# ILI Newsletter

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(Deemed University)

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## Editorial

The 'Paris Agreement', the biggest environment agreement ever, was adopted by more than 190 countries at the 21st Conference of Parties (COP21) of the United Nations Framework Convention on Climate Change (UNFCC) on 12, December 2015 after two weeks of intense negotiations. The Agreement marks the latest step in the evolution of the United Nations Climate Change Regime, which originated in 1992 with the adoption of the UNFCC. Parties to the UNFCC reached on historic agreement, outlining a new course for more than two decades old global climate effort. This is the first time all states parties to the UNFCC agreed to lower planet- warming greenhouse gas emissions to help stave off the most drastic effects of climate change. The Agreement stipulates that all parties would strive to keep the increase in global average temperatures well below 2 degree Celsius and will make efforts to limit the increase to 1.5 degree, this would significantly reduce the risks and impacts of climate change. Markets now have the clear message that they have to scale up investments that will generate low-emissions, climate resilient development. The major achievement for the developing countries are the explicit language on equity and the references to the principle of common but differentiated responsibilities (CBDR) are found in several places in the Agreement. Retention of the principle of differentiation allows the discussion on mitigation, adaptation, financial transfer, and support for capacity building in the developing countries. For the first time, every nation in the world has made commitment to curb their emissions and agreed to act internationally and nationally to address climate change. All states have agreed in Paris that they will review their national climate plans every five years, starting with 2018. Sustainable development and climate goals must be mutually reinforcing and developed nations must fulfil their promises to support developing nations in addressing climate change with finance, technology and capacity building. The Paris Agreement for the first time brings all nations into a common cause based on their historic, current and future responsibilities. It is appropriate to conclude with the statement of UN Secretary General Ban Ki-Moon, "we have entered a new era of global cooperation on the one of the most complex issues ever to confront humanity. For the first time, every country in the world has pledged to curb emissions, strengthen resilience and join in common cause to take common climate action. This is a resounding success for multilateralism."

Manoj Kumar Sinha



**Inside**




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# NEW PRESIDENT OF I L I

**Hon'ble Mr. Justice T. S. Thakur**

Chief Justice of India / President, ILI

Hon'ble Mr. Justice T. S. Thakur has been appointed as the 43rd Chief Justice of India and the President (Ex-Officio) of the Indian Law Institute on December 3, 2015. He hails from the State of Jammu and Kashmir.

Mr. Justice Thakur was born on January 4, 1952. He was enrolled as a Pleader in October, 1972 and joined the chamber of his father Late Shri D.D. Thakur, a leading advocate and later, a Judge of High Court of Jammu & Kashmir. He practised in civil, criminal, constitutional, taxation and service matters in the High Court of Jammu & Kashmir. He was designated as a Senior Advocate in the year 1990.

He was appointed as an Additional Judge of the High Court of Jammu & Kashmir on February 16, 1994 and was transferred as Judge of the High Court of Karnataka in March, 1994. He was appointed as a permanent Judge in September, 1995. In July 2004, he was transferred as a Judge of the High Court of Delhi. He was appointed as Acting Chief Justice of Delhi High Court on April 09, 2008 and took over as Chief Justice of the High Court of Punjab and Haryana on August 11, 2008. He was elevated as Judge of Supreme Court and assumed charge on November 17, 2009.

## ACTIVITIES AT THE INSTITUTE

### Training Programmes

The Indian Law Institute in collaboration with National Human Rights Commission have organised the following Training Programmes in this quarter:

**Session I**- Two-Days Programme for Judicial Officers on Human Rights: Issues and Challenges on October 3 & 4, 2015.

**Session II**- Two Days Training Programme for Police Personnel on Police and Human Rights: Issues and Challenges on November 7 & 8, 2015.

**Session III-** Two-Days Programme for Prison Officials on Human Rights: Issues and Challenges on December 12 & 13, 2015.


Shri S.C. Sinha, Member, NHRC, Shri P.K. Malhotra, Law Secretary, Ministry of Law and Justice at two days programme for prison officials.

### Finance Committee Meeting

The meeting of the Finance Committee was held at the Institute on December 9, 2015 under the Chairmanship of Hon'ble Mr. Justice Anil R. Dave, Judge, Supreme Court of India. The members included Hon'ble Mr. Justice Badar Durrez Ahmed, Judge, High Court of Delhi, Mr. Rakesh Munjal, Senior Advocate / Vice President, ILI, Ms. Priya Hingorani, Advocate, Supreme Court, Ms. Annie Mathew, Joint Secretary, Department of Expenditure, Ministry of Finance, Mr. P K. Malhotra, Secretary, Department of Legal Affairs, Ministry of Law & Justice, Prof. (Dr.) Manoj Kumar Sinha, Director, ILI and Mr. Shreenibas Chandra Prusty, Registrar, ILI.

The members approved the audited statement for the financial year 2014-15. The members considered the revised estimate for the financial year 2015-2016. Also the members of the committee noted the progress of the renovation work of ILI Building undertaken by the CPWD.

## SPECIAL LECTURES

**Prof. Zafar Nomani,** Professor of Law, Aligarh Muslim University delivered a special lecture to LL.M. students on the topic "Hypothesis and Research Design" on October 14, 2015.

**Justice Vineet Kothari,** Judge, High Court of Rajasthan delivered a special lecture to LL.M. students on the topic "International Taxation Law" on October 30, 2015.

**Dr. Lisa P Lukose,** Associate Professor, GGSIP University delivered a special lecture to LL.M. students on the topic "Plagiarism and Ethical Values of Research" on November 2, 2015.


Prof. (Dr.) Manoj Kumar Sinha, Justice Vineet Kothari, Judge, High Court of Rajasthan and Mr. Shreenibas Chandra Prusty Registrar, ILI.

**Prof. V. Sudesh,** Dean, Faculty of Law, University College of Bangalore, delivered a special lecture to LL.M. students on the topic "Comparative Jurisprudence" on November 23, 2015.

**Prof. S.N. Singh,** Former Professor and Dean, Faculty of Law, Delhi University, delivered a special lecture to LL.M. students on the topic "Research Papers and Research Projects" on November 19, 2015.

