ANUJ GARG & ORS. A

*v.*

HOTEL ASSOCIATION OF INDIA & ORS.

DECEMBER 6, 2007

**[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]** B

*Constitution of India, 1950; Articles 14, 15, 16, 19(1)(g) and 372/ Punjab Excise Act, 1914; S.30:*

*Right to employment—Prohibition in employment—S.30 of the Act prohibiting employment of men under 25 years of age and women in any premises where liquor/intoxicating drug is being served—Constitutionality of—Held: High Court rightly held s.30 of the Act* **ultra vires** *Articles 14, 15 and 19(1)(g) of the Constitution—1914 Act is a pre-constitutional legislation—Changed social psyche and expectations with time are important factors to be considered in the upkeep of law—When the Act was enacted, concept of equality between two sexes was unknown—However, with the framing of articles 14 and 15, the constitution makers intended to apply equality amongst two sexes in all spheres of life—Impugned provisions provide for wide restriction by prohibiting employment of men and women below 25 years of age in any premises where liquor is served—Thereby young graduates of Hotel management Course would be deprived of their right to employment without any rational criteria to justify such prohibition—Instead of putting restrictions on women's freedom, empowerment in the law enforcement strategies would be more tenable and socially wise approach—It is for the Court to review that the majoritarian impulse rooted in moralistic tradition do not impinge upon individual autonomy—Impugned legislation with pronounced protective legislation suffers from incurable fixation of stereotyped morality and conception of sexual role—Thus, outmoded in content and stiffing in means—Personal freedom is a fundamental tenet which could not be compromised in the name of expediency until and unless there is compelling State purpose—Only on a pre-supposition of*

C D E F G



H

A *happening of some incident, a law cannot be declared intra vires which is* **ex facie ultra vires**—*Thus, no infirmity found in the decision of the High Court holding the impugned Section 30 of the Act* **ultra vires** *Articles 14, 15 & 19(1)(g)—Right to equality—Right to employment—Judicial review.*

B *Doctrines:*

*Doctrines of "Res Extra Commercium Issue" and "Parens Patriae Power of State"—Applicability of.*

*Judicial deprecation—Held: Practice of raising a contention* C *before Supreme Court which not only had not been raised before the High Court but in an appeal filed by others maintainability whereof is in question is deprecated.*

*Words and Phrases:*

D *'Justice discourse' and 'Privacy rights'—Meaning of.*

**The first respondent with four others filed a writ petition before the Delhi High Court questioning the validity of the provision under Section 30 of the Punjab Excise Act, 1914. The High Court declared** E **Section 30 of the Act** *ultra vires* **Articles 19(1)(g), 14 and 15 of the Constitution of India to the extent it prohibits employment of any men/woman in any part of such premises, in which liquor or intoxicating drugs are consumed by the public. Hence, the present appeals.**

F **Appellants contended that as nobody has any fundamental right to deal in liquor, being 'res extra commercium', the State had the right to make a law and/or continue the old law imposing reasonable restrictions on the nature of employment therein.**

G **Dismissing C.A.No.5657 of 2007 and allowing C.A.No.5658 of 2007, the Court**

**HELD: 1.1. Punjab Excise Act, 1914 is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles**

H

**14, 15 and 19 of the Constitution of India, is permissible in law.** A
**[Para 7] [1001-B]**

**1.2. A statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid.** B
**[Para 7] [1001-B]**

*John Vallamattom & Anr.* **v.** *Union of India,* **[2003] 6 SCC 611, relied on.**

*United Nations Covenant on Civil and Political Rights,* **(1966), referred to.** C

**1.3. Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time which is operating in. Primacy to such transformation in constitutional rights analysis would not be out of place. [Para 8] [1001-G-H]** D

*Githa Hariharan* **v.** *Reserve Bank of India,* **[1999] 2 SCC 228;** *Air India* **v.** *Nergesh Meerza,* **[1981] 4 SCC 335;** *Municipal Corporation of Delhi* **v.** *Female Workers (Muster Roll) & Anr.,* **[2000] 3 SCC 224;** E *Madhu Kishwar & Ors.* **v.** *State of Bihar & Ors.,* **[1996] 5 SCC 125;** *Vishaka & Ors.* **v.** *State of Rajasthan & Ors.,* **[1997] 6 SCC 241;** *Randhir Singh* **v.** *Union of India & Ors.,* **[1982] 1 SCC 618 and** *Liverpool & London S.P. & I. Association Ltd.* **v.** *M.V. Sea Success I & Anr.,* **[2004] 9 SCC 512, referred to.** F

