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WOMEN AND THE LAW

*Kamala Sankaran**

I INTRODUCTION

THE RIGHTS of women in the public sphere, in terms of opportunity to occupy political office and in terms of access to work and employment, have been important themes covered by the cases under the current year's survey. The rights of women in the 'public' realm and the need for all wings of the state machinery to accord dignity and respect to women in this sphere has been an important site of the struggle for equality. The Constitution of India prohibits discrimination, *inter alia,* only on the ground of sex. Direct, and what is more critical, systematic, discrimination against women has been challenged in a large number of instances over the years, and there is extensive case law dealing with denial of equal opportunity to women, sexual harassment at the work place and sexual violence. Increasingly, indirect forms of discrimination against women have also been highlighted by the courts. In the Indian context, this includes cases where sex discrimination is only one of the factors behind such discrimination and also cases where the discrimination is not overt but the effects of the law or policy are disproportionately felt by women. This year too, the development of this branch of the law dealing with direct and indirect discrimination has been significant. It is in the context of pervasive discrimination against women that the government had proposed an Equal Opportunity Commission Bill that seeks to deal, *inter alia*, with gender-based discrimination. The year also saw the elevation of a woman judge in the Supreme Court after a long hiatus, a step in the direction of ensuring a level playing field in all aspects of life for men and women.

II WOMEN'S POLITICAL PARTICIPATION

The 73rd and 74th constitutional amendments sought to increase the participation of women in *panchayats* and municipalities, and as translated in several state-level *panchayat* laws, sought to ensure a certain proportion of women as chairpersons of *panchayats*. The constitutionality of these

* Associate Professor, Campus Law Centre, Faculty of Law, University of Delhi, India. Email:kamala.sankaran@gmail.com.

amendments and state level laws has been the subject of constitutional challenge on the ground that such reservations violated the '50 per cent rule' regarding reservations. Three important decisions have dealt with such constitutional challenges in the current year.

In a case before the Kerala High Court,[1] the petitioners sought a declaration that articles 243D(2), 243D(3), 243D(4) along with its second proviso, 243T(2), 243T(3) and the part of article 243T(4) of the Constitution of India providing for reservation in favour of women were beyond the amending power under article 368 since the said provisions damage part of the basic structure and likewise challenged certain provisions of the Kerala Panchayat Raj Act, 1994 and the Kerala Municipality Act, 1994 as unconstitutional. By virtue of article 243D and articles 243-P to 243-ZG, seats had been reserved in *panchayats* and municipalities for scheduled castes, scheduled tribes and women. The Kerala Panchayat Raj Act, 1994 provided for reservation for women in village *panchayats*, block *panchayats* and district *panchayats*. Similarly, one-third of the seats in village, block and district *panchayats* reserved for scheduled castes/scheduled tribes (SC/ST) were reserved for women belonging to those categories, and provision was also made that one-third of the total seats to be filled by elections, should be reserved for women. The court referred to *Govt. of Andhra Pradesh* v. *P.B. Vijaykumar*[2] and other cases to hold that reservation of posts for women or special preferences given to them was constitutionally valid.

A constitution bench of the Supreme Court was dealing with a similar petition challenging the validity of the 73rd and 74th constitutional amendments for violation of the principles such as equality, democracy and fraternity, which are part of the 'basic structure' of the Constitution.[3] The petitioners contended that the Karnataka Panchayati Raj Act, 1993 which provided for the aggregate reservation of nearly 84 per cent of the seats in *panchayats* was excessive and violative of the equality clause. It was also contended that reserving seats and the position of chairperson in favour of other backward classes (OBCs) was an unjustified departure from the intent of the framers of the Constitution. It was also contended that OBCs did not need reservation benefits because empirical findings suggested that there was already a high degree of political mobilization among them. Arguing that such reservation of chairpersons interfered with the right to universal adult franchise, the petitioner stated that there might be very few persons from the reserved category in a particular village, thereby forcing voters to re-elect candidates belonging to the reserved categories despite dissatisfaction with their

1 *M.J. Simon* v. *Union of India*, decided on 11 January, 2010. Available at http://www.indiankanoon.org/doc/820304/.

2 AIR 1995 SC 1648; also see *P. Sagar* v. *State of Andhra Pradesh*, AIR 1968 AP 165 and *Union of India* v. *K.P. Prabhakaran* (1997) 11 SCC 638.

3 *K. Krishna Murthy* v. *Union of India* (2010) 7 SCC 202.

performance. In dealing with these challenges, the court stated that the principles contemplated by articles 15(4) and 16(4) for conferring reservation benefits cannot be mechanically applied in the context of reservations enabled by article 243-D and 243-T. Article 243-D(4) provides for reserving the positions of chairperson in favour of SCs and STs (in a proportionate manner), while also providing that one-third of all chairperson positions in each tier of the *panchayati raj* institutions would be reserved in favour of women. The court held that the considerations behind the provisions of article 243-D cannot be readily compared with those of article 16(4) which is the basis for reservations in public employment. The court also indicated that the identification of 'backward classes' under articles 243- D(6) and 243-T(6) should be distinct from the identification of socially and educationally backward classes for the purpose of article 15(4) and of backward classes for the purpose of article 16(4).

While it is a settled principle in the domain of service law that single posts cannot be reserved under the scheme of article 16(4), the court refrained from striking down reservations for chairperson positions in *panchayats*. The court argued that the positions of chairperson should not be viewed as solitary seats for the purpose of reservation. Instead, the frame of reference would be the entire pool of chairpersons in each tier of the three levels of *panchayati raj* institutions in the entire state, and such positions would be in proportion to the population of SCs and STs in the entire state. The court, therefore, upheld the constitutional provisions for reservation of chairpersons, including women chairpersons in the *panchayats*.