**Prof. Virendra Kumar,** Former Founding Director (Academics) of Chandigarh Judicial Academy and UGC Emeritus Fellow had an interactive session with LL.M. students on the topic "Collegium System" on December 2, 2015.

**Prof David Tushaus**, Fulbright Nehru Scholar and Professor at Western Missouri University, USA delivered a special lecture to LL.M. students on the topic "Clinical Legal Education on December 3, 2015.

**Hon'ble Mr. Justice P. S Narayana,** Former Judge, Andhra Pradesh High Court, delivered a special lecture to LL.M. students on the topic "Role of Science and Technology in Criminal Investigation in India" on December 4, 2015.

**Mr. Justice Michael Kirby**, Former Judge, High Court of Australia, delivered a special lecture on "Comparative Analysis of Australian and Indian Constitution" on December 18, 2015.

## RESEARCH PROJECTS

### Project from Ministry of Panchayati Raj, Government of India

The Ministry of Panchayati Raj (MoPR), has entrusted a project to the Indian Law Institute on "*A Study on Case laws Relating to Panchayati Raj in Supreme Court and Different High Courts*". The study is under progress.

### 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 and to draft a Model Investigation and Procedural Manual.

### Project with United Nations Office on Drug and Crime (UNODC)

The Institute in association with United Nations Office on Drug and Crime (UNODC) has published a, "*Compendium of Bilateral and Regional Instruments on Extradition and Mutual Legal Assistance in SAARC Countries*". The book has been published and the soft copy of the book is available on the ILI website.

### Project from Ministry of Law and Justice

Ministry of Law and Justice, and Indian law Institute has also prepared a Report on the "Merger of Tribunal in India". The Report has been submitted.

## ACADEMIC ACTIVITIES

The Admissions Committee for Ph. D. programme 2015, after considering performance and research proposals in presentation of the shortlisted candidates, admitted three students to the Ph. D programme 2015 in November, 2015. Candidates need to undergo coursework followed by examination as mandatory criteria.

## EXAMINATION

### Examination for LL.M. Programmes

LL.M. 1Year First Trimester End Examinations were successfully conducted from October 26-30, 2015. Examination for LL.M. (2/3 Year) Odd Semester Programmes was held in December, 2015 as per schedule.

Results for the Post Graduate Diploma Supplementary Examinations and Ph.D. Coursework Examinations, 2014 batch was declared in October, 2015.

## RESEARCH PUBLICATIONS

### Released Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 57 (3) (July- September 2015).
- *Annual Survey of the Indian Law Institute* 2014.
- Index to legal Periodicals 2014.

### Forthcoming Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 57 (4) (October- December 2015).
- Index to legal Periodicals 2015.
- Revised edition of the book *"A Treatise on Consumer Protection Laws"*.

## E - LEARNING COURSES

**Online Certificate Courses in Intellectual Property Rights Law" and "Cyber Law"**

***Cyber Law***

The 22nd batch of three months duration that started on August 20, 2015 was completed on November 20, 2015. Admission to 23rd batch was started in December, 2015. A total of 75 students were enrolled for this batch.

***Intellectual Property Rights Law***

The 33rd batch of three months duration that started on August 20, 2015 was completed on November 20, 2015. Admission to 34th batch was started in December, 2015. A total of 75 students were enrolled for this batch.

## STAFF ACTIVITIES

**Mr. Bhag Singh,** Librarian, Superannuated from the services of the Institute on November 30, 2015.

Prof. (Dr.) Manoj Kumar Sinha, Mr. Bhag Singh, Librarian and Shreenibas Chandra Prusty Registrar, ILI at the farwell function.

**Ms. Gunjan Gupta,** Assistant Librarian participated in the 11th International Conference on Webometrics, Informetrics, and Scientometrics (WIS) and the 16th COLLNET Meeting 2015 India, from November 26-28, 2015 at Institute of Economic Growth, University of Delhi Enclave, New Delhi, India.

## LIBRARY

The digitized version of Index to Indian Legal Periodicals from 1963 to 2014, volume (1 to 52) and ILI Publications were released on the website of the Indian Law Institute. A strong search engine has been provided to make the material searchable. The users can search, view and save the content according to their requirements. The link to access the collection is:*http://www.elearningilidelhi.org/ILIWEB/* .

The Library has added 65 books on Cyber Law, Intellectual Property Rights, Family Law, Muslim Law, Company Law, Constitutional Law, Human Rights, Criminal Law, Media Law and Environmental Law to enrich the library collection.

## VISITS TO THE INSTITUTE

**Student's visit at ILI**

- Students from Nyay Darshan (Para Legal Course) (Centre for Human Rights & Justice) Baroda, Gujarat visited ILI on October 6, 2015.
- Students from Swami Shukdevanand Law College, Mumukshu Ashram, Shahjahanpur, Uttar Pradesh visited ILI on December 21, 2015.

Prof. (Dr.) Manoj Kumar Sinha, Director and Faculty members of ILI with Prof. Martin Hunter, Expert, International Commercial Arbitration.

## FORTHCOMING ACTIVITIES

- Dr. David Malone will deliver a special lecture on, January 18, 2016 on the topic, "The UN Security Council in a Time of Renewed Great Power Tension".
- The Institute in collaboration with National Human Rights Commission (NHRC) will organize a one day training programme for Juvenile Homes / Old Age Homes / Health Officials / on Human Rights: Issues and Challenges on January 30, 2016.

## LEGISLATIVE TRENDS

### The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015

(December 31, 2015)

The President promulgated the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 on October 23, 2015. The Ordinance enables the creation of commercial divisions and commercial appellate divisions in high courts, and commercial courts at the district level.

The salient features of the Ordinance are:

- The specified value of a commercial dispute that will be dealt with by commercial divisions in high courts and commercial courts will be an amount not below one crore Rupees, and will be specified by the Central Government.
- All suits of a value of Rupees one crores or more that are pending in the high court shall be transferred to the commercial division, after it is constituted.
- Similarly, suits currently pending in the district courts, with a value of Rupees one crore or more would be transferred to the commercial court. However, a suit will not be transferred if a final judgment on the matter is pending.

