

# Bi-Monthly Legal News

Partners for Law in Development (PLD), Issue -5, 2008

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## NATIONAL NEWS

### Government of India announces 2 year Child Care Leave for its women employees

According to an order effective from September 1, 2008 women employees' maternity leave entitlement has been increased to 180 days from 135 days. In addition to this, women employees will be entitled to two years (730 days) of paid "child care leave" for two children till they turn 18. The leave can be on any ground regarding their "children's needs" like examinations, sickness, etc. They can avail of the two years leave in any combination without any effect on their seniority.

While maternity leave is part of affirmative action, based on women's biological condition during and pursuant to child birth and therefore necessary, the Child Care leave is problematic and must be critiqued. This leave naturalises women's child care role towards their children, that too until they attain majority. Moreover, it privileges women's child care role over all other care giving roles and makes an unfair distinction between primary care giving roles performed by both women and men in relation the elderly, their spouses, partners and other members within the diverse forms of family that exist.

Source: The Times of India; Tuesday, 16<sup>th</sup> September, 2008

[http://timesofindia.indiatimes.com/Women\\_in\\_govt\\_service\\_to\\_get\\_3\\_yrs\\_child\\_care\\_leave/articleshow/3487022.cms](http://timesofindia.indiatimes.com/Women_in_govt_service_to_get_3_yrs_child_care_leave/articleshow/3487022.cms)

### Woman *Qazi* solemnises a *Nikah* in Lucknow – a first time in recent Muslim history

Dr. Sayeda Hamid, a member of the Union Planning Commission and an expert of Islamic studies, solemnised the wedding of a Muslim couple as *qazi* in Lucknow on August 12, along with four other women who acted as witnesses. There has been no precedent of women conducting an Islamic marriage ceremony in recent Muslim history in spite of the fact that women had attained the position of *qazi* and *mufti* in times of the Prophet. The bride, Naesh Hasan, is founder member of the Bhartiya Muslim Mahila Andolan, a social organisation.

Source: The Hindu; Wednesday, 13<sup>th</sup> August, 2008

<http://www.hinduonnet.com/2008/08/13/stories/2008081353600300.htm>

### Health Minister endorses removal of Section 377 (IPC) at the International AIDS Conference

Addressing the India Session of the 17<sup>th</sup> International AIDS Conference at Mexico City on August 7, Union Health Minister Anbumani Ramadoss highlighted that Section 377 (IPC) acts as an impediment for reaching out to “men who have sex with men” (MSMs), who are at high risk of contracting HIV. The section regards sex between two men as “against the order of nature”. According to NACO estimates already, 15% of MSMs have got infected with the deadly disease. The Minister pointed out that while his Ministry is scaling up the number of targeted interventions for MSMs, their successful implementation is linked to removal of obstructions like Article 377.

He also underlined the need to relook into the impending Bill to amend the Immoral Trafficking (Prevention) Act. This Bill also drew criticism at the India session from UNAIDS Chief Peter Piot, who said, “The Bill has raised concerns that it would push prostitution underground.” According to a recent report by the world’s first independent commission on AIDS in Asia-Pacific, the HIV epidemic in Asia is mainly driven by men who go for paid sex. While 75 million men in Asia visit sex workers, 10 million women sell sex to these men.

Source: Queer Media Watch

<http://qmediawatch.wordpress.com/2008/08/08/reports-on-the-statements-by-union-health-minister-anbumani-ramadoss-at-the-mexico-international-aids-conference/>

### Anand Grover appointed as UN special rapporteur on health

Anand Grover, an Indian lawyer and the founder of the Lawyers Collective HIV/AIDS Unit, has recently been appointed UN special rapporteur on the right to health. He was a member of the drafting group of the International Guidelines on Human Rights and HIV/AIDS. He has championed the rights of people living with HIV, including in relation to marry, to work and to health care. In respect of access to treatment, he has successfully challenged the Indian patent law. He has also advocated for the rights of sex workers, drug users and men who have sex with men.

