

# Bi-Monthly Legal News

Partners for Law in Development (PLD), Issue-6, December, 2008

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# NATIONAL

## NATIONAL NEWS

### Woman denied entry to para-military security forces on grounds of congenital secondary sex characteristics

A woman has challenged the decision of the medical panel of the Sashastra Seema Suraksha Bal (SSSB) - a national para-military force that guards the Indo-Nepal border - in the Delhi High Court. The SSSB panel has declared her "unfit" because she suffers from a congenital anomaly called pseudo-hermaphroditism (person born with secondary-sex characteristics), inspite of the fact that the woman had undergone a surgery known as gonadectomy (which involves surgical removal of an ovary or testis) and that independent doctors have declared her as medically fit and that she is physically, emotionally and psychologically a woman. The woman maintains that her being born with secondary sex characteristics is no ground to deny her this job. A division Bench of Justice Sanjay Kishan Kaul and Justice Mool Chand Garg admitted her plea and observed that "one cannot be refused opportunity of employment on the basis of sexual dysfunction, unless a reasonable connection is proven between the requirement of the job and the inability of the candidate due to the sexual disability." Citing the Gender Recognition Act (GRA) of UK, her counsel sought a direction to the Central government for an appropriate law on this sensitive issue and informed HC that the English law provides such persons a legal recognition in their acquired gender, but there is no legislation along these lines in our country. Following the counsel's submissions, the High Court Bench sought the Central government's response and directed the lawyer to furnish all medical reports by the next date of hearing in the matter.

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

[http://timesofindia.indiatimes.com/Cities/Delhi/Woman\\_denied\\_entry\\_into\\_SSSB\\_moves\\_HC\\_/articleshow/3575014.cms](http://timesofindia.indiatimes.com/Cities/Delhi/Woman_denied_entry_into_SSSB_moves_HC_/articleshow/3575014.cms)

### Detention of Hijra activists and Sexual Rights Activists in Bangalore

On October 20, 2008, police arrested five hijras (working-class, male-to-female, transgender people), detained representatives of a nongovernmental organization trying to negotiate their release, and subsequently attacked a group of peaceful demonstrators protesting the arrests. A total of 42 people were detained. Those detained alleged that officers beat, slapped, and kicked them, even as two of them were sexually abused. The activists eventually appeared before magistrates, and all were released by the next evening. The five hijras originally arrested were freed on bail on October 22. However, many still face charges ranging from extortion (in the case of the hijras) to unlawful assembly and rioting. Thirty-one activists spent about seven hours inside a police van, with barely enough room to lie down, and were not fed or allowed to use a toilet for 18 hours and police sexually harassed some of them. The five hijras originally arrested were freed on bail on October 22. However, many still face charges ranging from extortion to unlawful assembly and rioting.

**Source:** Human Rights Watch

<http://hrw.org/english/docs/2008/10/28/india20086.htm>

### Kerala Law Reforms Commission Considers Issues of Polygamy, Talaq

The Kerala State Law Reforms Commission took up a draft legislation to restrict polygamy among Muslims and check misuse of talaq, for discussion. The draft has been drawn up by the Commission headed by jurist V.R. Krishna Iyer, suggests that the state government bring a law "to declare that among Muslims in Kerala, monogamy is the general rule and polygamy an exception". It says polygamy should be permitted only in socially exceptional circumstances and that, too, subject to "compassionate conditions". The draft will be submitted to the government soon. Earlier, the Kerala High Court had asked the Centre to deliberate upon legislation to control and supervise Muslim marriages and divorces, pointing out that the *Quran* allowed polygamy in a different historical context when many orphans, widows and prisoners of war were unable to live with dignity. The draft says if any Muslim man or woman remarries during the subsistence of the first marriage, he or she shall be held guilty of bigamy under the Indian Penal Code and liable to be prosecuted. However, a husband could be allowed a second marriage with the consent of the first wife, given in writing before a notary public or a judicial officer and *talaq* can be effected only subject to special conditions. The debate over this issue has become polarised with Islamic scholars like A.P. Aboobaker Musliar stating that such legislation is unnecessary as Islamic laws is clear that remarriage or talaq must be exercised only in unavoidable circumstances. Others, such as the Kerala Women's Commission member P.K. Sainaba support the proposal and stress the need for an explicit law.