The Madhya Pradesh High Court decided a challenge to the Municipalities Act, 1961 which was amended in 2007 to increase the reservation for women from 33 to 50 per cent in these bodies. The court pointed out that reservation under articles 15 and 16 was distinct from the reservations under article 243 of the Constitution. The court pointed out that in case of reservation of posts in government employment, the notion of horizontal reservation was applicable and if the requisite number of women had not been selected they would be selected against their respective social reservation categories as had been pointed out by the Supreme Court.[4] On the contrary, where seats are reserved for women in political constituencies, a fixed quota of seats would be reserved for women though a woman could contest from not only these seats but also the general seats. Thus, the concept of horizontal reservation and its modality of application are distinguishable from the case where seats are reserved for women in municipalities. The court was of the view that article 243T uses the term 'not less than one-third' which will permit the reservation of 50 per cent of the seats for women. The court read article 243T with article 15(3) of the Constitution to uphold the provision of reservation of 50 per cent of the seats for women.

4 *Rajesh Kumar Daria* v. *Rajasthan Public Service Commission*, AIR 2007 SC 3127.

It must be pointed out that the question of reservation of seats under article 243 is once again an issue with the introduction of a constitution amendment bill in Parliament. The Constitution (One Hundred and Tenth Amendment) Bill, 2009 seeks to amend article 243D of the Constitution by proposing that the reservation of women in the total number of seats and offices of chairpersons and in the seats reserved for SCs and STs across three tiers should be raised from 'not less than one-third' to 'not less than one-half' and also proposing similar reservation for women belonging to the SC and ST categories in the offices of chairpersons in the *panchayats* at each level up to 'not less than one-half'. The Constitution (One Hundred and Tenth Amendment) Bill, 2009, introduced in Lok Sabha on 26th November, 2009, was referred to the Standing Committee on Rural Development. The Standing Committee[5] recommended that some measure of uniformity in the modalities of rotation of seats be provided in the Bill and that immediate steps should be taken to ensure effective implementation of capacity building plans so that the proposed increase in the reservation of seats for women in *panchayats* yields the intended results.

Participation in political life and number of children

The Supreme Court decision in *Javed* v. *State of Haryana*[6] upheld the constitutionality of laws which linked the right to contest election for public office in *panchayats* to the number of children a person had. Restricting the right to contest election to a public office to those with two living children was seen as a reasonable restriction by the court. This decision clearly privileged population stabilisation policies over the personal liberty of citizens, particularly women, who due to patriarchal relations within the family, are often unable to control the number of children they bear. The Rajasthan High Court recently dealt with the Rajasthan Panchayati Raj Act, 1994, as amended in 1995, which provided for a limit of two children for a person intending to contest any election in the *panchayat.* However, the amendment provided that any additional child born to a person between the date of commencement of the original Act (23.4.1994) and the date of the amendment Act (27.11.1995) would not count towards disqualification on the ground of having more than two children. The High Court ruled that the expression 'additional child' would include two children born in the *interim* period and thus the petitioner in this case who had two children in this period would not be disqualified from contesting such elections.[7]

5 See http://164.100.47.134/lsscommittee/Rural%20Development/14th%20Report_110% 20Bill.pdf.

6 AIR 2003 SC 3057.

7 *Ratiram* v. *Devi Charan*, AIR 2010 Raj. 134.

III DO RESERVATIONS FOR WOMEN PERMIT A CORRELATED QUOTA FOR MEN?

Related to the question of women's reservation is the question whether a separate quota for male candidates is permissible. This matter came up recently in a case before a division bench of the Punjab and Haryana High Court.[8] The Punjab State Education Class III (School Cadre) Service Rules, 1978 permitted recruitment of two separate cadres of lecturers, General male and general female, which was challenged as violative of article 16 of the Constitution. The High Court held, "Neither Article 15 nor Article 16 contemplates reservation of posts in favour of men. Such posts are required to be filled in on the basis of merit alone and if on the basis of merit women are meritorious, they are entitled to be appointed against the posts described as reserved for men to the extent of posts meant for women." The court clarified that there could be no separate quota for male candidates where women could not apply. Relying on *Rajesh Kumar Daria*,[9] the High Court pointed out that a correct method of implementing horizontal reservations in favour of women was to prepare a combined merit list of all the candidates. It was only in the event that the required numbers of women candidates are not selected to the extent of posts reserved for them that women lower in merit can be selected and appointed to fill up the requisite posts meant for such women candidates. Such a course alone will be an act of horizontal reservation and in accordance with the mandate of articles 14 to 16 of the Constitution. The court, therefore, struck down, prospectively, rules that had been in existence since 1955 permitting separate cadres for men and women candidates.

IV DISCRIMINATION AGAINST WOMEN

An instance of direct discrimination rose in an important matter before the Delhi High Court. The exclusion of women from permanent commission in the armed forces was the subject of challenge before the court.[10] The petitioners were women on short service commission (SSC) for periods as long as 14 years but who were denied a permanent commission (PC) in the armed forces. In the case of the petitioners from the air force, the terms of the advertisement under which they were recruited indicated that they would be granted a SSC for a period of 5 years, and that they were entitled to a PC so long as they were willing and subject to their suitability. The petitioners were not considered for grant of a PC even though they underwent the same training of one year as

8 *Neelam Rani* v. *State of Punjab,* 2010 INDLAW PNH 2451.

9 *Supra* note 4. For a discussion on this case and the principle of horizontal reservation, see Kamala Sankaran, 'Women and the Law', XLIII *ASIL* 637-59 (2007).

10 *Babita Puniya* v. *The Secretary,* 2010 INDLAW DEL 323.

the male PC officers whereas 10 batches of male SSC officers who had undergone training of a much shorter period of only three months in the air force administrative college were considered and granted PC in the same period when women SSC officers continued to work in the same capacity. The women petitioners from the army contended that they were not seeking induction into the combat wings, which is a matter of policy for the government to determine. However, where women officers had been inducted in SSC and their performances had been found up to the mark, there was no reason to deny them a PC especially when the government has taken a policy decision to grant PC to SSC women officers in certain departments like the legal branch and army education corps branches. The air force contended that there could be no legitimate expectation to obtain a PC since the petitioners knew that the induction of women officers in the air force was on an experimental basis for five years to be reviewed thereafter and the admission to PC was subject to suitability and the requirements of the air force.

