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WOMEN AND THE LAW

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I INTRODUCTION

COURT DECISIONS relating to women have been getting greater visibility over the years in the media. The law reports also contain increasing number of cases relating to women. These cases relate to virtually every branch of law spanning constitutional law, family law, property law, criminal law and taxation law, to name but a few. Heightened awareness of rights, greater 'voice' for women within and beyond the family and larger number of gender-specific laws and provisions have, no doubt, contributed to this increase. The year under review is no exception and it has seen significant judgments relating to women. One can see the impact of the heightened visibility and sensitivity to women's issues in some of the judgments, but one can also note with regret the long road ahead before women receive their rightful place, of dignity and equality, in the public domain and in their interactions with institutions, including the courts.

II EQUALITY OR PROTECTION? RECENT DEVELOPMENTS

The Indian Constitution provides for a complex nature of equality rights – providing for a non-discrimination right embodied in article 15(1) together with a substantive equality provision in article 15(3) that permits the state to make special provisions for women and children. Several measures to give greater protection to women have been gradually developed under the latter clause.[1] Over the years, the question of whether such special provisions, in fact, protect women and whether such 'protection' and such a paternalistic outlook is required in the face of increasing self-determination on the part of women has been raised. While no doubt article 15(3) is a valuable constitutional provision, there are some areas where recourse to it can be perceived as stifling of women's striving for equality. Recent case law brings out the shifting dimensions of the debate clearly.

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1 For an analysis of the nature of the right under art. 15(3) and its relationship to other rights in the Constitution, see Kamala Sankaran, Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution, 23 *South African Journal on Human Rights* 277-90 (2007).

In *Anuj Garg* v. *Hotel Association of India*,[2] the court discussed the constitutional validity of section 30 of the Punjab Excise Act, 1914 prohibiting employment of any man under the age of 25 years or any woman in any part of such premises in which liquor or intoxicating drug is consumed by the public. The case arose out of a judgment and order dated 12.01.2006 passed by the High Court of Delhi which held the impugned pre-constitutional law to be in violation of articles 14, 15 and 19(1) (g) of the Constitution.[3]

The Supreme Court observed that it was "trite" that a law which may have been constitutional when it was first enacted could become unconstitutional with a changed situation and the passage of time. It was with this approach that the court examined whether the law which precluded women from taking up certain kinds of employments in the name of their 'protection' could stand up to the scrutiny of non-discrimination at the current time. The court cited Indian and foreign precedents, theories of feminist jurisprudence and international treaties and felt that a broad and liberal approach which privileged the individual, rather than the community rights of women, was called for. The court also noticed that the hospitality industry has grown enormously in recent years, and to prohibit women and men below the age of 25 years from taking up any employment in an establishment where liquor was served would unduly restrict their employment opportunities. (The court in fact pointed out that such an approach would prevent women from being employed aboard flights where liquor was served.) The court noticed that several young persons had qualified in hotel management and that while the right to employment was by itself not a fundamental right, there certainly was a right to be considered fairly with others similarly situated for such employment when available. The court also rejected an argument based on liquor trade being *res extra commercium*. Pointing out that such an argument could only apply if the policy of prohibition was being challenged and the manufacture and sale of liquor were banned, the court declared that it had no application where the sale of liquor was permitted and a person was seeking employment in such establishments where its sale was granted under a licence.

Most importantly, the court ruled that *parens patriae* power of the state and what it considers to be in the 'best interests' of women and children is subject to scrutiny, on two counts: firstly, in terms of its necessity and secondly, on an assessment of any trade-off or adverse impact, if any. The test of a strict judicial scrutiny as advocated by the courts to test discriminatory provisions as in the present case would entail a two pronged scrutiny:

2 AIR 2008 SC 663.

3 *Hotel Association of India* v. *Union of India*, MANU/DE/0284/2006.

(a) the legislative interference (induced by sex discriminatory legislation as in the instant case) should be justified in principle; and
(b) the same should be proportionate in measure.

The court stated that its task was to determine whether the measures furthered by the state in form of legislative mandate, to augment the legitimate aim of protecting the interests of women were proportionate to the other well-settled gender norms such as autonomy, equality of opportunity and right to privacy. In short, there should be a reasonable relationship of proportionality between the means used and the aim pursued.

Thus, a rule or a law may be considered overly paternalistic or discriminatory in changed circumstances. Basing itself on the right to self-determination which is a facet of gender justice jurisprudence, the court concluded, that "Young men and women know what would be the best offer for them in the service sector. In the age of internet, they would know all pros and cons of a profession. It is their life; subject to constitutional, statutory and social interdicts a citizen of India should be allowed to live her life on her own terms." Seemingly influenced by the development of women's rights under the concept of privacy right in the United States, the court held that the autonomy right to choose one's profession is a facet of the privacy rights of women. Yet the court was careful to retain the need for state protection in a country like India and observed that state protection must not translate into censorship. It concluded that the present law ends up victimising its subject in the name of protection. It observed that instead of totally prohibiting women's employment in bars the state ought to focus on factoring in ways through which unequal consequences of sex differences could be eliminated. The court called upon the state to inspire confidence in women to discharge their duty freely in accordance with the requirements of the profession they chose to follow, and stated that any other policy inference (such as the one embodied under section 30) drawn allegedly from societal conditions would be oppressive on women and against their privacy rights. As has been noticed in previous surveys such an approach has been adopted by different high courts while holding the ban on night work for women to be unconstitutional.[4] The present approach of the Supreme Court may perhaps guide the court when the matter comes up before it in the pending appeal.

The court in the present case also ruled that depriving men below the age of 25 of the right to seek employment in such hotels serving liquor was an undue restriction and the same was struck down. *Anuj Garg* therefore represents a definite shift in the manner in which the court examines declarations by the state that a policy or law is covered under the protection of special provision under article 15(3). The court had enunciated that such

4 See Kamala Sankaran, 'Women and the Law', XL *ASIL* 581-82 (2004).

policies and laws are open to judicial scrutiny and would have to be scrutinized in the light of the right to equality and non-discrimination and women's right to autonomy and self determination.