Source: <http://www.aidsalliance.org/sw55079.asp>

### Re-worked NACO Adolescence Education Programme draws flak

In a press conference on September 7, youth groups, educationists, groups working on child sexual abuse, sexual rights groups, disability rights groups and women’s groups demanded an approach to Sexuality Education that genuinely seeks to inform and empower young people. They rejected the re-worked Adolescence Education Programme prepared by NACO on the ground that the proposed curriculum is entirely driven by a narrowly defined HIV/AIDS agenda. Other problems with the curriculum include that it promotes abstinence and monogamy as solutions for the disease; it is silent even on biological details

of reproduction and information related to safer sex. Further, it addresses issues of gender superficially, assumes that all young people are able bodied, that they desire the opposite sex and conform to the gender assigned to them. NACO seems to have almost entirely shunned any reference to sex and sexuality on account of the backlash that the earlier version of this material triggered, undermining as a result, young people's right to sexuality education. A national level policy on sexuality education is urgently needed to inform all curricula related to adolescence education/ life skills education in the country. Such a process must involve representatives of youth groups, educationists, groups working on child sexual abuse, sexual rights groups, disability rights groups and women's organizations.

PLD's clarification regarding a news item published in e-newsletter (Issue 4, August, 2008) on the Bombay High Court judgement in the Anchorage case pertaining to allegations of paedophilia.

In its judgment acquitting the accused of paedophilia, the Bombay High Court Division Bench observed in relation to Section 377, IPC, that '*there are lots of changes taking place in the social milieu and many people have different sexual preferences, which are even not considered to be unnatural. Therefore it is high time that the provisions of law which was made more than a century ago, is looked at again.*' This statement was projected in the media as a progressive judicial opinion against criminalization of homosexuality through retention of Section 377. While we quoted this media report in our newsletter, we did not seek to convey that the High Court's observations were desirable or supportive of the campaign against Section 377. On the contrary, we clarify that a judicial opinion against Section 377 in a case of alleged paedophilia is highly problematic as it reinforces the artificial conflict between child rights and queer rights. Such an observation neglects to take into account the travesty of justice caused by the absence of a law on child sexual abuse, as a result of which Section 377 is used as a partial remedy for prosecuting cases of non peno vaginal penetration of children by adults. Many child rights, queer rights, women's rights and human rights groups feel that the Court ought to have directed attention towards the protection gap on child sexual abuse, and the wrongful justification by the state for retaining Section 377. RAHI Foundation, an organization working with adult survivors of child sexual abuse has stated in an open letter that the answer to addressing child sexual abuse "is not to advocate for an existing law that provides partial legal remedy and also otherwise violates rights of adults, including gay men, to consensual non-abusive sex. A law that violates the rights of one section of society cannot be effective in protecting rights of another." In this context, it is important to note that the present petitions filed in the Delhi High Court by Naz Foundation and Voices Against 377, seek to read down section 377 and not scrap the entire section for this reason alone. The prayer to read down the law seeks to bring adult consensual same sex acts in private,

particularly in respect of homosexuality, out of the purview of criminality but to retain Section 377 only for the purpose of safeguarding children from sexual abuse. As Lesley Esteves, a queer activist notes, "the petition does not in fact ask for Section 377 to be scrapped entirely because the gay community in India recognises that in 60 years, India has failed to create laws that punish child sexual abuse. Hence children's lawyers are forced to use Section 377, a vague law relating to adults which can only be used in case of penile penetration, and hence is a poor deterrent for pedophiles".

## LEGAL DEVELOPMENTS

### WCD Minister plans to introduce new Bill on Acid Attack in October

The Minister for Women and Child Development, Renuka Chowdhury, says the government plans to bring the Bill titled Prevention of Offences (by acids) Act 2008, before the parliament next month. The draft bill has been prepared by the National Commission for Women (NCW) moots for setting up a board to provide assistance to the victim in the form of interim relief of an amount upto Rs 5 lakhs, after having been prima facie satisfied that a case of acid attack has been made out. Any further sum of money as approved by the Board from time to time shall be towards the treatment of the victim, subject to a maximum of Rs 30 lakhs.

Women who reject lovers, husbands or employers are often targeted by men using easily available and cheap chemicals like acids. The outcome of acid attacks is often not murder but life-long torture in the form of permanent disfigurement or scarring of the face. The perpetrators frequently get away with minor punishments - under the current law the punishment is not so severe if the victim does not die. The Supreme Court had expressed concern that victims are not getting justice. This legislation would classify acid attacks as a "most heinous form of offence".