### The Payment of Bonus (Amendment) Act, 2015

(December 31, 2015)

The Act introduced some amendments in the Payment of Bonus Act, 1965 which provides for the annual payment of bonus to employees of certain establishments (including factories and establishments employing 20 or more persons).Under the 1965 Act, the calculation of the bonus is done on the basis of the employee's salary and the profits of the establishment. The key highlights of the Amendment Act, 2015 are:

- The eligibility for the payment of bonus was raised from employees drawing a salary of Rs 10,000 per month to Rs 21,000 per month.
- The amendment raised monthly bonus calculation ceiling to Rs 7,000 per month from existing Rs. 3, 500.
- The Act provides that the Central Government may make rules to implement its provisions and mandates prior publication of such rules in the official gazette to allow for more public consultation.
- The amendment will be implemented with retrospective effect from April 1, 2015

### The Atomic Energy (Amendment) Act, 2015

(December 31, 2015)

The salient features of the Amendment Act are:

- The definition of government company under the 1962 Act including a company where 51% of the paid-up share capital (the capital received by a company from the issue of shares) is held by the Central Government has been expanded to include companies where the whole of the paid up share capital is held by one or more government company and whose articles of association empower the Central Government to constitute its Board of

Directors. This provision will allow for the formation of joint ventures between Nuclear Power Corporation of India Limited and other government companies.

- License required for acquisition, production, use, export and import of any plant designed for the production and development of atomic energy or research will now only be granted to entities such as a government company or a department of central government.
- Any license granted for matters such as: (i) producing atomic energy, and (ii) acquiring and using substances or minerals from which atomic energy can be obtained, will be cancelled if a licensee ceases to be a government company.

## FACULTY NEWS

**Manoj Kumar Sinha** delivered Key Note address in National Conference on Public Health, Medicine and Law: Growing Concerns and Challenges organised by VIPS & AILTC, December 11, 2015.

Delivered a talk on the theme of "India and International Law", organised by CSH in collaboration with *Alliance Francaise de* Delhi, December 10, 2015.

Delivered a talk on "Human Rights in 21st Century: Issues and Challenges" organised by the South Asian University, New Delhi, December 10, 2015.

Delivered a talk on "Prisoners of War" to the participants of South Asia Teaching Session on International Humanitarian Law, organised by the International Committee of the Red Cross (ICRC) on December 10, 2015.

Delivered Opening Remarks in a book release function on book titled "The State of Being Stateless: An Account of South Asia and Rohinghyas: the Emergence of a Stateless Community" organised by Calcutta Research Group (CRG), December 1, 2015

Invited to Judge Final round of 20th Stetson International Environment Law Moot Court Competition, RGNLU, Patiala, November 29, 2015.

Delivered a talk on Cyber Warfare at International Conference on Cyber Law, Cybercrime & Cyber Security , New Delhi, November 19, 2015.

Delivered a talk on "Accountability for IHL Violations" to the participants of 3rd Advanced International Humanitarian Law South Asia Academics Training (AISAAT), organised by the International Committee of the Red Cross (ICRC) November 19, 2015.

Delivered a talk on Juvenile Justice Act to LL.M. students of Tripura University, October 16, 2015.

Delivered a talk on Business and Human Rights to the Faculty members of the NLU, New Delhi on October 10, 2015.

Appointed an External Expert in the Research Advisory Committee of Department of Law, Tripura University.

**Anurag Deep** Participated as an external expert for an examination assignment in Faculty of Law, Jamia Milia Islamia, New Delhi on December 01, 2015.

Chaired a session in a National Seminar on the Ten Decades of RTI in Modern Law College, Ghaziabad on November 26, 2015.

Participated as Judge in the final round of Intra Moot Court Competition 2015 in School of Law and Legal Affairs, Noida International University on November 20, 2015.

Contributed his suggestions to Department of Justice on "Improvement in Collegium" as sought by the Constitution Bench in the matters of *Supreme Court*

*Advocate on Records Association* v. *Union of India* on November 13, 2015.

Engaged three classes of students of Ph.D. course work of Faculty of Law, University of Allahabad on the topic of "Primary and Secondary Sources" and "Selecting and Framing a Research Topic" on October 31, and November 1, 2015.

Delivered lecture on the occasion of Sardar Patel National Integration Day celebration of University of Allahabad on October 31, 2015.

Participated as an external expert for an LL.B examination assignment in Faculty of Law, Jamia Milia Islamia, New Delhi and PG examination assignment of Tripura Central University, SGT University and Galgotia University.

**Jyoti Dogra Sood** presented a paper titled "Death Penalty to Terrorists: Violation of Human Rights" in an International Conference on *Human Rights, Civil Society and Changing Facets of Terrorism* on November 21, 2015 at Geeta Institute of Law, Panipat.

Chaired a technical session in a National Conference on Access to Justice in Army Law Institute Mohali on November 7, 2015.

Was a Resource Person in a panel discussion titled "Together for a Better World: Issues and Challenges for the Differently-abled Persons" held in Symbiosis Law School, Noida on October 16, 2015.

Chaired a technical session on the theme "Human Rights and Justice Delivery Challenges" in a two day International Conference on October 2-3, 2015 on *Human Rights: Contemporary Issues and Challenges at Jagran Lake City University Bhopal.* Presented a paper titled "Witchcraft and Witch hunting: Ambivalent positions taken by law" in the same conference.

**Vandana Mahalwar** participated in an ICSSR sponsored faculty development programme organised at Maharshi Dayanand University, Rohtak from December 18- 31, 2015.

Delivered a lecture on Intellectual Property Protection at D.S. National Law University, Vishakhapatnam on October 31, 2015.

Attended a workshop on 'Ethics in Teaching' organised by National law University, Delhi on October 17, 2015.

**Stanzin Chostak** participated in a two day national seminar on 'Rights of Women in the Contemporary Era', organised by the Faculty of Law, Jamia Millia Islamia in collaboration with the National Commission for Women from November, 21-22, 2015. Presented a paper on the topic 'Climate Change, Women and Law: An Analysis'.

