

Laws for the underprivileged

Speech delivered by Justice H.L. Gokhale, Judge, Supreme Court of India, at the Colloquium at the Calcutta High Court on Sunday, the 5th of May, 2013:

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15. Namaskar, dignitaries on the dais and in the audience, and brothers and sisters. This is the last session of the colloquium arranged on the occasion of celebration of 150 years of the establishment of the Calcutta High Court. The High Court has done me a great honor by inviting me to preside over this session concerning '**The laws for the underprivileged**'. I claim no particular connection with the Calcutta High Court, the first chartered High Court of India, established in 1862. But I may mention that I have had a connection with the other two chartered High Courts, established at the same time, and in that sense can claim some connection with the fraternity of lawyers and judges of the Calcutta High Court. I practiced in the Bombay High Court and then became a Judge in that High Court. I had the privilege to preside as the Chief Justice over the third High Court established at the same time i.e. the Madras High Court, wherefrom I was elevated to the Supreme Court. This colloquium gives me the opportunity to pay my tribute to the first High Court of India, which has produced great lawyers and great judges.

2. The chartered High Courts administered the laws as they prevailed in the British India. After independence "We the People of India" have given to us an egalitarian constitution, and our constitution itself is a document greatly concerned

with providing equality of status and of opportunity. In the initial period after independence our parliament applied its mind immediately to two underprivileged sections of our society, namely, the agriculturists and Hindu women. Under the leadership of our first Prime-minister Jawaharlal Nehru, and the then Law Minister Dr Ambedkar, the Parliament passed enactments on land reforms and for the emancipation of Hindu Women from the traditional Hindu Law. Now here, when we speak about the laws for the underprivileged, we look at the subject from the point of view of the people who are deprived of the necessary opportunities and status. Prof. Amartya Sen in his treatise 'The Idea of Justice' speaks of the underprivileged as those who are deprived of capabilities i.e. persons who lack actual opportunities to do the things that they value, and who have to live their lives in the absence of those capabilities. Thus we are not looking to the concept of being underprivileged in the traditional sense. This is because, as all of you will remember, being students of Jurisprudence, that the celebrated author Salmond considered 'privilege' in the context of liberty. Roscoe Pound, in a similar vein, while speaking about privilege, talks of it as the 'negation of a legal duty'. Ordinarily privileges would mean having something higher than normal legal rights, such as parliamentary privileges or the privileges of the government during the emergency. When we talk about the laws for the underprivileged we look at the subject from the point of view of the people who are deprived of capabilities.

3. In this background, as the Chairman of this session, my initial presentation will be to give an outline of the area which we have to cover, which is undoubtedly very vast. The other learned participants will of course dilate on some of the facets, and then there would be some interaction within the time available. But to catalogue

these laws, first we may refer to those laws which we can call as laws reducing the under-privileged status. In this we will have to begin with those who are at the rock bottom, and the laws passed for them. Thus to begin with, after independence we have enacted various laws of land reforms, which are in tune with the objectives of the freedom movement enshrined in the Directive Principles of the Constitution. The laws of land reforms had undoubtedly to have precedence in a country where the largest section of the population is of agriculturists. Protection of the tiller of the land was the primary objective of these enactments. Distribution of agricultural holdings, consolidation of these holdings, and prevention of their further fragmentation were the other objectives of these initial land reforms. They were bound to be met with resistance, as we see in **State of Bihar vs. Kameshwar Singh** reported in AIR 1952 SC 252. But the Supreme Court substantially repelled the challenge to **the Bihar Land Reforms Act 1950**. This Act and so many such State Acts came to be protected by placing them in the 9th schedule, added by the first amendment to the Constitution. While speaking about the relationship between Directive Principles, enshrined in Article 39 (b) and (c) and the first amendment, Chandrachud, C.J. observed in **Waman Rao Vs. Union of India** reported in 1981 (2) SCC 362:-

“Article 39 of the Constitution directs by clauses (b) and (c) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These twin principles of State policy were a part of the Constitution as originally enacted and it is in order to effectuate the purpose of these directive principles that the First and the Fourth Amendments were passed.”