In a fairly similar case before the Kerala High Court, the court was examining whether it was correct to exclude women from applying for the post of electricity *mazdoor* in the electricity board.[5] The question before the court was whether women were unsuitable to perform the duties of electricity worker (*mazdoor*) which involves climbing electric poles, painting transformers, assisting the engineers to draw electric lines, carrying materials to the work spot etc., which require attention round the clock. Women and physically handicapped persons were prohibited from applying for such posts. The petitioners who were women argued that they were eligible for the post and would have been considered but for the ban on women applying for such jobs. They argued that such a ban was not only inherently discriminatory, but was also compounded by the fact that upon the death of an existing linesman, women dependants were given compassionate appointments to the very same posts while women were prohibited from applying for direct recruitment to such posts. The electricity board replied that women candidates who would get appointment as electricity worker from among the dependents of the board employees on compassionate grounds consist of only a small percentage of the total number of posts and, therefore, the relaxed norms did not adversely affect the effective and efficient functioning of the board. The board contended that since women candidates are physically unfit to carry out the kind of manual labour which is arduous, their entry into service in the general category as direct recruits would adversely affect the execution of important works like erection of electric posts, installing, repairing and maintaining transformers and climbing the poles in connection with the restoration of electric supply during the day and night.

In a judgment rich with analysis of Indian and foreign precedents, the court held that romantic, paternalistic notions of what kinds of works were appropriate for women needed to be reconsidered. The court reiterated that the decision of what kinds of work are suitable for women ought to be decided on the basis of what women feel about it and their capacity to carry out the work. The court held that exclusion of women from such posts was discrimination wholly on the ground of sex and therefore in violation of articles 15(1) and 16(2) and directed the board to invite applications dropping the offending portion of the notification and elaborating the kinds of tasks required for the said posts. Selection of candidates was directed to be based on a practical test to determine their capacity to do such jobs so that those who are paid wages or emoluments from public funds do render the required service, quality-wise and quantity-wise, subject to statutory provisions governing benefits provided for working women.

5 *Siniya Mol C.S.* v. *K.S.E.B.,* 2008 (1) KLT 30.

Reservation for women in employment – special reservation or social reservation?

Cases of reservation for women have been coming before the courts intermittently, but the understanding of the manner in which they must be implemented, the extent of the reservation and manner of allocation of such seats/posts of women have been subject to far greater analysis in recent years. *Rajesh Kumar Daria* v. *Rajasthan Public Service Commission*[6] is an important case dealing with the manner of dealing with such reservation in tune with the interpretation in the leading *Mandal* reservation case.[7] It may be recalled that the *Mandal* case termed reservations in favour of scheduled castes, scheduled tribes and other backward classes under article 16(4) as vertical reservations and reservations in favour of physically handicapped under article 16(1) as horizontal reservations. Horizontal reservations were to cut across vertical reservations (interlocking reservations) with adjustments being made whenever a person is selected in the horizontal category, against the number of positions in the vertical category.

Rule 9 (3) of the Rajasthan Judicial Service Rules, 1955 provided:

> Reservation for women candidates shall be 20% category-wise in the direct recruitment. In the event of non-availability of the eligible and suitable women candidates in a particular year, the vacancies so reserved for them shall be filled in accordance with the normal procedure and such vacancies shall not be carried forward to the subsequent year and the reservation treated as horizontal reservation, i.e. the reservation for women candidates shall be adjusted proportionately in the respective category to which the woman candidate belongs.

Interpreting this rule, the court held that special provisions for women made under article 15(3) in respect of employment, is a special reservation when compared with the social reservation under article 16(4). Based on the interpretation of how horizontal reservations were worked out in earlier cases[8] the court held that where a special reservation for women is provided within the social reservation for scheduled castes, the proper procedure was first to fill up the quota for scheduled castes in order of merit and then to find out the number of candidates among them who belonged to the special reservation group of scheduled castes-women. If the number of women in such list was equal to or more than the number of special reservation quota, then there was no need for further selection towards the special reservation quota. The court clarified that only if there was a shortfall would there be a

6 MANU/SC/7813/2007.

7 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217.

8 See for instance *Anil Kumar Gupta* v. *State of U.P.*, MANU/SC/0747/1995; *R. K. Sabharwal* v. *State of Punjab,* (1995) 2 SCC 745, and *Union of India* v. *Virpal Singh Chauhan,* (1995) 6 SCC 648.

need to delete the corresponding number of scheduled caste candidates from the bottom of the list so as to include the corresponding number of scheduled caste-women. Thus, women selected on merit within the vertical reservation quota would be counted against the horizontal reservation for women. By this important clarification, the Supreme Court allowed in part the appeal of those candidates who had been wrongly denied their seats to accommodate women candidates without considering the number of women already included in the vertical reservation process.

While the judgment is a welcome one explaining the nature of interlocking reservation, the court's statement that reservations for women is of a 'special' (horizontal) nature rather than a social one may be open to question. One of the judges in the *Mandal* judgment[9] had taken the view that given the criteria of social and educational backwardness required by article 15(4), women too could be considered to be 'backward' as a class. If that view be taken, then reservations for women could be considered under vertical reservations. This matter has not been adequately examined in the academic literature, save for an interesting comment by B. Sivaramayya.[10] The implications of using sex rather than the conventional starting point of caste for determining backwardness of a group would of course require that women who are better off (in sum, the creamy layer) would have to be denied the benefits of such reservation in keeping with the latest court rulings in the matter.[11]

While the above case dealt with reservation of seats, giving of preference to women candidates in the matter of recruitment came up before the courts in *Marripati Nagaraja* v. *The Government of Andhra Pradesh*.[12] The State of Andhra Pradesh in 1995 had provided for preference to women candidates to the extent of 30 % in the matter of direct recruitment with retrospective effect from 1984. In another notification issued in 1996 the percentage was raised to 331/3 %. This was not a case of a quota of seats set aside for women. Instead the relevant rules indicated that preference should be given to women, provided that such absolute preference to women should not result in total exclusion of men in any category of posts. The court in this case held that the power of the state to make relevant rules under article 309 of the Constitution included the power to make rules with retrospective effect. The court held that no existing right of any person had been taken away as a result of the notification varying the percentage of preference since the selection process was not yet over.

In a case dealing with the informal economy, particularly street vendors, the Supreme Court gave its approval to the scheme drawn up by the Municipal Corporation of Delhi (MCD) for hawkers and street vendors.[13] On the

9 *Supra* note 7.