## LEGAL JOTTINGS

### IPRs be treated as 'plant' under Section 43(3) of the Income Tax Act and entitled to depreciation

The definition of 'plant' in section 43(3) of the Act is inclusive. Even prior to the insertion of "intangible assets" in Section 32, Income Tax Act, 1961, intellectual property rights such as trademarks, copyrights and know-how constituted "plant" for purposes of depreciation. There can be no doubt that for the purposes of a large business, control over intellectual property rights such as brand name, trademark etc. are absolutely necessary. Moreover, the acquisition of such rights and know-how is acquisition of a capital nature. Therefore, it cannot be doubted that so far as the Assessee is concerned, the trademarks, copyrights and know-how acquired by it would come within the definition of 'plant' being commercially necessary and essential as understood by those dealing with direct taxes.

*Mangalore Ganesh Beedi Work's* v. *Commissioner of Income Tax, Mysore* 2015(10) SCALE 701.

## CASE COMMENTS

***Rajbala* v. *State of Haryana***

2015(13) SCALE 424

Decided on December 10, 2015

The Supreme Court of India upheld the amendments to the Haryana Panchayati Raj Act, 2015 which added certain educational qualifications for candidates contesting panchayat election. In addition to the educational qualifications the said amendments also include other qualifications such as a functioning toilet and rural indebtedness as a pre requisite for contesting an election for the position of *sarpanch*. This amendment resulted in disqualifying a large number of people from contesting the election. The amendment was challenged by three political activists who had been disqualified from contesting the panchayat election because none of them possessed requisite educational qualification. The petitioners challenged the Constitutionality of the Haryana Panchayati Raj (Amendment) Act, 2015 on the grounds of arbitrariness and discrimination and the enactment being violative of article 14 of the Constitution. It was pointed out by the petitioners that the stated objective of the amendments, to provide good governance and to have people who were "model representatives" of the panchayat, had no connection with the amendments and that the amendments were discriminatory, unjust and arbitrary. It was also highlighted that MPs and MLAs, performed far more onerous tasks of legislating and discussing policy and passing the budget and other important matters related with welfare of the people had no such disqualifications prescribed for them to contest elections.

These amendments, according to the petitioners, create unreasonable restrictions on the constitutional rights of voters to contest elections. However, the State of Haryana argued that there was no fundamental right to vote or stand for elections, and in any case, the disqualification served larger purpose of spreading education, reducing indebtedness and greater sanitation in rural areas. The right to vote and right to contest at an election to a panchayat are constitutional rights subsequent to the introduction of part IX of the Constitution of India. Both the rights can be regulated by the appropriate legislature directly. It is a settled principle of law that curtailment of any right whether such a right emanates from common law, customary law or the Constitution can only be done by law made by an appropriate legislative body. However, any law made by any legislative body must be consistent with provisions of the Constitution. The court held that prescribing certain minimum educational qualification criteria as one of the qualifications for a candidate to contest the election has a reasonable nexus with the object sought to be achieved. The Supreme Court held that the stated objective of such classification is to ensure that those who seek election to panchayats have some basic education so that the elected representatives of the panchayats will be in position to discharge their duties more effectively and rationally. Thus, the object sought to be achieved cannot be said to be irrational or illegal or unconnected with the scheme and purpose of the Act or provisions of part IX of the Constitution. It is only education which gives a human being the power to discriminate between right and wrong, good and bad. The petitioners had also argued that failure to have a toilet was also a result of abject poverty and homelessness. However, this unhealthy practice is not only confined to poorer sections of the society. The court noted that to discourage this practice, state has adopted various policies including the financial assistance to economically weaker sections of the society to construct a toilet. The court found merits in observation of respondents that if people still do not have a toilet it is not because of their poverty but because of their lacking the requisite will. The court held that those who aspire to get elected to those civic bodies and administer them must set an example for others. To achieve this objective the legislatures which stipulates that those who are not following basic norms of hygiene are ineligible to contest panchayat election, neither be said to create a class based on unintelligible criteria nor can such classification be said to be unconnected with the object sought to be achieved by the Act. No doubt, the impact of this decision will be felt by the underprivileged and weaker sections of the society and because of these criteria, many of them belonging to weaker sections of the society will not be able to contest panchayat election.

**Manoj Kumar Sinha**

***Lal Shah Baba Dargah Trust* v. *Magnum Developers***

2015(13) SCALE 629

Decided on December 15, 2015

In this case, the plaintiff instituted the suit before a one member wakf tribunal claiming the suit property as waqf property held by the trust, for perpetual

injunction restraining defendants from illegally developing portion of the suit plot; from raising further construction; creating any third party interest; and from changing the nature of the suit properties as also from handing over the possession of the flats constructed therein.

Tribunal granted the interim injunction. A civil revision application was filed before the high court by the aggrieved parties to the order. The high court which set aside the order passed by the tribunal holding that it had no jurisdiction. High court further opined that the waqf suit instituted by the plaintiff before a single member tribunal is not maintainable and consequently plaint along with application is liable to be returned for presentation before appropriate civil court. The high court was of the view that since there is no provision for transfer of pending suits in the Waqf (Amendment) Act, 2013, suits or any other proceedings, so instituted on or after November 1, 2013 shall continue to be tried by civil courts even after the state government issues notification constituting a three member tribunal as per the amended section 83(4) unless the Central Government intervenes as per section 113 of the Act or the legislation is suitably amended.

Taking note of the amendment in 2013, the Supreme Court formulated the main issue that "whether till a three member tribunal is constituted by the State Government by issuing notification one member tribunal as constituted under 1995 Act shall continue functioning or it ceases to have any jurisdiction to entertain disputes and decide it in accordance with the provisions of Act." Reiterating the statement of object and reasons of the 2013 amendment Act and relying on the common practice that till a new institution is in place the old institution continues its work, the Supreme Court held that "the one member tribunal will continue to exercise jurisdiction till the time the State constitutes three members tribunal by notification in the Official Gazette". It also observed that the jurisdiction of the civil court has been ousted by the 2013 amendment. Thus, the Supreme Court set aside the impugned judgment passed by the high court holding that the interim order passed by the tribunal shall continue.

The judges of the division bench of the Supreme Court did not strictly adhere towards letter of law and also did not deliberate upon mere technicalities rather has emphasized over the spirit of the law which, of course, ensures to protect the waqf properties from regular encroachment, and that's why laws for its administration art being updated by the state from time to time. Accordingly, the judges by enforcing the spirit of the law have also taken into consideration the intention of the amending legislation, nature of the waqf and have tried to ensure that no effort should be left to secure the property. This interpretation cannot be said to be solely based on charitable or pious purposes but is also concerned with the economic betterment of the community which is already socially and economically backward.