**Source:** The Telegraph - Calcutta, India

[http://www.telegraphindia.com/1081109/jsp/nation/story\\_10084563.jsp](http://www.telegraphindia.com/1081109/jsp/nation/story_10084563.jsp)

### Women security guards for India-Pakistan border

The Border Security Force (BSF) has recently recruited 612 women (among more than 8500 applicants after screening, physical tests and, of which 45 are from West Bengal and the rest from Punjab. These women will be stationed along the 553 km international border between India and Pakistan, which has 300 gates along the electrified barbed wire fencing in Punjab. These women are being trained in weapons and explosives handling, physical training, drill, map reading, field craft, border management and given knowledge about all major laws including Indian Penal Code (IPC), customs, passport and immigration. The BSF, over the years, had been facing problems in frisking women accompanying farmers across the fence and frisking is essential as a lot of smuggling, particularly of drugs, takes place at the border.

**Source:** The Times of India; Tuesday, 11<sup>th</sup> November, 2008

[http://timesofindia.indiatimes.com/India/Women\\_to\\_man\\_India-Pakistan\\_border/articleshow/3699363.cms](http://timesofindia.indiatimes.com/India/Women_to_man_India-Pakistan_border/articleshow/3699363.cms)

## LEGAL DEVELOPMENTS

### Dowry Cruelty Conviction Possible without Specific Charge

The Supreme Court has held that Court can convict an accused for dowry harassment and cruelty even if there is no specific charge of that offence. The Bench said: "Section 498-A was added to the India Penal Code in the backdrop of the growing menace of dowry-related cases in which women were subjected to cruelty and harassment and were forced to commit suicide. This section lays down that if the husband or his relative subjects a woman to cruelty, then he/she is liable to be punished with imprisonment for three years and a fine". The Bench further said: "Section 498-A has a wider spectrum

and it covers all cases in which the wife is subjected to cruelty by her husband or his relatives which may result in suicide or grave injury or danger to life, limb or health (whether mental or physical) or even harassment caused with a view to coercing the woman or any person related to her meet the unlawful demand for dowry of property of valuable security...An accused can be convicted of dowry offence with which he may not have been specifically charged and than an error, omission or irregularity in the framing of charge by itself is not sufficient for upsetting the conviction." For purposes of conviction under Section 498-A, it was sufficient to prove that the woman was subjected to cruelty by her husband or his relatives.

**Source:** Rashtra Mahila. August 2008.p.4

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

PLD's last newsletter carried a story on a legal tug-of-war happening 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. Following a direction from the Supreme Court, the Regional Passport Office in Jaipur issued an "identity certificate" to Baby Manji Yamada, to enable her to get a Japanese visa and fly with her grandmother to join her father in Japan.

**Source:**

[http://indiatoday.digitaltoday.in/index.php?issueid=73&id=19050&option=com\\_content&task=view&sectionid=4](http://indiatoday.digitaltoday.in/index.php?issueid=73&id=19050&option=com_content&task=view&sectionid=4)

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

On November 7, 2008 the The Delhi High Court Division Bench comprising Justice A.P. Shah and Justice S. Muralidhar reserved the judgment on conclusion of arguments by all parties to the petition. The petitioner, Naaz Foundation, argued that continuation of the penal provision (Section 377) against homosexuality in the Indian Penal Code violated Articles 14, 19 and 21 of the Constitution. The Union Home Ministry and the Health and Family Welfare Ministry took contradictory stands in Court with the former opposing the petition and the latter supporting it. Additional Solicitor-General P.P. Malhotra said homosexuality was a disease and if it was legalised it would further accentuate AIDS in the country. Senior BJP leader B.P. Singhal is an intervener opposing the petition, on similar grounds. The bench sought evidence in support of the argument of the respondents, noting that, "In several countries where ban has been lifted (on gay sex), no one has claimed that the act is injurious. Even WHO (World Health Organisation) does not say that it causes injuries to people involved in such acts."