10 B Sivaramayya, 'The Mandal Judgement: A Brief Description and Critique', in M.N. Srinivas (ed.), *Caste: Its Twentieth Century Avatar* (1996).

11 *Ashok Kumar Thakur* v. *Union of India*, MANU/SC/1397/2008.

12 MANU/SC/8040/2007.

13 *Sudhir Madan* v. *Municipal Corporation of Delhi*, 2007(8) SCALE 257.

arguments by the petitioners for a demarcation of an area exclusively for women hawkers, the court noted that this would be a matter of policy and that it would not be appropriate for the court to direct the MCD to give preference to women vendors or recognize daily markets only for women. The court, however, pointed out that it was no doubt true that women vendors ought to be given adequate opportunity to supplement their family income and that they deserved more protection than others. While planning markets in the city, MCD could consider whether some space could be reserved exclusively for women who might be allotted sites adjacent to each other in a block. It also pointed out that it might also be a good idea to establish markets where sites could be allotted exclusively to women for selling items which primarily interest women. The court was of the view that this might greatly convenience women shoppers who would then have an exclusive place to go and shop for all their personal needs, and that in the future planning of markets, such considerations should weigh with the planners.

Sexual harassment at work

Subsequent to the well-known judgment in *Vishaka*,[14] employers and organisations are under a mandate to set up complaint mechanisms to deal expeditiously with complaints of sexual harassment. The increasing number of cases coming to the courts point to the widespread harassment faced by several women.[15] What is indeed shocking is that authorities, particularly government departments, do not take speedy action based on such complaints, that they are now mandated to do under the law of the land. A case from Madhya Pradesh illustrates the rank disregard shown by the state government in dealing with complaints of sexual harassment.[16] A young woman working as sub-inspector complained about the sexual harassment and pressure brought to bear upon her by her superior, the Superintendent of Police. She was, subsequently, found dead in suspicious circumstances. The father of the deceased, who alleged that she had been murdered, moved the high court demanding that the investigation be handed over to the CBI. In its judgment, the court pointed to the hurried manner in which the SP (who was himself named as the harasser by the deceased) conducted the investigation and the destruction of evidence. The court observed that despite the complaint being received, the state government did not take any action against the senior IPS officer named in this regard. It stated: "The allegations may be wrong or may be right but that is not relevant at this point of time. If such serious allegation is made against a senior officer then the principle laid down by the Supreme Court in the case of *Vishaka and Ors.* v. *State of Rajasthan and Ors.* is attracted. The State Government in such circumstances

14 *Vishaka* v. *State of Rajasthan,* MANU/SC/0786/1997.

15 Apart from the cases discussed in this survey also see *Madhuri. P., Receptionist, STED* v. *Chief Secretary to Govt.of Kerala*, decided by the Kerala High Court on 12/01/2007 and *The Secretary, Technical Education,U.P.* v. *Lalit Mohan Upadhyay*, (2007) 4 SCC 492.

16 *Kedarnath Sharma* v. *Union of India*, MANU/MP/0515/2007.

was expected at least to issue a show-cause notice and proceed departmentally against the senior officer when such serious allegations are made. This is also not done by the State Government in the present case (para 33)." As a result the court ordered that the matter be investigated by the CBI independently.

This case only points to the disregard that those in authority continue to show to cases of sexual harassment and the protection they continue to afford to those who violate the constitutional rights of women. That the harassment resulted in the death of the young police woman, be it suicide or murder, only underscores the need for swift action to be taken by those in authority.

An important case that relates to the manner in which enquiries are conducted into charges of sexual harassment levelled by students against their teacher has come up before the Madras High Court.[17] In this case several girl students had made complaints of sexual harassment against some teachers and they had appeared before a complaints committee that found the teachers *prima facie* guilty. The university appointed an enquiry officer, and the question was whether the students ought to be examined once again in this enquiry or if their statements made to the university complaints committee could be relied upon. The court held that "in order to protect the modesty of girl students and to prevent their unnecessary exposure at an enquiry, they need not appear and depose before the present Enquiry Officer. On the other hand, the Enquiry Officer is directed to take note of their statements, supply copy of the same to respondents …… and after giving opportunity to them to offer their further response, if any, the Enquiry Officer is free to submit his report for further action."[18]

While due care is taken to respect the sensitivities of young students and prevent their repeated re-victimisation in enquiries, one has to mention an aspect of sexual harassment cases that reach the courts which are disturbing.[19] While conducting enquiries within educational institutions, due care is often taken to protect the identities of the victims and to prevent their repeated contact with the perpetrator of the harassment in the course of the enquiry. However, when the matter reaches the courts, the judgments reveal the names of the victims and the witnesses, which are often not revealed under the policies of the universities. It is time that the courts evolve a model of judgment-writing that pays heed to the need to protect the identity of such victims when their harassers pursue the matter into the courts.

In keeping with the *Vishaka* mandate, governments have constituted complaints committees as directed by the apex court. A case that came up

17 *C. Parthiban and Selvi D. Akila* v. *Dr. K. Meena, Convenor, Vice-Chancellor Committee Bharathidasan University*, MANU/TN/7122/2007.

18 The court relied on *Avinash Nagra* v. *Navodaya Vidyalaya Samiti*, 1997 (2) SCC 534 at para 15.

19 See for instance, *The Secretary, Technical Education, U.P.* v. *Lalit Mohan Upadhyay*, *supra* note 15.

before the Madras High Court illustrates the need for prompt disposal of such complaints.[20] Village health nurses in Tamil Nadu had made a complaint against the medical officer of a sub-primary health centre alleging various instances of sexual harassment in 1997. While a complaint committee was set up to examine the matter, the organization of village health nurses obtained a stay on the conduct of the proceedings. The high court in the present case, ordered that a fresh committee be constituted as per the guidelines of the apex court to look into the matter which was more than nine years old. The history of the case highlights the need for prompt action by the authorities on such complaints and the need to constitute such committees in a manner that is seen as unbiased and fair in the eyes of the complainant as otherwise the matter reaches the courts and the proceedings get unduly delayed.