**Furqan Ahmad**

***Union of India* v. *Sriharan @ Murugan***

2015(13) SCALE 629

Decided on December 2, 2015

Under article 32 is it necessary to argue that any of the fundamental rights under part III of the constitution of India has been violated? You need not be genius to quickly answer the question. Violation of fundamental right would be a condition precedent to invoke writ jurisdiction in the Supreme Court. This is the major difference between article 226 and article 32 that under article 226 writs can be issued "*for any other purpose*" also while in case of article 32 none of the four clauses obliges or empowers the Supreme Court to issue writ for *any other purpose.* 32(2) says "The Supreme Court shall have power to issue directions or orders or writs, for the enforcement of any of the rights conferred by this Part." Can we "read into" article 32 "writ for *any other purpose"*? A five judge constitution bench judgement (under comment) unanimously indicates that article 32 is no more limited to violation of fundamental rights only.

The full bench of the Supreme Court in *V. Sriharan alias Murugan* v. *Union of India* (2014) 4 SCC 242) commuted the sentence of death to life imprisonment was on the ground of *Triveniben* (1988) principle of delay. The decision of the Supreme Court came on February 18, 2014. The Government of Tamil Nadu immediately expressed its desire to release the prisoners under section 423 Cr PC 1973. As per section 435 state government has to seek consultation from Central Government in certain cases. Therefore the very next day *i.e.,* on February 19, 2014 the Chief Secretary of Tamil Nadu issued a letter to the Secretary, Government of India proposed to remit the sentence of life imprisonment (as they have spent 23 years in jail) and to release the prisoners. In the letter three day time was given to Central Government to express its views failing which Tamil Nadu

government was adamant to release them. On February 20, 2014 the Government of India came to the Supreme Court under article 32 challenging the letter of Tamil Nadu government dated February19, 2014 stating that under section 432(7) of Cr PC 1973 it is the Central Government which is appropriate government and not the Tamil Nadu government which is competent to take decision of remission and release of the three prisoners because the investigation and prosecution was done not by state agency but by central agency. As per section 435 Cr PC 1973, state government can remit and release only after consultation with Central Government and consultation does mean concurrence. The case came before a full bench of the Supreme Court which granted stay on the letter of Tamil Nadu Government and found that in order to address the issues involved the court will have to review three judge bench judgement in Swamy Shraddananda (2008). There is another judgement of constitution bench *Bhagirath* v. *Delhi Administration* (1985) which also needed consideration. The full bench therefore referred the case to constitution bench. Out of seven, one of the issue framed by the constitution bench was: Maintainability of this Writ Petition under *article 32* of the Constitution by the Union of India.

The advocates of Tamil Nadu and those of prisoners raised preliminary objections on three grounds. *One* that, whose and which fundamental rights have been violated? *Two*, none of questions would fall under the category of constitutional question and *three*; article 131 and not 32 is the correct provision under which the petition may be filed.

Union of India defended with three arguments. *One*, that the objection regarding maintainability has been made for the first time. Why the objections were not made on April 25, 2015 when the case was referred by three judges to constitution bench. Why was it not raised on July 9, 2015 when notices were issued to state governments. *Two* a suit under article 131 of the Constitution cannot be filed since the accused are private parties and therefore, writ petition is the only remedy available. *Three*, that after Criminal Law Amendment Act, 2013 rights of victims stand duly recognised and that the instant crime having been investigated by the CBI, Union of India in its capacity as *parens patriae* (legal protector of citizens) was entitled to approach this court under article 32. The arguments of Union of India therefore were based on Timing of objection (barred by limitation), TINA (There Is No alternative) factor and self declared protector.

The constitution bench agreed with Union of India. Fakkir Mohamed Ibrahim Kalifulla J. rejected preliminary objections because "answer to those questions would involve substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162, various Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of Indian Penal Code and Code of Cr.PC and thereby serious public interest would arise for consideration." and, therefore, the court did not find it appropriate to reject the reference on the narrow technical ground of maintainability. UU Lalit J observed that as the petition have been entertained, notices were issued, impleadment applications entertained, interim orders were granted, it would not be appropriate at this stage to consider such preliminary submissions. The court also took guidance from judgment of the Constitution Bench in *Mohd. Aslam alias Bhure* v. *Union of India* [(2003)4 SCC 1] quoting as under:

> On several occasions this Court has treated letters, telegrams or postcards or news reports as writ petitions. In such petitions, on the basis of pleadings that emerge in the case after notice to different parties, relief has been given or refused. Therefore, this Court would not approach matters where public interest is involved in a technical or a narrow manner. Particularly, when this Court has entertained this petition, issued notice to different parties, new parties have been impleaded and interim order has also been granted, it would not be appropriate for this Court to dispose of the petition on that ground.

The court therefore admitted the petition of *Union of India* under article 32. The *ratio decidendi* of the constitution bench on first issue may be summarized as under-

*Firstly* that article 32 can be successfully pleaded in case of public interest and violation of fundamental right need not be shown. *Secondly* maintainability of a petition is a narrow technical argument which may be overlooked in certain cases. *Thirdly*, preliminary objections on maintainability must be made at initial phase of arguments and cannot be admitted at advance stage of a petition. *Fourthly* court has similar precedents from the constitution bench of *Mohd. Aslam alias Bhure* which cannot be overlooked. The interpretation of article 32 has witnessed ups and down in last 65 years. The direction of interpretation