**Source:** The Hindu, 8<sup>th</sup> November, 2008

<http://www.thehindu.com/2008/11/08/stories/2008110857330400.htm>

#### SC asks NCW to report on condition of widows in Brindavan

A Supreme Court bench comprising Chief Justice K G Balakrishnan and Justice P Sathasivam directed the National Commission for Women (NCW) to submit its report within 3 months regarding the condition of widows and orphan women staying in the ashrams in Brindavan. The petitioner had alleged that these women have been abandoned by their families and are forced to live in deplorable conditions, falling prey to all forms of exploitation and the government must take immediate steps to look after these women.

**Source:** <http://www.indlawnews.com/NewsDisplay.aspx?57f17e7b-3ca8-4c8b-be38-e35ef1e58994>

### Maharashtra legalises live-in relationships.

Drawing heavily from the recommendations of the Justice (retd) S Mallimath Committee formed by the Centre to suggest reforms in relation to criminal procedure, the Maharashtra state cabinet has given its green signal to amend Section 125 of Criminal Procedure Code (CrPC) to extend protection to the pecuniary interests of the 'other woman'. However, it still needs the Centre's approval to become a law. According to the amendment proposed by Maharashtra, the definition of the word 'wife' under Section 125 needs to be changed to include a woman who was living with a man like his wife for a "reasonably long period" (though this term has been left ambiguous). This amendment would cover the interests of women involved in polygamous or live-in relationships. state law department officials explain the need for such an amendment, by observing that most bigamy cases lead to problems for the 'other woman' not recognised by law in presence of the official wife.

**Source:** The Times of India; Tuesday, 9<sup>th</sup> October, 2008  
<http://timesofindia.indiatimes.com/articleshow/3575090.cms>

## INTERNATIONAL

### INTERNATIONAL NEWS

#### French 'virgin' ruling reversed

A French court of appeal has overruled the decision to annul the marriage of two Muslims because the bride had lied about being a virgin. They are now effectively married again, although both partners said they accepted the original judgment. That verdict triggered strong outrage among some feminists, who said that upholding virginity as a pre-condition to marriage amounted to a "fatwa" against women's liberty. The husband had argued that the wife had breached the wedding contract, and gained his consent on the assurance that she was a virgin. The woman had admitted doing so and accepted the earlier annulment. Under the French civil code, a marriage can be annulled if a spouse has lied about an "essential quality" of the relationship. But Justice Minister Rachida Dati ordered a review of the verdict, which was referred to in some quarters as "a real fatwa against the emancipation of women" and "a ruling handed down in Kandahar". Feminists had argued that the annulment was unfair because a woman would not be able to cancel her marriage on the same grounds.

**Source:** <http://news.bbc.co.uk/2/hi/europe/7733601.stm>

#### China - Domestic Violence - Court Guidance Text for DV Cases

The Institute of Applied Laws under the Supreme People's Court drafted a "Court Guidance on Cases Involving Domestic Violence in Marriage" to establish guidelines for resolving some issues in cases of domestic violence. The Guidance covers a broad area, including the definition of domestic violence, the basic principles in marriage and family cases concerning domestic violence, personal safety protection measures, evidence, property division, child support, etc. The Guidance provides safety protection

measures for victims and further issues regulations for practical conditions, checkups, judicial content, implementation and responsibilities to protect personal safety. Many local and intermediate courts have used the Guidance as reference in cases and have cited it in their rulings.

**Source:** [http://www.womenofchina.cn/Issues/Rights\\_Protection/206783.jsp](http://www.womenofchina.cn/Issues/Rights_Protection/206783.jsp)

### Indonesia passes anti-porn bill

An extremely polarised debate ensued in Indonesia as its Parliament passed a far-reaching Anti-pornography law which enjoys support of some Islamic parties that are 'concerned at the moral degeneration of their society', but has equally, been condemned by many parliamentarians and eminent persons. There have been numerous protests against this law by artistes, women, non-Muslim minorities which fear censorship to indigenous and minority cultural traditions, and gay and trans-gendered persons – who fear victimization, and unwarranted moral policing. Even when the Parliament proceedings were on, about 100 legislators staged a walk-out because the bill's definition of pornography was too broad and they strongly felt that it went against Indonesia's tradition of cultural plurality and diversity. Violators under this law would face up to 12 years in prison and hefty fines. A widespread consensus has emerged about the need to mobilize people, educate them on the provisions of the law and prepare for a judicial review.