The care with which the high courts scrutinise the proceedings of such enquiry committees in cases of complaints of sexual harassment is also to be noted in another case that came before the same high court.[21] Reversing the finding of the enquiry officer on the grounds that he did not appreciate the materials placed on record in their proper perspective leading to miscarriage of justice, the court held that the complaint was filed with the ulterior motive of avoiding repayment of a loan taken from the wife of the delinquent officer. The court directed the dismissed officer to be reinstated with all attendant benefits.

III FAMILY RELATIONS AND THE RIGHTS OF PARTIES

The family provided the site for several court cases dealing with the rights and status of women members of the family. The Protection of Women from Domestic Violence Act enacted in 2005 (PWDVA), saw the beginnings of judicial interpretation of this landmark enactment in the year under review. *S.R. Batra* v. *Smt. Taruna Batra*[22] is an important judgment from the apex court. In this case a suit was filed for mandatory injunction to enable the estranged wife to enter the house where she and her husband last resided together. The trial judge found the wife to be in possession of the second floor of the said premises and granted a temporary injunction restraining her in-laws from interfering with her possession. In appeal the senior civil judge held that she had no right to the premises as by then the husband had shifted to a rented accommodation elsewhere. In further appeal a single judge of the high court held that she could continue to reside in the premises since it was her matrimonial home, i.e. where the spouses had last resided together. In the course of the case, the PWDVA was enacted and in

20 *The Tamilnadu Village Health Nurses' Association rep. by its Secretary K. Gomathi* v. *The State of Tamilnadu, rep. by its Secretary Department of Health and Family Welfare,* MANU/TN/7018/2007.

21 *G. Pushkala* v. *High Court of Judicature at Madras*, (2007) 4 MLJ 692.

22 (2007) 3 SCC 169.

the Supreme Court the wife argued that her right to reside in the house belonging to her mother-in-law flowed from the definition of a shared household. The court examined the question of whether the place where the parties were living before the petition for divorce was filed, and which belonged to the mother-in-law of the respondent, could indeed be considered a 'shared household' within the meaning of the said Act.

Section 2(s) states: "`shared household` means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, *irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."* (Emphasis added).

The respondent in order to obtain the right to residence also relied on section 17 of the said Act which holds:

> 17. (1)Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.
> (2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

Rejecting these arguments, the court proceeded to hold that as regards section 17(1), the wife was only entitled to claim a right to residence in a shared household. The court was of the view that the definition of 'shared household' in the PWDVA had been clumsily worded. It held that a 'shared household' could only mean the house belonging to or taken on rent by the husband, or the house which belonged to the joint family of which the husband was a member. Since the property in question in the present case neither belonged to the husband, nor was it taken on rent by him and nor was it a joint family property of which he was a member, but was the exclusive property of his mother, the court was categorical that it could not be called a 'shared household'. The court also turned down the plea for alternative accommodation made under section 19 of the PWDVA.

This interpretation to a pivotal phrase in the PWDVA will certainly circumscribe the capacity of the law to provide residence rights for such women victims of domestic violence, considering we do not have any law such as the English Matrimonial Homes Act, 1967 that gives crucial residence rights in the matrimonial home.

The interpretation of what constitutes a shared household has been applied in subsequent cases as well. The Delhi High Court has reiterated that

the daughter-in-law could not claim the right of residence in a house belonging to her mother-in-law and such a claim could only be made against her husband. Further, where the mother-in-law disposes of such property the court held that the plaintiff could not claim any relief from the purchasers since she has, if at all, only a right to residence in the property and no interest in the property as such.[23]

Dowry and its re-interpretation

Appa Saheb v. *State of Maharashtra*[24] decided an important matter relating to the interpretation of the term 'dowry' under the Dowry Prohibition Act, 1961. Section 2 defines 'dowry' as any property or valuable security given or agreed to be given either directly or indirectly –

(a) by one party to a marriage to the other party to the marriage; or
(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage of the said parties, but does not include dower or *mahr* in the case of persons to whom the Muslim Personal law (*shariat*) applies.

The Supreme Court held that giving or taking of property or valuable security must have connection with marriage of the parties and that a correlation between the giving and taking of property or valuable security with the marriage of the parties is essential. Further, since the dowry law was a penal one, it needed to be strictly construed. Elaborating further, the court held that a "demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood."[25] In the said case, the deceased had complained of ill-treatment by her husband and in-laws and had also been asked to demand money form her parents for the purchase of manure shortly before her death. From the facts of the case, the court concluded that asking for money from the in-laws was not in connection with marriage and was due to financial stringency and concluded that the case therefore did not fall within the scope of section 304B of the Indian Penal Code, 1860 that deals with 'dowry death'.

The manner in which the definition of dowry has now been interpreted de-links subsequent demands for money from the occasion of marriage and therefore exempts such demand from the scope of dowry as defined. However, it should be noted that a husband facing financial stringency often chooses to demand money in the first instance from his in-laws rather than from his own relatives. This power to demand money from his wife's parents

23 *Smt. Abha Arora* v.*Angela Sharma*, MANU/DE/7992/2007.
24 AIR 2007 SC 763.
25 *Id*. at 767.

is precisely because he perceives himself as having the 'power' to do so, a power which invariably is seen to flow from marriage in our society. Dowry in fact is frequently seen as a means to increase one's social status, provide the much-needed seed capital for any business venture or to tide over financial crises for whatever reason in the husband's family. Unfortunately, by taking such a narrow legal view of what constitutes dowry (on the ground that it is a penal statute) which is unmindful of social realities, the court has exempted demands for money from in-laws except in strict connection with the marriage of the parties. The Dowry Prohibition Act, 1961 has seen very few convictions over the years and such interpretations would appear to make it harder for the prosecution to obtain convictions.