*"Habits of the Heart: Individualism and Commitment in American Life" by R. Bellah, R. Madsen, W. Sullivan, A. Swidler and S. Tipton,* **(1985), referred to.**

**2.1. The important jurisprudential tenet involved in the matter is not the prioritization of rights inter se but practical implementation issues competing with a right. [Para 18] [1004-H; 1005-A]** G

**2.2. When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution** H

A intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, *inter alia*, on the ground of sex would be wholly impermissible but it B is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden thereof would be on the State. While considering validity of a legislation of this nature, the court has to take notice of the other provisions of the Constitution including those contained in Part IV A of the C Constitution. [Para 20] [1005-E-F]

*Bhe & Ors.* v. *The Magistrate, Khayelisha & Ors.*, (2004) 18 BHRC 52, referred to.

3.1. In India, hospitality industry has grown by leaps and bounds. D Liquor, in the hospitality industry, is being served not only in the bar but also in the restaurant. Service of liquor is permissible also in the rooms of a hotel. [Para 22] [1006-E]

3.2. The impugned provision provides for wide restrictions. It prohibits employment of any woman in any part of the premises E where liquor is being served. It would prohibit employment of women and men below 25 years in any of the restaurants. As liquor is permitted to be served even in rooms, the restriction would also operate in any of the services including housekeeping where a woman has to enter into a room; the logical corollary of such a wide F restriction would be that even if service of liquor is made permissible in the flight, the employment of women as air-hostesses may be held to be prohibited. [Para 23] [1006-F-G]

3.3. Hotel Management has opened up a viesta of young men G and women for employment. A large number of them are taking hotel management graduation courses. They pass their examinations at a very young age. If prohibition in employment of women and men below 25 years is to be implemented in its letter and spirit, a large section of young graduates who have spent a lot of time, money and energy in obtaining the degree or diploma in hotel management would H

**be deprived of their right of employment. Occupation/service in the management of hotel industry is a specialized job. It requires specialized skill. To deprive a large section of successful young men and women from obtaining any job for which they have duly been trained would be wholly unjust. The State cannot invoke the doctrine of 'res extra commercium' in the matter of appointment of eligible persons. It, thus, cannot prohibit employment of men below 25 years. Such a restriction keeping in view a citizen's right to be considered for employment, which is a facet of the right to livelihood do not stand judicial scrutiny.**

**[Paras 24, 25 and 54] [1006-H; 1007-A, B; F, G; 1017-D]**

*Kerala Samsthana Chethu Thozhilali Union* **v.** *State of Kerala and Ors.,* **[2006] 4 SCC 327, relied on.**

**3.4. Right to be considered for employment subject to just exceptions is recognized by Article 16 of the Constitution. Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. [Para 24] [1007-B-C]**

**4.1. One important justification to Section 30 of the Act is parens patriae power of state. It is a considered fact that use of parens patriae power is not entirely beyond the pale of judicial scrutiny. Parens Patriae power has only been able to gain definitive legalist orientation as it shifted its underpinning from being merely *moralist* to a more objective grounding i.e. *utility.***

**[Paras 27 and 28] [1008-G]**

**4.2. The subject matter of the Parens Patriae power can be adjudged on two counts: (i) in terms of its necessity and (ii) assessment of any tradeoff or adverse impact, if any. Parens Patriae power is subject to constitutional challenge on the ground of Right to Privacy also. Young men and women know what would be the best offer for them in the service sector. In the age of internet, they would know all pros and cons of a profession. It is their life - subject to**

A **constitutional, statutory and social interdicts – a citizen of India should be allowed to live her life on her own terms.**

**[Paras 29 and 30] [1008-H; 1009-A-C]**

*City of Cleburne* **v.** *Cleburne Living Center,* **473 U.S. 432, 439-41 (1985), referred to.**

B

**5.1. Right to Self Determination is an important offshoot of Gender Justice discourse. At the same time, security and protection to carry out such choice or option specifically, and** *state of violence-free being* **generally is another tenet of the same movement. In fact,** C **the latter is apparently a more basic value in comparison to right to options in the feminist matrix. [Para 33] [1009-F]**

**5.2. Privacy rights prescribe autonomy to choose profession whereas** *security concerns* **texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to** D **safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship. [Para 34] [1009-G-H]**