Sources:

<http://news.webindia123.com/news/Articles/India/20080918/1056635.html> &  
[http://news.bbc.co.uk/2/hi/south\\_asia/7623816.stm](http://news.bbc.co.uk/2/hi/south_asia/7623816.stm)

### Update on Naz Foundation (India) Trust v. Government of NCT, Delhi and Others

The final hearing on the case has commenced in the Delhi High Court on September 18. The petitioner Naz Foundation and one of the interveners, Voices against 377 made their final submissions in the Court in support of reading down

Section 377 so as to take homosexuality out of its purview. The Union Government was given time to reconcile the contradictory positions between the Union Home Ministry that supports the law and the Health and Family Welfare Ministry that views Section 377 as an impediment to HIV/ AIDS prevention amongst "men who have sex with men", and by implication is against it. The Additional Solicitor General commenced his arguments in support of retaining Section 377, as per the instructions from the Union Home Ministry, and is to continue his submissions on September 15.

### Abortion beyond first trimester: Debate about amendment to the Medical Termination of Pregnancy Act, 1971

On August 4, the Bombay High Court rejected Niketa Mehta's plea to abort her 26 weeks old foetus which might have developed a serious congenital heart defect on birth. The court observed that medical experts did not express any "categorical opinion that if the child is born it would suffer from serious handicaps." Mehta also sought an amendment to the Medical Termination of Pregnancy (MTP) Act so that pregnancy can be terminated even after 20 weeks if doctors believe that the child, if born, will have serious abnormalities, so as to render it handicapped. The division bench of Justice R M S Khandeparkar and Amjad Sayed observed that they could not alter the provision as it was the job of the legislature. The MTP Act allows abortion till 12 weeks of a pregnancy, and subject to medical complications regarding the health of the pregnant woman or the child when it is born, abortion is permitted also in the period between 12 to 20 weeks. Beyond 20 weeks, pregnancy may be terminated only if two registered gynaecologists or obstetricians testify that it is immediately necessary to save the life of the pregnant woman.

The Niketa Mehta case has initiated a nationwide debate on various legal and ethical issues involved in abortion of fetuses suspected to have congenital ailments or disabilities.

Union Health Minister Anbumani Ramadoss has decided to re-examine the Medical Termination of Pregnancy (MTP) Act, 1971, and explore the possibilities of addressing the issue through an amendment. He has set up a committee comprising of former Indian Council of Medical Research (ICMR) chief and top biotechnologist Dr NK Ganguly and health secretary Naresh Dayal to look into the possibility of increasing the period for MTP from 20 weeks to 24 and relaxing the conditions for such MTPs. The committee is expected to submit its report in five months, based on which the ministry may then move an amendment.

Source: <http://www.dnaindia.com/report.asp?newsid=1188983> & <http://www.indiaabroad.com/news/2008/aug/04abort.htm>

Surrogate Japanese baby stuck in a legal tug-of-war in India

A legal tug-of-war happened over the custody of a surrogate child born in India, when her Japanese father and grandmother landed in India to take her home from Jaipur. The baby girl Manji's Japanese parents got divorced while she was in the womb of her surrogate Indian mother. When her father and grandmother came to India, they faced a legal obstruction in getting a passport for Manji in the absence of her mother. Both the Japanese and Indian women in question refused to be involved in the matter. The matter was taken up by the Rajasthan High Court on a *habeas corpus* petition filed by a Jaipur based NGO – SATYA, seeking restraint on taking the baby out of India, pursuant to which notices were issued to the Central and State Governments to produce Manji in court. However, the Supreme Court restrained the police from forcibly taking away the baby and granted the custody of the child to her grandmother, and has directed the government to issue a passport to the child to travel to Japan with her grandmother. The Supreme Court also clarified that issues on surrogacy could only be considered by the National Commission for Protection of Child. It was also contended that the guidelines of the Indian Council for Medical Research (ICMR) on accreditation, supervision and regulation of ART (Assisted Reproductive Technologies) clinics considered the baby as a legitimate child of the biological father.

