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ILI Newsletter

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Editorial

The twenty-second session of the Conference of the Parties (COP 22) was held in Bab Ighli, Marrakech, Morocco from November 7-18, 2016 to discuss about the implementation of the Paris Agreement. The Agreement came into effect on November 4, 2016. It set up general climate targets, but the details regarding the implementation was discussed in the COP 22 meeting and it was agreed upon that the process regarding implementation has to be completed by 2018. In the COP 22, climate finance was also discussed and agreed upon by the States parties to scale up their financial contributions towards the pre agreed $ 100 billion a year by 2020 goal and to achieve a greater balance between adaptation and mitigation. A key theme of COP 22 was debating how best to create a fair "rulebook" that all countries could share and have confidence in when assessing each other's climate pledges. States have agreed on a five year work plan on "loss and damage" to address issues beyond climate adaptation like slow-onset impacts of Climate Change, non economic losses and migration. The 48 countries, united as the Climate Vulnerable Forum (CVF), committed to strive to meet 100% domestic renewable energy production as rapidly as possible while working to end energy poverty, protect water and food security taking into consideration national circumstances. COP 22 provided a platform for policy makers, countries and organisation to announce new strategy plans, initiative and finance charges. Nations notably reaffirmed the global commitment to the Paris Agreement with the Marrakech Action Proclamation (Proclamation). The government of India had welcomed the Proclamation expressing its satisfaction that most of its demands including the issue of providing finance to developing nations to tackle climate change has been incorporated and the country will continue to support its agenda as per the Paris Agreement. In addition to this India in association with developing countries, was able to secure that climate actions are based on the principles of equity and common but differentiated responsibilities (CBDR) and climate justice. The conference concluded on November 18 with the main thrust to develop rules for implementation of the Agreement.

Manoj Kumar Sinha

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SUBSCRIPTION RATES

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ACTIVITIES AT THE INSTITUTE

Annual Law Conference on Legal Research Methodology: Issues and Challenges and Book Release Programme

The Indian Law Institute conducted an Annual Law Conference on "Legal Research Methodology: Issues and Challenges" at the Institute from December 16 to 18, 2016. Legal research requires a great deal of skill and competence as it has become highly demanding, complex and pervasive in the recent years. The technological advancements have further changed the dynamics of legal research. The Institute was founded with the objective to enhance science of law and to promote advance legal studies and research in law. In furtherance of this objective, the conference focused to provide an enriching exposure to the participants on various aspects of legal methodology.

Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India was the chief guest at the inaugural function along with Professor, Ved Prakash, Chairman, UGC as the guest of honour.

Hon'ble Mr. Justice Dipak Misra, lighting the lamp at the inaugural programme of the Annual Law Conference along with Prof. Ved Prakash and Prof. Manoj Kumar Sinha.

Speaking on the occasion, Justice Dipak Misra laid emphasis on pluralism in research. He stressed upon adopting a multi-discipline, multi-prong, all inclusive approach in research to evolve a new formulation, perception and proposition. Professor Ved Prakash said that it is imperative for the institutes of higher learning to create new knowledge. He also emphasised on incorporating the concept of inclusiveness and pluralism in research.

During this session, Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India and Professor Ved Prakash Chairman, UGC also inaugurated a book on "Legal Research Methodology" on December 16, 2016. The edited book by Professor Manoj Kumar Sinha, Director, ILI and Deepa Kharb, Assistant Professor, ILI, is a joint publication of the Indian Law Institute and Lexis Nexis (India) Publications.

Book on Legal Research Methodology released by Hon'ble Mr.Justice Dipak Misra and Prof. Ved Prakash.

Around 18 eminent speakers from the relevant background addressed the participants during the four technical sessions on key areas of legal research and methodology.

The keynote address for the first technical session on **Legal Research- Imperatives and Challenges** was delivered by the chairperson for the session, Professor Upendra Baxi, Emeritus Professor of Law, University of Delhi and University of Warwick, UK. The session

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was addressed by eminent speakers like Professor Mohan Gopal, Director, Rajiv Gandhi Institute for Contemporary Studies, Delhi, Professor Ishwara P. Bhat, Vice Chancellor WBNUJS, Kolkata, Professor Virendra Kumar, Former Founding Director, Chandigarh Judicial Academy, Professor Sam Adelman, University of Warwick, and Professor Jaydev Pati, Dean, SOA National Institute of Law, Odisha.

In the second technical session on **Designing Research-Methods, Tools and Techniques-I**, chaired by Professor Ishwara P Bhat , speakers like Professor S.K. Verma, Secretary General, ISIL, Former Director ILI, Professor Vijender Kumar, Vice Chancellor, National Law University, Nagpur, Professor Afzal M. Wani, Former Dean, USLLS, GGSIPU, Delhi and Professor G.S. Bajpai, Registrar, National Law University, Delhi exposed the participant with the diverse issues related to designing of doctrinal and empirical legal research and shared their experiences with the gathering on dealing with the technicalities involved in desining legal research projects.

The third technical session, chaired by Professor Mohan Gopal, continued with the theme on **Designing Research** and Prof. N.K. Chakrabarti, Director, KIIT Law School, KIIT University, Odisha, Dr. Anurag Deep, Associate Professor, Indian Law Institute and Ms. Latika Vashist, Assistant Professor, Indian Law Institute addressed the participants on some key tools and methods in legal research.

Prof. Virendra Kumar, Prof. Jaydev Pati, Prof. P. Ishwara Bhat, Prof. Mohan Gopal, Prof. Upendra Baxi and Prof. Sam Adelman at the Conference.