Succession rights and the Constitution

The amendments to the Hindu Succession Act in 2005 have provided greater rights to women in the joint family property. This amendment followed in the wake of several similar, but not identical, amendments carried out in certain states in the decades earlier that had sought to make the Hindu law of succession more gender equal. Since matters relating to marriage, divorce, succession and inheritance fall within the concurrent list of the Constitution, the effect of the central amendment on the state-level legislation was noted in a recent case before the Andhra Pradesh High Court.[26] The decision establishes the overriding nature of the central amendment *vis-à-vis* state amendments that had a more restricted scope with regard to daughters' rights. The court noted that the central amended Act which came into force from 9.9.2005 was introduced in order to bring uniformity throughout the country. It also noted that the stipulation under the Hindu Succession Act as amended in the State of Andhra Pradesh that the marriage of the daughter should not have been performed before 5.9.1985 was now removed. Therefore, following the enactment of the central amendment, irrespective of the dates of marriage, all the daughters would be deemed to be coparceners, with one exception, viz., that partition should not have taken place before 20.12.2004. The court also noted that the expression partition herein means that partition under a duly registered partition deed or partition effected by a decree of the court.

The court also observed that Parliament while amending section 6 of the Hindu Succession Act, 1956, did not repeal the amendments made by the states of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra. In other words, the Central Amending Act did not repeal section 29-A of the Hindu Succession Act (Andhra Pradesh) Amendment Act, 1985. The court noted that the proviso to article 254(2) empowers the Union Parliament to repeal or amend a repugnant state law even though it has become valid by virtue of the President's assent. Further, Parliament may repeal or amend the repugnant state law, either directly, or by itself enacting a law repugnant to

26 *N. Jangi Reddy* v. *Yellaram Narasimha Reddy*, decided on 03/10/2007

the state law with respect to the same matter. Although the subsequent law made by Parliament did not expressly repeal a state law, the court noted that the state law became void as soon as the central amendment came into force since there was repugnancy between the two laws. Thus in the given case, a revised pleadings incorporating the revised position of rights of daughters irrespective of their date of marriage was allowed to be filed by the court since the central amendment impliedly repealed section 29-A of the Andhra Pradesh amendment to the Hindu Succession Act, 1956. It also ruled that the preliminary decree in a partition suit could be altered in the light of the revised circumstances.

Value of house work

As noticed in the survey last year too, courts are increasingly assigning monetary value to the housework performed by women. Such cases normally arise where compensation is sought from the motor accident claims tribunal (MACT) by family members for compensation upon the death of a 'non-working' woman who cared for and looked after the household. This year too the Gujarat High Court has upheld an order of a MACT which calculated the loss of domestic service rendered by the woman to the household (termed 'income' by the tribunal) at Rs. 1500 per month and projected at Rs. 2250 per month, prospectively. Deducting a sum of one-third for personal expenses and by using the appropriate multiplier the compensation amount was upheld. The court remarked that "judicial notice can certainly be taken of the services being rendered by the housewife to the family."[27] This is a welcome development. Acknowledgment of the care work done by women within the household is an important step in the development of matrimonial property law and the prior right of the women/widow in the property of her husband even if such assets are nominally purchased or held in the name of the husband alone.[28]

In another case which arose under the Motor Vehicles Act, 1988 the court has clarified that liability under section 140 of the Act does not cease because there is absence of dependency. The 'no fault' liability under the Act which is a statutory liability is treated as part of the estate of the deceased. Thus, even a married daughter who is not a 'dependant' on the deceased would be entitled to the amount under section 140 of the Act.[29]

What is, however, anomalous is that when the deceased is a working woman the compensation is computed purely on the basis of her income with nothing extra being given for the value of household services she performs.[30] It is well-known that there is a 'double burden' cast on the

27 *United India Assurance Co. Ltd.* v. *Virambhai Ranchodbhai Patel,* AIR 2007 Guj 119 at 120.

28 For a detailed analysis of matrimonial law and the work performed by women within the household, see Kamala Sankaran, 'Family, Work and Matrimonial Property: Implications for Women and Children' in Archana Parashar and Amita Dhanda (eds*.), Redefining Family Law in India: Essays in Honour of B. Sivaramayya* 258-81 (2008).

29 *Smt. Manuri Bera* v. *Oriental Insurance Co. Ltd*., AIR 2007 SC 1474.

30 *New India Assurance Co*. v. *Prem Chand,* AIR 2007 (NOC) 1746 (HP).

working woman in India – apart from working outside the home, in most cases she also performs household work. Upon her death the value of these household services is never computed even though in cases where she is a non-working 'housewife' these services are computed. It is necessary that this anomaly be ended and where it is so established, value for the domestic and care work performed also be computed.

Pleadings in matrimonial cases

The Rajasthan High Court in *Radhey Shyam* v. *Mst. Pappi*[31] decided an important question related to pleadings. The Hindu Marriage and Divorce Rules, 1956 framed by the Rajasthan High Court require that the petitioner implead the alleged adulterer while filing for divorce on the grounds of adultery by the spouse. However, the court held on a conjoint reading of the relevant rule, the requirement to give full particulars and the ground upon which the applicant seeks relief are to be those "which are known to him". The court held that where a person had no knowledge, s/he could not be asked to implead that unknown person as a party in the divorce proceedings. In another context, the division bench of the same high court had held that desertion and cruelty are continuing wrongs with each day giving a fresh cause of action. In these circumstances, the court declined from applying the concept of *res judciata* to a fresh petition filed for divorce under the HMA where similar petitions filed earlier had failed.[32]

DNA and paternity cases

In the case discussed above,[33] the husband had obtained the DNA test of his wife and son following the order of the trial court (where the wife had given her consent for such test). Yet, he was not allowed to tender the result of such a test along with his application for divorce by the trial court. Reversing this, the high court pointed out that there was a distinction between tendering such report in evidence and proving it. Since he had obtained the report on the orders of the court, he had a right to tender it; the question of whether the document had been proved or not was another matter. The question of whether such a report was a public document and if further proof of it was required or not were remanded back to the trial court.

As noticed in the previous surveys on this subject, the question of a court ordering DNA tests to establish paternity of children or for establishing adultery in petitions for divorce or in maintenance matters continues to be a vexed one despite the judgment in *Sharda* v. *Dharmpal*.[34] In *V.K. Bhurvaneswari* v. *N. Venugopal*[35] the husband had filed a petition for divorce on the ground of desertion by the wife. He also moved an

31 AIR 2007 Raj 42.
32 *Shyam Lal* v. *Smt. Leelawati,* AIR 2007 Raj 93.
33 *Supra* note 31.
34 AIR 2003 SC 3450.
35 AIR 2007 (DOC) 158 (Mad).

interlocutory application for directing the wife and child for a DNA test for establishing paternity. On challenge by the wife the high court held that an order directing the wife to undergo DNA test was not an interference in the personal liberty of the said person. Without there being a medical examination it would be difficult for the court to decide if the petition seeking divorce was correct or not.