**5.3. Women would be as vulnerable without State protection as** E **by the loss of freedom because of impugned Act. The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable** F **of being called reasonable in a modern democratic society.**

**[Para 35] [1010-A-B]**

**5.4. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies** G **of the state as well as law modeling done in this behalf.**

**[Para 36] [1010-C]**

*Abdulaziz, Cabales And Balkandali* **v.** *United Kingdom,* **(1985_ ECHR 7;** *Van Raalte* **v.** *The Netherlands,* **(1997) ECHR 6;** *Schuler-Zgraggen* **v.** *Swizerland,* **(1993) ECHR 29 and** *Petrovic* **v.** *Austria,* H

**(1998) ECHR 21), referred to.** A

*"The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" by Professor Williams*, **referred to.**

**6.1. The combination of biological and social determinants may find expression in popular legislative mandate. Such legislations** B **definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.Therefore, one issue of immediate relevance in such cases is the effect of the traditional** C **cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart.**

**[Paras 39 and 40] [1011-F-G]**

**6.2. Instead of prohibiting women employment in the bars** D **altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance with the requirements of the profession they choose to follow. Any other** E *policy inference* **(such as the one embodied under section 30) from societal conditions would be oppressive on the women and against the privacy rights. [Para 41] [1012-A, B]**

*Frontiero* **v.** *Richardson,* **411 U.S. 677, 93 S.Ct. 1764 and** *Dothard* F **v.** *Rawlinson,* **433 U.S. 321, 97 S.Ct. 2720, referred to.**

**7.1. It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation** G **should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means. [Para 44] [1012-A-B]** H

A **7.2. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which can not be compromised in the name of expediency until and unless there is a *compelling state purpose.* Heightened level of scrutiny is the normative threshold for judicial review in such cases.**

B **[Para 45] [1014-H; 1015-A]**

*Reconstructing Sexual Equality, by Professor Christine A. Littleton*, **referred to.**

**7.3. Having regard to the scope of Section 30 of the Act and**
C **the impugned legislation generally the Court has to reach to a finding as to whether the *legislative interference* to the autonomy in employment opportunities for women is justified as a legitimate aim and proportionate to the aim pursued. The test to review such a Protective Discrimination statute would entail a two pronged**
D **scrutiny: (a) the legislative interference (induced by sex discriminatory legalisation in the instant case) should be justified in principle, (b) the same should be proportionate in measure.**

**[Paras 47 and 48] [1015-C-F]**

**7.4. The Court's task is to determine whether the measures**
E **furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al. The bottom-line in this behalf would be a functioning modern democratic**
F **society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued.**

**[Para 49] [1015-G-H; 1016-A]**

G

*United States* **v.** *Virginia,* **518 U.S. 515, 532-33 (1996), referred to.**

**7.5. Only on a pre-supposition that there is a possibility of some incident happening, a law cannot be declared intra vires which is** *ex*

H

*facie ultra vires*. **[Para 51] [1016-G-H]** A

**7.6. The Government of NCT Delhi, although did not challenge the impugned judgment of the Delhi High Court, seeks to enter into the fray through a side door. It, on the one hand, challenges the focus of the appellant which objection, if upheld, would make the appeal liable to be dismissed at the threshold, on the other, seeks to justify the validity of Section 30 of the Act. Only on a pre-supposition that there is a possibility of some incident happening, a law cannot be declared *intra vires* which is *ex facie ultra vires*. The Court deprecated the practice of the Government of NCT to raise a contention of such a nature which not only had not been raised before the High Court but in an appeal field by a few citizens maintainability whereof is in question. [Para 51 and 52] [1017-A; F-H]** B C

**8. No infirmity is found in the impugned decision of the High Court. [Para 55]** D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5657 of 2007.

From the Judgment and final Order dated 12.1.2006 of the High Court of Delhi at New Delhi in CWP No. 4692 of 1999. E

WITH

C.A. No. 5658 of 2007.

Rajiv Dutta, M.P. Shorawala, Jyoti Saxena, Vipin K. Saxena and Shashi Kiran for the Appellants. F

Arun Jaitley and Nagender Rai, Ravi Sikri, Saket Sikri, Madhu Sikri, Vikas Sharma, Sweta Garg and D.S. Mahra for the Respondents.