The court indicated that the area of judicial scrutiny would arise where both men and women officers were taken on SSC pursuant to a policy decision, and when men have been offered PC, a similar privilege was not extended to the women officers. The court confined its examination to the denial of PC to women officers who had completed SSC. The court surveyed international developments and noted that the "the traditional distinctions between combat and non-combat or combat support roles having become blurred with the introduction of deep battlefield and over-the-horizon weaponry." It stated that it would be gross violation of articles 14, 16 and 21 of the Constitution to accept a situation where such women officers are deprived of a PC while male officers are granted one. The court took note of the fact that women officers within the army were placed on a footing different from those in the air force since there had been no such direct assurance of grant of PC held out to them. However, the court held "We are of the considered view that the women officers of the Army can be treated no differently from the Air Force women officers even though there is no specific policy decision in their case as they are at par with the women Air Force officers." While acknowledging that the decision regarding the areas in which to induct women is a policy decision of the armed forces, the court expressed the hope that this sphere would be expanded keeping in mind the changed environment across the world today.

The Tamil Nadu state transport corporation conducted recruitment for conductors including women conductors. The qualifications for appointment as conductors, *inter alia*, included that candidates have a height of 160 cms, weight of 45 kgs and be free from any physical deformity. The first petitioner in this case was 3 cms short of the height requirement and challenged her rejection in the recruitment conducted by the respondent.[11] The High Court

11 *R.S. Kavitha* v. *The State of Tamil Nadu,* 2010 INDLAW MAD 933.

pointed out that the rules had not distinguished, at least in respect of physical standards, between male and female candidates. The court pointed out that in the case of discrimination 'only' on the grounds of sex (what has been termed the 'but for' test in other jurisdictions), a clear discrimination on the grounds solely of sex should be demonstrated. The court emphasised that rules framed need to be reasonable and fair. The court pointed out: "The prescription of height and weight are no doubt minimum physical standards required, but it does not mean that the respondents/Corporation should close its eyes in all cases where even a fraction of height in centimeters is missing and reject the claim, especially when admittedly the number of women candidates who appeared for the interview was negligible." The court, therefore, declared that the corporation ought to consider the case of the first petitioner who was short of the height requirement only marginally, which did not render her unfit for the post of conductor at all. The court circumscribed the said deviation from the rules by stating: "But, at the same time, it should be made clear that such leniency by applying the Rules must be restricted to rarest of rare cases and that cannot be converted into a major rule and therefore, in rarest of rare cases there is nothing wrong in exercising such discretion without causing harm to the nature of work to be performed by a candidate to be selected." Such a caveat on the part of the court, it is submitted, reduces the precedential value of this judgment which would then be confined to the peculiar facts of this case. It would have better advanced the jurisprudence in this area of discrimination had the court pointed out that fixing a minimum height of 160 cms is biased against the selection of women since more men than women would fulfil this apparently neutral minimum requirement. The said rule could have been treated as a case of indirect discrimination, which on the face of it was not discriminatory on the grounds of sex alone, but which normatively tended to exclude women and was thus unfair and unreasonable. A related case was referred to by the High Court where a candidate who suffered from a postural defect that did not impede his work as a conductor was directed to be considered for recruitment despite the existing recruitment rules.[12] In such a case, the recruitment rule would serve as an instance of discrimination which had no reasonable nexus to the requirements of the job and, therefore, needed to be treated as arbitrary and discriminatory.

The Tamil Nadu electricity board advertised for the recruitment of 2500 helpers/electricians, and restricted the applicants to males who fulfilled the eligibility requirement since it felt that the suitability of the women candidates for the helper post was not ensured. They also stated that women candidates need not be requisitioned from the employment exchange in the proposed recruitment and that "the 30% reservation provided for women by the

12 *P. Mahavishnu* v. *The General Manager, Tamil Nadu State Government Transport Corporation (Madurai) Ltd., Tirunelveli*, 2008 INDLAW MAD 3338.

government also need not be implemented, in view of the arduous nature of work."

This recruitment by the electricity board was challenged by the petitioner on the ground that the case on hand was a clear example of gender discrimination perpetrated by the respondents. The court pointed out that making special provisions for women in respect of employment or posts under the state is an integral part of article 15(3). This power conferred under article 15(3) is not whittled down in any manner by article 16. Thus, articles 15 and 16 read together prohibit direct discrimination between members of different sexes, *i.e*. if they do not receive the same treatment as comparable to members of the opposite gender. But, the two articles do not prohibit special treatment for women. The constitutional mandate is infringed only where the females would have received the same treatment with males but for their sex. Under the English law, 'but-for' test has been developed to mean that no less favourable treatment is to be given to women on gender-based criterion which would favour the opposite sex, and women will not be deliberately selected for less favourable treatment because of their sex. In this particular case, the court rejected the view of the board that women cannot be appointed to the post of helper since it involved arduous work. The court stated that this, "cannot at all be appreciated since the same work is already being performed by women workers on contract basis. This action of the respondents definitely amounts to gender discrimination, and cannot be called as a reasonable restriction".[13] Clearly, this constituted a case of direct discrimination against women and was not saved by article 15(3) as a special provision in favour of women since women were already working as helpers on contract basis but were deprived of being regularly recruited for the said post.

In previous years, the survey had noted the shift in the position of the courts over what constitutes 'special provisions' for women and that in the name of 'protecting' women, discriminatory positions cannot be countenanced. The apex court in *Anuj Garg* case highlighted that gender discriminatory provisions cannot be justified under article 15(3) on the ostensible grounds that limiting women's employment is to benefit women.[14] Mere assertion by the state that a restriction is a 'special provision' to favour women will be subject to judicial scrutiny and such 'special provisions' made for women under article 15(3) should in no way be less-favourable than that meted out to men. This is a welcome development since what constitutes 'protective' provisions to benefit women change over time, and if not scrutinised carefully, may result in entrenching traditional perceptions of women's roles and the kinds of occupations/jobs they can perform.

13 *G. Gunavathy* v. *The State of Tamil Nadu* Madras High Court decided on 2 March, 2010.

14 *Anuj Garg* v. *Hotel Association of India*, AIR 2008 SC 663.