Source: <http://www.hindu.com/2008/08/15/stories/2008081555241300.htm>

### Nepal Supreme Court delivers a landmark ruling in the Kumari 'goddess' case

A Nepali tradition of locking a young pre-pubescent girl in a palace and worshipping her as a "living goddess" received a setback when the country's Supreme Court ruled that she has the right to go to school. The court's verdict was in response to a complaint from local lawyers that keeping a young girl confined in a palace in Kathmandu's medieval quarters was a violation of her rights. "The court ruled there were no historic or religious documents that state the child should be denied the rights of education, movement etc. She should not be denied these things just because she is the Kumari." Furthermore, the "living goddess" concept is facing redundancy given that Nepal is now officially a secular republic run by ultra-leftist ex-rebel Maoists keen to do away with the country's "feudal" practices.

Source: <http://afp.google.com/article/ALeqM5gOiyJDv9KV8-dJNJMDilOhWwye1g>

## EVENTS

Consultation on Amendments to Dowry Prohibition Act, 1961 and Draft Bill on Prevention of Offences (by acids) Act, 2008

On behalf of the Ministry of Women and Child Development, a Consultation was organized by the National Commission for Women on September 18 at Vigyan Bhavan, New Delhi to discuss the amendments and the drafts proposed by the Commission related to the above mentioned Acts concerning dowry and acid attacks. The proposed amendments and the Draft Bill are available on the website of National Commission for Women at [www.ncw.nic.in](http://www.ncw.nic.in).

### CEDAW Capacity Building Workshops in Jharkhand and Bihar

Partners for Law in Development organized state level CEDAW Capacity Building Workshops in Ranchi, Jharkhand during 11<sup>th</sup> – 14<sup>th</sup> September, and in Bodh Gaya, Bihar during 26<sup>th</sup>-29<sup>th</sup> September. Each workshop was attended by about 35 social workers (both male and female) and senior NGO staff working at the district level. The workshop aimed at developing an understanding of concepts and issues related to gender diversity and stereotypes, its relationship with structural discrimination, human rights and CEDAW. The objective of the workshop was to facilitate integration of CEDAW in the diverse field based initiatives at the local levels. A plan of action was made by each participating organisation, CEDAW network formed, and a local coordinator appointed. The strongest 6-7 participants were selected from both workshops for a national level training programme to advance their capacities further.

### Meeting on Women's Equality and Tribal Customary Law

Partners for Law in Development organised a Meeting on Women's Equality and Tribal Customary Law with 27 eminent persons including male tribal leaders, tribal women activists, researchers, academics, artistes and journalists in Ranchi on September 15. The meeting explored ways in which women's equality is being negotiated in the context of tribal customary laws and practices within the communities, the law and the State in Jharkhand. The forum enabled dialogue on different views and approaches to obtaining women's rights within tribal communities.

### Two day National Consultation on Assisted Reproductive Technologies: Emerging Concerns and Future Strategies

Sama Resource Group for Women and Health organized a two day National Consultation on Assisted Reproductive Technologies (ARTs): Ethical and Legal implications on September 13 and 14, 2008 in Delhi in view of the rise in unregulated and unethical practices in the field of ARTs and Surrogacy especially since a Draft Assisted Reproductive Technologies (Regulation) Bill & Rules-2008, is on the anvil. It was attended by around 70 women's and health activists, academicians, medical professionals, scientists and legal experts from across the country. The representatives from the Ministry of Health and Family Welfare, the Planning Commission and the

Indian Council of Medical Research (ICMR) were also present. A collectively drafted statement of concern was released which raised concern about the Bill's inadequacy in protecting and safeguarding the rights and health of women and children. All those present urged the ICMR to not rush into finalizing the Bill till a wider debate across the country, at various levels and regions has been conducted and their responses incorporated.

## FORTHCOMING EVENTS

The Asia Pacific NGO Consultation with two UN Special Rapporteurs – The Special Rapporteur on Violence against Women, Its Causes and Consequences (UNSRVAW), Yakin Ertürk and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedom of Indigenous People (UNSRIP), S. James Anaya is being organised by Asia Pacific Forum for Women, Law and Development (APWLD; based in Chiang Mai, Thailand) and is scheduled to be held in New Delhi during 14 – 16 October. The outcomes of the consultation will include identifying existing mechanisms, remedies and strategies to advance the situation of indigenous women at all levels.