of article 32 may have three classifications. Ordinary interpretation (1950-1975), limited (committed) interpretation (1976-1977) and broad (purposive) interpretation (1978 to contd). For the first 25 years article 32 has been used to enforce fundamental rights without hindrance. But the rule of *locus standi* was applied strictly. In other words only aggrieved party or one who can show specific legal damage could go for article 32. Therefore this period could be termed as period of 'ordinary interpretation.' A small period of two-three years of emergency was the time of committed interpretation of "enforcement of fundamental rights", because fundamental rights were crushed and its enforcement was denied. Arbitrariness reached to its nadir and even the Supreme Court bowed before the whims and pleasure of executive with the majority judgement in *Additional District Magistrate*, *Jabalpur* v. *S. S. Shukla* (28 April, 1976). The majority behaved like *Nero* and interpreted article 359 as if it is a "Bill of Attainders" [Bills of attainder were Acts (1321 to 1791] of legislature in England which allowed death sentence without conviction in the ordinary judicial proceedings). The Supreme Court, however, regained its constitutional conscience in 1978 and the journey of interpretation of fundamental rights especially that of article 32 has found wide meaning. The Supreme Court was not only positive in its approach, constructive in its attitude but also innovative in its thinking. During 1978 to 82 it started admitting PIL under article 32 loosening the grip of *locus standi (SP Gupta* case 1981*)*. Article 32 witnessed two radical changes. First, it was not necessary to show the petitioner is aggrieved party. Second, a matter of public interest may be filed under article 32 even if arguments for violations of fundamental rights are not directly made. Who's right or which right are not material question for article 32 and specific private interest has given way to sufficient public interest.

The journey of article 32 from ordinary interpretation to broad interpretation and from broad to extraordinary interpretation by various benches especially constitution benches may be not as per intentions of framers of the constitution but is in pace with the time and requirements. As submitted in the first paragraph of this comment the distinction between article 32 and 226 will sooner be a distinction without difference.

**Anurag Deep**

***Krishika Lulla* v. *ShyamVithalrao Devkatta***

2015(10) SCALE718

Decided on October 15, 2015

The apex court in the case in hand contributed to the jurisprudence on 'Copyright in title of a literary work'. The brief facts of this case were: The complainant scribed a brief synopsis of a story and titled it as "Desi Boys" and also got the same registered with the Film Writers Association on November 25, 2008. The complainant came to know from a friend that a comedy film story is required by a film director's son and on such instance, he sent the story via email to his friend who further forwarded the same naming it as 'just an idea' via mail to some other person. The synopsis of story contained no dialogues, plot of action, and screenplay. After receiving no reply, the complainant happened to watch the promos of a movie titled 'Desi Boyz'. The complainant maintained that use of title of his synopsis is the violation of copyright and he also admitted that as he has not watched the movie so far, he is not sure whether the movie infringed his story too. According to appellants, their movie is squarely founded on a story written by an author with whom the appellants entered into an agreement and have also given the author some pecuniary consideration for writing the same. The main issue that popped up before the court was whether complainant has any copyright in the title 'Desi Boys' of his synopsis of the story. Complainant grievance is that the title is the soul of his story and copying it is equivalent to taking of everything from his story. Court looked into section 13 of the Copyright Act, 1957 which provides that copyright subsists in original literary work and contended that 'desi' and 'boys' are the words of common parlance and do not qualify for being described as 'literary' and also that, a title does not qualify to be a work either as it is not complete in itself and refers to the work that follows. Moreover, a title does not clear the substantiality test to get protection under copyright law. The persuasive authority was of *Dicks* v. *Yates*, where Jessel M.R. said

*"there might be a copyright in a title as for instance a whole page of title or something of that kind requiring invention".*

It is really appreciable that court has made this rule merely qualified and not absolute as it also laid down the circumstances in which a title can be protected as it may be must in some cases, in order to protect the copyrighted literary composition, for courts to protect

the titles, as the construction of title requires author's skill, talent and judgment. Where *'De minimis non curat lex'* is a subtle and irrefutable component of the ruling, the doctrine of '*Minimum modicum of creativity'* also finds its place in the judgment which provides that originality subsists in a work where a sufficient amount of intellectual creativity and judgment has gone into the creation of that work. So, it is a definite pronouncement by the court that no copyright shall subsist in the title of literary works. However, the common law remedy of passing off will prevent the use of these titles in a misleading manner. The ruling carries a special significance for the authors as court signified its intention to protect the adequately distinct titles, which encourages the authors to come up with more of creative titles to their literary works.

**Vandana Mahalwar**

***Lal Babu Priyadarshi* v. *Amritpal Singh***
2015(12), SCALE 76
Decided on October 27, 2015

In the present case, an appeal by special leave against the order of IPAB (Intellectual Property Appellate Board) upholding an opposition to the registration of the trademark RAMAYAN, the question before the SC was whether the "*registration of the word RAMAYAN as a trade mark, being the name of a Holy Book of Hindus, is prohibited under Section 9(2) of the Trade Marks Act, 1999*"?

The appellant, engaged in the business of manufacturing incense sticks had applied to register the mark 'RAMAYAN' for its goods. The appellant's registration was opposed by the respondent, the proprietor of the mark 'BADSHAH RAMAYAN' which was pending registration. The respondent argued that the mark 'RAMAYAN' represents the title of a book considered to be a religious book of the Hindus in our country. Thus, using exclusive name of the book 'RAMAYAN', for getting it registered as a trade mark for any commodity could not be permissible under the Act. The opposition was rejected by the assistant registrar of trademarks. The registrar held that the mark 'RAMAYAN' was not included in the list of prohibited marks hence, it was open for registration. The respondent filed an appeal against this order before the IPAB. The IPAB set aside the registrar's order hence the appeal.

The apex court held that there are many holy and religious books like Quran, Bible, Guru Granth Sahib, Ramayan *etc*., to name a few. The answer to the question as to whether any person can claim the name of a holy or religious book as a trade mark for his goods or services marketed by him is clearly 'NO'. The word 'RAMAYAN' represents the title of a book written by Maharishi Valmiki and is considered to be a religious book of the Hindus in our country. Thus, using exclusive name of the book 'RAMAYAN', for getting it registered as a trade mark for any commodity could not be permissible under the Act even in the absence of express prohibition.

The apex court referred to previous case laws as well as the 'Eighth Report on Trademarks Bill', of 1993 of the Parliamentary Standing Committee on the issue. In clause 13.3 of the report, the committee expressed its opinion that any symbol relating to Gods, Goddesses and places of worship should not ordinarily be registered as a trade mark. However, the committee was not in the favour of disturbing the existing trade marks by prohibiting their registration leading to chaos in the market. Therefore, it entrusted the government with the responsibility to initiate appropriate action on receiving complaints of hurting the religious susceptibilities. As a result, instead of a blanket prohibition on such names and titles, the prohibition was rested on 'hurting the religious susceptibilities' clause included in 1958 as well as the 1999 version of the trademark legislation in India, to be judged on contemporary sensibilities.