Sexual harassment

The Delhi High Court has had an occasion to clarify the close connection between sexual harassment and sex-based discrimination in a case where a lady doctor alleged harassment and discrimination by a senior male doctor.[15] It pointed out while sexual harassment was a species of sex-based discrimination, the latter could cover a wide gamut of acts of commissions and omissions, which were not limited to acts that partook of express unacceptable sexual acts or innuendoes. For instance, the use of 'abusive and abrasive language' and 'imputation of the competence of a person only because such person is of a certain gender' were matters that would be covered under the expression sex-based discrimination. This judgment has clarified the relationship between discriminatory actions and acts of sexual harassment and that objectionable behaviour could fall within the contours of both sex-based discrimination and sexual harassment.

In the present case, while the petitioner had lodged complaints of sexual harassment against her superior, the alleged perpetrator of harassment had also lodged complaints against the professional competence of the complainant. The Delhi High Court highlighted that incidents of sexual harassment ought not to be viewed in isolation. Counter-allegations are often filed against the complainant as noted by the Supreme Court in *D.S. Grewal* v. *Vimmi Joshi.*[16] In the case in hand, the High Court noted that the authorities had proceeded to deal with the counter complaint against the complainant and also proceeded to transfer the complainant instead of the person against whom the complaint was lodged and who was in a position of authority. This was a glaring omission of the *Vishaka*[17] guidelines which requires the employers to ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

Importantly, the High Court held that in complaints of sexual harassment and sex-based harassment or discrimination, which persists over a length of time, the defence of limitation or *laches* may not be relevant. The High Court reiterated the importance of analysing what constitutes harassment from the women's perspective. In order to do so, the court pointed out that a complaint of sexual harassment and sex-based discrimination requires the body entrusted with the investigation of such complaints to "undertake its task with the correct approach and sensitivity."

The need to deal with allegations and counter-allegations in the light of the guidelines provided by the Supreme Court in *Vishaka* case has also been

15 *Dr. Punita K. Sodhi* v. *Union of India* (2010) 1 LLJ 371 (Del.)
16 (2009) 2 SCC 210.
17 *Vishaka* v, *State of Rajasthan* (1997) 6 SCC 241.

pointed out in another case dealing with sexual harassment from Tamil Nadu.[18] The Madras High Court observed that, "[W]hen there is complaint and counter complaint and when the counter complaint raises the issue of sexual harassment, it is the bounden duty of the respondents to conduct an enquiry as per the guidelines issued by the Supreme Court in *Vishaka* case." In this case concerning a complaint made by a woman employee in the inspectorate of labour, the employer (government) made only a "so-called discreet enquiry" which, as the court pointed out, was "to be made only to get the view of all the employees in the office" with "no finding whether the petitioner was sexually harassed and whether the incident had actually took place."

Sexual harassment within the police force continues to be a serious challenge confronting both women in the force and affecting also, by implication, the degree of gender sensitivity women elsewhere can expect from the police force. In a shocking case before the court, a woman police officer made repeated complaints with very little response from the police departments.[19] An earlier complaint made by the father of the police woman against a head constable was examined by the department and declared to be false. Subsequent complaints of sexual harassment by the complainant against higher police officers were not looked into on the ground that the earlier complaint had been found to be false. The High Court in this particular case was constrained to observe:[19a]

> It is the contention of the respondents that this complaint is an after-thought and only to avoid any possible disciplinary proceedings against the appellant. The question is whether the complaint of sexual harassment could be said to be false even without there being any enquiry conducted by a mechanism in consonance with the judgment of the Supreme Court in *Vishaka* case, especially when the allegations trigger against the District Superintendent of Police. As could be seen from the records, the complaints given by the father of the appellant were alone enquired by a team headed by the Deputy Superintendent of Police, Manamadurai, which submitted a report stating that the complaints were false. ..The complaint alleging sexual harassment by the Superintendent of Police was lodged only on 19.6.2010. From the counter affidavits… we could see that no enquiry was conducted on the said complaint by a committee or for that matter by a superior officer. In the absence of such an enquiry, it may not be proper to throw the complaint as false solely on the ground that it was an after-thought….

18 *Smt. V. Barani* v. *The Inspector of Labour*, Madras High Court decided on 5 April, 2010. Available at http://www.indiankanoon.org/doc/1135277/.

19 *K. Narmatha* v. *The Home Secretary,* (2011) 1 MLJ 495.

19a *Id.* at 500-501.

Surely, such a cavalier or lackadaisical attitude on the part of the higher bureaucracy in dealing with complaints of sexual harassment by those employed in different branches of the government constitutes a violation of the conduct rules and merit departmental action against such officials. Otherwise, one may well echo the Roman satirist who asked: *Quis custodiet ipsos custodes*? - "Who will guard the guards themselves?"

Discrimination in succession rights

The Karnataka High Court has declared that with the passing of the Hindu Succession (Amendment) Act, 2005, there is an implied repeal of section 6-A(d) of the earlier Karnataka amendment to the Hindu Succession Act, 1956, which had conferred the status of a coparcener only to unmarried daughters. The court pointed out that since the central amendment was deliberately silent on the question of marriage of daughters and grants all daughters the right to be treated as coparceners from birth, the central amendment will prevail in the entire country.[20] The amended section 6 of the Hindu Succession Act, 1956 is silent about the rights of other female relatives of a Hindu male dying before the commencement of the amended Act. The vested rights that have accrued to other female members are not affected by the amendment. Thus, other female relatives, *i.e*. the mother, grandmother, granddaughter do not get any benefit in obtaining an enlarged share of the property as a result of the amendment. Therefore, while the amendment of 2005, no doubt, granted a coparcener status to all daughters by birth, and that too, retrospectively, it has not uniformly benefited other female members whose position as non-coparceners continues as before. This asymmetry in the effect of the Hindu Succession (Amendment) Act, 2005 has been noted by the Karnataka High Court.

