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ILI Newsletter

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Editorial

The devastation caused by the two World Wars, and particularly the sufferings of the civilian population during the Wars, created a huge public opinion in favour of laying down principles to protect civilians and the injured during armed conflicts. The lessons of World War II brought about the reaffirmation and expansion of the 1929 Geneva Conventions by the adoption of the four Geneva Conventions of 1949, namely, (1) Geneva Convention I, which deals with the wounded and sick members of the armed forces in the field; (2) Geneva Convention II, which deals with the wounded, sick and shipwrecked, members of armed forces at sea; (3) Geneva Convention III, which deals with the treatment of Prisoners of War and (4) Geneva Convention IV, which deals with the Protection of Civilians in times of War. The Geneva Conventions of 1949 are a legacy of World War II. The Geneva Conventions have since been supplemented by three Additional Protocols; together they constitute the principal source of International Humanitarian Law (IHL). IHL, which was earlier known as the Law of Armed Conflict, is a branch of international law which applies in times of armed conflict. The purpose of IHL is to reduce the sufferings of those caught in conflicts, firstly by affording protection to people affected by it, such as civilians, wounded combatants and prisoners of war and, secondly, by restricting or prohibiting those means and methods of warfare which are indiscriminate in character or cause unnecessary suffering. IHL has proven extremely useful during numerous conflicts in providing relief and protection to different categories of persons caught in international and non-international armed conflicts. Admittedly there are violations of this law leading to inhuman consequences and suffering. But there are also many success stories which seldom get attention in the media. Serious concerns are being expressed regarding the effectiveness of IHL for the protection of civilians against the effects of hostilities, and whether modification of the existing law is required. In some recent conflicts, questions relating to the protection of civilians emerged in settings where local populations and objects are closely intermixed with military forces and resources. This law has considerable significance in our modern world because of an unfortunate reality - the proliferation of armed conflicts - which is seriously increasing the level of violence in many different parts of the world. The South Asian region is unfortunately marked by armed conflict and other situations of violence, which exist in many countries. It is therefore of the utmost importance to foster respect for IHL in times of conflict.

Manoj Kumar Sinha

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ACTIVITIES AT THE INSTITUTE

One day Workshop on Dispelling Rhetoric: Law of Divorce and Gender Equality in Islam

The Indian Law Institute organised a One-Day Workshop on **"*Dispelling Rhetorics: Law of Divorce and Gender Equality in Islam*"** on Saturday, April 29, 2017 at the Institute's premises.

The inaugural ceremony of the workshop was graced by eminent guests on and off the dias. Professor Upendra Baxi, Emeritus Professor of Law, University of Delhi and University of Warwick, UK was the Chief Guest along with Professor (Dr.) Tahir Mahmood, Distinguished Jurist Chair, Professor of Eminence and Chairman, Amity Institute of Advanced Legal Studies, Professor G. Mohan Gopal, Former Director, National Judicial Academy and Former Director, NLSIU; Director, Rajiv Gandhi Institute for Contemporary Studies and Ms. Flavia Agnes, Director, Majlis Legal Centre, Mumbai as the guest of honour at the programme.

Professor (Dr.) Manoj Kumar Sinha, Director, Indian Law Institute in his welcome address accredited Professor G. Mohan Gopal for proposing the theme of the workshop and Professor (Dr.) Furqan Ahmad, Professor, Indian Law Institute for sucessfully executing the same.

Professor Furqan Ahmad, the workshop convener, after reciting a small poem on Ijtihad (independent reasoning) composed by famous jurist and poet Dr. (Sir) Mohd. Iqbal, introduced the theme of the workshop and emphasised that the purpose of the workshop was to clarify those facets of Islamic Law that have been grossly misunderstood. The initiative also provided a platform for fruitful deliberations on the varied sub-themes like the viability of the much-debated Uniform Civil Code and Triple Talaq.

Prof. Tahir Mahmood, Prof. Manoj Kumar Sinha, Prof. Upendra Baxi, Prof. G. Mohan Gopal, Ms. Flavia Agnes and Prof. Furqan Ahmad at the inaugural session of the workshop. (left to right)

Professor Upendra Baxi in his inaugural speech highlighted the concept of *fiqh al-aqalliyyat* which asserts that Muslim living as minorities need to devise new methods to peacefully coexist with non-Muslims in the society. Professor G. Mohan Gopal, in his address discussed the difference between law prevalent in Saudi Arabia and Islamic Law as prevalent in India. He also argued that fundamental rights must be safeguarded regardless of social or religious backdrops. Commenting on the un-Islamic nature of Triple Talaq, he remarked that any religion based on brotherhood and love cannot be oppressive towards women.

Ms. Flavia Agnes discussed the need to move beyond the theoretical constructs of Triple Talaq under the Islamic laws and instead, address the needs of Muslim women. She insisted that 'empowerment' and 'education' is the demand of contemporary times to remedy the miseries of Muslim women.

Ms. Flavia Agnes, Prof. Manoj Kumar Sinha, Prof. Upendra Baxi and Prof. Furqan Ahmad at the function (left to right).

The workshop included three technical sessions wherein participants from all over India presented papers on the issue of divorce and gender equality in Islam.

The first technical session on "Men's Right to Divorce: Triple Talaq and Intervening Marriage (Halala)" was chaired by Professor Upendra Baxi and co-chaired by Ms. Flavia Agnes. Eminent speakers like Mufti Ejaz Arshad Qasmi, representative from All India Muslim Personal Law Board remarked that even though Triple Talaq finds no mention in Quran and is unapproved still all the four schools of Sunni jurisprudence recognise it and deem it valid. Dr. Kiran Gupta, Associate Professor, In-charge, Law Centre-II, Faculty of Law, University of Delhi emphasised that Quran has laid down the essential conditions and procedure for divorce which is recognise has been by Indian courts in various judgments. Dr. I.A. Khan, Professor and Chairman, Department of Law, Aligarh Muslim University suggested that instead of banning Triple Talaq it should be treated as single revocable divorce.

Ms. Taslima Yasmin, Assistant Professor, Department of Law, University of Dhaka, Bangladesh explained the legal position in Bangladesh on Triple Talaq. Professor (Dr.) Samiya Tabasaum, Director School of Law, Maharaja Agrasen University, Baddi, Himachal Pradesh and Dr. Abdul Azim Akhtar, Assistant Professor, SGT University, Mr. Zubair Ahmad Khan, Assistant Professor, USLLS, GGSIPU and Mohd. Umar, Assistant Professor, School of Law, Galgotia University, Noida also shared their opinions on the theme with the participants.

The second technical session on "Right to Khula: Unveiling Gender Equality concerns in India" was chaired by Professor M. Afzal Wani, Former Dean, USLLS, GGSIP University, Delhi and co-chaired by Professor (Dr.) Samiya Tabasaum. The keynote address was delivered by Professor Wani who spoke on the need to look at Islamic jurisprudence in the context of the reformist mission of the Prophet Muhammad (PBUH). Dr. Shweta Gagneja, Assistant Professor, Faculty of Law, University of Delhi, Dr. Saadiya, Assistant Professor, Faculty of Law, Jamia Milia Islamia, Mr. Prakash Sharma, Assistant Professor, Faculty of Law, University of Delhi and Ms. Tavleen Kaur Khurana, Research Fellow, GGSIPU. Ms. Fasila A.K. and Ms. Radhika, ILI alumni also presented their papers.

The third technical session based on the theme, "Muslim Law Reforms in India: Problems and Prospects" was chaired by Professor, M.P. Singh, Former Vice Chancellor, NUJS and Professor of Law, University of Delhi.