The fourth and final technical session on **Supervision and Conduct of Research** was chaired by Professor M.P. Singh who also delivered the keynote address. Professor Furqan Ahmad, Professor, Indian Law Institute, Professor Manjula Batra, Former Dean, Faculty of Law, Jamia Millia Islamia and Dr. P. B. Pankaja, Associate Professor, Faculty of Law, Delhi University spoke on role of law teacher as supervisor and issues and challenges involved in supervising research and academic writing.

Each and every technical session was followed by healthy interactive discussion among the various panel dignitaries and participants.

Professor Ranbir Singh, Vice Chancellor, NLU Delhi delivered the valedictory address emphasising on developing research environment in law institutes and universities. Professor M.P. Singh also graced the occasion and shared his views and experiences as a researcher and supervisor with the participants. Professor Manoj Kumar Sinha, Director, Indian Law Institute and Dr. Deepa Kharb shared the stage with the esteem guests and addressed the participants. Mr. Sreenibas Prusty, Registrar, ILI delivered the vote of thanks followed by distribution of certificates to the participants.

Prof. Manoj Kumar Sinha, Prof. M.P. Singh, Prof. Ranbir Singh, Mr. Sreenibas Prusty and Dr. Deepa Kharb at the valedictory session.

The two-day conference covered the basic concepts of research methodology focusing on theoretical and practical inputs like formulation of research problem,

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data collection, conducting literature review, selection of an appropriate method for analyzing data and report writing. The target group for participation were faculty members, research scholars and post graduate students from the field of law and social sciences. Dr.Deepa Kharb was the key moderator for the programme.

Group photograph of the participants of the Annual Conference with Prof. Upendra Baxi, Prof. Manoj Kumar Sinha and faculty members of the Indian Law Institute.

International Conference

The Indian Law Institute along with Australian Government and Australia – India Council hosted the law conference on, **"Use of Technology in Courts and Liberalisation of Legal Profession"** jointly organised by Deakin University, Australia and National Law School, Delhi on December 10, 2016 at the Institute. Professor Sandeep Gopalan, Dean Deakin Law School, lead the inaugural session by making opening remarks as Master of Ceremonies. Professor Manoj Kumar Sinha, Director, ILI and Professor Ranbir Singh, Vice Chancellor, NLU Delhi further led the event with their welcome address and occasional address respectively. Mr. Chris Elstoft, Acting Australian High Commissioner to India delivered the occasional address. Further, Mr. Salman Khurshid, Senior Advocate, Supreme Court of India delivered his Presidential address to the participants.

Conference was spread over five intensive technical sessions with important themes like, Technology in the Court, Use of Technology in Australian Courts, The Indian Legal Profession, Foreign lawyers in India and Case for Liberalisation. Each and every technical session was followed by healthy interactive discussion among the various panel dignitaries and participants so as to create clarity over the important issues raised in the seminar. The conference not only attempted to create clarity over the role of technology in increasing efficiency in courts but also raised various concerns that keeps a track of whether technology is able to meet the criteria of transparency, accountability and accessibility which lies at the core of every judicial system.

Professor Manoj Kumar Sinha,Prof. Sandeep Gopalan, Mr. Chris Elstoft, Mr.Salman Khurshid, Prof. Ranbir Singh at the inaugural programme of International Conference.

Presentation

The Indian Law Institute and International Committee of the Red Cross (ICRC) jointly organised a presentation on, **"Sexual and Gender Based Violence in Armed Conflict and Other Emergencies: Ending the Silence of Suffering"** on December 9, 2016 at the Institute. Professor Manoj Kumar Sinha, Director, ILI and Mr. Jeremy England, Head, Regional Delegation, ICRC New Delhi,

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addressed the inaugural session. Hon'ble Mr. Justice Madan B. Lokur, Judge, Supreme Court of India was the moderator for the session. Dr. Helena Duram, Director International Law and Policy ICRC, New Delhi delivered the keynote address at the event followed by an interactive session.

Workshop

The Indian Law Institute conducted a national workshop on, "**Understanding the Copyright and Related Rights"** at the Institute from November 21 to 26, 2016. The workshop aimed to create an elaborate understanding of copyright law and related rights as well as an awareness of contemporary issues that have gained importance over the period of time.

Prof. Manoj Kumar Sinha, Dr. Susmitha P. Mallaya, Professor Ved P Nanda, Professor Ashwani Kumar Bansal, and Dr. Vandana at the inaugural session of the workshop.

Professor Ashwani Kumar Bansal, Former Head and Dean, Faculty of Law, University of Delhi delivered the inaugural address. The workshop took up important issues like Idea– Expression Dichotomy and Originality Requirement in Copyright, Protection of Neighboring Rights: Limitations and Exception, Access to Published Work for Visually Disabled Persons, Concept of ownership and Licensing of Copyright, Exhaustion of Rights and Parallel Import of Copyrighted Works, Copyright and Internet. Informative sessions were led by numerous dignitaries like Professor T.C. James, Visiting Fellow, Research and Information System for Developing Countries, New Delhi, Dr. V.K. Ahuja, Associate Professor, Faculty of Law, University of Delhi, Dr. Lisa P. Lukose, Associate Professor, University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, Delhi, Dr. Poonam Dass, Assistant Professor, Faculty of Law, University of Delhi, Dr. Vishal Mahalwar, Assistant Professor, National Law University Delhi, Dr. Vandana Mahalwar, Assistant Professor, Indian Law Institute, New Delhi and Mr. Rodney D. Ryder, Partner, Scriboard, New Delhi.