For determining the share of a male Hindu who died before the date of commencement of the amended Act, *i.e.* 9.9.2005 and who had an interests in coparcenary property if he left behind him surviving a female relative, his share is to be determined treating his daughter also a coparcener. The constitutionality of the proviso to section 6(1)(c) was examined by a single judge of the Karnataka High Court who has held that the denial of an equal right to a daughter to question any disposition or alienation of coparcenary property prior to 20.12.02004 *vis-à-vis* a son is arbitrary and violative of article 14. The court referred to the 174th Report of the Law Commission of India to hold that such a provision which denies equal rights to a daughter in a coparcenary as compared to a son is violative of the right to equality.[21] It is submitted that the amendment Act has made a reasonable classification in order that certainty would obtain to vested rights which accrued prior to the

20 *Pushpalatha N.V.* v. *V. Padma*, AIR 2010 Kant. 124.
21 *Miss R. Kantha* v. *Union of India,* AIR 2010 Kant. 27.

date. This classification between daughters who by the amendment Act for the first time got rights as coparceners and males who by birth had always been treated as coparceners appears to be a sound one . We can expect to see further litigation on this matter.

V MARRIAGE AND DOMICILE

The issue whether there is a single or multiple domiciles in India came up for decision before the courts in the current year. Does a woman of one state marrying a person belonging to another state lose her original "domicile" in the state of her husband.[22] In this case, the petitioner prior to marriage belonged to an 'other backward class' by birth and was residing in the State of Uttarakhand. Her husband was a permanent resident of Bihar and, after marriage, she applied for a job at the UPSC which required her to submit a caste certificate. The state government refused to give her such a certificate on the ground that she was no longer domiciled in Uttarakhand.

While deciding a petition filed by the aggrieved woman, the Uttarakhand High Court discussed the law relating to domicile and residence in India. It noted that the Supreme Court in *Pradeep Jain* v. *Union of India*[23] had stated that, "Now it is clear on a reading of the Constitution that it recognises only one domicile, namely, domicile in India. Article 5 of the Constitution is clear and explicit on this point and it refers only to one domicile, namely, 'domicile in the territory of India'."[24] The court held that the concept of 'domicile' has no relevance to questions arising under municipal laws, whether made by the Union of India or by the states. It stated that it would not be right to say that a citizen of India is domiciled in one state or another forming part of the Union of India. The domicile which he has is only one, namely a domicile in the territory of India. When a person who is permanently resident in one state goes to another state with the intention of residing there permanently or indefinitely, his domicile does not undergo any change and he does not acquire a new domicile of choice. His domicile remains the same, namely Indian domicile. The court in *Pradeep Jain* had further observed that it was not uncommon for the state governments to use the term 'domicile' when what they actually intend to state is 'permanent residence'. However, the apex court also cautioned the state governments to desist from using the term domicile which has a technical meaning under private international law. The court also noted that that several states use the term domicile not in its technical sense but in the popular sense as meaning residence in the context of rules prescribing domiciliary

22 *Neha Saini* v. *State of Uttarakhand*, AIR 2010 Utt. 36.

23 AIR 1984 SC 1420.

24 Also see *Nagina Devi* v. *Union of India*, AIR 2010 Pat. 117, where the court dealt with domicile as understood under the Constitution of India and the Citizenship Act, 1955.

requirements for admission to various state colleges. This is also the sense in which the five-judge bench in *D.P. Joshi* v. *State of Madhya Bharat* used this particular term.[25]

The Uttarakhand High Court distinguished a division bench judgment of the same court in *Jyotibala* v. *State of Uttarakhand*[26] since the issue of domicile had not been discussed in that case. In that case, the benefit of permanent residence had been granted to the petitioner in view of the fact that the husband of the petitioner was a bona fide resident of Uttarakhand, and it was presumed that the petitioner was also the bona fide resident of Uttarakhand and, therefore, entitled to be issued a permanent residence certificate by the state authorities in Uttarakhand. In the present case,[27] the High Court was of the view that the petitioner was born in the *Saini* community, which was notified as OBC in Uttarakhand. Although she had married into a higher caste, yet she was entitled to her caste certificate, which was determined by birth and the community she was born into. This certificate could only be granted to the petitioner by the authorities in Uttarakhand. Therefore, the court held that under law if the petitioner demanded such a certificate from the authorities in Uttarakhand, such a certificate ought to be granted to her. It could not be denied to her merely because she had now married into a higher caste or that her husband was a permanent resident of Bihar.

What is to be welcomed in this judgment is that it recognises that a woman continues to be entitled to her caste certificate which does not change upon marriage. The linking of the caste certificate to a requirement for permanent residence as required by the rules in some states is unfortunate and wrong as this judgment indicates. When one cannot avail of change of caste status upon marriage or the benefits of reservation, surely the law cannot "punish" the woman who marries into a higher caste by denying her the right to collect an OBC certificate from the state of her birth and residence prior to marriage. This anomaly which is found in the rules of the state governments needs to be rectified forthwith in order that women are not victimised for marrying outside their caste, or for that matter, outside the state of their birth, given that many women migrate from their state of birth upon marriage given the patrilocality of the most Indian marriages.

The question whether a spouse can avail of reservation merely by marrying a person belonging to a reserved category has repeatedly come up before the courts. Based on the decision in *Valsamma Paul*,[28] the court has clarified that reservation is available only for those who suffered the disability of caste discrimination from birth, and that marriage to a person who is a

25 AIR 1955 SC 334.
26 2009 (1) U.D. 1.
27 *Supra* note 22.
28 *Valsamma Paul* v. *Cochin University* (1996) 3 SCC 545.

member of a community/caste eligible for reservation does not confer such eligibility to a spouse. This matter was once again reiterated in the case under review. What is noteworthy is that the respondent in this case had applied for a job in the bona fide belief that she was so entitled to get the benefit of reservation. Several long years later, the employer detected that she did not belong to the reserved category from birth and sought to terminate her employment. This action of the employer was successfully challenged by the respondent before the central administrative tribunal. In dealing with the petition filed by the employer, a division bench of the Delhi High Court,[29] in a well-balanced judgment declared:

> [T]he appointment was not secured by the respondent by procuring the Scheduled Tribe certificate by playing fraud upon the authorities. A reading of the response issued by the respondent to the … petitioner shows that the respondent had claimed the status of Scheduled Tribe on a bona fide belief that she acquired the membership of Munda community after getting married to a male member of said community... The laxity of the petitioner in appointing the respondent without checking the social status of the respondent and thereafter waking up from its slumber after 15 years and taking action against the respondent has worked to the great detriment of the respondent.