Professor Faizan Mustafa, Vice Chancellor, NALSAR, Hyderabad, while speaking on "Muslim Law Reform: Problem and Challenges highlighted the distinction between "*Sharia*" and "*Fiqh*". Any reforms from judiciary or legislature will not work. Law reforms should come from within the community. It is required to engage the Ulema in dialogues and convince them in the same way as has worked in the history, which led to the enactment of a progressive legislation, Dissolution of Muslim Marriage Act, 1939.

Professor Furqan Ahmad, Professor, ILI, speaking on "Muslim Law Reform Controversy and Role of Indian Muslim Jurist" also suggested the strategy of reform following the doctrine of Takhyar (eclectic choice) as applied by Moulana Ashraf Ali Thanvi while getting enacted Dissolution of Muslim Marriage Act, 1939. Dr. Anurag Deep, Associate Professor, Indian Law Institute spoke on "Fundamental Rights Issues in Muslim Personal Law-A Critical Study of Maintainability of Shayara Banu Petition under Article 32".

He highlighted that in the Shayara Banu case, currently *sub- judice*, the maintainability of writ petition before Supreme Court has been challenged on the ground that the subject matter of Triple Talaq, polygamy and *nikah halala* are matters of religious belief. However, this contention has been rejected by the Supreme Court in various constitution bench decisions.

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Prof. Upendra Baxi addressing the participants at the workshop

Mr. Fuzail Ahmad Ayubi, Advocate - on-Record, Supreme Court of India, referred to article 25 and 26 of the Constitution, and argued that Constitution provides provisions for safeguarding Muslim Personal Law and if any issue of interpretation arises, scriptures and holy book of Muslims can be referred. Also, Mr. M.R. Shamshad, Advocate - on - Record, Supreme Court of India, argued that the principle of equality cannot be applied without considering the fact of cultural differences and religious following which are core of the community. Dr. M. Asad Malik, Assistant Professor, Jamia Milia Islamia, Ms. Mini Srivastava, Assistant Professor, Amity University, Delhi, and Ms. Saema Jamil, Research Scholar, Faculty of Law, Delhi University also shared their views on the issue.

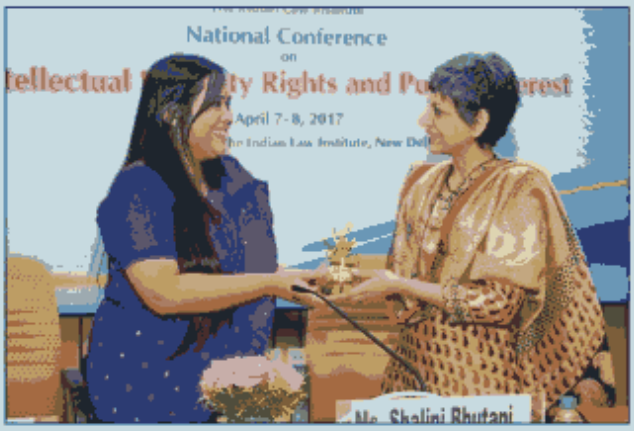
In his valedictory remark, the Professor M.P. Singh asserted that while the Constitution of India was being debated and framed, the Constitution makers left the issue of personal law on the communities. He stated that the appropriate time has not yet come when the law can be placed over them without their consent. Rather the community should suggest what is just and proper regarding gender related rights. The workshop was concluded with Mr. Shreenibas Chandra Prusty, Registrar, Indian Law Institute, proposing a vote of thanks.

National Conference on Intellectual Property Rights and Public Interest

The Indian Law Institute organised a two day National Conference on ***"Intellectual Property Rights and Public Interest"*** on the 7 and 8 April, 2017. The two day National Conference aimed at bringing together the intellectual minds over the country to discuss the emerging issues and trends in intellectual property rights *vis-a-vis* public interest commenced with the lighting of the lamp by the chief guests.

Mr. Shreenibas Prusty, Ms. Jupi Gogoi and Mr. T. C. James at the inaugural address.

The dignitaries on the dias included Mr. T.C. James, Director, National Intellectual Property Organization, Dr. Mira Shiva, Founder Coordinator and Co-Convenor of All India Drug Action Network, Mr. Shreenibas Chandra Prusty, Registrar, Indian Law Institute, and Ms. Jupi Gogoi, Assistant Professor, Indian Law Institute.



Ms. Jupi Gogoi and Ms. Shalini Bhutani at the conference

Mr. T.C. James delivered the inaugural address. He shared his experiences on the history of intellectual property rights and how it has created an island of exclusivities in the form of – monopoly. He also discussed the nuances of the Berne Convention, GATT Agreement, TRIPS Agreement, Doha Declaration, issues pertaining to special exceptions of intellectual minds over, compulsory licensing, role of competition and how private monopoly which smothers innovation cannot be allowed and there should be a balance between private economic rights and public interest rights.

The conference consisted of two technical sessions each spread over a period of two days. Dr. Alka Chawla, Associate Professor, University of Delhi, shared her expertise on the exceptions *i.e.*, marginalised groups and how intellectual minds over combats the same. Dr. Mira Shiva elaborately discussed on the health budget, national health policy, lack of research in case of tropical diseases, exorbitant pricing of drugs and its non

Group photograph of participants of the programme with Chief Guest, Registrar and faculty members of ILI.

-accessibility to people especially those falling below the poverty line, investor state dispute settlement and how TRIPS lacks behind in achieving these goals.

The second technical session on day one was chaired by Dr. Raman Mittal, Associate Professor, University of Delhi and Dr. Lisa P. Lukose, Associate Professor, USLLS, GGSIPU. Dr. Lisa P. Lukose gave her insights on traditional knowledge and opined that no *sui generis* mechanism for trademarks has evolved till date despite the discussions on the same taking place in various conferences, workshops and other forums.

Second day of the conference began with the remarks of respected panelist Ms. Shalini Bhutani, Legal Researcher and Policy Analyst as the chair person; she talked about the inter-relation between law and public interest. Then she briefly talked about the three important international conventions of United Nations which came in the year 1992, the Bio-diversity Act, 2002 and summed up saying what comes next apart from merely documenting the traditional knowledge and also about new IPR Policy and what value is it adding to the existing IPR regime.

The last technical session was addressed by chairpersons, Dr. Vikrant Vasudeva, Advocate Supreme Court and Dr. Deepa Kharb, Assistant Professor, Indian Law Institute they explained the position of intellectual property rights in the globalised era and highlighted the emerging issues relating to the intellectual property in international trade as well as the impact of the recent trade and investment treaties on flexibilities under the TRIPS agreement.

Seminar Course on Law and Violence

The Institute organised a one week seminar course on "Legal Theory: The Contexts of Justification/ Dejustification for Violence in a Civilized Society" from May 8-14, 2017.The course was taught by Professor Upendra Baxi, Emeritus Professor of Law, University of Delhi and University of Warwick, United Kingdom.

The course was open to postgraduate and doctoral students. The idea of the course was to explore different contexts of justification and dejustification of violence.

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Various themes were explored in the week long programme *viz.*, divine displeasure and violence; legitimate monopoly and control of means of violence; narratives of distinctions between legality and legitimacy; constitutionalism and violence; terror, violence and the law. Professor Baxi laid down the conceptual framework for thinking about violence through his lecture on theories of evil and contradictions.

The students were provided with an elaborate course material which included selected texts on different modules of the course. The course pack was a bouquet of inter-disciplinary material. Each student was required to make a presentation on pre-assigned texts which was followed by discussion.

Ms. Latika Vashist, Assistant Professor was the faculty coordinator of the seminar course.

Monthly Discussion Series

In continuation of the initiative of monthly discussion series, a discussion was held on April 12, 2017 on the topic *SherSingh@ Pratapa* v. *State of Haryana* [2015 (1) SCALE 250]. The members of the panel were Professor Manoj K Sinha, Anurag Deep, Associate Professor, Dr. Jyoti Dogra Sood, Associate Professor and Ms. Latika Vashist, Assistant Professor. This discussion was followed by question answer session by the panel members, other faculty members, Ph.D. research scholars and the LL.M. students of the Institute.