**Sources:** The Jakarta Post, 6<sup>th</sup> November, 2008 & <http://news.bbc.co.uk/go/em/-/1/hi/world/asia-pacific/7700150.stm>

### New Law Against Buying Sex in the UK

The UK Home Office is set to criminalize paying for sex with a woman "controlled for another person's gain" i.e. paying for sex with prostitutes who are controlled by pimps or are in brothels. In the UK Buying or selling sex is legal but soliciting and pimping are not. Under these provisions, men will be prosecuted if they pay for sex with such women. Ignorance that woman was being controlled is not to be a defence and conviction will carry hefty fine and criminal record. Men who knowingly pay for sex with trafficked women may face rape charges and first-time kerb crawlers would face prosecution as well as 'naming and shaming'. This measure is being mooted as a step to reduce 'demand' for trafficked women who are 'effectively held as slaves', according to the UK Home Secretary, Ms. Jacqui Smith. The Home Office said police would get powers to close brothels. Currently they can only shut premises associated with prostitution if anti-social behaviour or when Class A drugs are involved. Critics of the government's proposals say they will simply drive customers elsewhere, rather than tackling the problem.

**Sources:** [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7735908.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7735908.stm) & <http://www.guardian.co.uk/society/2008/nov/19/prostitution-law-trafficked-women-smith>

### Conservative UAE Gets Its First Female Marriage Official

Fatima Saeed Obeid al-Awani, 33, a married mother of two children became the first ever Muslim woman allowed to conduct marriages in the oil-rich United Arab Emirates and throughout the conservative Gulf. She was named to the post of a "*maazoun*" in the UAE capital of Abu Dhabi by the Justice Ministry. She now becomes the first woman to be allowed to write up marriage contracts throughout the conservative Gulf, but she is not the first woman "*maazoun*" in an Arab state -- Egypt has already broken ground in that area. In March 2008, Abu Dhabi got its first woman judge and in February the

number of women in the cabinet was doubled to four. Last year Abu Dhabi got its first female Emirati taxi driver.

**Source:** [http://www.gulfinthemedia.com/index.php?id=441558&news\\_type=Top&lang=en](http://www.gulfinthemedia.com/index.php?id=441558&news_type=Top&lang=en)

### Surrogacy succour for gay couples

In 2007 in India for the first time a gay couple from Israel was able to have a baby through surrogacy. This year again, recently another Israeli gay couple experienced parenthood through this means in India as laws in their country prohibit surrogacy for gays. The couple said they had two options – India or US, but they chose India as it was cheaper and they believed that their money “would help a woman here much more than elsewhere”.

**Source:** <http://in.news.yahoo.com/32/20081118/1056/tnl-surrogacy-succour-for-gay-couples.html>

### Punishment for torture to domestic workers

On November 28, a Sessions Court in Malaysia has convicted the Malaysian employer of a domestic worker of Indian origin for assault and noted the employer’s behaviour as “sadistic”. Earlier on November 20, the Malaysian Court of Appeal enhanced the sentence of another employer for raping his 19-year old domestic help. These are significant developments as far as the protection of the human rights of migrant/trafficked women domestic workers are concerned. Last year, in the US a multi-millionaire Indian couple, the Sabhnani’s were found guilty of torture and ‘inhuman cruelty’ to their two Indonesian helps, and sentenced severely by a jury in Long Island, New York.