4. The other section of society which is underprivileged and needs protection is the tribal population. The tribals, however, had to wait for a legislation until 2006

when **the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006** was enacted. The Act provided for, (a) Community rights over common property resources, in addition to individual rights, (b) Right to protect, regenerate, conserve or manage any community forest resource which the communities have been traditionally protecting and conserving for sustainable use, and (c) Right to intellectual property and traditional knowledge related to biodiversity and cultural diversity.

5. The fourth section which is undoubtedly underprivileged, are the Scheduled Castes. Article 15 of the Constitution prohibited discrimination on the grounds of religion, race, caste, sex, and place of birth, and Article 17 specifically abolished untouchability and its practice in any form. Yet a specific legislation to deal with the atrocities on the Scheduled Castes and Scheduled Tribes was felt necessary. This led to the passing of the **Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989**. It contains a salient feature that in the event of such atrocities being committed seeking of anticipatory bail is ruled out by virtue of Section 18, thereof.

6. Again coming back to women, it was felt that special legislation for their protection was required. They continued to suffer in their homes as well as at their work places. And therefore, **The Protection of Women from Domestic Violence Act was passed in 2005**. For their protection at the work place, very recently, **The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act** came to be passed in 2013. We may note that this followed the judgment of Supreme Court in **Vishaka v. State of Rajasthan** reported in AIR 1997

SC 3011 which adopted the guidelines from the international **Convention on Elimination of Discrimination against Women (CEDAW)**.

7. Now we come to another underprivileged section which unfortunately consists of children, and for whose benefit and protection the Parliament passed the **Juvenile Justice (Care and Protection of Children) Act, 2000** improving upon the legislation holding the field earlier. The Act provides for a special approach towards 'juveniles' 'in need of care and protection' and 'juveniles in conflict with the law'. It provides for a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system. There has been some criticism of some of the provisions of this act particularly with respect to the definition of a child. A juvenile has been defined, under this Act, as a child below the age of 18 years and the rigour of punishments for them is much less. It is, however, noted that a large number of crimes by the juveniles are committed by persons within the age group of 16 to 18, and therefore it is canvassed that if a person of that age can commit a serious crime like murder or a rape, such a person should not get the benefit of the Act and the definition of child be lowered to 16. Presently the debate on this issue is in the public domain.

8. There is one more group of persons who are underprivileged because of the physical or mental disabilities that they suffer. '**The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act**', was passed in 1995, for their benefit. It contains many positive features including the equal employment opportunities in every sector. Three percent of the jobs are to be reserved for the persons suffering from disabilities, and in the event of an employed person suffering a disability, out of an accident during his or her service, he or she is

required to be protected by giving them a suitable alternative employment. **The Mental Health Act, 1987** was passed by the parliament to consolidate and amend the law relating to the treatment and care of mentally ill persons, and to make better provision with respect to their property and affairs

9. There is one more section of the society which is underprivileged. They are the manual scavengers for whom, unfortunately, we have not been able to do much though an Act has been passed in the year 1993, viz. '**The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act**', 1993.

The Act provides under Section 3 that:-

'no person shall-

- (a) engage in or employ for or permit to be engaged in or employed for any other person for manually carrying human excreta; or
- (b) construct or maintain a dry latrine.'

One more Bill viz. '**The Prohibition of Employment as Manual scavengers and their Rehabilitation Bill**', 2012 is a new legislation that has been tabled in the Parliament on 6th September, 2012.

10. The other group which is underprivileged, and which we must mention, are the under-trials. There are of course provisions in jail manuals for governing their rights and duties, but it was seen from time to time that all these provisions remained on paper. In **Sunil Batra v. Delhi Administration and Ors.** reported in **AIR 1978 SC 1675**, the Supreme Court held that prisoners are also entitled to rights under Article 21. **Hussainara Khatoon and Ors v. Home Secretary, State of Bihar, Patna** reported in **AIR 1979 SC 1360**, disclosed a shocking state of affairs in the jails where people charged for minor offences were languishing in jail for years together

without trial. A speedy trial was therefore held to be of the essence of criminal justice, and delay in trial by itself was held to constitute denial of justice. The sad part however is that our courts are clogged with criminal cases, and after 10 or 15 years of languishing in jail, while deciding their appeal, the accused are told that they are innocent and they may go home. Or, on the other hand, 15 to 20 years after being let out, they are held to be guilty of heinous crimes and then put in jail. The recent murder of Sarabjit Singh in a Pakistani jail, and such incidents in India, are a reminder that the life of the prisoner has to be protected in the jail also. As lawyers and Judges we have to give a serious thought, which is the only thing we can do, to the plight of the prisoners. Even with the best of our efforts it is very difficult to say as to when we can bring about a change in what is happening.