SPECIAL LECTURES

Professor B. P. Panda, Vice Chancellor, Maharashtra National Law University, Mumbai delivered a special lecture for LL.M. students on the topic "Teaching Methods Pedagogy and Social Justice" on April 6, 2017.

Dr. Ashley Tellis, Independent Researcher and LGBT Activist delivered a special lecture for LL.M. students on the topic "Minority as Vulnerable Group" on April 13, 2017.

Dr. Rakesh Ankit, Assistant Professor/ Assistant Director, Centre for Law and Humanities, Jindal Global Law School delivered a special lecture for Ph.D. and LL.M. students on the topic "Constitutionalism and Republic" on April 21, 2017.

Dr. Kishore Singh, Former UN Special Rapporteur on the Right to Education delivered a special lecture for LL.M. students on the topic "Human Values and the Right to Education" on April 27, 2017.

Dr. Kishore Singh, Former UN Special Rapporteur delivering special lecture to the students.

Mr. Amit Bindal, Assistant Professor, Jindal Global Law School delivered a special lecture for LL.M. students on the topic "Alternative Cosmologies and Indigenous Imagination" on May 2, 2017.

Ms. Shalini Bhutani, Legal Researcher and Policy Analyst delivered a special lecture for LL.M. students on the topic "Bio-diversity protection and the Indian Legal Scenario" and Plant Varieties and Farmers Rights" on May 2 and 4, 2017.

Professor S.N. Singh, Former Dean, University of Delhi, delivered a special lecture for LL.M. students on the topic "Professional Ethics and Role of Bar Council, Lawyer, Judges and Academicians" on May 5 and 11, 2017.

Dr. U. C. Jha, Wing Commander (Retd.) delivered a special lecture for Ph.D. and LL.M. students on the topic "Role of the ICRC in implementation of International Humanitarian Law" on May 9, 2017.

RESEARCH PROJECTS

Project from Ministry of Panchayati Raj, Government of India

The Indian Law Institute has been entrusted by the Ministry of Panchayati Raj (MoPR) a project on the "*A Study on Case laws relating to Panchayati Raj in Supreme Court and Different High Courts*". The study inolves a gist of various high court and Supreme Court cases on the Panchayati Raj System in India. Report on the "Compilation of Judicial Pronouncements on Panchayati Raj System in India" has been submitted and follow up action in many cases has been initiated by the Institute.

Project from the National Investigation Agency

The National Investigation Agency (NIA), Ministry of Home Affairs, Government of India has entrusted a project to the Indian Law Institute to prepare a Compendium of Terrorism Related cases in order to draft a Model Investigation and Procedural Manual.

The project was divided into two phases. The first phase included analysis of all the state high courts and Supreme Court decisions on terrorism. The second phase included the analysis of all the trial court decisions followed by scrutiny. A draft of the Compendium has already been submitted to the NIA officials by the Institute.

Project from Central Information Commission, Government of India

Central Information Commission has entrusted a project to the Indian Law Institute on "Evaluation of Transparency Audit of Public Authorities". The study is under progress.

ACADEMIC ACTIVITIES

- The Institute offers admission for Ph.D., LL.M. (1 Yr.) and four Post Graduate Diploma Courses of one year duration in Alternate Dispute Resolution (ADR), Corporate Laws and Management (CLM), Cyber Law (CL) and Intellectual Property Rights Law (IPRL). The admission process for academic year 2017-2018 started with the sale of prospectus *w.e.f.* May 1, 2017. LL.M.
- The All India Entrance Examination for Ph.D. was conducted by the Institute on June 10, 2017. Merit list has been declared and Viva-Voce for the same has been scheduled in the month of July, 2017.
- The last date for application for the Post Graduate Diploma Courses was on July 3, 2017. The merit lists for the same are under preparation and shall be displayed within the time frame.
- The Institute offered internship opportunities to the law students from various universities during April - June, 2017. Around 30 interns participated from different universities *viz.*, Central University of South Bihar, Vivekananda Law School, New Law College, Pune, MUST, Rajasthan, *etc.*

RESEARCH PUBLICATIONS

Released Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 59 (1) (January- March, 2017).
- Book on *Environment Law and Enforcement: The Contemporary Challenges.*

Forthcoming Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 59 (2) (April- June, 2017).
- Book on *Right to Bail.*
- *ILI Law Review* 2017 (Summer Issue).

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E-LEARING COURSES

"Cyber Law" and "Intellectual Property Rights Law"

Cyber Law

The 27th batch of three months started from May 18, 2017. A total of 79 students enrolled for this batch.

Intellectual Property Rights Law

The 38th batch of three months duration started from May 18, 2017. A total of 70 students enrolled for this batch.

EXAMINATION

All India Common Admission Test for admission to LL.M. and Ph.D. Programmes

The All India Common Admission Test (CLAT) for admission to the LL.M. Programmes was conducted on June 10, 2017 at ILI, New Delhi. 512 candidates appeared for LL.M. – 1 Yr. programme. 21 candidates appeared for the Ph.D. programme. The merit list of candidates shortlisted for interview/ viva shall be notified as per the approved schedule.

Examination for P.G Diploma

Annual Examination for Post Graduate Diploma Courses was successfully conducted from April 10-30, 2017. The result for the same was declared in June.

Examination for LL.M/ Ph. D Programmes

Examinations for LL.M (1 yr/ 2 yr/ 3 yr) were successfully conducted in the May. Result for LL.M 2 yr/ 3 yr was declared in the month of June. Examination for Ph.D. Coursework was conducted from 23-28 May, 2017.

LIBRARY

- Library in this quarter added 95 books on various topics such as Business Law, Cyber Law, Criminal Law, Comparative Law, Tax Law, Company Law and Intellectual Property Rights to enrich the collection.

- Upgraded its Library Management Software *i.e.*, from LIBSYS 4 to LIBSYS 10 along with the LSmart System. The Electro-Magnatic gates have also been upgraded for security of books. LIBSYS 10 is a smart Web centric system providing access through industry standard web browsers.

- In the process of digitization, 'Journal of the Indian Law Institute' (JILI) -2016 has been digitized and put on Institute's website which may be accessed through the link: *http://14.139.60.114:8080/jspui/handle/123456789/43119*

- 20 students along with faculty members from Department of Law, University of Gauhati visited the library on June 19, 2017. A brief introduction was given to them about various resources and services available with the library.

- The Library Committee in its meeting held on May 18, 2017 appreciated the initiative and efforts undertaken by the Institute's library for being a part of MHRD's National Mission on Education through Information and Communication Technology (NME-ICT) and sharing Institute's Institutional repository at National Digital Library (NDL) platform. The Institute's repository may be accessed at NDL Platform through the link: *https://ndl.iitkgp.ac.in/.*

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VISITS TO THE INSTITUTE

Ms. Samanthi Dias, Attorney-at-Law, from Sri Lanka visited the ILI. She was on a personal visit to the Institute on June 27, 2017 along with former Vice President Mr. Rakesh Munjal. They discussed with Director in detail about the growth and forthcoming activities of the Institute.

She also visited the library of the Institute and was apprised with a detailed introduction about the process and growth of Indian law Institute's virtual library. She praised the rare collection of books, journals and law reports *etc* and also admired the system to retain the same.

Ms. Samanthi Dias along with Mr. Rakesh Munjal and Prof. Manoj Kumar Sinha.

