}{\text{Total number of women applying}}$ $P(w) = \frac{15}{30} = \frac{1}{2}$

Meaning that each woman stands a 0.5 chance to secure a job as a hairdresser with respect to other competitors who are women. In reality, if presumptions on market participation of women is considered,⁶⁰ the number of women applying for the position of hairdresser would be much lesser and result in an upward push on wages. The aforementioned assumption of numbers is based on basic socio-economic presumptions on surplus labour market participation in general and scanty participation of

⁶⁰ Sudipa Sarkar et al., *Employment Transitions of Women in India: A Panel Analysis*, 115(C) WORLD DEVELOPMENT, ELSEVIER, 291-309 (2019).

women in the labour market, that they are not visible in labour market participation owing to social constructs, and more specifically in the unorganised sector.⁶¹ Their roles are mostly limited to reproduction or reproduction of domestic roles in the public sphere of employment.⁶² They are inevitably concentrated at the bottom of the triangle.⁶³ The unorganised sector, of which the film industry is a part, represents a triangle. At the top one finds a greater concentration of men in comparison to women. There are relatively better conditions of work with some semblance of formal contracts. Progression from the top to the middle and eventually to the bottom displays an increase in the concentration of women doing work in the absence of a formal contract and dealing with greater perishable commodities at the bottom.⁶⁴

The judgment substantially alters the function of demand for labour and the equation changes. There is no longer a distinction between hairdressers and make-up artists as the ‘gendered’ distribution is lifted. There are now 45 vacancies. The total number of women and men applying, and this is still when the union is strict about its ‘resident of Maharashtra’ rule, remains the same i.e., 90. In such a case, both men and women can apply to any position they want. The scenarios developed from this are:

⁶¹ *Id.* at 2.

⁶² Jayati Ghosh, *Women’s work in the India in the early 21st century*, SEMANTIC SCHOLAR (2013), <https://www.semanticscholar.org/paper/Women-’s-work-in-the-India-in-the-early-21-st-Ghosh/22b503210c638b528ea3acd1d6bffa1f08dd2cd#citing-papers>.

⁶³ See generally Martha Alter Chen, *Rethinking the informal economy: linkages with the formal economy and the formal regulatory environment*, LINKING THE FORMAL AND INFORMAL ECONOMY 75 (Basudeb Guha-Khasnobis et al. eds., 1 ed. 2006).

⁶⁴ *Id.*

- a. The probability of a total number of unemployed individuals now ranges between 15 men and 30 women (scenario A) and 0 women and 15 men (scenario B).
- b. In scenario A, among the 45 vacancies, all of them go to men and in scenario B, 30 women secure 30 positions and the rest 15 go to men.
- c. In case, more individuals wish to pursue either of the two occupations (suppose hairdresser), there will be more concentration of labour supplied there and this would inevitably push the wages down. Conversely, there shall be an acute shortage of labour supplied in the other occupation (makeup) resulting in abnormally higher wages in the latter.

Now, the situation changes. The probability of each individual getting the job has to be analysed. The formula remains the same. Each individual still has a 0.5 chance of getting the job because the total vacancies are just half of the total supply of labour (including men and women). But how many of these individuals shall be men and women? There are two extremes pointed out in 'a.' In a survey conducted by the ILO it was empirically shown that women are more likely to be unemployed than men.⁶⁵ The survey relied on unemployment rates in 113 countries and found that it was higher for women. The actualities in the labour market are already structured in a manner wherein women face structural

⁶⁵ WOMEN IN LABOUR MARKETS, *supra* note 13. at 28.

discrimination at various stages of employment.⁶⁶ In about half of the countries surveyed by the ILO, the share of informal workers in total employment is higher for women than for men. Therefore, in an already sexist, anti-feminine and misogynistic world, the likelihood of (B) happening is much higher. The only outcome from which women can stand to benefit is when there are too many applicants (both men and women) for either of the jobs (say hair-dresser) and there are few women for the other occupation (makeup artist)- a quasi-reservation like situation, albeit transient in nature. But the probability of this situation happening in reality would have to pass greater complexities and not rest on theoretical assumptions by a professor of law and his laptop. These numbers still represent an ideal situation where the probability of each individual prior to and post the judgment remains unchanged. The equation alters in case the actualities the world of work and its perilous condition, like a greater number of men being available in the market for labour than women owing to the conflict between work and family,⁶⁷ are considered. Women would be present, generally, in much lesser numbers as their participation in economic activity in the market is still skewed. It is highly likely that among the total number of applicants, in the post-judgment liberalized setup, the number of women remains considerably low and relatively lower than men applicants whose numbers may be much higher than 60. Their overall probability of securing a job would be much higher than women where the