The apex court through this judgement has tried to suggest that grant of exclusivity in such a case, excluding other traders from using it, can be read into 'hurting the religious susceptibilities' clause. However, if any other word is added as suffix or prefix to the word 'RAMAYAN' and the alphabets or design or length of the words are same as of the word 'RAMAYAN' then the word 'RAMAYAN' may lose its significance as a religious book and it may be considered for registration as a trade mark.

**Deepa Kharb**

***Supreme Court Advocates-on-Record Association* v. *Union of India***
2015 (11) SCALE
Decided on October 16, 2015

The hearing of the present case in hand (popularly known as *NJAC* case) went on for thirty days, which included an unusual two weeks long sitting during the summer vacations with the hearing in three different courts. A constitution bench of five judges consisting of Jagdish Singh Khehar, Madan B. Lokur, Kurian

Joseph & Adarsh Kumar Goel, and J. Chelameswar (dissenting) JJ struck down the Constitution (Ninety Ninth Amendment Act 2014) (hereinafter 'the Amendment Act') inserting article 124 A, 124 B, 124C, 217 & 222. Article 124A constitutes the edifice of 'the Amendment Act' whose striking down has automatically led to the undoing of the amendments made to articles 124, 124B, 124C, 127, 128, 217, 222, 224, 224A and 231. The latter articles are sustainable only if article 124A is upheld. The impugned amendment Act sought to delete the word 'consultation' from article 124(2) and article 217(1) of the Constitution.

The case involved many issues at the outset such as the submission for recusal of J.S. Khehar J challenging the appropriateness of his participation. However, for the present purpose two important issues before the court were: *Firstly,* whether the 'the Amendment Act' which substitutes and replaces the extant procedure for the appointment of judges of the Supreme Court and the high courts with a radically different procedure impinges on the independence of the judiciary and violates the basic structure of the Constitution? *Secondly*, whether the National Judicial Appointments Commission Act, 2014 (hereinafter the 'NJAC Act') is a constitutionally valid legislation. Other issues in the present case intrinsically connected to the above points were that prayer for reference to a larger bench and reconsideration of the second and third judges cases were made by the Union of India. Besides the Union of India submitted to the court to revisit the second and third judges case so that the executive can play a proactive role in appointment and transfer of judges by bringing into force 'the Amendment' and the 'the NJAC Act'. The latter Act of course is a creature of the former. The court refused to reconsider and review the judgments rendered in the second and third judges case and gave its reasoning for not doing so. It reaffirmed that the procedure contemplated under the judges case, is not a system of *Imperium in Imperio* (which means state within a state). In its reasoning the court relied on many principles of constitutional law such as the independence of judiciary, separation of powers, rule of law and constitutional scheme of checks and balances, rule against bias, conflict of interest and doctrine of revival and so on.

The Union of India submitted that the impugned constitutional amendment reflected the will of the people, that it would not be appropriate to test it through a process of judicial review, even on the touchstone of the concept of “basic structure”. In stressing the legitimacy of judicial review the majority judgment referred and cited Prof. Philip C. Bobbit's book 'Constitutional Fate: Theory of the Constitution' in which a typology of five archetypes constitutional arguments were presented, *viz.,* (1) Historical (2) Textual (3) Structural, (4) Prudential (5) Doctrinal. The court also referred to Professor (Dr.) Upendra Baxi who has developed yet another tool called 'episodic', which according to him, is often wrongly used in interpreting the Constitution. The court while citing Prof. Baxi, states that to him 'structural' is the most important argument while interpreting the Constitution. Structural arguments according to him are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures. Again citing Prof. Bobbit the court held that in interpreting the Constitution, all the tools are to be appropriately used, and quite often, in combination too. The court held that the 'structural tool' is to be prominently applied for resolving the issues arising in the present case.

On the independence of the judiciary the court while referring to previous cases referred to collective and harmonious reading of articles 12, 36 and 50 on the one hand and articles 124, 217 and 222 on the other. Relying on the construction of the above articles the court states that the 'basic structure' is nothing but a set of fundamental foundational principles, drawn from the provisions of the Constitution itself and not a fanciful principles carved out by the judiciary on its own. The case has left many students of constitutional law yearn for more answers. For example, with regard to the system of checks and balances (separation of powers) how do we reconcile judicial opinion between the minority and the majority in this case when the former says it is diluted because of executive 'non inclusion' whereas the latter reads it in the exercise of power under judicial review? What then is the limited role of the executive? Where it begins and where it stops? As for the present case the effect of the judgment is that the 'collegium system' as existing prior to the Constitution (Amendment) Act, 2014 is declared to be operative.

Opportune it would be to reflect on how the eminent jurist Nani Palkhivala saw the constitution as a legacy that had to be honoured while simultaneously being flexible. Quoting Thomas Jefferson he said, the constitution must go “hand in hand with the progress of the human mind”. He was however a firm opponent of politically motivated constitutional amendment. Quoting Joseph Story, who said: “The Constitution

has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, the people."

**Stanzin Chostak**

***S Prakash* v. *Phulavati***

2015(11) SCALE 643

Decided on October 16, 2015

While feminism itself may have moved- philosophically as well as conceptually- much beyond the vision of radical feminists, one slogan given by radical feminists remains relevant even today: Law is Male. The objectivity of Law and the Reason of 'reasoned judgments' are so imbued in the male worldview that, despite the developments in feminist jurisprudence, the project of legal reforms is continually undone and erased by a resistance towards feminist change. *Prakash* v. *Phulavati* (per Anil R. Dave and Adarsh Kumar Goel JJ) is but one illustration of this undoing and erasure. The court was called upon to decide whether Hindu Succession (Amendment) Act, 2005 has retrospective effect.