While refusing to set aside the quashing of the termination order, the High Court directed that the respondent would not be treated as a member of ST in future.

VI VIOLENCE AGAINST WOMEN

Cruelty

The Supreme Court has reiterated that for a prosecution to be sustained under section 498A, IPC, one has to be a 'relative' of the husband by blood, marriage or adoption.[30] Based on the specific language of the section and the explanation, the court was of the view that the word 'relative' would not include a paramour or concubine, more so, since a penal provision was being construed. It held that a strict construction would be proper, unless a contextual meaning was required to be given to the statute. In this case, the wife lodged FIR against the foster sister of the husband but in view of the interpretation adopted by the courts of section 498A of the IPC, the court quashed the prosecution of such foster sister under that provision.

29 *Kendriya Vidyalaya Sangathan* v. *Shanti Acharya Sisingi,* 176 (2011) DLT 341.
30 *Vijeta Gajra* v. *State of NCT of Delhi*, AIR 2010 SC 2712.

The role of the courts in evaluating the efficacy of legislative provisions came up recently before the Supreme Court in *Preeti Gupta* v. *State of Jharkhand*.[31] The case arose from a petition by the sister-in-law and unmarried brother-in-law of a complainant who filed a case under section 498A, IPC against her husband and in-laws. The petitioner had approached the High Court for quashing the case against them. The Supreme Court noted that it was a matter of common knowledge that matrimonial litigation was rapidly increasingly in the country and most of these cases are "filed in the heat of the moment over trivial issues without proper deliberations." This is a sweeping remark for which no empirical data was presented before the court. However, to balance this remark, the court also observed that there is a "rapid increase in the number of genuine cases of dowry harassment." The court urged the members of the bar to take their responsibilities seriously and to "ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints" and to "ensure that one complaint should not lead to multiple cases." The court went on to hold that, "The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases." Before concluding, the court observed that there was a need for a serious relook at the legislation and directed the registry to send a copy of the judgment to the Law Commission of India and to the union law secretary, Government of India for placing the same before the minister of law and justice to take appropriate steps in bringing about a reform in the law in the "larger interest of the society." It is interesting that to note that Rajya Sabha Committee on petitions is also considering the issue of re-drafting this section.

This unusual step by the court in asking for a specific law reform on the basis of what it considers to be frivolous, or worse, misuse, of the provisions of section 498A, IPC is fraught with serious consequences for many. In the absence of any concrete or systematic study over the misuse of the provisions, the direction of the proposed law reform is unclear. Women's groups who campaigned long and hard for the insertion of this provision in the law have pointed to the large number of cases under the IPC and DVA which are testimony to the degree of violence in many marriages and domestic relationships today. The decision taken by such women to file cases is often a decision taken after a long period of battering and violence and cannot be trivialised. The proposed law reform process needs to bear in mind the views of all parties and soberly assess the social impact of the law and its amendment.

31 AIR 2010 SC 3363.

Domestic violence and the right to residence

The Delhi High Court considered the contours of the 'right to residence' available to victims of domestic violence under the Protection of Women from Domestic Violence Act, 2005 (DVA).[32] Analysing the definition of a 'shared household' in the Act in the light of the judgment of the apex court in *S.R. Batra* v. *Taruna Batra*,[33] the division bench held that if the property in question did not belong to the husband and, further, if he did not have any share or interest in the same, there was no question of the said property being regarded as a "shared household" in terms of section 2(s) of the Act. The court was of the view that while the right to residence could mean the right to reside in a commensurate property, it did not "translate into a right to reside in a particular house". The Delhi High Court was not persuaded by the views of the Kerala and Madras High Courts that had distinguished *Batra* case in certain circumstances.[34]

Women as respondents under the DVA

The definitions under DVA have been a contentious issue for some time now. As per section 2(a) of the DVA, an "aggrieved person means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent." Under section 2(q), a "respondent means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner." A plain reading indicates that no application under the DVA will lie against a woman. However, the proviso to section 19(1) maintains that no order under section 19(1)(b), which directs the respondent to remove himself from the shared household, shall be passed against any person who is a woman.

A division bench of the Delhi High Court has held that the definition of respondent can include women also.[35] The court held that the definition of 'respondent' under the said Act has to be segregated into two independent and mutually exclusive parts, not treating proviso as adjunct to the main provision. These two parts are: a) Main enacting part which deals with those aggrieved persons, who are in a domestic relationship. Thus, the other person against whom she has sought any relief as respondent has to be an adult male person. The proviso to section 2(q), on the other hand, deals with limited and

32 *Shumita Didi Sandhu* v. *Sanjay Singh Sandhu,* 174 (2010) DLT 79.
33 2007 (3) SCC 169.
34 *S. Prabhakaran* v. *State of Kerala*: 2009 (2) RCR (Civil) 883.
35 *Varsha Kapoor* v. *Union of India,* 2010 INDLAW DEL 1526.

specific class of aggrieved person, *viz*. a wife or a female living in relationship in the nature of marriage. In this case, the court held that the definition of respondent is widened by not limiting it only to adult male person, but also including a relative of husband or the male partner, as the case may be. The court, therefore, held that the expression 'a relative' in proviso to section 2(q) included a female relative and also rejected the contention that the Act was to protect women from domestic violence perpetrated by men alone. As the court put it, "What follows is that on the one hand, aggrieved persons other than wife or a female living in a relationship in the nature of marriage, viz., sister, mother, daughter or sister-in-law as aggrieved person can file application against adult male person only. But on the other hand, wife or female living in a relationship in the nature of marriage is given right to file complaint not only against husband or male partner, but also against his relatives." Regarding section 19, the court went on to hold that except for residence orders under section 19(1)(b), it is competent for the magistrate to pass orders against the relatives of the husband including a female person under section 19(1)(c), *i.e*. restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resided. The court found support for this interpretation in the view taken by a division bench of the Kerala High Court in another case.[36]

The view that the definition of the term 'respondent' under the DVA includes a female relative was affirmed in a case from Madras High Court.[37] In this case, the court referred to the proviso to sub-section (1) of section 19 of the Act which makes clear that the expression 'respondent' mentioned in proviso to section 2(q) is not restricted to a 'male' relative and would also include a 'female' relative. However, the court cautioned as to whether relief could be granted against the female relatives would depend upon the facts and circumstances of the case.