The Judgment of the Court was delivered by G

**S.B. SINHA, J.** 1. Leave granted.

*Introduction*

2. Constitutional validity of Section 30 of the Punjab Excise Act, 1914 (for short "the Act") prohibiting employment of "any man under the H

A age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public is the question involved in this appeal which arises out of a judgment and order dated 12.01.2006 passed by the High Court of Delhi in CWP No. 4692 of 1999.

B

*Background* Facts

3. First Respondent is the Hotel Association of India. Its members carry on business in hotels. Liquor is served in the hotels not only in the bar but also in the restaurant. Liquor is also served in rooms as part of C room service. First Respondent with four others filed a writ petition before the Delhi High Court questioning the validity of the said provision. By reason of the impugned judgment, Section 30 of the Act has been declared to be *ultra vires* Articles 19(1)(g), 14 and 15 of the Constitution of India to the extent it prohibits employment of any woman in any part of such D premises, in which liquor or intoxicating drugs are consumed by the public.

4. National Capital Territory of Delhi appears to have accepted the said judgment. But as a respondent, it seeks to support the impugned statutory provision, although no Special Leave Petition has been filed by it. Appellants herein, who are a few citizens of Delhi, are before us.

E

A special leave petition has been filed by the First Respondent questioning that part of the order whereby restrictions had been put on employment of any man below the age of 25 years.

*Submissions*

F

5. Mr. Rajiv Dutta, learned senior counsel appearing on behalf of the appellants, in support of this appeal, submitted that as nobody has any fundamental right to deal in liquor, being 'res extra commercium', the State had the right to make a law and/or continue the old law imposing G reasonable restrictions on the nature of employment therein.

6. Mr. Arun Jaitley, learned senior counsel appearing on behalf of the respondents, on the other hand, supported the impugned judgment.

H

*Constitutional Backdrop*

7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid.

In *John Vallamattom & Anr.* v. *Union of India,* [2003] 6 SCC 611, this Court, while referring to an amendment made in UK in relation to a provision which was in *pari materia* with Section 118 of Indian Succession Act, observed :

> "The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time."

Referring to the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights as also Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, it was held :

> "33. It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation."

8. Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in constitutional rights analysis would not be out of place. It will be in fitness of the discussion to refer to the following text from

A "Habits of the Heart: Individualism and Commitment in American Life" by R. Bellah, R. Madsen, W. Sullivan, A. Swidler and S. Tipton, 1985, page 286 which suggests factoring in of such social changes.

> "The transformation of our culture and our society would have to happen at a number of levels. If it occurred only in the minds of individuals (as to some degree it already has) it would be powerless. If it came only from the initiative of the state, it would be tyrannical. Personal transformation among large numbers is essential, and it must not only be a transformation of consciousness but must also involve individual action. But individuals need the nurture of crops that carry a moral tradition reinforcing their own aspirations.
>
> These are commitments that require a new social ecology and a social movement dedicated to the idea of such a transformation."

*International Treaties*

9. International treaties *vis-à-vis* the rights of women was noticed by this Court in a large number of judgments, some of which we may notice at this stage.

10. In *Githa Hariharan* v. *Reserve Bank of India,* [1999] 2 SCC 228, this Court was faced with construing Section 6(a) of Hindu Minority and Guardianship Act, 1956 and Section 19(b) of Guardian and Wards Act, 1890. The sections were challenged as violative of the equality clause of the Constitution, inasmuch as the mother of the minor is relegated to an inferior position on ground of sex alone since her right, as a natural guardian of the minor, is made cognizable only 'after' the father. The court relied upon the Convention on the Elimination of All Forms of Discrimination against Women, 1979 ("CEDAW") and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of ail forms against women is quite clear. It was held by the court that the domestic courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them.

11. In *Air India* v. *Nergesh Meerza* [1981] 4 SCC 335, this Court was faced with the constitutional validity of Regulation 46(i)(c) of Air India

Employees' Service Regulations, it was provided that the services of the Air Hostesses would stand terminated on first pregnancy. The Court after considering various US Supreme Court judgments regarding pregnant women held that the observations made therein would apply to the domestic cases. A

12. In *Municipal Corporation of Delhi* v. *Female Workers (Muster Roll) & Anr.*, [2000] 3 SCC 224, the short question which was to be decided by this Court was whether having regard to the provisions contained in Maternity Benefit Act, 1961, women engaged on casual basis or on muster roll basis on daily wages and not only those in regular employment were eligible for maternity leave. The Court while upholding the right of the female workers to get maternity leave relied upon the doctrine of social justice as embodied in Universal Declaration of Human Rights Act, 1948 and Article 11 of the Convention on the elimination of all forms of discrimination against women held that the provisions of the same must be read into the service contracts of Municipal Corporation. B C D