This kind of argument is disturbing. Desertion as a ground for divorce could be established by other means. Directing a spouse and child to undergo a DNA test is aimed at establishing paternity of the child and goes against the well established principle of section 112 of the Indian Evidence Act, 1872. Further, if it is established that the paternity of the child is not that of the petitioner, while this may be the basis of a divorce, the "collateral" damage done to the child and the principle that the father is he whom the marriage indicates, would be too easily upset. This is a factor to be kept in mind by the court while ordering a DNA test in cases where divorce is sought on grounds such as desertion.

In an interesting case where a married woman moved the family court for a declaration that the petitioner was the biological father of the child born to her while she was married to another man, the high court clarified that the family court would get jurisdiction to decide questions of paternity only when the question of legitimacy of the child was raised before it as a matrimonial cause arising out of the matrimonial relationship between the parties.[36] Thus, the court ruled that paternity, as in the instant case, need not be a matrimonial cause since the husband (who was the second respondent) had not raised the issue of legitimacy of the child. However, the high court clarified that while the family court did not have jurisdiction to determine the question of paternity in the absence of a matrimonial cause, this would not prevent the parties from approaching the civil courts for a declaration on the matter.

Legitimacy

The anomalous position in section 16 of the Hindu Marriage Act, 1955 (HMA) with regard to legitimacy of children was once again brought into focus in a recent case decided by the Kerala High Court. The interesting question that arose in *Chodon Puthiyoth Shyamalavalli Amma* v. *Kavalam Jisha*[37] was whether children born of a couple who neither went through a void or voidable form of marriage could be treated as legitimate under section 16 of the Act. As is well known, the said provision seeks to provide legitimacy to children born of marriages that are declared void or voidable under the Act. However, for such marriage to be declared void or voidable a ceremony of marriage performed according to section 7 of the Act is a

36 *Bharat Kumar* v. *Selama Mini,* AIR 2007 Ker 197 (DB).Also see *Renubala Moharana* v. *Mina Mohanty,* AIR 2004 SC 3500 cited by the court that questions of legitimacy cannot be entertained by the family courts by those having no claim on the matrimonial relationship.

37 AIR 2007 Ker 246.

sine qua non. In the instant case there was no solemnisation of marriage at all and thus the children born of such alliance could not obtain the benefits conferred by section 16 read with sections 5 and 11 of the Act. This decision though in accordance with strict reading of the law points to an anomaly in the law. The PWDVA of 2005 now makes provision for relationships 'in the nature of marriage' and allows such women to obtain relief from domestic violence. When the legislation has sought to provide them protection even where there is no ceremony of marriage between the parties and when in other cases a presumption is allowed to be raised about the existence of marriage due to long periods of cohabitation and when the community treats the parties as a couple, to now hold that children born of loose relationships cannot be legitimised since there was no valid ceremony or solemnisation of marriage as is required for void or voidable marriages would run contrary to the legislative policy in this regard. There is a need for legislative amendment to include children of such relationships in the nature of marriage to also obtain the benefits of section 16 of the HMA.

Guardianship in marriage of minor

Reiterating that the marriage of a minor is neither illegal, invalid or void, a division bench of the Andhra Pradesh High Court proceeded to declare that the husband of the minor girl would be the natural guardian under section 6(c) of the Hindu Minority and Guardianship Act, 1956. In this case it appears the girl was not willing to go with her parents, and her custody was given to her husband.[38] But a question that remains to be answered is whether section 6 of the said Act can be construed as giving custody of a minor wife to a husband in the event that he is also a minor? It is submitted that such a broad interpretation would not be correct and requires to be clarified.

A division bench of the Chhatisgarh High Court has upheld the constitutionality of section 13(2) of the HMA. The petitioner had argued that special grounds of divorce had been granted only to the wife who had contracted a marriage below the age of 15 years but not the husband who could also have been a victim of child marriage. The court upheld the constitutionality on grounds of article 15(3) of the Constitution and held that the said sub-section is not discriminatory on the ground of sex.[39] The court also held that notwithstanding the fact that the husband was married in violation of the Child Marriage Restraint Act, 1929 and the Hindu Marriage Act, 1955, he was liable to pay maintenance to his wife. This is a consequence of the court holding that such child marriages are valid notwithstanding such provisions penalising the performance of child

38 *Makemalla Sailoo* v. *Supdt. of Police, Nalgonda,* AIR 2007 (DOC) 135 (AP) (DB).

39 The court relied on *Pratap Singh* v. *Union of India,* AIR 1985 SC 1695; *Toguru Suhakar Reddy* v. *The Government of Andhra Pradesh,* AIR 1994 SC 544 and *Govt. of Andhra Pradesh* v. *P.S. Vijay Kumar,* AIR 1995 SC 1648 which had dealt with the state's competence to make special provisions with respect ot women. See *Roop Narayan Verma* v. *Union of India*, AIR 2007 Chh 64.

marriage. The court rejected the prayer of the petitioner that the state was liable to pay such maintenance since it had not adequately enforced the law and prevented such child marriages from taking place.

Maintenance

The courts have once again clarified that the fact that the wife did not claim maintenance during the initial compromise petition for divorce, does not preclude her from claiming maintenance subsequently. The court has held such an agreement cannot be legally enforced as it is against public safety and thus the wife can subsequently claim maintenance under section 125(4) of the Code of Criminal Procedure, 1973 (Cr PC).[40]

In an interesting judgment the Kerala High Court has pointed out that while "s. 125 of the CrPC mandates that the wife, parents and the children must be maintained by a person, it significantly does not insist that all of them should live with the person against whom the claim is made. That obligation is only on the wife." The court has noticed that under the provision the husband is entitled to insist that the wife should live with him. However, the court has clarified that husbands who permanently live abroad or in distant cities in India cannot insist that the wife should live in his parental home or along with his relatives with no prospect of his visiting her or living with her on permanent or regular basis. The court has thus held that the expression "living with the husband" must receive a "natural, reasonable and fair construction and must oblige the husband to make an offer which would entail the actual living together of the spouses." Thus, in the given case since the husband had no prospect of living with her she could not be denied maintenance on the ground that she did not go and live in his parental home.[41]