Several High Courts have taken the contrary view. The Karnataka High Court has taken the view that except for sections 17 and 19 of the DVA, in all other cases, relief can be granted only against the respondent and the respondent is defined as only a male member, subject to the proviso which confers an option on the aggrieved person to file a complaint against a relative.[38] The word 'relative' has not been referred to elsewhere except in section 19(1)(c) wherein the court has power to restrain the respondent or any of his relatives from entering in any portion of the shared household in which the aggrieved person resides. Section 19(1) prohibits the passing of any order against a woman under section 19(1)(b). Under section 17, every woman who is in a domestic relationship has a right to reside in a shared household. The

36 *Vijayalekshmi Amma* v. *Bindu,* 2010(1) KLT 79.
37 *R. Nivendran* v. *Nivashini Mohan*, AIR 2010 (NOC) 688 (Mad.).
38 *Amruth Kumar* v. *Chithra Shetty*, AIR 2010 (NOC) 687 (Kant.).

court was of the view that a harmonious construction of the provisions of sections 17 and 19 shows that a woman is protected from being removed from the shared household; she has a right to reside and other reliefs can be granted under sections 18, 20, 21 and 22 of the DVA, and all these reliefs are directed only against the respondent, which means only adult male members in a domestic relationship with the aggrieved person and not others. Therefore, on a plain meaning, the provisions do not provide any right to the aggrieved person to file complaints against another woman. Hence, the court was of the view that the definition of 'respondent' has to be understood to mean only a male relative of the husband or male partner of the aggrieved person with whom she is in a domestic relationship, and the word relative appearing in the proviso to section 2(q) means a relative other than a female relative of the husband or male partner of the aggrieved person, and further, that the definition of respondent means only an adult male member who is or has been in a domestic relationship with aggrieved person and not all adult male members. This interpretation appears to be in consonance with the overall objects of the DVA.

Rape

The courts have once again emphasised that delay in reporting a rape will not necessarily jeopardise the case against the accused so long as the testimony of the victims was cogent and reliable.[39] In this case, there was a delay of 42 days in lodging the complaint. The delay was because the two sisters who were the victims complained to their mother, who was illiterate, and they feared going to the police station since there were no male members in the family. They informed the owner of the mine where they were employed and finally gathered courage to file the complaint. This delay was explained and accepted by the courts, particularly since the courts were of the view that where the testimony is reliable, the courts must keep in mind that "no self respecting woman would put her honour at stake by falsely alleging the commission of rape". The court chose to approvingly cite another decision of the Supreme Court in *Sohan Singh* v. *State of Bihar,*[40] where it had observed: When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR.

39 *Santhosh Moolya* v. *State of Karnataka*, AIR 2010 SC 2247.
40 (2010) 1 SCC 68.

While this is no doubt a laudatory position for the courts to take, it is disturbing that the courts have chosen to explain the dilemma a woman faces before approaching the police only with regard to a "Hindu lady". Surely, women from other communities too face a similar trauma as a result of rape and confront the social consequences thrust by society upon such rape victims. One can only quote the words of the Supreme Court:[41]

> The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife in contrast to non-Hindu wives as if women professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the peculiar habits, ideas, susceptibilities and expectations of persons belonging to the strata of society to which these two belong. All circumstances which constitute the occasion or setting for the conduct complained of have relevance…. The evidence in any case ought to bear a secular examination.

Clearly, the court was concerned about stating the problem facing women in such a fragmented, religion-specific manner, which holds true in matters relating to rape also.

Murder against an inter-caste marriage (Honour killings)

Should the circumstances connected with a particular crime alone be the determining factor in deciding the quantum of punishment in a case of murder? An earlier bench of the Supreme Court had indicated that, "It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial."[42] Yet in *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*,[43] the Supreme Court held that it should not confine its consideration principally or merely to the circumstances connected with the particular crime but also give due consideration to the circumstances of the criminal. Based on this understanding first elaborated in *Bachan Singh* v. *State of Punjab*,[44] the court in the present case had to determine whether the award of life sentence imposed on a person who was guilty of murdering the "lower" caste brother-in-law from another community who had married his sister was correct. The

41 *Narayan Ganesh Dastane* v. *Sucheta Narayan Dastane*, AIR 1975 SC 1534
42 *Ravji alias Ram Chandra* v. *State of Rajasthan*, 1996 (2) SCC 175.
43 JT 2009 (7) SC 248.
44 AIR 1980 SC 898.

court used the test as formulated by *Bariyar* case to hold that, "The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case." The court was of the view that the appellant had been the victim of his wrong but genuine caste considerations and, therefore, this did not justify death sentence but a life imprisonment of 25 years.

Can strongly held incorrect views be a mitigating factor in the imposition of a sentence? Often perpetrators of sexual harassment or discrimination hold strong patriarchal or misogynist views. Surely, such a view cannot be a factor for reducing the sentence in caste or gender–related crimes. The test of due regard to the circumstances of the criminal should be limited to considerations such as age, sex, maturity levels of the accused, as otherwise ideological, political and social motivations may become the determining factors in sentencing policy.