The informative sessions spread over one week were followed by participants' presentation on final day.

Group photograph of participants of the workshop with Prof. Ved P Nanda,Prof. Ashwani Kumar Bansal, Prof. Manoj Kumar Sinha, Dr.Susmitha P. Mallaya and Dr.Vandana.

On successful completion of workshop participants were awarded certificates by ILI. Dr. Susmitha P. Mallaya was the coordinator and Dr. Vandana Mahalwar was the organising secretary for the event.

ILI- NHRC TRAINING PROGRAM -

I. For Police Personnel:

The Indian Law Institute and National Human Rights Commission (NHRC) jointly organised two days'

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training programme for Police Personnel on "**Police and Human Rights:Issues and Challenges"** on November 19 and 20, 2016 at the Institute. Mr. S.C. Sinha, Hon'ble Member NHRC, delivered the inaugural address. Mr. J.S. Kochher, Joint Secretary (T&C), NHRC and Professor Manoj Kumar Sinha, Director, ILI also addressed the participants in the inaugural session. Hon'ble Mr. Justice Arijit Pasayat, Former Judge, Supreme Court of India delivered the valedictory address.

The two days' training programme involved a series of intensive technical sessions that covered numerous contemporary issues such as- Role of NHRC in Protection of Human Rights, Human Rights of Police Personnel, Role and Responsibilities of Police in Vulnerable Groups, Human Trafficking: Issues and Challenges to name few. The participants were exposed to various issues and challenges in the field and the effective mechanisms to counter them. On successful completion of training programme, certificates were distributed to the participants by ILI.

II. For First Class Judicial Magistrates:

The Indian Law Institute and National Human Rights Commission (NHRC) jointly organized two days' training programme for First Class Judicial Magistrates on **"Human Rights: Issues and Challenges"** on October 22-23, 2016 at the Institute. Hon'ble Mr. Justice D. Murugesan, Member NHRC, delivered the inaugural address. Mr. J.S. Kochher, Joint Secretary (T&C), NHRC and Professor Manoj Kumar Sinha, Director, ILI also addressed the participants in the inaugural session.

This two days' programme exposed the participants to the current issues and challenges in human rights sector and how judiciary can work for the promotion of human rights. The training programme laid special emphasis on prison reforms, protection of human rights of vulnerable groups, protection of women from domestic violence and facilitation justice for victims to name few.

One Day Programme by Prayas

Indian Law Institute and Prayas Juvenile Aid Centre (JAC) society jointly organised one day programme on **Juvenile Justice: Issues and Challenges** on December 20, 2016. Professor Ranbir Singh, Vice Chancellor, National Law University, Dwarka, New Delhi was the chief guest at the function.Mr.Amod K Kanth,General Secretary, Prayas JAC presented an overview of juvenile justice in India before the participants.

Mr. Shashank Shekhar, Former Member, DCPCR delivered the valedictory address along with Mr. Vishwajeet Ghoshal, Director (Project) Prayas Juvenile Aid Center (JAC) Society. The valedictory session was followed by distribution of certificates by ILI to the participants on successful completion of the training.

Mr.Amod K Kanth, Prof. Ranbir Singh with Mr.Sreenibas Prusty at one day programme on Juvenile Justice.

International Delegation

Indian Law Institute hosted an international delegation of young scholars and early career UN officials working in the field of Law and International Affairs. The delegation visited the Institute on October 7, 2016 for an interactive meeting with Professor Manoj Kumar Sinha, Director, ILI and

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other faculty members. The delegates were part of annual joint workshop, "Implementation of International Law through Facilitation Mechanism" organised by American Society of International Law (ASIL), Academic Council of UN System (ACUNS) and OP Jindal Global University (JGU), Sonipat.

International delegation with Prof. Manoj Kumar Sinha, Prof. Vasselin Popovski and Prof. Dabiru Sridhar Patnaik.

Professor Manoj Kumar Sinha, Director, ILI made a presentation on "The Role and Current Work of the ILI and its Contribution in Research and Dissemination of Knowledge on Legal Issues in India". This was followed by discussion on various contemporary issues like Paris Pact and Climate Change Implication for India, Counter Terrorism, International Court of Justice, Responsibility to Protect (R2P), Human Rights and Role of Supreme Court in Promotion and Protection of Human Rights.

This meeting was attended by Professor C. Rajkumar, Vice Chancellor, OP Jindal Global University, Professor Dabiru Sridhar Patnaik, Director, OP Jindal Global University, Professor Vasselin Popovski, Vice Dean, OP Jindal Global Law School and faculty members of Indian Law Institute.

Columbia University Delegation

Mr. Lalit Bhasin, President, Bar Association of India , New Delhi visited ILI along with a delegation from University of District of Columbia, David A. Clarke School of Law, Washington on November 8, 2016. Professor Katherine S. Broderick, Dean and Joseph L. Rauh, Jr. Chair of Social Justice was accompanied by eminent law teachers from the school.

Professor S. Sivakumar, Professor, ILI, currently serving as the member of Law Commission of India, briefed the faculty delegation about the restatement projects undertaken by ILI and the progress made in this behalf. Dr.Jyoti Dogra Sood made a presentation before the delegation about the research and teaching assignments carried out at ILI and the prestigious publications of ILI including books, Journal of Indian Law Institute and Annual Survey. She also explained how Supreme Court of India, ILI and Law Commission of India work in tandem. This was followed by a faculty interaction on different aspects related to research, teaching and contemporary legal issues.