**Sources:**

[http://www.nst.com.my/Current\\_News/NST/Friday/National/2414042/Article/index\\_html](http://www.nst.com.my/Current_News/NST/Friday/National/2414042/Article/index_html)  
& <http://www.indiatime.com/2007/12/18/nri-couple-found-guilty-of-maid-torturing-now-face-decades-behind-bars/>

## UPDATES FROM THE UN

### CEDAW Committee General Recommendation No. 26 on migrant women workers

The Committee Elimination of All Discrimination Against Women affirmed that migrant women, like all women, should not be discriminated against in any sphere of their life and issued the General Recommendation No. 26 on some categories of women migrant workers, who may be at risk of abuse and discrimination. The Recommendation affirms the applicability of the human rights enshrined in the Universal Declaration on Human Rights (UDHR) on the rights of migrant women, irrespective of the cause of their migration (which are enumerated in GR 26). All women migrant workers are entitled to the protection of their human rights which include the right to life, the right to personal liberty and security, the right not to be tortured, the right to be free of degrading and inhumane treatment, the right to be free from discrimination on the basis of sex, race, ethnicity, cultural particularities, nationality, language, religion or other status, the right to be free from poverty and to an adequate standard of living and the right to equality before the law and to benefit from the due processes of the law.

## UNHRC urges Japan to restore dignity to World War II "Comfort Women"

The UN Human Rights Committee considered Japan's report on its implementation of the International Covenant on Civil and Political Rights (ICCPR) on 15 October and called on the Government of Japan to restore dignity to the survivors of Japan's military sexual slavery system. The Committee recommended that: "The State party should accept legal responsibility and apologize unreservedly for the 'comfort women' system in a way that is acceptable to the majority of victims and restores their dignity, prosecute perpetrators who are still alive, take immediate and effective legislative and administrative measures to adequately compensate all survivors as a matter of right, educate students and the general public about the issue, and to refute and sanction any attempts to defame victims or to deny the events."

Source: Amnesty International

<http://www.amnestyusa.org/document.php?id=ENGNAU200811037951&lang=e>

## Review of 15 years of the work of Special Rapporteur on VAW

The SRVAW mandate was established in 1994 to seek and receive information on VAW, respond to situations and recommend measures for protection from violence and for the elimination of VAW. Since its inception two independent experts have held the mandate – Prof Radhika Coomaraswamy [1994-2003] and Prof Yakin Erturk [2004-2009]. As the term of the second mandate holder comes to an end, a review of the 15 years of work of the mandate has been conducted to take stock of the gains and the future potential and challenges before the mandate. On the International Day for the Elimination of Violence against Women (November 25, 2008), the United Nations Special Rapporteur on Violence against Women, the Office of the United Nations Special Adviser on Gender Issues and Advancement of Women (OSAGI) and the United Nations Population Fund (UNFPA) co-organized a panel to discuss the preliminary findings of '*15 Years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences [1994-2009]: A Review*'. The review will form an attachment to the final annual report submitted by Prof Yakin Erturk to the Human Rights Council in 2009, and will also be available as a UNFPA publication.

## NEW RESOURCES

"Fundamentalisms in Asia-Pacific": Published by Asia Pacific Forum for Women, Law and Development (APWLD)

Available at: <http://www.apwld.org/publication.htm>

This paper maps the trends of fundamentalisms in the region, surfaces the interconnections between different forms of fundamentalisms, its impact on women and maps the diverse strategies adopted by progressive movements and organizations to address these trends. Fundamentalisms in this paper refers to monolithic approaches adopted by movements in their quest for hegemony and political power, particularly through deployment of cultural, religious, ethnic and nationalist discourses.



Staying Alive - Second Monitoring & Evaluation Report 2008 on the Protection of Women from Domestic Violence Act 2005: Published by Lawyers' Collective

Available at: <http://www.lawyerscollective.org/wri/publications/staying-alive-2>

This is a part of an ongoing effort by the Lawyers Collective to compile annual monitoring and evaluation reports on the manner in which the Act is being implemented across the country, since it was brought into force in October 2006.