FORTHCOMING EVENTS

- The Human Rights and Business Academy (HURBA) in collaboration with the Indian Law Institute Delhi (ILI) will organise an intensive certificate course on "Business and Human Rights" (BHR) from July 3-8, 2017.
- ILI in collaboration with HURBA will organise an International Conference on July 8, 2017.
- The Institute will organise a two day training programme by NHRC for first class Judicial Magistrate on 15-July 16, 2017.
- Training programme for 25 officials from Myanmar shall be organised from July 24-28, 2017.
- Interviews for admission in Ph.D. and LL.M. one year programmes are scheduled in July, 2017.

LEGISLATIVE TRENDS

I. Ordinance:

THE BANKING REGULATION (AMENDMENT) ORDINANCE, 2017

(May 4, 2017)

The ordinance is in continuation of recent initiatives taken by the government for expeditious resolution of stressed assets in the banking system. Stressed assets are loan accounts where the borrower has defaulted in debt repayment or where the repayment schedule has been restructured. The recent enactment of Insolvency and Bankruptcy Code (IBC), 2016 has opened up new possibilities for time bound resolution of stressed assets. The SARFAESI and Debt Recovery Acts have been amended to facilitate recoveries.

Key highlights:

The promulgation of the Banking Regulation (Amendment) Ordinance, 2017 inserting two new Sections (viz. 35AA and 35AB) after Section 35A of the Banking Regulation Act, 1949 enables the Union Government to authorize the Reserve Bank of India (RBI) to direct banking companies to resolve specific stressed assets by initiating insolvency resolution process, where required. The RBI has also been empowered to issue other directions for resolution, and appoint or approve for appointment, authorities or committees to advise banking companies for stressed asset resolution.

The ordinance intends effective resolution of stressed assets, particularly in consortium or multiple banking

arrangements, as the RBI will be empowered to intervene in specific cases of resolution of non-performing assets, to bring them to a definite conclusion.

II Acts:

THE MENTAL HEALTHCARE ACT, 2017

(April 17, 2017)

An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto.

The Act has been formulated in line with the Convention on Rights of Persons with Disabilities and its Optional Protocol adopted by the United Nations. The Mental Healthcare Act, 2017 (the 'Act' hereinafter) repeals the existing Mental Health Act, 1987.

Key highlights:

- The Act lays down a broader, more inclusive and specific definition of mental illness.
- Decriminalising attempt to commit suicide: Section 115 provides that whoever attempts suicide will be presumed to be under severe stress and shall not be tried and punished for attempt to commit suicide under section 309 of Indian Penal Code.
- Introduction of advance directives- Section 5 gives people suffering from a mental illness the right to choose their mode of treatment and to nominate representatives who will ensure that their choices are carried out. The legal guardian as per section 11(4) of the Act shall have right to make an advance directive in writing in respect of a minor which shall apply to such minor till such time he attains majority.
- Establishment of a Central Mental Health Authority at the national level (chapter VII) and a State Mental Health Authority (chapter VIII) in every state of the country. Every mental health institute and mental health practitioner will have to be registered with this authority. In addition, a Mental Health Review Board will be constituted at the state level to protect the rights of persons with mental illness. Any person/nominee aggrieved by the decision of any of the mental health establishment or whose rights under this Act have been violated, may make an application to the Board seeking redressal or appropriate relief.
- Rights to persons with mental illness: The Act creates a rights-based framework for mentally ill persons and holds the government accountable for service delivery. Spread over ten sections (section18-28), Chapter V guarantees every person with mental illness certain rights like-
  - the right to access mental health care and treatment from the government(section 18),
  - right to community living i.e. to live in their communities with respect and dignity society and not continue to remain in a mental health establishment (section19)
  - right to equality of treatment and protection from inhuman and degrading treatment(section 20,21)
  - right to confidentiality (section23, 24). Photographs or any other information pertaining to the person cannot be released to the media without the consent of the person concerned.
  - right to receive free legal services to exercise any of the rights provided by this Act (section 27).

- Awareness generation- The central government is required to take appropriate measures for creating awareness about mental health and illness and reducing stigma associated with mental illness.

- Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the Board is empowered by or under this Act to determine, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

THE EMPLOYEE'S COMPENSATION (AMENDMENT) ACT, 2017

(April 12, 2017)

An Act further to amend the Employee's Compensation Act, 1923. The Act provides for the payment of compensation to employees and their dependants in the case of injury by industrial accidents, including occupational diseases.

Key Highlights:

- Insertion of new section 17A which provides that every employer shall immediately at the time of employment of an employee, inform the employee of his rights to compensation under this Act, in writing as well as through electronic means, in English or Hindi or in the official language of the area of employment, as may be understood by the employee.

- In case of default on the part of employer, the amendment has increased the penalty amount to a minimum of fifty thousand rupees which may extend upto one lakh rupees.

- As per the amended act, appeals can be made against orders related to compensation, distribution of compensation, award of penalty or interest, only if the amount in dispute is at least ten thousand rupees. The same has been revised from the earlier minimum amount of three hundred rupees.

- Any dispute related to an employee's compensation will be heard by a commissioner who will have the powers of a civil court. Appeals from the commissioner's order, related to a substantial question of law, will lie before the high court.

- In a further amendment, the Act has scrapped the rule as per which the employer could temporarily withhold any payments towards the employee in case the former had appealed against a commissioner's order.

LEGAL JOTTINGS

Sexually assaulted victim not to go through further sufferings

The quintessential purpose of life, be it a man or a woman, is the dignity of life and all efforts are to be made to sustain it. Where a 35-year-old woman victim of sexual assault carrying pregnancy of five months (22 to 24 weeks) had sought for termination of pregnancy on the ground that she is HIV positive, the Supreme Court, after considering the report of the medical board of All India Institute of Medical Science (AIIMS) which stated that the procedure involved in termination of the pregnancy is risky to the life of the petitioner and the fetus in the womb, held that as termination of pregnancy could not be done as per the report of the medical board of AIIMS directed the State of Bihar not only to bear the cost of her treatment but also awarded damages of 3,00,000/- to the victim as compensation under the scheme of section 357A Code of Criminal Procedure, 1973 within four weeks as she has been a victim of rape.

[*Indu Devi* v. *State of Bihar*, 2017 SCC OnLine SC 560].

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Showing signs of reformation after initiating review petition not enough to save a man who raped and murdered a child

The aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances brought on record in the review petition and were not enough to save a man from death sentence. The review was sought on the grounds that after the court awarded him death sentence, the petitioner completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and cleared the Gandhi Vichar Pariksha and had participated in drawing competition. It was also asserted that the jail record of the petitioner is also without any blemish.

[*Vasanta Sampat Dupare* v. *State of Maharashtra*, 2017 SCC OnLine SC 524, decided on May 3, 2017].

Public interest litigation cannot be used as a tool to direct the apex court

What shall be taught in the schools or what shall be included in the syllabus of all classes cannot be directed by the Supreme Court in exercise of power of judicial review and also in exercise of power relating to entertaining public interest litigation where rule of locus is not insisted upon and the scope and ambit have been exercised. It was said any litigant should not feel, when he files a public interest litigation that his hope and aspirations for anything and everything deserves to crystalise. He should not harbour the feelings that for any idea to be fructified, he can knock at the doors of this court under article 32 of the Constitution of India.

Refusing to entertain the public interest litigation seeking issuance of a writ of *mandamus* and appropriate directions commanding the Union of India and all the states and union territories to incorporate detailed life history and teachings of all the ten Sikh Gurus along with Guru Granth Saheb in syllabus of all the classes in history books for teaching, the court said the broad canvass that is sought to be painted in this petition does not come within the domain and sphere of the public interest litigation.

[*Subhash Chander Katyal* v. *Union of India*, 2017 SCC OnLine SC 465].

Eve teasing violates womens right to live with dignity

Pained by the sorrowful fate of a young girl who committed suicide as an outcome of the psychological harassment and continuous eve-teasing by the accused, the court said that in a civilized society male chauvinism has no room. The right to live with dignity as guaranteed under article 21 of the Constitution cannot be violated by indulging in obnoxious act of eve-teasing.