11. Apart from some of these acts, which we have seen, there are laws which provide for affirmative action. In this area you will have to mention the **Mahatma Gandhi National Rural Employment Guarantee Act, 2005**, which provides a right to work for 100 days in a year to persons who do not have any employment. Now we have the **National Food Security Bill** also, which is pending before the Parliament, and hopefully it will be passed at the earliest. This will require the State to provide food containing minimum required calories to our citizens. This is necessary considering the serious cases of malnutrition which are coming to our attention from all over the nation.

12. Then, as far as the Industrial workers are concerned, we have various industrial laws, including **The Minimum Wages Act, 1948**, to guarantee the minimum wages. We also have the **The Employees State Insurance Act, 1948** which is supposed to assure medical aid to the employees. The fact, however,

remains that the scheme under the Act is in shambles and the services in these hospitals are miserable.

13. There are many laws which one can mention in this list of laws for underprivileged sections of society. One such section which we cannot ignore is the children, who do not get proper education. **The Right of Children to Free and Compulsory Education Act**, was passed by the Parliament in the year 2009. This was consequent to the judgment of the Supreme Court in **Unni Krishnan, J.P. and Ors. Vs. State of Andhra Pradesh and Ors.** reported in **AIR 1993 SC 2178** leading to the introduction of **Article 21A** in the Constitution. This right however, is most likely to remain only on paper. There is a tremendous inequality in the field of education. Although, subsequent to the judgment of Supreme Court in **T.M.A Pai Foundation Vs. State of Karnataka** reported in **AIR 1995 SC 2431** regulatory measures were introduced, through the judgments in **Islamic Academy v. State of Karnataka** reported in **AIR 2003 SC 3724** and **P. A Inamdar v. State of Maharashtra** reported in **AIR 2005 SC226**, private institutions continue to charge fees which are beyond the means of ordinary people, and which are highly discriminatory. Keeping aside this scenario of the higher education, what we find is that the level of primary education is so mediocre that recent surveys have indicated that a very high percentage of the students studying in 7th or 8th standard cannot do the sums of 2nd or 3rd standard, nor can they read and write simple sentences, even in their mother tongue. The effect of Sarva Shiksha Abhiyan has remained limited. One tends to think that Right to Education is meaningless, without the same being coupled with some kind of punishment for the parents, if the child is not sent to the school. Today you have a right to go to the school but if you don't go to the school and you

do not study, it does not matter. In this context I may refer to one interesting study done in the areas of Old Baroda State where, prior to independence, education was compulsory in the days of Maharaja Sayajirao Gaekwad. Education was free and all facilities were provided therefor, but if the children were not sent to school the parents would have to pay a fine. The result is that in many parts of the territory of old Baroda State we have a situation, particularly amongst the backward classes of the community, that grandmothers are educated, but granddaughters are not.

14. I have referred to some of the specific enactments concerning the laws for the underprivileged, and the acts containing affirmative action. There are ameliorating provisions under these laws. All these enactments have undoubtedly created a framework, however, in the absence of effective implementation, thereof, more often it is said that we have only the laws on paper, but not the results emanating therefrom. Recently there was a very interesting comment with respect to the manner in which laws are passed, the moment any problem is noticed. An eminent journalist wrote that if it is brought to the notice of the Government that there is a serious deficiency of Vitamin D-3 amongst the children, the Government may even pass an **Elimination of Vitamin D-3 Deficiency Act**. We can only hope that these laws concerning the underprivileged are implemented in their true spirit.

15. With this coverage of some of the enactments concerning the underprivileged, which is a very vast area, I leave the topic for other participants in the colloquium to present their views and thereafter, for interaction.

Thank you.