VII PATERNITY, SURROGACY AND OTHER MATTERS

Paternity and DNA tests

The question of when a court can order the conducting of a DNA test to determine the paternity of a child has been a vexed one. In *Goutam Kundu* v. *State of West Bengal*,[45] the court laid down that they would order DNA tests as a matter of course, and that a strong and *prima facie* case of non-access would need to be established by a husband in order to avoid the presumption arising from section 112 of the Evidence Act, 1872. A three-judge bench in *Sharda* v. *Dharmpal*,[46] observed that a matrimonial court could order a person to undergo such a medical test where a strong *prima facie* case and sufficient material exists, and further, such a test cannot be considered as violative of the right to personal liberty under article 21 of the Constitution. A *two-judge bench of the Supreme Court* has recently held that when there is an apparent conflict between the right to privacy of a person not to submit to an medical examination and the duty of the court to find the truth, the court has to exercise its discretion after balancing all aspects of the case. The court held that the order to conduct a DNA test should be passed only if the case passes the test of 'eminent need' and also after considering whether it would be possible for the court to arrive at the truth without ordering such a test.[47] Further, the court pointed out that the state commission for women, which had ordered such a test, had no authority, competence or power to order a DNA test. For instance, where the husband contended non-access to his wife, and wife

45 AIR 1993 SC 2295.
46 AIR 2003 SC 3450.
47 *Bhabani Prasad Jena* v. *Convenor Secretary, Orissa State Commission for Women*, AIR 2010 SC 2851.

herself expressed her consent to get such a DNA test, the Andhra Pradesh High Court was willing to order a DNA in a case before it.[48]

Thus, a review of the case law indicates that care and discretion is necessary before a DNA test can be ordered during the subsistence of a marriage in order to determine the paternity of a child born during the course of such marriage.

Surrogacy

The Gujarat High Court decided a petition whether a child born in India to a surrogate mother, an Indian national, and whose biological father was a foreign national, would get citizenship in India.[49] The court observed that only Indian citizens could apply for a passport under the Passports Act, 1967. The court pointed out that since the central government was yet to legalise surrogacy, children born in this manner through foreign parents was an area where the law is developing. The court noted that the Law Commission of India in its *220nd Report on Need for Legislation to Regulate Assisted Reproductive Technology* was of the view that surrogacy agreements would continue to govern relations between the parties and that the child should be recognised as the legitimate child of the commissioning parents and that the birth certificate should contain the names of the commissioning parents only and not those of the genetic mother (donor of ova) or the surrogate mother. The court pointed out that in India there was no law prohibiting artificial insemination, egg donation, lending a womb or surrogacy.[50] In the absence of a legislation, the court was inclined to view the surrogate mother as a natural mother. The wife of the biological father who had neither conceived nor delivered the baby could not be treated as the legal mother. An additional factor for granting the child an Indian passport was that the genetic mother, the egg donor, in this case was an Indian national (revealed before the single judge before whom the case first came with her identity kept anonymous). Given these factors and the *factum* of the birth of child in India, the court directed that the babies born in this case from surrogacy be granted Indian passport. A careful reading of the judgment would indicate that the citizenship of the surrogate mother is critical to establish the condition that one of the child's parents is an Indian as per section 3(1)(c)(ii) of the Citizenship Act, 1955. Since the legitimacy of such children born to a surrogate mothers is not established, the court observed that the only remedy was a proper legitimisation through the process of adoption. This judgment paves the way for grant of Indian passport to children born in India to commissioning parents

48 *Buridi Vanajakshmi* v. *Buridi Venkata Satya Varaha Prasad Gangadhar Rao*, AIR 2010 AP 172.

49 *Jan Balaz* v. *Anand Municipality*, AIR 2010 Guj. 21.

50 See *Baby Manji* case, AIR 2009 SC 84.

from abroad provided the surrogate mother was an Indian citizen. The rights and liabilities of all the parties in such cases are in need of urgent legislative attention.

Unpaid work within the home

As pointed out in earlier surveys, the courts in India continue to ignore the unpaid work put in by a woman within a household in calculating the assessment of compensation of a housewife under the Motor Vehicles Act, 1988. In several cases, when a housewife died, her income was arbitrarily assessed with an additional amount added towards pain and suffering. That the amount is arbitrary is seen from the fact that the courts neither refer to the minimum wages applicable in a state nor acknowledge the amount of unpaid work such a woman had put into the household for the nurturance and sustenance of other family members.[51]

Re-marriage and the right to compensation

An important issue regarding claim by a widow for compensation under the Motor Vehicles Act, 1988 was decided by the Gauhati High Court which held that there was no prohibition disqualifying a widow who remarries during the pendency of a claim petition from getting compensation on the death of her husband.[52] The court held that under section 166 of the Act, a widow becomes a legal representative of the deceased immediately upon the death of her husband in a vehicular accident. Her right to claim compensation under the Act accrues in her favour and, in the absence of any provision to the contrary, she cannot be divested of her right by any subsequent remarriage.

Dowry

The question of what constitutes 'dowry' has repeatedly come before the courts. What is particularly disturbing is the interpretation adopted by courts in recent years. In *Ram Singh* v. *State of Haryana*,[53] the Supreme Court held that payments, which are customary payments, for example, payments given at the time of birth of the child or certain ceremonies would not be covered by the expression 'dowry'. This interpretation, though warranted by the penal nature of the statute, will not advance the aim of the law which seeks to prevent the social obligation to provide money constantly by the wife's family to that of her in-law through the life cycle of marriage.

51 See, for instance, *Suman Lata Kuthiala* v. *Piyare Lal*, AIR 2010 (NOC) 7 (H.P.).
52 *State of Trirpura* v. *Smt Bela Dey (Das)*, AIR 2010 (NOC) 156 (Gau.).
53 AIR 2008 SC 1294; also see *Satbir Singh* v. *State of Punjab*, AIR 2001 SC 2828.

VIII CONCLUSION

The legal challenge against direct and indirect forms of discrimination in society is increasing. The courts in India are in the process of developing tests for determining if indirect discrimination is established. Establishing the existence of discrimination, particularly indirect discrimination, often requires the petitioners to collect empirical materials to prove that apparently gender neutral provisions disproportionately impact women and constitute forms of systematic discrimination. The development of this branch of law within India can draw upon various tests developed in other jurisdictions to determine if discrimination is established. Another aspect that needs to be kept in mind in dealing with cases of discrimination is that the constitutional provisions prohibiting discrimination are state-centric in several instances. There is a need to deepen the horizontal effects of this important constitutional guarantee against discrimination in a thorough manner against both state and non-state parties. There is, therefore, a need to have a comprehensive anti-discrimination law in India to achieve this goal.