Eve-teasing is causing harassment to women in educational institutions, public places, parks, railways stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated, the three judge bench of Dipak Misra, A.M. Khanwilkar and M.M. Shantanagouda, JJ said that why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom.

[*Pawan Kumar* v. *State of Himachal Pradesh,* 2017 SCC OnLine SC 509 decided on April 28, 2017].

ISSN 2455-7242

FACULTY NEWS

Manoj Kumar Sinha chaired a session on "*Disruptive Innovation in Legal Services*" organized by Deakin Law School, Melbourne, Australia, May, 22-24, 2017.

Invited as Chief Guest to address the participants in one day National Conference on "*New Developments & Challenges in Protection of Intellectual Property Rights*" organised by Meerut University May 6, 2017.

Invited to judge the final round of 2nd VITSOL National Moot Court Competition on International Law, organised by VIT School of Law, Chennai, April 9, 2017.

Delivered lectures on *'General Protection under International Humanitarian Law and Prisoners of War'* to the participants of teachers training programme organised by the International Committee of the Red Cross (ICRC) and Pune University, Pune on April 4, 2017.

Furqan Ahmad was invited to deliver inaugural lecture at the faculty development programme on "*Legal Research and Teaching Methodologies in Contemporary Era*" from June 5-9, 2017, organised by Centre for Post Graduate Legal Studies, School of Law, the NorthCap University, Gurugram.

Anurag Deep presented a research paper in the National Seminar on Caste Panchayats, Democracy and Constitutional Values on April 15-16, 2017 at the National Law University, New Delhi. The title of the paper was '*Denial of Arbitrariness Principle in Rajbala: Did the Supreme Court followed the Correct Precedent*?'

Published an article on "Legislative Intention -A Critical Study of Recent Trends, Tools and Techniques in India" in *Aligarh Law Journal*: vol. XXIV (academic year 2016-17).

Jyoti Dogra Sood participated in a day long consultation on Child Marriage and related issues organized by the National Commission on Protection of Child Rights on April 25, 2017.

Susmitha P Mallaya was invited to deliver a special lecture on "Dishonour of Cheque: Recent Trends" at Delhi Metropolitan Education, NOIDA affiliated to Guru Gobind Singh Indraprastha University, New Delhi on April 19, 2017.

Latika Vashist participated in the London Critical Theory Summer School 2017, Birkbeck Institute for the Humanities, University of London from June 26 – July 7, 2017.

Organised and coordinated the *"Seminar Course on Law and Violence"* conducted by Professor Upendra Baxi from May 8- 14, 2017.

Presented a paper titled *"Anger in Criminal Law: Towards a Psychoanalytic Theory of the Legal Subject"* at Criminal Justice and Critical Theory : A Workshop, National Law Unversity, Delhi on 6-7 April, 2017.

Discussant on the panel on "The Construction of Offenders by the Supreme Court" at *Academic Colloquium on Judicial Reasoning and Judicial Behaviour: A Study of the Supreme Court of India* organsied, by Centre for Public Law and Jurisprudence, Jindal Global Law School from April 29 - 30, 2017.

CASE COMMENTS

Re: Exploitation of Children in Orphanages in the State of Tamil Nadu* v. *Union of India

AIR 2017 SC 2546

Decided on May 5, 2017

The Supreme Court of India issued significant directions to the Government of India in *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu* v. *Union of India*. This writ petition was taken on the basis of an article published in Hindustan (Lucknow edition) on July 4, 2007, alleging cases of

sexual abuse in orphanages run by NGOs and the government in Mahablipuram in Tamil Nadu. The author, in her article, highlighted the fact that the problem of sexual abuse of children in government institutions has become a serious problem and requested immediate redressal. The court had previously passed several orders related to children, namely orders related to trafficking of children, school premises taken by military forces and the right to education guaranteed to children. In this case the court sought to enlarge the scope of public interest litigation to address the general welfare of children. It was submitted under this petition that the rights of children can be adequately secured only if the monitoring and controlling provisions contained in statutes relating to children such as The Commissions for Protection of Child Rights Act, 2005, the Right of Children to Free and Compulsory Education Act, 2009, The Protection of Children from Sexual Offences Act, 2012 and the Juvenile Justice (Care and Protection of Children) Act, 2000 are fully implemented. Despite the Court's detailed order December 16, 2013 there was no satisfactory progress made by the state and union territories in protection of the rights of children. The court further noted the lack of empathy with respect to child sexual abuse, which often involves persons in positions of authority and ineffective implementation of the laws passed by Parliament, virtually making parliamentary legislation irrelevant. The court stressed that the Juvenile Justice (Care and Protection of Children) Act is a medium for the state to honour the Directive Principles of State Policy particularly under article 39(f) of the Constitution by giving children the opportunity to develop in a healthy manner and in conditions of freedom and dignity. Three important categories of children at risk were, namely: (i) Children in need of care and protection (ii) trafficked children and (iii) street children. With regard to the rights of children in need of care and protection, it was highlighted that child care institutions, whether managed by the state, NGOs or voluntary organisations, need to follow certain minimum standards of care, and rehabilitation of children must be a priority of these institutions. Unfortunately, the court found that, despite adoption of the Juvenile Justice Act, 2015 which mandated registration of all institutions by July 15, 2016, the registration process for residential care institutions in India was incomplete. The court directed the government of the state and union territories to complete the registration process for child care institutions by December 31, 2017 and stressed the need for creation of a database of all children in need of care and protection. Article 3(3) of the Convention on the Rights of the Child, 2005 specifically obligates the state parties to ensure that institutions responsible for care and protection of children conform to standards laid down by competent authorities, particularly in the areas of safety, health, staff and supervision. The court also emphasised that the National Commission for Protection of Child Rights (NCPCR) and State Commissions for Protection of Child Rights (SCPCR) be allowed to function in terms of the CPCR Act and POCSO Act, 2012 and only for the benefit of children. In addition to the above directions the court further directed the governments of the state and union territories to, among other things, set up inspections of institutions, prepare individual child care plans for all children in care, set up an inspection committee, implement rehabilitation and social re-integration schemes for children leaving care, ensure the training of personnel involved, and conduct social audits. The court also directed the government to submit a status report regarding its direction on or before January 15, 2018.

The court stressed that, despite the fact that laws are in place for the protection of children, it has been found that violations within child care institutions and outside happen regularly. It is important to mention here that the Government of India ratified the CRC on December 11, 1992. According to article 19 of the CRC the government has an obligation to take all necessary steps to protect the child from all forms of violence. The governments of the state and union territories will take necessary steps for protection of

the rights of the child and ensure implementation of the directions given by the court.

Manoj Kumar Sinha

Rajasthan Wakf Board* v. *Devki Nandan Pathak

AIR 2017 SC 2155

Decided on May 4, 2017

The brief facts of the case were that a property was sold which was claimed to be *waqf* property by the *mutawalli*. This sale gave rise to the dispute between the *waqf* represented by the *mutawalli* on the one hand and on the other the person who claimed to be the owner of the said property and the persons to whom the sale was made.

The main issue in the appeal was whether the high court was justified in declaring that the suit was not capable of being tried by the tribunal under section 83 of the act and that the remedy lay in filing a civil suit before the civil court.