Prof. S. Sivakumar, Mr.Lalit Bhasin, Prof. Katherine S. Broderick and Mr.Sreenibas Prusty with the faculty members of ILI and Columbia University and research scholars of ILI.

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SPECIAL LECTURES

- Indian Law Institute and OP Jindal Global University Jointly organized a distinguished public lecture by Professor Sital Kalantry on, **"The Jurisprudence of the Supreme Court of India: Empirical Analysis and Comparative Perspectives"** at the Institute on December 8, 2016. Professor Sital Kalantry is a Clinical Professor of Law at Cornell Law School and founder of the International Human Rights Clinic and co-founder of the Avon Global Center for Women and Justice. Mr. C. Rajkumar, Vice Chancellor, OP Jindal Global University introduced the speaker and the theme for the event. The lecture was chaired by Hon'ble Mr. Justice Madan B. Lokur, Judge Supreme Court of India. Dr. Anurag Deep, ILI also addressed the inaugural session.

Dr. Anurag Deep, Prof. C. Raj Kumar, Hon'ble Mr. Justice Madan B. lokur, Prof. Sital Kalantry, Prof. Mnoj Kumar Sinha and Prof. Dabiru Sridhau Patnaik at the went.

Hon'ble Mr. Justice Madan B. Lokur, Judge Supreme Court of India, in his presidential address largely focused over the lack of real, in depth studies and research on the Indian legal system, its functioning or the relation between the judiciary and the executive. He also emphasised on the need of further exploration and requirement to pay attention on the research and studies conducted by overseas students on issues particularly relating to the justice delivery system in India to ascertain what others are thinking about the justice system and the jurisprudence being developed by the high court and the Supreme Court. He stressed on the need for a domestic perspective and encouraged academicians and researchers to study the Indian justice delivery system.

The lecture was attended by faculty members, LLM and PhD students from ILI and OP Jindal Global University and several advocates.Professor Dabiru Sridhar Patnaik, Director, OP Jindal Global Law School delivered the concluding remarks and proposed the vote of thanks.

- The Indian Law Institute and OP Jindal Global University Jointly organised a distinguished special lecture on, **"US Election 2016: Rhetoric and Reality"** on October 26, 2016. Professor C. Rajkumar, Vice Chancellor, OP Jindal Global University made the opening remarks apart from introducing the speaker and theme for the event. Professor Nathaniel Persily, Professor of Law at the Stanford Law School, Stanford University US was the main speaker for the event. Professor Persily also served as Senior Research Director for the Presidential Commission on Election Administration, a bipartisan commission created by the President to deal with the long lines at the polling place and other administrative problems witnessed in the 2012 US Presidential elections.

Professor Persily, in his lecture discussed issues in relation to effects of the recent US Presidential elections and campaign on American democracy, aspects of debates on polarization and voters views on major 2016 election issues, including US and global economic concerns.

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Mr. Stanzin Chostak, Prof. Manoj Kumar Sinha, Prof. C. Rajkumar, Prof. Persily, Prof. Dabiru Sridhar Patnaik, Ms. Kathleen Giles and Mr. Sreenibas Prusty.

The lecture was attended by faculty members along with LLM and Ph.D. students from ILI. Ms. Kathleen Giles of Center for Deliberative Democracy, Stanford University also participated in the lecture.

Professor Dabiru Sridhar Patnaik, Director, OP Jindal Global University delivered the concluding remarks. Mr.S.C. Prusty, Registrar, ILI proposed the vote of thanks.

- **Professor Alvarez Jose,** Herbert and Rose Rubin Professor of International Law at the New York University School of Law, New York University delivered a special lecture to LL.M students on the topic **"The Future of International Investment Regime"** on October 21, 2016.

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 includes 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 been submitted to the NIA officials.

Project from Ministry of Law, Department of Justice

The Ministry of Law, Department of Justice has entrusted a project to the Indian Law Institute on "*Infrastructure facilities for Subordinate Judiciaries*". The study is under progress.

ACADEMIC ACTIVITIES

Ph.D. Admissions 2016

The Admissions Committee for Ph.D. Programme 2016, after considering the performance and research proposals in a presentation of the shortlisted candidates, admitted five students to the programme in December, 2016. The selected candidates are required to undertake mandatory coursework followed by examination.

RESEARCH PUBLICATIONS

Released Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 58 (3) (July- September 2016).
- Book on *"Legal Research Methodology"*.

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Forthcoming Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 58 (4) (October- December 2016).
- Book on *"Environment: Sustainable Development and climate Change"*.
- Book on *Right to Bail*.
- Book on *Law of Copyright: Challenges in the Digital World.*
- *ILI Law Review* 2016 (Winter Issue).

EXAMINATION

Examination for LL.M. Programmes

LL.M. (1YR) I[st] Trimester-End Examinations were successfully conducted from October 24-30, 2016 and the result for the same was declared in December 2016. Examination for LL.M. (2/3 YR) Odd Semester Programmes was held from December 5-12, 2016.

Final presentations for LL.M. 1 year (3[rd] Trimester and LL.M. 2 year (4[th] Semester) were conducted on November 29, 2016 for candidates who have not submitted their dissertations in the month May, 2016.

Ph.D. Programme 2016

Result for the Ph.D. course work was declared on December 1, 2016 and the presentation of the shortlisted candidates for Ph. D. was held on November 17, 2016.