A division bench of the same high court has held that where the order of a magistrate under section 125(3) of the Cr PC directs that the husband should pay maintenance every month, failure to do so at the end of each month would entail non-compliance of the order. Thus, where a consolidated application for a breach of 84 months had been filed, it was not as if there has been only one breach; there was a breach every month which was punishable with imprisonment for a term of one month on each of the said occasions.[42]

A division bench of the Rajasthan High Court has held that parents could claim maintenance from a son even though they were living with another son. The court has also clarified that the non-discharge of any parental obligation by the parents could not be raised in order to contest an application under section 125 Cr PC moved by the parents.[43]

40 *Biswapriya Bhuiya* v. *Smt. Jhumi Banik*, AIR 2007 (NOC) 657 (Gau).
41 *Moideen* v. *Nabeesha,* 2007 (1) KLT 324 (Ker).
42 *Sunil Kumar* v. *Jalaja,* 2007 (1) KLT 266 (Ker).
43 *Purshottam Bhatra* v. *Family Court No. 1, Jaipur,* AIR 2007 (NOC)898 (Raj).

The Allahabad High Court has ruled that merely because the wife was educated, it would not disentitle her to maintenance under section 125 Cr PC. The court noted that merely because one is educated it did not imply that one would get a job. Thus, unless a wife is actually employed, she would be entitled to obtain maintenance under the said provision of the law.[44]

Marriage and divorce

The performance of matrimonial duties and whether failure to perform the perceived duties of a wife would amount to cruelty has been the subject matter of several court decisions. In a welcome move a division bench of the Rajasthan High Court has held that allegations by the husband that the wife did not cook food on time compelling him to eat at a hotel on one occasion, or visited her parents' house without his permission, or said insulting words regarding older relatives of the husband etc. were merely petty quibbles of married life and that these do not amount to cruelty. The court followed the principle that such incidents were nothing "more serious than the wear and tear of married life". The high court thus set aside the decree of divorce granted by the family court to the husband in this case.[45]

In *Samar Ghosh* v. *Jaya Ghosh*,[46] the court noted the need for divorce based on irretrievable breakdown of marriage based on the 71st Report of the Law Commission of India and reiterated its views mentioned in earlier cases such as *Naveen Kohli* v. *Neelu Kohli*.[47]

The court in *Samar Ghosh* has enumerated, *inter alia*, the following instances of cruelty in marriage:

> ……..
>
> (xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.
>
> (xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.
>
> (xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

44 *Shiv Kumar Singh* v. *State of U.P.*, AIR 2007 (NOC) 1274 (All).
45 *Bhavna Sharma* v. *Devendra Kumar Sharma,* AIR 2007 Raj 157 (DB).
46 (2007) 4 SCC 511.
47 (2006) 4 SCC 558.

It may be noted that the points stated by the court in the *Samar Ghosh* considers the refusal to have a child as amounting to cruelty. In 2003, the exclusion of the women who have more than two children from contesting for *panchayat* positions and its subsequent approval by the Supreme Court[48] had been commented on as unmindful of ground realities in India and the unequal position of women in marriages.[49] The present case reinforces this view. The decision of the number of children the wife would bear is often the sole prerogative of the husband. Refusal to bear children could confront women with an 'either–or' situation: to either bear more children or to be divorced on the ground of cruelty. This aspect unfortunately continues to be not adequately taken into account by the courts.

Conflict of laws

The vexed question of domicile and the jurisdiction of courts when parties live abroad and one party files for divorce in a foreign jurisdiction and the jurisdiction of the Indian courts in related matters is a recurring problem in these globalised times when increasing numbers of Indians are migrating and living abroad for considerable periods of time. The need for definitive rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes was emphasized in a recent case by the Madras High Court.[50] The estranged wife had obtained a custody order of her child from a court in California while the husband had filed for a similar relief in the courts in India.

The high court relied on *Narasimha Rao* v. *Venkata Lakshmi*,[51] where the apex court had noted that clause (a) of section 13 of the Code of Civil Procedure, 1908 (CPC) states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. The court was of the view that this clause should be interpreted to mean that only that court will be a court of competent jurisdiction which the Act or the law under which the parties are married recognises as a court of competent jurisdiction to entertain the matrimonial dispute. Any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that court. The expression 'competent court' in section 41 of the Indian Evidence Act, 1872 has also to be construed likewise. Further, clause (b) of section 13 of the CPC states that if a foreign judgment has not been given on the merits of the case, the courts in India would not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the

48 *Javed* v. *State of Haryana*, AIR 2003 SC 3057.
49 Kamala Sankaran, 'Women and the Law', XXXIX *ASIL* 689-91 (2003).
50 *Hari Narayanan* v. *Meenakshi Narayanan*, MANU/TN/8367/2007.
51 (1991) 3 SCC 451.

respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the court either in person or through a representative for objecting to the jurisdiction of the court, should not be considered as a decision on the merits of the case. In this respect the general rules of acquiescence to the jurisdiction of the court which may be valid in other matters and areas should be ignored and deemed inappropriate. The Supreme Court had reviewed the provision of the law in *Narasimha Rao* and summarized the position thus:

> From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

Based on these principles, the high court held that in the case before it, the custody order claimed by the wife was *ex parte* in nature, that is to say, not being contested by the respondent, and the custody given by the Superior Court of California being temporary in nature pending further proceedings, the same could not be treated as an order passed on merits. It appeared on the face of the order of the foreign court that there was a clear refusal to recognise the law of India viz., violation of natural justice and in such circumstances the order was held not binding on the courts in India. Further, the court noted that the respondent/wife had also subjected herself to the jurisdiction of the additional family court, Chennai, in the divorce proceedings and therefore she could not contend that she would only abide by the order of the Superior Court of California.

Further, regarding the question of what the domicile of the wife was, the court observed that for obtaining relief in such cases, domicile of the parties was not the deciding factor. The court noted that a person may have only one domicile at one point of time. If a person takes up foreign domicile, his original or native domicile simply remains in abeyance. As soon as he

abandons foreign domicile, the original domicile is revived automatically. While domicile of the parties was not an issue in this case, the court reiterated the view prevalent in private international law that the wife's permanent domicile during her marriage follows the domicile of her husband.