13. In *Madhu Kishwar & Ors.* v. *State of Bihar & Ors.*, [1996] 5 SCC 125, challenge was made to certain provisions of Chotanagpur Tenancy Act, 1908 providing succession to property in the male line in favour of the male on the premise that the provisions are discriminatory and unfair against women and, therefore, *ultra vires* the equality clause in the Constitution. The Court while upholding the fundamental right of the Tribal women to the right to livelihood held that the State was under an obligation to enforce the provisions of the Vienna Convention on the elimination of all forms of discrimination against women (CEDAW) which provided that discrimination against women violated the principles of equality of rights and respects for human dignity. E F

14. In *Vishaka & Ors.* v. *State of Rajasthan & Ors.*, [1997] 6 SCC 241, the writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India with the aim of finding suitable methods for realization of the true concept of "gender equality"; and preventing sexual harassment of working women in all work places through judicial process to fill the vacuum in existing legislation. This Court while framing the guidelines and norms to be observed by the employers in work places G H

A to ensure the prevention of sexual harassment of women, *inter alia*, relied on the provisions in the Convention on the Elimination of All Forms of Discrimination against Women as also the general recommendations of CEDAW for construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

B 15. In *Randhir Singh* v. *Union of India & Ors.* [1982] 1 SCC 618, this Court while holding that non-observance of the principle of 'equal pay for equal work' for both men and women under Article 39(d) of the Constitution amounted to violation of Articles 14 and 16, recognized that the principle was expressly recognized by all socialist systems of law C including the Preamble to the Constitution of the International Labour Organization.

16. In *Liverpool & London S.P. & I. Association Ltd.* v. *M.V. Sea Success I & Anr.*, [2004] 9 SCC 512, this Court had to interpret D the meaning and import of the word 'necessaries' used in Section 5 of the Admiralty Court Act, 1861. The Court whiled importing the meaning of the same through Foreign (American) Court decisions, opined :

> "It is true that this Court is not bound by the American decisions. The American decisions have merely a persuasive value but this E Court would not hesitate in borrowing the principles if the same is in consonance with the scheme of Indian law keeping in view the changing global scenario. Global changes and outlook in trade and commerce could be a relevant factor. With the change of time, from narrow and pedantic approach, the court may resort to broad and F liberal interpretation. What was not considered to be a necessity a century back, may be held to be so now."

*Setting of the Debate*

17. In the instant matter, we are in the thick of debate relating to G Individual Rights of women. The classical counter to individual rights is the community orientation of rights. There is no such shade to the current matter. Here the individual rights are challenged by a problem of practical import – of enforcement and security.

H 18. Therefore, the important jurisprudential tenet involved in the

matter is not the prioritization of rights inter se but *practical implementation issues* competing with a right. It is one thing when two norms falling in the same category (for instance Individual Rights versus Community Orientation of Rights) compete and quite another when two norms with unequal hierarchical status come in conflict with each other. A

19. At the very outset we want to define the contours of the discussion which is going to ensue. Firstly, the issue floated by the state is very significant, nonetheless does not fall in the same class as that of rights which it comes in conflict with, ontologically. Secondly, the issue at hand has no social spillovers. The rights of women as individuals rest beyond doubts in this age. If we consider (various strands of) feminist jurisprudence as also identity politics it is clear that time has come that we take leave of the theme encapsulated under Section 30. And thirdly we will also focus our attention on the interplay of doctrines of self-determination and an individual's best interests. B C D

*Equality*

20. When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, *inter alia*, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefor would be on the State. While considering validity of a legislation of this nature, the court was to take notice of the other provisions of the Constitution including those contained in Part IV A of the Constitution. E F

21. In *Bhe & Ors.* v. *The Magistrate, Khayelisha & ors.*, (2004) 18 BHRC 52, the South African Constitutional Court was required to consider the constitutionality of the Black Administration Act, 1927 (South Africa) and the Regulations of the Administration and Distribution of the Estates of Deceased Blacks (South Africa). This scheme was purporting to give effect to the customary law of succession where principle of male G H

A primogeniture is central to customary law of succession.