E-LEARING COURSES

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

Cyber Law

Result for the 25[th] batch was declared in December, 2016. Admission to 26[th] batch of three months duration started in December, 2016 and last for enrollment is January 6, 2017.

Intellectual Property Rights Law

Result for the 36[th] batch was declared December, 2016. Admission to 37[th] batch of three months duration started in December, 2016 and last for enrollment is January 6, 2017.

LIBRARY

- Library added 130 Books on Religion Law, International Arbitration, International Law, Research Methodology, Property Law, Refugee Law, Politics, Cyber Law, Intellectual Property Rights, Family Law, Muslim Law, Company Law, Consumer Protection Law, Administrative Law, Constitutional Law, Human Rights, Criminal Law and Environmental Law to enrich the library collection.
- The library subscribed to a new monthly journal namely, "Banking Cases" which is a monthly journal covering cases on banking laws from various courts in India.

VISITS TO THE INSTITUTE

- Students from Haldia Law College visited Institute on November 17, 2016.
- Students from Durgapur Law College, Burdwan, West Bengal visited Institute on November 16, 2016.
- Students of NERIM Law College Guwahati, Assam visited Institute on November 3, 2016.

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STAFF ACTIVITIES

- Ms. Sonam Singh, Library Superintendent and Mr. Gurjinder Singh, Technical Assistant participated in the two day Workshop- Cum-Training Programme on "Institutional Digital Repository and Metadata Engineering" on December 9-10, 2016 jointly organized by West Bengal National University of Juridical Sciences (WBNUJS) and Indian Institute of Technology, Kharagpur under National Digital Library Project, sponsored by Ministry of Human Resource Development (MHRD) and Govt. of India.

- Mr. Sanjeev Kumar, Library Assistant Joined the Institute *w.e.f.* from November 28, 2016.

- Mr. Swapan Kumar Barua, Junior Library Assistant, joined the Institute *w.e.f.* from November 28, 2016.

- Dr. Deepa Kansra, Assistant Professor was relived *w.e.f.* October 30, 2016. She joined as Assistant Professor at JNU, New Delhi.

- Ms. Chetna Salwan, Library Assistant was relived *w.e.f.* October 10, 2016. She joined as Librarian in the Directorate of Education, New Delhi.

FORTHCOMING EVENTS

- Judicial Consultation on Bail Related Matters on January 21, 2017.

- Workshop on *Environmental Law: Contemporary Issues and Challenges* from February 6-11, 2017.

- National Conference on *Competition Law and Policy: Problem and Prospects* on March 18-19, 2017.

LEGAL JOTTINGS

An absolute bequest made in respect of certain property to certain persons to prevail over a bequest made qua the same property later in the same will to other persons.

Where under a will testator has bequeathed his absolute interest in the property in favor of his wife, any subsequent bequest which is repugnant to the first bequeath will be invalid.

Earlier clause of will granting absolute right to house property jointly to testators widow and elder daughter but later directing that after the death of widow and elder daughter other lineal descendents would become owners of specified parts of the same property. It was held that absolute bequest in will shall prevail over any subsequent bequest.

Madhuri Ghosh v. ***Debobroto Dutta***

(2016) 10 SCC 805 decided on November 9, 2016.

LEGISLATIVE TRENDS

ACTS

The Taxation Laws (Second Amendment) Act, 2016.

(December 15, 2016)

The Taxation Laws (Second Amendment) Act, 2016 came into force on December 15, 2016. The Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojana, 2016 (the scheme herein after) introduced vide the said Act shall commence on December 17, 2016 and shall remain open for declaration up to March 31, 2017. The rules in this

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regard have been notified vide Notification No. 116 dated December 16, 2016. The amendment was introduced with the objective to give people a chance to disclose their unaccounted income. Further, the Amended Act ensures that defaulting assessee are subjected to tax at a higher rate and stringent penalty provision.

THE RIGHS OF PERSONS WITH DISABILITIES ACT, 2016

(December 28, 2016)

The Rights of Persons with Disabilities Act, 2016 (the Act herein after) will replace the existing Persons with Disabilities Act, 1995, which was enacted 21 years back. The Act was passed to bring our law in line with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), to which India is a party. This will fulfill the obligations on the part of India in terms of UNCRD. Further, the new law will not only enhance the Rights and Entitlements of *Divyangjan* but also provide effective mechanism for ensuring their empowerment and true inclusion into the society in a satisfactory manner.

ORDINANCES:

The Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016

The Specified Bank Notes Cessation of Liabilities Ordinance, 2016 was promulgated on December 30, 2016. The Ordinance provides that the specified bank notes (old Rs. 500 and Rs. 1,000) will cease to be liabilities of the Reserve Bank of India (RBI) from December 31, 2016 onwards. Further, these notes will no longer be guaranteed by the central government.

The notes were demonetised on November 8, 2016 through a notification issued under the RBI Act, 1934. The notification has allowed these notes to be deposited in banks or post offices by December 30, 2016.

FACULTY NEWS

Manoj Kumar Sinha was invited as Chief Guest to deliver Inaugural Address in two day conference on "Gender and Popular Culture: Representations and Embodiment", organised by Shyam Lal College, New Delhi, on December14-15, 2016.

He was invited to present a paper on 'Human Rights' on the occasion of Human Rights Day celebration by the Indian Society of International Law (ISIL) on December 9, 2016.