## EVENTS

APWLD and MASUM - Regional & National NGO Consultation with UNSRVAW and UNSRIP (October 15-16, 2008)

The Asia Pacific Forum on Women, Law and Development (APWLD) in collaboration with Mahila Sarvangeen Utkarsh Mandal (MASUM) organized an Asia Pacific Regional and a National NGO consultation with the United Nations Special Rapporteurs on Violence Against Women, Prof. Yakin Ertürk and; on Human Rights and Fundamental Freedoms of Indigenous Peoples, Professor James Anaya; during October 15-16 and October 17, respectively at New Delhi. The Regional Consultation brought together approximately 60 women/human rights activists and Indigenous Women across the Asia Pacific region. This included partners, regional and international NGOs; and UN agencies from 24 countries across the world. The National Consultation was attended by 105 women from 17 states of India. The presentations from the Regional Consultation and the concept note are available at <http://www.apwld.org/unsr.htm>

National People's Tribunal on Torture in India (October 17, 2008)

The National Project on Preventing Torture in India (NPPTI), organised a national-level People's Tribunal on Torture on October 17, 2008 in New Delhi. The event highlighted the legal void in relation to torture and its consequences. India signed the UN Convention Against Torture (CAT) in 1997, but ten years later the same has not yet been ratified; the CAT's Optional Protocols (OPCAT) remain unsigned. The tribunal focussed on issues like - prevention and reduction of torture in India, addressing victims' fear of further prosecution or retribution, unresponsiveness of institutions, and the culture of impunity. The Jury Members for this national-level PTT included a number of international experts and was chaired by Justice Shivraj Patil, Former Judge Supreme Court of India and Former Acting Chair of the National Human Rights Commission of India.

GOI - CEDAW Orientation (October 21-22, 2008)

The Ministry of Women and Child Development with UNIFEM South Asia Regional Office is conducting a series of regional trainings for the Government officials to implement the concluding observations to India by the CEDAW Committee, following India's review in Jan 2007. The workshops focus on building inter ministerial awareness and capacity building on CEDAW concepts, concluding observations and gender budgeting. The Eastern Regional workshop was held in New Delhi at NIPCCD on Oct 21-22, 2008 involving 20 senior and mid level bureaucrats as participants from the states of Assam, Manipur, Sikkim, Meghalaya, Nagaland, Arunachal Pradesh, Orissa, West Bengal and Bihar. PLD was part of the resource pool for this workshop.

'Staying Alive': National Conference on implementation of DV Act in India – Lawyers' Collective, WCD Ministry, UNIFEM South Asia (October 26-27, 2008)

The Lawyers' Collective Women's Rights Initiative in partnership with National Commission for Women and UNIFEM held a one day National Conference on the 14th November 2008 at New Delhi. Findings of the report on the implementation of the Protection of Women Against Domestic Violence Act (PWDVA) 2005 along with a manual developed for the members of Judiciary under the project supported by UN Global Trust Funds to End Violence Against Women at this National Conference were also released at the event. The one day national conference brought together different functionaries such as Protection Officers, members of the Judiciary, Service Providers, police and representatives from civil society engaged in working towards protection of women's rights as well as some women who have used the PWDVA.

Kartini Asia Conference (November 2-5, 2008)

The Indonesia based Kartini Network for Gender and Women's Studies in Asia, organised the 2nd All-Asia Conference 2-5 November 2008 at Bali, Indonesia. The conference, taking the theme of 'The Future of Asian Feminism Confronting Fundamentalism, Conflicts and Neo-Liberalism' was opened with five keynote speeches and was attended by participants from all over Asia, as well as from Australia and Europe.

## FORTHCOMING EVENTS

PLD - Orissa CEDAW training (December 11-15, 2008)

A state level capacity building workshop on CEDAW for lawyers, para legals and social workers is to be held by PLD during December 11-15, 2008 at Bhubaneswar. At this event PLD will release the newly published Oriya version of its resource book on CEDAW, Restoring Rights to Women. This resource book is available with PLD in English, Hindi, Malayalam and now in Oriya, and is used by both NGOs and the Government.

PLD - CEDAW Training Of Trainers in Hindi scheduled for January 2009, New Delhi

A workshop for training of trainers on CEDAW is scheduled for Jan 29- Feb 2, 2009 for selected trainers from PLD's state level trainings in the Hindi speaking states - Jharkhand, Bihar, Orissa, Rajasthan, Uttar Pradesh, Uttaranchal and Delhi.