Mutawalli filed a suit against the person claiming to be owner of the said property and the persons to whom the sale was made, before the wakf tribunal. The foundation on which *mutawalli* filed the suit for claiming relief was that the "suit land" was the *waqf* property or, a part of the *waqf* property and hence respondent, who was an individual and unconnected with the affairs of the *waqf*, had no right, title and interest to sell the suit land to anyone much less to other respondents. The tribunal decreed the suit and passed an order against the respondents. It was held that firstly, the tribunal has the jurisdiction to try the suit; secondly, the respondent who was the *mutawali* of the *waqf* property and, therefore, competent to file the suit in relation to the suit land; and thirdly, the suit land was the *waqf* property or, in other words, a part of the *waqf* property and, therefore, it was subjected to the Wakf Act, 1995. Respondents filed the revision under section 83(9) of the Wakf Act, 1995 in the high court. The single judge of the high court allowed the revision and set aside the order of the tribunal on the ground that the tribunal had no jurisdiction to try the suit and the remedy of respondents was to file civil suit before the civil court. The high court did not examine the merits of the issues arising in the case. Hence, the present appeal was preferred.

The Supreme Court held that section 83 of the Act empowers the tribunal to determine any dispute, question or other matter relating to a *waqf* or *waqf* property under the Wakf Act 1995. Section 85 of the Act which deals with the bar of jurisdiction of civil court provides that no suit or other legal proceedings shall lie in any civil court in respect of any dispute, question or other matter relating to any *waqf*, *waqf* property or other matter which is required by or under this Act to be determined by the tribunal. The tribunal was right in its view in holding that it had the jurisdiction to try the suit on merits whereas the high court was in wrong in holding that the jurisdiction lay with the civil court instead of tribunal.

Having heard counsel for the parties and on perusal of the record of the case, the Supreme Court found force in the submission of the counsel for the *waqf* board which argued that the question as to whether a particular property is a *waqf* property or not has to be tried and decided by the tribunal under section 83 of the Act and the jurisdiction of the civil court to decide such question is expressly barred by section 85 of the Act.

The apex court further observed that since The Wakf Act, 1995 was amended by The Wakf (Amendment) Act, 2013 and that present the case was governed by the unamended Act, that's why the court considered some of the relevant unamended provisions of the Act which are as under:

(i) Section 51 of the Act provides that notwithstanding anything contained in the *waqf* Deed, any gift, sale, exchange or mortgage of any immovable property, which is a *waqf* property, shall be void unless it is effected with the prior sanction of the Board.

(ii) Section 52 of the Act empowers the board to approach the collector of the district to obtain

possession of such *waqf* property, which is alienated in contravention of section 51 or section 56 of the Act. It also provides a right of appeal to the tribunal against the order of the collector passed under section 52(2) of the Act.

(iii) Section 54 of the Act provides that the chief executive officer to approach the tribunal to seek an order of eviction against any encroacher of the *waqf* property.

(iv) Section 83 of the Act empowers the tribunal to determine any dispute, question or other matter relating to a waqf or *waqf* property under this Act. Section 85 of the Act which deals with the bar of jurisdiction of civil court provides that no suit or other legal proceedings shall lie in any civil court in respect of any dispute, question or other matter relating to any *waqf*, *waqf* property or other matter which is required by or under this Act to be determined by the tribunal.

After considering the submissions mentioned in the plaint as well as in the light of aforementioned sections, the court was of the view that the tribunal was right in holding that it had the jurisdiction to try the above suit.

Whether a property is a *waqf* property or not is a question to be decided only by the tribunal and not by the civil court in the view of the supreme court and in this regard the apex court referred to the its earlier precedents viz., *Ramesh Gobindram* v. *Sugra Hamayun Mirza Waqf* (2010) 8 SCC 726 and *Bhanwar Lal* v. *Rajasthan Board of Muslim Wakf* 2014) 16 SCC 51).

The apex court has also observed that once the property is declared to be a *waqf* property, a *fortiori*, whether the sale of such property is made by a person not connected with the affairs of the *waqf* or by a person dealing with the affairs of the *waqf*, the same becomes void by virtue of section 51 of the Act unless it is proved that it was made after obtaining prior permission of the Board as provided under the Act. The court further viewed that it is undisputed that the matters falling under sections 51 and 52 of the Act are also required to be decided by the tribunal and hence jurisdiction of the civil court to decide such matters is also barred by virtue of provisions contained in section 85 of the Act.

Since the high court while deciding the question did not examine the question in its proper perspective, the impugned order was set aside by the apex court and the matter was remanded to the high court for deciding the revision afresh on merits with a view to decide as to whether the findings of the tribunal on merits by which the suit was decreed were correct or not.

It is respectfully submitted that the division bench of the apex court has rightly interpreted the provisions of the Wakf Act, 1995 and the amendments made therein in 2013 and accordingly this is the intention of the legislature was to avoid encroachment as far as possible of the waqf properties and that's why instead of civil court a special tribunal was initiated to decide the waqf cases. Thus the apex court did affirm the intention of the legislature and tried to save the economy of that community which is economically much backward.

Furqan Ahmad

Seeni Nainar Mohammed* v. *State Rep. by Deputy Superintendent of Police

2017 (5) SCALE 392

Decided on April 27, 2017

Counter terror laws have been facing the criticism of being abused at the hand of State. It has been accused of being biased against minority community. While there seems some merit in the argument that police has abused the power against weaker section of society (of all religions) the genesis lies in the hard fact that the persons in power use police as a tool to serve petty political and financial interest. While identifying this malady, the intellectual writings in the area of counter terror laws have been reckless in concluding that most of the acquittals are cases of merit acquittals. The abuse of counter terror laws have

been blown out of proportion and police has been projected as the sole culpable party to the abuses. It is correct that a number of time long trial in the court and hard work of a few goes in vain because of a negligent (may be because they are hard pressed of time and over burdened responsibilities) police executive or unequipped prosecution machinery. 'Excellence is not an act, it is a habit.' Execution of law and prosecution of a case especially those under counter terror laws has to be cultivated as an excellent habit if India wishes to successfully check the *sui generis* enemy of terrorism.

In the present case, six accused of a minority community were prosecuted under Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) for killing Rajagopalan, who was President of Hindu Munnani Association. The designated TADA court found the appellants guilty for offences punishable under section 120(B) read with sections 302, 147,148 and 149 of the Indian Penal Code, 1860 and sections 3(2), 3(3) and 3(4) of the TADA. The issues involved include whether this murder case is suitable for application of TADA and whether the sanction granted under section 20A of TADA are valid? Under section 20A permission of sanctioning authority (Inspector General of Police or IG) is mandatory before chargesheet is submitted in the court. As the chargesheet was under section 3(intent to create terror) the sanctioning authority has to apply his mind whether section 3 of TADA is correctly applied or not.

The sanctioning authority (IG) stated in the court that he perused all the records before reaching to the conclusion that the case deserves sanction for prosecution. The records placed before him were the Inquest Report, Post-mortem Report, section 164 Statements of eye-witnesses (Recording of confessions and statements by Magistrate) and section 161 statements of other witnesses (Examination of witnesses by police), confession of A-1. There was another document *ie.*, confession of A-6. The Supreme Court found that (i) The investigating officer (IO) did not place the confession of A-6 before IG.(ii) 'Confessions of A-1 and A-6 were not voluntary 'since those confessions were not recorded in a free atmosphere.' (iii) The confession of A1 and A6 both were contradictory. (iv) The sanctioning authority did not know Tamil in which various documents were available and used only those material which were in English.