He was invited as chief guest to deliver key note address on the occasion of 'Constitution Day' by Faculty of Law, S.V. University, Tirupati on November 26, 2016.

He was invited as chief guest to deliver key note address on the occasion of 'Constitution Day' by Rashtriya Sanskrit Vidyapeetha, Triupati on November 25, 2016 at New Delhi.

He was invited as chief guest to deliver key note address on the occasion of 'Constitution Day' by Department of Law, Sri Padmavati Mahila Visvavidyalayam, Tirupati, on November 25, 2016.

He presented a paper on "Cyber warfare and International Humanitarian Law" in International Conference on Cyber Law, Cybercrime and Cyber security on 17-18 November, 2016 at New Delhi.

He delivered a lecture on "Prisoners of War" to the participants of 28th South Asia Teaching Session on International Humanitarian Law organised by the International Committee of the Red Cross (ICRC) and the Indian Society of International Law (ISIL), New Delhi, on 26 October, 2016.

He chaired a session on "Refugee Law" in International Conference on Law and Policy

organized by SPOCULIT Events, New Delhi on 23 October, 2016.

He delivered series of lectures on "Law and Justice in a Globalizing World" to LL.M. students of Nirma University Ahmedabad, on 16 to 17 October, 2016.

He was invited to deliver a talk on "Need of Textbook on International Humanitarian Law" organised by the International Committee of the Red Cross (ICRC), New Delhi, on October 6, 2016.

He delivered a lecture on "Response to queries concerning to Human Rights", to Public Relation Officers of CISF, organised by UGC Staff College, Jamia Millia Islamia, on October 6, 2016.

He delivered lecture on "Right to Education: National and International Perspective", to LL.M students on National Law University, New Delhi, on October 4, 2016.

Furqan Ahmad has been awarded the "*Dewang Mehta National Education Award"* for his contribution to the field of law and legal studies as the, "Best Professor of Law" at the 24th Business School Affaire on November 25, 2016.

Anurag Deep participated in the Rules Drafting Committee of PESA (The Provisions of the Panchayats (Extension to Scheduled Areas) Rules, 2017 in the Ministry of Panchayati Raj as a member on November 24, 2016.

He participated as a resource person in National Seminar on the theme "Maximum happiness for the Greatest Number- the motto of the Government policies- In depth Analysis" in Chotanagpur Law College, Ranchi. He addressed the participants on "Higher Education Policies, Practices and Privately Financed Courses: Builder's Debris or A Rational Edifice (A Case Study of Gorakhpur Region)". The same is published in the seminar proceedings on November 19, 2016.

He was invited as a resource person on the topic, '*Suraksha Bal aur Manav Adhikar'* in All India Radio, FM Gold on October 25, 2016.

Published a paper on 'Recent Trends in Capital Punishment: Judicial Mistakes to Judicial Maturity' *Vivekananda Journal of Research*, page 22-46, (VJR) Vol. 5, Part 2 (2016).

Published a paper on "National Investigation Agency Act 2008, (Constitutionality, Desirability and Feasibility)" *Aligarh Law Journal*: Vol, XXXIII, Page- 174-202 (2015-16).

He published a book on *Cyber Terrorism and Human Rights: An Introduction* from Gayan Sadan Publications, Allahabad.

Jyoti Sood was part of the committee which submitted a "Draft Manual on Living Conditions in Institutions for Children in Conflict with Law" to the Ministry of Women and Child Development, Government of India.

Contributed in the book titled *Courts of India: Past to Present* (Publications Division, Government of India, 2016)

Jupi Gogoi has a publication in the Journal of Intellectual Property Rights on *"Judima'- The Traditional Rice Wine of the Dimasa community of Assam: A Potential Candidate for GI Registration".*

Deepa Kharb participated in the International Conference on "Socio-Economic Justice after Seventy Years of India's Independence: Domestic and Global Challenges" at the Faculty of Law University of Delhi on November 18-20, 2016.She also presented a paper on '*Child Labour (Prohibition and*

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Regulation)Act 2016- A Progressive Legislation or a Half -Hearted Approach Towards Children, their Childhood and Dignity?' on November 19, 2016 at the conference.

Latika Vashist contributed in the book titled *"Courts of India: Past to Present"* (Publications Division, Government of India, 2016).

Susmitha P Mallaya was invited to judge Indian Round of Second Professor N.R. Madhava Menon SAARC Mooting Competition, 2016 at Llyod Law College, Greater Noida on December 3, 2016.

She was invited as 'Guest of Honour' on National Seminar on "Feasibility and Need for Uniform Civil Code in India" on October 21, 2016 at School of Law, BLS Institute of Management and Technology Management, Jakhoda, Bahadurgarh, Haryana.

She was also invited as chairperson for one day National Seminar on Juvenile Justice organised by Amity University, Noida on October 14, 2016.

CASE COMMENTS

National Campaign on Dalit Human Rights* v. *Union of India

2016(12) SCALE 955
Decided on December 15, 2015

This writ petition was filed by the voluntary organisations working for emancipation of members of Scheduled Castes and Scheduled Tribes. The petitioners filed this writ petition aggrieved by the non-implementation of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('the Act') and sought the following reliefs: "Issue a writ of mandamus or any other appropriate writ, order or direction, directing the Respondents to set up special officers, nodal officers and protection cell as required under the Act forthwith.