The suit was instituted by Phulavati in 1992, four years after the death of her father, for the partition and separate possession of her share in the father's property. During the pendency of this suit, she amended the plaint to claim her share as per 2005 Act in the entire property of her father, and not merely his self-acquired property. While the trial court limited her right to only father's self acquired property, the high court held that the 2005 Act applied to the pending proceedings, even if the amendments are not taken as retrospective in application (reported in AIR 2011 Kar. 78). Commenting on the high court decision, Poonam Pradhan Saxena had observed that "a female presently introduced as a coparcener is entitled to the same share as a male in the joint family property irrespective of the fact that she had filed a partition suit much earlier. The conclusions are appropriate and within the legal framework." ("Hindu Law", *Anuual Survey of Indian Law*, ILI, 2011).

The Supreme Court however did not find the conclusions appropriate and overruled the high court decision in the present case. According to the court, "[i]n view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective" (para 17). Relying on section 6(1) and 6(3) of the Act the Court concluded that: (1) daughters became coparceners "on and from the commencement of Hindu Succession (Amendment) Act, 2005" (*i.e*., September 09, 2005) and not before that, and (2) daughter can claim as coparceners if their father died on or after the commencement of the Act. The "apparent conflict" raised by the proviso to section 6(1) and the Explanation was suppressed by giving the amendments a "rational" and "harmonious" meaning (para 19), leading the court to conclude "that the rights under the amendment are applicable to living *daughters of living coparceners* as on 9th September, 2005 irrespective of when such daughters are born" (para 23, emphasis mine).

It is humbly submitted that such rationality and harmonious construction have only served to strengthen the harmony of patriarchal familial relations, marking the interpretive exercise as patently against the vision and objective of the 2005 Act. A purposive interpretation of the statute would have mandated the court into recognizing the Act as a social welfare legislation enacted for women. And therefore, for all purposes, it should have been interpreted *in favour and not against* the interests of women. It was important to bear in mind that language used in the statute to create coparcenary rights for daughters' *i.e*, a daughter shall "*by birth* become a coparcener *in her own right*" (emphasis mine). Thus, the right is created from her birth, and ought not to be contingent on the time of father's death. In this backdrop, proviso to section 6(1) and the explanation should be understood as provisions that are conferring finality to partitions, prior to December 20, 2004, which were either registered or effected by a decree of the court. Any partition which was neither registered nor obtained through a decree of court was not exempted from the applicability of the new Act, thereby enhancing the share of the daughter.

In this regard it may also be pertinent to note an earlier decision of the Supreme Court in *Ganduri Koteswaramma* v. *Chakiri Yanadi* (2011) 5 LW 612 (SC), per R.M. Lodha and Jagdish Singh Kehar JJ. In this case, the father had died in 1993 during the pendency of the suit and a preliminary decree was passed by the trial court in 1999 and later amended in 2003. The question before the court was: whether a preliminary decree passed by the trial court would deprive the daughters of the coparcenary rights created by 2005 Act, even though the final decree for partition was not passed. Answering this question in the negative, the court applied the 2005 Act to the pending partition suits.

*Ganduri* and other similar earlier apex court decisions were in fact brought to the notice of the court but the court distinguished these cases in following terms:

> Many of these decisions deal with situations where change in law is held to be applicable to pending proceedings having regard to intention of legislature in a particular law. There is no dispute with the propositions laid down in the said decisions. Question is of application of the said principle in the light of a particular amending law. The decisions relied upon do not apply to the present case to support the stand of the respondents. (para 25)

These observations of the court do not clarify the conceptual distinction between *Ganduri* and the present case. The court has not been able to lucidly illustrate on what legal basis it has classified the present case as one "where shares of the parties stood already crystalised by operation of law to which the amending law had no application" (para 25.6). What this case has done, apart from diluting the effect of 2005 Act, is to add to the legal incoherence in the realm of succession of property.

What is astonishing is that while restricting the property rights for Hindu women, the court expressed concerns about Muslim women who have "no safeguard against arbitrary divorce and second marriage by her husband" (para 28). Thus, in the zeal of saving the Muslim women from the Muslim men, the court echoed the judicial call for uniform civil code (one may recall similar observations made in *Sarla Mudgal's* case), and unwittingly gave into rhetoric of uniformity that informs the agenda of right wing.

**Latika Vashist**

***Gautam Kundu* v. *Manoj Kumar, Assistant Director, Eastern Region, Directorate of Enforcement (PML Act) Govt. of India***

AIR 2016 SC 106

Decided on December 16, 2015

Money laundering being an economic offence poses a serious threat to the national economy and national interest. Money launderers are committing this offence with clear calculation and deliberate design with the motive of personal gain. They are not concerned about the consequences of their action on the society and the courts cannot brush aside this fact while deciding the case before it even if it is relating to the procedure of granting bail. Since the Prevention of Money Laundering Act, 2002 (PMLA) is a special statute dealing with money laundering it will have an overriding effect on the general provisions of the Code of Criminal Procedure (Cr PC) in case of conflict between them. PMLA lays down the conditions for grant of bail to any person accused of an offence under it. These conditions are mandatory. Moreover the court shall presume that proceeds of crime are involved in money laundering and the burden of proof lies on the accused to prove that they are not involved in money laundering.

The question that arose for consideration before the Supreme Court was whether the refusal to grant bail by High Court of Calcutta under section 439 of Cr PC was arbitrary and capricious. In this case the appellant was arrested on suspicion of commission of offence punishable under provisions of PMLA. The Supreme Court refrained from deciding the questions raised regarding the offence of money laundering since it is nothing but only a bail application. Moreover, since the matter is pending before the division bench of the high court any observations or remarks made by the court may cause prejudice to the case of both the sides. Therefore the Supreme Court found that at the time of refusing the bail application the high court has exercised its discretion judiciously keeping in mind the nature of the offence and the probability of commission of further offence by the accused while on bail.

The criminal jurisprudence provides that in the matters related to criminal offences bail is a matter of right of the accused and that jail is an exception. Moreover, only in exceptional cases courts can refuse to grant bail to the accused. However, in the cases relating to economic offences, there is a need to relook into the provisions relating to grant of bail since they have deep rooted conspiracies and involve huge loss of public funds which pose serious threat to the financial health of a country. Therefore the approach of the Supreme Court that for the money launderers 'jail is the rule and bail is an exception' is a welcome step in curbing the growing trend of economic offences in our country.

**Susmitha P. Mallaya**

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