It was held by the majority that the rule of male primogeniture as it applied in customary law to the inheritance of property was inconsistent with the constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property. The rules of
B succession in customary law had not been given the space to adapt and to keep pace with changing social conditions and values. Instead, they had overtime become increasingly out of step with the real values and circumstances of the society they were meant to serve. The application of the customary law rules of succession in circumstances vastly different
C from their traditional setting caused much hardship. Thus the official rules of customary law of succession were no longer universally observed. The exclusion of women from inheritance on the grounds of gender was a clear violation of the constitutional prohibition against unfair discrimination.

Further, the principle of primogeniture also violated the right of
D women to human dignity as it implied that women were not fit or competent to own and administer property. Its effect was to subject those women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of gender differentiation.

E *Remark on changing realities*

22. We may now look into the ground reality. In India, hospitality industry has grown by leaps and bounds. As noticed hereinbefore, liquor, in the hospitality industry, is being served not only in the bar but also in the restaurant. Service of liquor is permissible also in the rooms of a hotel.

F 23. The impugned provision provides for wide restrictions. It prohibits employment of any woman in any part of the premises where liquor is being served. It would prohibit employment of women and men below 25 years in any of the restaurants. As liquor is permitted to be served even in rooms, the restriction would also operate in any of the
G services including housekeeping where a woman has to enter into a room; the logical corollary of such a wide restriction would be that even if service of liquor is made permissible in the flight, the employment of women as air-hostesses may be held to be prohibited.

24. Hotel Management has opened up a viesta of young men and
H

women for employment. A large number of them are taking hotel management graduation courses. They pass their examinations at a very young age. If prohibition in employment of women and men below 25 years is to be implemented in its letter and spirit, a large section of young graduates who have spent a lot of time, money and energy in obtaining the degree or diploma in hotel management would be deprived of their right of employment. Right to be considered for employment subject to just exceptions is recognized by Article 16 of the Constitution. Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grass root democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriage, pilots et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a Multinational Company. They are now widely accepted both in police as also army services.

*Res Extra Commercium Issue*

25. Occupation/service in the management of hotel industry is a specialized job. It requires specialized skill. To deprive a large section of successful young men and women from obtaining any job for which they have duly been trained, in our opinion, would be wholly unjust. The State cannot invoke the doctrine of 'res extra commercium' in the matter of appointment of eligible persons. The said principle could have been invoked if the State intended to adopt a policy of prohibition. It is one thing to say that the trade in liquor is regulated but it is another thing to say that such regulations which are principally in the area of manufacture, sale, export and import of intoxicants should be allowed to operate in

A other fields also.

26. In *Kerala Samsthana Chethu Thoxzhilali* Union v. *State of Kerala and Ors.*, [2006 4 SCC 327, this Court held:

> "When an employer gives employment to a person, a contract of
> B employment is entered into. The right of the citizens to enter into any contract, unless it is expressly prohibited by law or is opposed to public policy, cannot be restricted. Such a power to enter into a contract is within the realm of the Indian Contract Act. It has not been and could not be contended that a contract of employment
> C in the toddy shops would be hit by Section 23 of the Indian Contract Act. So long as the contract of employment in a particular trade is not prohibited either in terms of the statutory or constitutional scheme, the State's intervention would be unwarranted unless there exists a statutory interdict. Even to what
> D extent such a legislative power can be exercised would be the subject matter of debate but in a case of this nature there cannot be any doubt that the impugned rules are also contrary to the provisions of the Indian Contract Act as also the Specific Relief Act, 1963."

E It was further observed:

> "Furthermore, a person may not have any fundamental right to trade or do business in liquor, but the person's right to grant employment or seek employment, when a business is carried on
> F in terms of the provisions of the licence, is not regulated."

*Parens Patriae Power of State*

27. One important justification to Section 30 of the Act is parens patriae power of state. It is a considered fact that use of parens patriae
G power is not entirely beyond the pale of judicial scrutiny.