Based on four reasons as above the court concluded that it was a case of non-application of mind by sanctioning authority (IG here) who did not or could not consider records in its entirety while granting approval for taking cognizance under TADA Act and undermining the objective of the Act. The Supreme Court also held that section 20A is a mandatory provision besides a penal provision. It has to be interpreted strictly and any mechanical application is bad in law. Section 3 for which sanction was to be given needs intention 'to strike terror in the people or any section of the people.' In other words the deceased was intentionally killed with the intention to generate terror among people. These types of crimes contain two types of intention. General intention and specific intention. Prosecution is required to prove both. For this IG was required to *prima facie* find material for special *mens rea ie.*, intent to create terror among public. The court found that there is no case for such special intent. For this special intent some evidence is required, like 'an adverse effect on the harmony amongst different sections of people in the vicinity of the place of incident.' It was, therefore, a general intent crime (of murder) and not a special intent crime (of killing for terrorism). The court is giving weightage to the 'consequence test' and therefore it is looking for some consequence after the killing of the deceased. Consequence test is in tune with interpretation of provisions that deal with sovereignty. (In sedition cases also the court needs some consequences of the statement made.) Moreover In the case of *Hitendra Vishnu Thakur* v. *State of Maharashtra* AIR 1994 SC 2623, *it was observed that* every 'terrorist' is a criminal but not *vice versa.* A criminal cannot be given the label of a 'terrorist' only to set in motion the more stringent

provisions of counter terror law. In the case under discussion (*Seeni Nainar Mohammed*) the killing seems to have a religious overtone but there was no proof that the killing was committed to challenge the sovereignty and integrity of country. In the case of *Vyas Ram @ Vyas Kahar* v. *State of Bihar* (2013) 12 SCC 349 also the caste war between upper and lower caste was prosecuted under TADA while it was indeed a law and order problem.(see case comment in *News Letter* July to Sept 2013).

The consistent failure of executives in appreciating the effective application of counter terror laws indicate the lack of proper training, adequate understanding of purpose of law and their unawareness about judicial decisions. The application of TADA in *Seeni Nainar Mohammed* can be one such illustration. The incident took place in 1994 and sanction for TADA was sought in 1997. The judgement of *Hitendra Vishnu Thakur came in 1994 which laid down the criteria to impose TADA provisions. It seems the sanctioning authority was unaware of the judgement. There is no mechanism where the impact of a judgement on execution of law is communicated to the executive authorities unless the judiciary* directs the government to take note of in the operative part of the judgement. It is the duty of the intellectuals and researchers in law to convey the impact of judgement to the executives. The government may also manifest to acquire a think tank which researches only on the impact of judicial decisions in the execution of laws. Had it been done earlier, this case would never have come to the court as a case under counter terror laws.

Anurag Deep

The State of Haryana* v. *Narender Soni

2017(6) SCALE 602

Decided on May 25, 2017

This is an appeal filed against the Punjab and Haryana High Court's decision of May 9, 2017 in which it set aside the Haryana Government notification of May 5, 2017.The Punjab and Haryana High Court's decision was on a petition filed by Narinder Soni, challenging the prospectus issued by Haryana for admissions in 2017-18 session post graduate medical for on the ground that institutional preference granted by the state and the incentives to in-service Haryana Civil Medical Service (HCMS) doctors in the prospectus were against the provisions of Regulation 9 (IV) of the Post-Graduate Medical Education Regulations, 2000 framed by the Medical Council of India. It was contended that the incentives in the form of marks to in-service doctors could only be given for services rendered in notified difficult and/or remote areas and not in all rural areas.

In the meantime, State of Haryana issued a notification on May 5, 2017 in which institutional preference was withdrawn from the prospectus and the criteria for the grant of incentive to the doctors at 10% of the marks obtained for each year, with a cap of 30%, was notified along with the list of difficult and remote areas. The notification was issued after the result of NEET had been published.

The high court made it clear that the decision to notify areas as remote or difficult must be applicable to all the beneficial schemes of the state for such areas, and not limited to the matter of admissions in post graduate medical courses, in terms of the Supreme Court's judgment in *State of U.P.* v. *Dinesh Singh Chauhan* (2016) 9 SCC 749. The counsels for the appellant contended that four criteria were considered to identify remote and/or difficult rural area. The four criteria were:

i. Health institutions not preferred by doctors for posting;

ii. CHCs and PHCs falling in the areas beyond 10 kilometers from the municipal limits,

iii. Challenging and difficult institutions/areas identified by the department in 2005 and 2006, and

iv. PHCs and CHCs falling in less developed areas of Mewat and Siwalik areas.

The precise question before the apex court was, the correctness of the notice issued by government. The apex court contended that the notification of May 5, 2017 notifying remote and difficult areas in the State for the grant of weightage in the marks obtained in National Eligibility-cum-Entrance Test (NEET) is based on a completely flawed process of identification, applying irrelevant criteria and ignoring relevant considerations.

The court stated that in order to identify an area as remote and/or difficult on the basis of unwillingness of doctors to join at those locations, which can be for numerous reasons cannot be held to be compelling and relevant criteria. The identification of these areas cannot be only for the purpose of admission in medical course as was held in *D.S. Chauhan*. Court also emphasised that the state must first identify the difficult and remote areas and then, should look into the lack of availability of doctors on these areas. The approach adopted by state government appears to be a turnaround of whole decision making process. Furthermore, court maintained that the proviso to Regulation 9(IV) is not a compulsion but merely an enabling provision.

It is here pertinent to refer to *Sharp* v. *Wakefield* (1891) AC 173 (179), wherein Lord Halsbury observed:

> Discretion means when it is said that something is to be done within discretion of the authorities that something is to be done according to the rules and justice , not according to private opinion…according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.

As the present case involves non-application of mind on the part of state government, the apex court has attempted to reflect upon the significance of exercise of discretionary powers with proper care and prudence. The decision puts stress on exercise of discretionary powers, to be fair, reasonable and only for the purpose for which the power has been conferred upon authority.

Vandana Mahalwar

Excel Crop Care Ltd. v. *Competition Commission of India*

2017(6) SCALE 241

Decided on May 05, 2017

The Supreme Court bench comprising of AK Sikri J and NV Ramana J in the present case was considering an appeal arising out of an order of the Competition Appellate Tribunal (COMPAT) in relation to an alleged contravention of section3(3) of the Competition Act, 2002 (the 'Act' hereinafter) in the public procurement of APT(aluminium phosphide tablets). The three manufacturers, M/s. Excel Crop Care, M/s. United Phosphorous Ltd, and M/s. Sandhya Organics Chemical Pvt. Ltd. were found guilty of cartelisation and collusive rigging by the Competition Commission of India (CCI) which imposed a penalty of Rs 318 crore in total(63.90 crores on Excel,1.57 crores on Sandhya Organics and 252.44 on United) @ 9% of the average total turnover of three preceding years of the affected companies under section 27(b) of the Act. The appellate tribunal though maintained the rate of penalty *i.e.,* 9 percent of three years average turnover but did not agree with the CCI that 'turnover' mentioned in section 27 would be 'total turnover' of the violator company.

Upholding the principle of 'relevant turnover', Supreme Court bench held that the penalty imposed under section 27 of the Competition Act for anti-trust violations should be based on the relevant turnover *i.e.,* turnover of the particular product rather than the total turnover of the offending company. The bench applied the principle of equitable consideration and proportionality while interpreting penalty imposing powers of CCI under the said section. The Supreme Court pointed out that while the objective of the Competition Act is to stop anti-competitive practices

and punish the perpetrators, penalties cannot be disproportionate and lead to anomalous and shocking results. Otherwise, the apex court added, excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. The bench held:

"No doubt, the aim of the penal provision is also to ensure that it acts as deterrent for others. At the same time, such a position cannot be countenanced which would deviate from 'teaching a lesson' to the violators and lead to the 'death of the entity' itself."

Moreover N.V. Ramana J in his concurring further judgment observed that the Act has provided the CCI with very wide powers under section 27, providing that the CCI as it deems fit' can impose penalties not more than 10% of the average turnover for last three preceding financial years on entities proved to be involved in anti competitive agreements and abuse of dominant position in the market. The principle of proportionality as established by the apex court through various judgments requires that the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. Therefore, the principle of proportionality needs to be imbibed into any penalty that is imposed by CCI under section 27 of the Act.