⁶⁶ *Id.*

⁶⁷ Esteban Ortiz-Ospina et al., *Women's employment*, OUR WORLD IN DATA (5 March 2022), <https://ourworldindata.org/female-labor-supply>.

latter's probability of securing a position shall be much lower. Furthermore, assuming the number of women applications to be at par with the number of vacancies, i.e., 15 - the total number of unemployed women is 0. The probability of each woman to get the position is 1 i.e., highly probable. This is possible only if these fifteen positions were reserved for women. As the judgment lifts the bar imposed by the trade union, the total number of vacancies remains unchanged i.e., 45. The total number of applicants now is 75 among which there are sixty men and fifteen women. Each applicant has a probability of .6 which is lesser than the probability per individual, let alone women, prior to the judgment. The probability of a woman candidate getting the job prior to the liberal emancipation propounded by Justice Mishra was much higher. This, however, does not mean that the trade union rule could be justified.

Would mankind not be better off if women were free?⁶⁸ Of course, there is no denying this fact. Unfreedoms have caused enough hindrance to growth. However, any means employed to liberate ought to withstand higher standards of scrutiny than the end itself. *Charu Khurana* is one such example where the mandate of liberation could have and should have been subjected to basic economic analysis. The judgment ends up doing more harm to women at the cost of protecting the rights of one upper class woman. There is, of course, another way of looking at it – this industry being as inaccessible as it is, one woman fighting a battle to practise a trade shall go a greater distance than the trade union preventing them from

⁶⁸ Mill, *supra* note 1 at 114.

practising at all. While the union rule could not have been defended, it seems that under the restrictive distribution setup women were better off. The definition of trade union itself includes “...*imposing restrictive conditions of work...*”.⁶⁹ It is not disputed that these restrictive conditions cannot violate principles of equality enshrined under the Constitution of India. Charu Khurana has a makeup academy and she charges around one lac for one of her advanced make up course.⁷⁰ Her basic makeup course costs around fifty thousand Indian rupees.⁷¹ These are in no way accessible numbers when it comes to Indian standards of income and expenditure. This creates barriers for women who belong to women who are doubly backward *vis-à-vis* class and caste. These women concentrate themselves in this labour market owing to relatively lower entry costs compared to the formal labour market.

V. CONCLUSION

On a closer analysis, it is realised that not all progressive judgments may have their intended effects. The union restrictively distributes the sources of livelihood among its members. There are social costs to this system - the livelihood of so many other more talented workers gets hampered owing to the geographic restriction. The distribution of a higher paying job (make-up artist) with that of a lower paying job (hair-dresser) among men and women can be called sexist and not be defended! However, judgments like *Charu Khurana* may only be able to answer complex socio-

⁶⁹ Trade Unions Act, 1926, No. 16, Acts of Parliament, 1926, § 2 (India).

⁷⁰ Khurana, *supra* note 30.

⁷¹ *Id.*

economic questions to a specific extent. As the realities of globalization disperse economic growth differently for different classes of society, greater participation of women is needed owing to it having an important bearing on her own upliftment and intra-household allocation of resources.⁷² Women's labour force participation and access to decent work are pillars for an inclusive and sustainable model of growth for nations like India. It can be argued that simply by removing or washing away backwards practises by capitalist progress all forms of socio-economic discrimination shall be done away with.⁷³ Capitalism can have multiple layers to it and each such layer should be analysed before hailing any document or judge as the champion of women's rights. Divisions and categories are not independent of capitalism but rather they allow for more surplus extraction and repeat multiple levels of oppression for members of classes who find themselves at the bottom ranks of the triangle.⁷⁴ Improper legal debates and judgments on gender and labour have proliferated since the 20th century. The recourse to law, to enhance the upliftment of women, has been bewildering. Law has only been able to make the subjection of women worse. The absence of proper socioeconomic analysis of issues of gender in the last decade may have contributed to the revival of conservative economic thought which justifies different choices made by the two genders by taking recourse to inherent differences in the biology and psychology of the two sexes.

⁷² Sarkar, *supra* note 60 at 21.

⁷³ Ghosh, *supra* note 62 at 15.

⁷⁴ *Id.*

Debates like these are endless and recourse should be taken to economics to analyse the real cost of various policies and judgments.