28. Parens Patriae power has only been able to gain definitive legalist orientation as it shifted its underpinning from being merely *moralist* to a more objective grounding i.e. *utility.*

H 29. The subject matter of the Parens Patriae power can be adjudged

on two counts: A

(i) in terms of its necessity and

(ii) assessment of any tradeoff or adverse impact, if any

30. This inquiry gives the doctrine an objective orientation and therefore prevents it from falling foul of due process challenge. [See *City of Cleburne* v. *Cleburne Living Center,* 473 U.S. 432, 439-41 (1985)] Parens Patriae power is subject to constitutional challenge on the ground of Right to Privacy also. Young men and women know what would be the best offer for them in the service sector. In the age of internet, they would know all pros and cons of a profession. It is their life; subject to constitutional, statutory and social interdicts – a citizen of India should be allowed to live her life on her own terms. B C

31. Let us understand various standards which objectify Parens Patriae. Best *interests* standard is one test in US jurisdiction in Child Custody matters. Similarly other standards have evolved amongst which right to self-determination holds an important place. D

*Right to employment vis-a-vis Security: Competing Values*

32. The instant matter involves a fundamental tension between right to employment and security. E

33. The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to Self Determination is an important offshoot of Gender Justice discourse. At the same time, *security and protection* to carry out such choice or option specifically, and *state of violence-free being* generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix. F

34. Privacy rights prescribe autonomy to choose profession whereas *security concerns* texture methodology of delivery of this assurance. But it is a reasonable proposition that that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship. G

H

35. At the same time we do not intend to further the rhetoric of empty rights. Women would be as vulnerable without state protection as by the loss of freedom because of impugned Act. The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.

36. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modeling done in this behalf.

37. Also with the advent of modern state, new models of security must be developed. There can be a setting where the cost of security in the establishment can be distributed between the state and the employer.

38. Gender equality today is recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe.

In the case of *Abdulaziz, Cabales And Balkandali* v. *United Kingdom,* (1985) ECHR 7 the court held:

> "As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."

Following *Abdulaziz* (supra) the European Court of Human Rights once again observed in *Van Raalte* v. *The Netherlands,* (1997) ECHR 6:

> "In the applicant's submission, differences in treatment based on sex were already unacceptable when section 25 of the General Child Care Benefits Act was enacted in 1962. The wording of Article 14 of the Convention (art. 14) showed that such had been the prevailing view as early as 1950. *Moreover, legal and social*

*developments showed a clear trend towards equality between men and women.* The applicant drew attention to, *inter alia,* the Court's *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom* judgment of 28 May 1985 (Series A no. 94), which stated explicitly that "the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe" and that "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention" (loc. cit., p. 38, para. 78)."

(emphasis supplied)

[See also *Schuler-Zgraggen* v. *Swizerland,* (1993) ECHR 29; and *Petrovic* v. *Austria,* (1998) ECHR 21]

*Stereotype Roles and Right to Options*

39. Professor Williams in *"The Equality Crisis: Some Reflections on Culture, Courts, and Feminism"* published in 7 WOMEN'S RTS. L. REP. 175 (1982) notes issues arising where biological distinction between sexes is assessed in the backdrop of cultural norms and stereotypes. She characterizes them as "hard cases". In hard cases, the issue of *biological difference between sexes* gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.

40. Therefore, one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart. In such circumstances the question revolves around the approach of state.

A 41. Instead of prohibiting women employment in the bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the B profession they choose to follow. Any other *policy inference* (such as the one embodied under section 30) from societal conditions would be oppressive on the women and against the *privacy rights.*

42. The description of the notion of "romantic paternalism" by the US Supreme Court in *Frontiero* v. *Richardson,* (411 U.S. 677, 93 S.Ct. C 1764) makes for an interesting reading. It is not to say that Indian society is similarly situated and suffers from the same degree of troublesome legislative past but nevertheless the tenor and context are not to be missed. The court noted in this case of military service:

D "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage...

E As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes..."

The court also maintained the *strict scrutiny standard* for review F and repelled the *administrative convenience* argument in the following terms:

"In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than G speed and efficiency.' And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.

H On the contrary, any statutory scheme which draws a sharp line

between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the (Constitution). We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment."

43. In another similar case wherein there was an effective bar on females for the position of guards or correctional counsellors in the Alabama state penitentiary system. The prison facility housed sexual offenders and the majority opinion on this basis *inter alia* upheld the bar. Justice Marshall's dissent captures the ranges of issues within a progressive paradigm. Dissent in *Dothard* v. *Rawlinson,* (433 U.S. 321, 97 S.Ct. 2720) serves as useful advice in the following terms:

"It appears that the real disqualifying factor in the Court's view is 'the employee's very womanhood.' The Court refers to the large number of sex offenders in Alabama prisons, and to 'the likelihood that inmates would assault a woman because she was a woman.' In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, 'the pedestal upon which women have been placed has upon closer inspection, been revealed as a cage.' It is particularly ironic that the cage is erected here in response to feared misbehavior by imprisoned criminals."