As law abhors absolute power and arbitrary discretion, he emphasised on the need to guide and regulate this wide discretionary power to bring about uniformity and stability with respect to imposition of penalty. Ramana J did not stop here and undertook the responsibility onto himself to describe the two step calculation methodology to be followed while imposing the penalty on offending enterprises under section 27. The first step involves the determination of relevant turnover of the entity pertaining to goods or services that have been affected by the contravention having regard to the audited financial statements or reliable financial records, depending upon the availability. After the initial determination of relevant turnover, there should be determination of appropriate percentage of penalty based on aggravating and mitigating circumstances peculiar to a case. However, he maintained that the in no case it should be more than the overall statutory limit of 10% of entity's relevant turnover.

The Supreme Court has settled a very critical issue relating to anti-trust jurisprudence on penalty imposition to the rescue of all stakeholders in India which was long overdue as CCI has not been found to be very consistent in penalty fixation and has at the same time failed to provide reasons for the amount of fines imposed in many cases. Although the judgment is welcomed by the corporate sector, it has curtailed the discretionary power conferred on CCI *via* 2007 amendment to section 27(b) to a great extent for which only the CCI is to be blamed.

Deepa Kharb

Gaurav Kumar Bansal* v. *Union of India

2017(6) SCALE1

Decided on May 8, 2017

India is one of the oldest civilizations in the world with a kaleidoscopic variety and rich cultural heritage. It covers an areas of 32, 87, 263 sq km, extending from the snow-covered Himalayan heights to the tropical rainforests of the south. As the 7th largest country in the world, India stands apart from rest of Asia, marked of as it is by mountains and the sea, which give the country a distinct geographical entity. Bounded by the Great Himalayas in the north, it stretches southwards and at the Tropic of Cancer, tapers off into the Indian Ocean between the Bay of Bengal on the east and the Arabian Sea on the east. The main land comprises four regions, namely, the great mountain zone, plains of the Ganga and the Indus, the desert region and the southern peninsula.

(India 2007, A Reference Manual, Ministry of Information and broadcasting). Against this background, India is also prone to natural disasters of all kinds due to factors ranging from climate change (in the anthropogenic sense as well as natural climatic cycle). The question that arises is what role can law

play in today's climate constrained world, particularly, the role of the court as one of the co-equal branch of the state? The present case deals with a welfare state's responsibility towards its citizens during times of natural disasters.

The case under comment arose out of a Public Interest Litigation (PIL) filed under article 32 of the Constitution of India. It relates to the Uttarakhand flood disaster that occurred in 2013. The petitioners contended that, "the adverse impact of the disaster could have been mitigated had there been effective implementation of the Disaster Management Act, 2005(hereinafter the Act) and adequate preparedness by the State Government of Uttarakhand. It was alleged in the writ petitions that many of the other States were also not fully prepared to deal with a disaster and therefore necessary directions ought to be given by the Hon'ble Supreme Court for proper implementation of the Act. In pursuance of the PIL the Hon'ble Supreme Court of India sought responses from both state governments as well as the Centre as to the implementation of the Act. Resultantly on the "prodding of the court" the National Disaster Management Authority (hereinafter NDMA) through its letter communicated to the Chief Secretaries of all the states to frame minimum standards of relief for victims of disaster.

On a review of the steps that have been taken by the NDMA, the court held that that there has been sufficient compliance with the provisions of the Act and there was no need to issue any particular directions. It further held that it is absolutely necessary for the NDMA constituted at the national level and the State Disaster Management Authority at the state level to be ever vigilant and ensure that if any unfortunate disaster strikes there should be total preparedness and that minimum standards of relief are provided to all concerned. The court disposed of the writ petitions while acknowledging the efforts put in by the petitioners in bringing into focus the necessity of implementing the statute that might affect any one at any time.

There is no denying the fact that climate change is playing a big role in the scale of natural disaster such as the Uttarakhand flood. Climate change is creating dynamics and we can see the tremendous results in the frequency, intensity and magnitude with which natural disasters are taking place. From a constitutional perspective Article 39A of the Constitution of India which provides for equal justice and free legal aid is relevant here. It reads: "The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." Though in present case the court nowhere makes mention of the said article in providing relief *etc*, the very 'spirit' of the article is manifested. It is to be noted here that the contours of legal aid is also changing from its traditional concept. For instance the word 'disability' and its meaning has been expanded to include 'disability' which arises out of natural disasters like flood of high magnitude which exacerbates the vulnerability of the community especially women and children.

Stanzin Chostak

Binoy Viswam* v. *Union of India

2017 (6) SCALE 621

Decided on June 9, 2017

The present case review is concerned with the decision by two member bench of apex court comprising of A.K. Sikri J and Ashok Bhushan J. relating to the constitutional validity of section 139 AA of Income Tax Act, 1961 which made quoting of Aadhaar number compulsory for filing income tax returns from July 1, 2017. The said provision was inserted in the Finance Act, 2017. It also made mandatory to quote the Aadhaar number while filling the application form for allotment of Permanent Account Number (PAN) as well. This case however, has not dwelled on the issue whether Aadhaar

scheme/legislation violated the 'right of privacy' under Constitution of India since; the matter is pending before the Constitution bench. Nonetheless, it contemplated the matter before it through the question, whether insertion of such mandatory provision by the government in the Income Tax Act is violating the articles 14 and 19 of the Constitution.

The court interpreted the question of power of courts to strike down legislation by exercising judicial review at three levels. *First* level consists of substantive judicial review where the court would examine as to whether impugned provision in legislation is compatible with fundamental rights enshrined under Constitution. *Second* level is procedural judicial review; where it falls foul of the federal distribution of powers and the *third* level examines whether the offending portion of the statute is severable and if it severed, the court strikes down the impugned provision declaring the same as unconstitutional. It observed that, in this case, the petitioners failed to demonstrate that Parliament, in enacting the impugned provision, had exceeded its power prescribed in the Constitution.

It is agreed that the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, (Aadhaar Act) was enacted to enable the Government to identify individuals for delivery of benefits, subsidies and services under various welfare schemes. However, the requirement of obtaining Aadhaar number was not mandatory as per the Aadhaar Act. However, for the purpose of Income Tax Act, 1961, section 139AA made it compulsory. The court tried to apply harmonious interpretation of these two enactments, *i.e.,* Aadhaar Act and the Income Tax Act, 1961 and came to a conclusion that there was no conflict between both the enactments and they operate in distinct field. Aadhaar Act makes it enrolment necessary when a person wants to take benefits of various welfare schemes and services provided by the government and the person has discretion to avail those benefits or not, whereas section 139AA is to check a menace of black money as well as money laundering and also to widen the coverage of income tax on those persons as well who are evading the payment of tax. Since there is a reasonable basis for differentiation between the persons who are assessees and those who are income tax assesses, equal protection close enshrined under article 14 is not attracted. Article 14 prohibits class legislation and not reasonable classification for the purpose of legislation. All income tax assesses constitute on class and they are treated alike by the impugned provision. It is true that the objective of this provision is to restrain duplicate PAN cards and to ensure that one person is having only one PAN card. This will check the issue of duplicate/fake PAN cards which are there in circulation in our country.

This voluminous decision however, ignores the practical difficulties a common man encounters due to technical problems and lack of proper awareness. There is also lack of sufficient and effective mechanism to regulate the loopholes in the system for accurate registration of Aadhaar and PAN. We cannot ignore the fact that lot of fraudulent people in the name of 'registering agencies' are misusing this situation by charging heavy fee for getting these services done in casual manner, whereas this facility is provided by the government with a nominal fee.

The question whether making Aadhaar violates right is privacy is to be decided by a nine- judge bench of apex court in India very soon. These petitions are based on making Aadhaar Scheme mandatory for millions of India by the Government of India in various schemes. The task to decide between the individual freedom and the power of state to regulate over freedom of individual is not easy and the decision awaited would create far reaching consequences on the economic development of the country.

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