This provision of private international law continues to remain in place unchallenged even though in several cases, exigencies of work compel the spouses to live in different countries or continents. As in the vexed question of who has the right to determine the matrimonial home, the unilateral right given to the husband in the rules of private international law to determine the domicile of the wife continues to be an area requiring urgent review by the legislatures and the courts.

IV OTHER AREAS

Crimes against women

The court has had occasions to deal with cases of custodial rape in the year under review. It has taken the view that for the offence of custodial rape the victim must have been in the custody of the accused i.e. lawful custody and also that the accused must have taken advantage of his official position. The court also went on to add that if a student and teacher fall in love, it could mean that the teacher had taken undue advantage of his official position. However, in a case before the Supreme Court where the prosecutrix admitted that sexual intercourse took place not within the school premises but outside, the court was of the view that the ingredients of an offence under section 376 (2)(b) IPC were not made out.[52]

This interpretation places a very narrow view of what is meant by 'custody'. Such an interpretation which places a spatial limitation on the place of custody is unfortunate. The power that a teacher has can be exercised in a manner to get the student to consent to sexual intercourse even outside the premises. An interpretation that acknowledges the notional extension of the place of custody would have been in tune with the spirit of the amendment to the rape law.

Courts in recent times have been instrumental in ordering trial on a day-to-day basis of crimes against women in order to provide speedy justice. The order of the high court in the case of the rape of a German tourist in Jodhpur is an instance.[53] The high court has continued to monitor such cases and has directed the administration to take steps, *inter alia*, "to effectively deal with, to eliminate incidence of all forms of violence against women physical and mental, whether at domestic or societal levels, including those arising from customs, traditions or accepted practices....It is further directed that the State Government shall create and strengthen institutions and mechanisms/ schemes for prevention of such violence, including sexual harassment at

52 *Omkar Prasad Verma* v. *State of Madhya Pradesh*, AIR 2007 SC 1381.
53 *Suo Moto* v. *State of Rajasthan*, MANU/RH/0034/2007.

work places and customs like dowry, for rehabilitation of the victims of violence and for taking effective action against the perpetrators of such violence. ... The mechanism will be evolved to regularly review all sorts of crimes against women, their incidence, prevention, investigation, detection and prosecution. Such a review will be taken at the State as well as District Level....Women's Cells in Police Stations, Women Police Stations, Family Courts, Counselling Centres, Legal Aid Centres and Nyaya Panchayats be strengthened and expanded to eliminate violence and atrocities against women. … It is also directed to review curriculum and educational materials to include gender education and human rights issues… Steps be taken to remove all references derogatory to the dignity of women from all public documents and legal instruments" (para 14).

Sterilisation

This is an area of medical negligence where the court cases show a varying pattern. In *Punnam Somalakshmi* v. *Govt. of A.P.*[54] the court awarded a compensation of Rs. 50,000 to the mother and Rs. 10,000 to the child who was born despite a sterilisation operation conducted on the mother. The court was of the view that the birth of the child subsequent to the operation indicated negligence on the part of the authorities. While compensation being awarded to the mother is understandable, why it was granted to the child is not at all clear.

Policies and non statutory schemes affecting women

Several welfare measures that target women and children are often not rights-based; as a consequence such government programmes can be withdrawn by the government citing budgetary constraints or difficulties in targeting and/or administration. Often funds allocated for such programmes are diverted and used for other exigencies. A PIL concerning setting up of *anganwadis* pointed out that the government needed to set up a greater number of *anganwadi* centres in accordance with the sanctioned number. Taking a serious view of this shortfall, the Supreme Court has continued to minutely monitor the matter in order to see that the state government open the sanctioned number of *anganwadi* centres.[55]

In a PIL filed before the court concerning the National Maternity Benefit Scheme, the court has now sought to partially transform this scheme from a mere welfare benefit and directed that no scheme "shall be discontinued or restricted in any way without prior approval of the Court."[56] The court further directed that the amount of benefit shall be Rs. 500/- per birth irrespective of number of children and the age of the woman. This is a welcome provision in the scheme which the court directed to be enforced.

54 AIR 2007 (NOC) 1238 (AP).
55 *People's Union for Civil Liberties* v. *Union of India*, 2007(9) SCALE 25.
56 *People's Union for Civil Liberties* v. *Union of India*, AIR 2008 SC 495.

However, in keeping with the views developed by the court that has upheld legislation that restrict rights for women who have more than two children in recent years,[57] the court in the present case stated, "it seems from the scheme that irrespective of number of children, the beneficiaries are given the benefit. This in a way goes against the concept of family planning which is intended to curb the population growth. Further the age of the mother is a relevant factor because women below a particular age are prohibited from legally getting married. The Union of India shall consider this aspect while considering the desirability of the continuation of the scheme in the present form. After considering the aforesaid aspects and if need be, necessary amendments may be made."[58]

Such a comment from the court, virtually directing the executive to change its policy of universal maternity benefit, it is submitted, runs counter to any human rights-based thinking on the matter, which regards basic maternity benefit as a human right to be given to any woman. Further, keeping in mind that the number of children a woman bears is often a decision taken by her husband, the suggestion by the court gives greater weight to family planning concerns compared to the health and medical needs of such women. It also ignores the unconditional mandate of aticle 42 of the Constitution that states, "The State shall make provision for securing just and humane conditions of work, and for maternity relief."

V CONCLUSION

The year under review shows the greater awareness and sensitivity of the courts towards the autonomy and ability of women to determine their role and status in society. The cases dealing with women rights in the public domain, particularly at work are welcome and show the shifts from an attitude of protection and benevolent paternalism to recognising that women themselves would have to determine what their role in society should be. The importance of ensuring equality both at home and in the public spaces needs to be recognised and the fresh interpretation of article 15(3) of the Constitution by the courts aptly demonstrates this trend.

57 See for instance the judgment of the court in *Javed* v. *State of Haryana*, *supra* note 48 that upheld a Haryana legislation that restricted the right to contest panchayati elections to those who had less than two children.

58 *Supra* note 56 at 500.