He also notes the nature of protective discrimination (as garb) in the following terms:

A "The Court points to no evidence in the record to support the asserted 'likelihood that inmates would assault a woman because she was a woman.' Perhaps the Court relies upon common sense, or 'innate recognition'. But the danger in this emotionally laden context is that common sense will be used to mask the "romantic
B paternalism" and persisting discriminatory attitudes that the Court properly eschews. To me, the only matter of innate recognition is that the incidence of sexually motivated attacks on guards will be minute compared to the 'likelihood that inmates will assault' a guard because he or she is a guard.

C The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of lawabiding women who wish to contribute to their community, but to take swift and sure punitive action against the inmate offenders. Presumably, one of the goals of the Alabama prison system is the eradication
D of inmates' antisocial behavior patterns so that prisoners will be able to live one day in free society. Sex offenders can begin this process by learning to relate to women guards in a socially acceptable manner. To deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our
E social priorities upside down."

*The Standard of Judicial Scrutiny*

44. It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as
F double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus
G arrived at is outmoded in content and stifling in means.

45. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which can not be compromised in the name of expediency until unless there is a
H *compelling state purpose*. Heightened level of scrutiny is the normative

threshold for judicial review in such cases. A

46. Professor Christine A. Littleton in her widely quoted article *RECONSTRUCTING SEXUAL EQUALITY*, 75 CALR 1279, July 1987 makes a useful observation in this regard:

> *"The difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons.* I call this the model of 'equality as acceptance.' To achieve this form of sexual equality, male and female 'differences' must be costless relative to each other." B C

47. Having regard to the scope of Section 30 of the Act and the impugned legislation generally the Court has to reach to a finding as to whether the *legislative interference* to the autonomy in employment opportunities for women is justified as a legitimate aim and proportionate to the aim pursued. In this behalf it would be relevant to understand the approach of European Court of Human Rights which has very often dealt with matters of competing public interests and tuned new legal devices for the same. Doctrine of Proportionality and Incompatibility would definitely find mention in such a discussion. D

48. The test to review such a Protective Discrimination statute would entail a two pronged scrutiny: E

(a) the legislative interference (induced by sex discriminatory legalisation in the instant case) should be justified in principle,

(b) the same should be proportionate in measure. F

49. The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al. The bottom-line in this behalf would a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim G H

A pursued.

50. In *United States* v. *Virginia*, (518 U.S. 515, 532-33 (1996)) Justice Ginsburg notes with particular emphasis the need for an intrusive multi-stage review in sex discrimination statutes. The court observed :

B "The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring. "Inherent differences" between men and C women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. *Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promote equal* D *employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."* (*internal citations omitted*)

E *Changing Stand of the Government of NCT Delhi*

51. The Government of NCT Delhi, although did not challenge the impugned judgment of the Delhi High Court, seeks to enter into the fray through a side door. It, on the one hand, challenges the locus of the F appellant which objection, if upheld, would make the appeal liable to be dismissed at the threshold, on the other, seeks to justify the validity of Section 30 of the Act. It cites examples of Jessica Lal and BMW to highlight dangerous consequences of allowing sale and consumption of liquor by young men below the age of 25 years and vulnerability of women G while working in bars. When the restrictions were in force, they could not prevent such occurrences. If the restriction goes, some such incidents may again happen. But only on a pre-supposition that there is a possibility of some incident happening, we cannot declare a law *intra vires* which is *ex facie ultra vires.*

H

52. We, furthermore, deprecate this practice of the Government of NCT to raise a contention of the aforementioned nature which not only had not been raised before the High Court but in an appeal filed by a few citizens maintainability whereof is in question. A

It, having allowed the judgment of High Court to attain finality, is estopped by records to question the correctness of the impugned judgment. B

*Conclusion*

53. In the instant case the end result is an invidious discrimination perpetrating sexual differences. C

54. Young men who take a degree or diploma in Hotel Management enter into service at the age of 22 years or 23 yerars. It, thus, cannot prohibit employment of men below 25 years. Such a restriction keeping in view a citizen's right to be considered for employment, which is a facet of the right to livelihood do not stand judicial scrutiny. D

55. For the reasons aforementioned, we do not find any infirmity in the impugned decision of the High Court. The appeal is accordingly dismissed. Cross-appeal filed by the respondents is allowed. There shall be no order as to costs. E

S.K.S. CA No. 5657 of 2007 dismissed and
CA No. 5658 of 2007 allowed.