The Act enlarges the scope of criminal liability by including several acts or omissions of atrocities which were not covered by the Indian Penal Code or the Protection of Civil Rights Act, 1955. The Act also provides protection to the Scheduled Castes and Scheduled Tribes against various atrocities affecting social disabilities, properties, malicious prosecution, political rights and economic exploitation. Provisions were incorporated to grant minimum relief and compensation to victims of atrocities and their legal heirs.

The Act is comprehensive enough to deal with the social evil but its implementation has been painfully ineffective. This fact is further strengthened by simply looking at the statistics which indicate the number of cases against the Dalit has increased significantly. Reports of the various committees including NHRC report raised the doubt regarding the implementation of the Act.

The court held that there has been a failure on the part of the concerned authorities in complying with the provisions of the Act and Rules and because of this the laudable object with which the Act was adopted is defeated. The suffering of the members of the Scheduled Castes and the Scheduled Tribes continue unabated. It is true that the state governments are responsible for carrying out the provisions of the Act, at the same time, the Central Government has an important role to play in ensuring the compliance of the provisions of the Act. The constitutional goal of equality for all the citizens of this country can be achieved only when the rights of the Scheduled Castes and Scheduled Tribes

are protected. The court directed the Central Government and state governments to strictly enforce the provisions of the Act and take appropriate action for non-implementation. The court also directed National Commissions to discharge their duties to protect the Scheduled Castes and Scheduled Tribes. The National Legal Services Authority is requested to formulate appropriate schemes to spread awareness and provide free legal aid to members of the Scheduled Castes and Scheduled Tribes.

The human rights instruments proscribes discrimination 'of any kind' and lists, non-exhaustively, various grounds of discrimination. The state is required to take positive measures to ensure effective implementation of laws and prohibit discrimination by private persons and organisations in any field of public life.

Manoj Kumar Sinha

Narendra* v. *K. Meena

(2016) 9 SCC 455

Decided on October 6, 2016

The appellant husband had married the respondent wife on February 26, 1992. Out of the wedlock, a female child named Ranjitha was born on November 13, 1993. The husband filed the divorce petition on grounds of cruelty stating that the wife was of highly suspicious nature and she used to level absolutely frivolous but serious allegations against him regarding his character and more particularly about his extra-marital relationship. Further, the wife wanted the husband to leave his parents and other family members and to get separated from them so that they can live independently. Another important allegation was that the wife very often threatened the husband that she would commit suicide and once she also made an attempt to commit suicide by pouring kerosene, however she was prevented by family members and some neighbours.

The aforestated facts were found to be sufficient by the family court for granting the husband a decree of divorce on November 17, 2001 after considering the evidence adduced by both the parties. Being aggrieved by the above judgment the wife filed a first appeal which was allowed by the Karnataka High Court on March 8, 2006, whereby the decree of divorce dated November 17, 2001 was set aside. Hence, the husband approached the Supreme Court challenging the order of the high court.

The issue in the case was whether the behaviour of the wife amounted to cruelty as a ground to divorce?

Supreme Court did not agree with the observations of the high court as the high court failed to give any importance to the false allegations made by wife, the constant persuasion by her for getting separated from the family members of the husband and further, no importance was given to the incident where wife made an attempt to commit suicide. On the contrary, the high court found some justification in the request made by the wife to live separately from the family of the husband.

Supreme Court was in agreement with the finding of the trial court and observed that the attempt to commit suicide by the wife was without any basis and amounted to mental cruelty and only this was sufficient to get the decree of divorce. Further, the demand of the wife to get separated from husband's family only for monetary consideration was observed as unjustified by the court as the family was virtually maintained from the income of the husband. The court further observed that as per the customs a Hindu son,

brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meagre income. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that and in this case only monetary consideration was not considered as a justified reason.

After carefully gone through the evidence the court held that there was no reliable evidence to show that the husband had an extra-marital affair with someone. Relying on the ratio of *Vijaykumar Ramchandra Bhate* v. *Neela Vijaykumar Bhate* (2003 (6) SCC 334), the court held that that the unsubstantiated allegations levelled by the wife and the threats and attempt to commit suicide by her amounted to mental cruelty and therefore, the marriage deserves to be dissolved by a decree of divorce on the ground stated in section 13(1) (ia) of the Hindu Marriage Act, 1955.

As renowned jurist of Private International Law G.C. Cheshire observed, "[D]ivorce, since it disintegrates the family unity is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the unity of family than to wreck the future happiness of the parties by binding them to a companionship that has become odious. Membership of a family founded on antagonism can bring little profit even to the children". (G.C. Cheshire, "The International Validity of Divorce" 61 *LQ Rev* 352 (1945)) The judges of the court in the said case did not leave any stone unturned to ascertain the reasons which constituted cruelty whether mental or physical and rightly expressed the confusion created by the High Court. In each and every case allegations and counter allegation of the parties should not be taken for granted rather they require strict scrutiny which the apex court did and in consonance with the view of the Cheshire preferred to dissolve the marriage and free the parties, rather than dragging them into a forced partnership. Further, every civilised society whether Hindu, Muslim, Christian, Jews or any other, recognises the duties of children to take care and maintain their parents and that is the reason why maintenance of parents has now become the part of many statues of various countries. Thus, any dispute by the parties negating the above duty, without any justified reason should not be taken into consideration for any relief. The wisdom of the division bench of the apex court in this regard is worthy for appreciation.

Furqan Ahmad

Baijnath* v. *State of Madhya Pradesh

AIR 2016 SC 5313
Decided on November 18, 2016

The case under comment is an ordinary case of dowry death with extraordinary significance. What makes this case extraordinary is the fact that this case has (rightly) not taken note of *adverse* precedents of 2015 on 'reverse onus' clause but based its decisions on the precedents of pre 2015 criminal jurisprudence. In this case the accused appellant, Baijnath was one of the 'in-laws' of deceased Saroj Bai. She was married to Rakesh and she was found dead within seven years of marriage. It was alleged that there was demand of dowry and cruelty, soon before the death. The Supreme Court came to the conclusion that neither demand of dowry nor harassment nor the nature of death could be proved *beyond reasonable doubts* as (i) the version of prosecution witnesses are not consistent, (ii) medical evidence is not conclusive whether homicide or suicide and (iii) defence witnesses are consistent in their statements. Accused

appellants were, therefore, acquitted. So, what is extraordinary in this case that warrants a comment? Whether a faulty investigation, a less persuasive prosecution or an over cautious less sensitive accused oriented judiciary? None of them for this comment though they may be one factor for the discussion. This case becomes extraordinary for not following (which is rightly done) the judicial precedents of 2015 on the point of standard of proof in criminal law regarding dowry death.

The year 2015 was a great set back to a time honoured principle of criminal jurisprudence. This undisputed principle mandates that the prosecution has to prove its case beyond reasonable doubts and the accused, if required, can prove his arguments on balance of probabilities. This well established rule of evidence was completely reversed by a division bench in *Sher Singh @ Pratapa* v. *State of Haryana* [2015 (1) SCALE 250] where it was held that "once the *presence of these concomitants*[basic elements of 304B] *are established or shown or proved by the prosecution, even by preponderance of possibility*, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the *heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt*." [Emphasis Added] What is more disturbing is the fact that precedent of *Sher Singh* has been approved by three judges bench in the case of *V.K. Mishra* v. *State of Uttarakhand*[(2015) 9 SCC 588], *Jivendra Kumar* v. *Jaidrath Singh* as well as *Rajinder Singh* v. *State of Punjab,* [(2015) 6 SCC 477]. Indeed these three judgements do not lay down correct law as they not only ignored principles of criminal jurisprudence, but the common sense policy that the State 'can afford to be generous' to have a level playing field. Moreover the three pronouncements of 2015 also ignore the established precedents beyond reasonable doubts in dowry death cases like *Shanti* v. *State of Haryana* [(1991) 1 SCC 371], *Pawan Kumar* v *State of Haryana* [(1998) 3 SCC 309], *Kans Raj v. State of Punjab*, [(2000) 5 SCC 207, which is a three judges bench decision] , *Indrajit Sureshprasad Bind* v. *State of Gujarat*, [(2013) 14 SCC 678], *Karan Singh* v. *State of Haryana* [(2014) 5 SCC 73], *Asha* v. *State of Uttarakhand*[(2014) 4 SCC 174], *Rajeev Kumar* v *State of Haryana* [AIR 2014 SC 227]. It is inconsistent with the interpretation made to 'shall presume' by a three judges bench in *V.D. Jhangan* v. *State of Uttar Pradesh* [AIR 1966 SC 1762] and *State of Maharashtra* v. *Wasudeo Ramchandra Kaidalwar* (AIR 1981 SC 1186). *Sher Singh* also goes contrary to the law laid down in the constitution bench cases of *K. Veeraswami* v. *Union of India* [1991 SCC (3) 655] and *Sanjay Dutt* v. *State Through C.B.I., Bombay* [1995 CriLJ 477] on reverse onus. *Baijnath* case (under comment) has rightly restored the pre 2015 criminal jurisprudence regarding standard of proof before great damage is done to the human rights of the accused.

Remedy to the problem is twofold. One, strengthening the research inputs mechanism that is provided to the judges before a judgement is delivered. It would address the problem in long run to reduce the chances of avoidable inconsistency in judicial process. Two, as an immediate measure, a larger bench ought to be set up to settle the matter regarding interpretation of reverse onus clause decided in *Sher Singh* regarding 'shall presume and deeming clause.' It is needed because inconsistent opinion of different benches of the Supreme Court creates confusion before high courts and sessions court.

Anurag Deep

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Karma Dorjee* v. *Union of India

2016(12) SCALE 770

Decided on December 14, 2016

This is a public interest litigation filed under article 32 seeking the guidelines to be laid down to restrain the discriminatory acts against the persons from north-eastern states. In the petition, numerous instances of murder, molestation and other offences were mentioned in order to stress upon the need for issuance of guidelines to address the problem of racial discrimination. It was also highlighted that such discriminatory treatment is violative of article 51A (e) of Indian Constitution which reads as:

"to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women".

The petitioners filed a writ of mandamus seeking the court to direct the union govt. and state govt. to devise a mechanism to deal with racial atrocities and to direct all authorities to undertake programmes for inculcating awareness and to sensitize the general public and the law enforcement machinery. The state has an obligation to fulfill its commitment of racial equality as constitution of India prohibits discrimination on ground of religion, race, caste, sex or place of birth under article 15. The International Convention on the Elimination of All Forms of Racial Discrimination also imposes an obligation on member states to condemn racial discrimination and to pursue all apt means to eliminate racial discrimination in all its forms and to promote understanding among all races. The court emphasised that these international obligations must be read in consonance with the Indian constitutional guarantees against racial discrimination. The court also voiced that the existing Indian Penal Code provisions *i.e.,* section 153A and 153B are not sufficient to cover the racial violence spectrum. All the deliberations took place in the backdrop of the Bezbaruah Committee's recommendations. The Bezbaruah Committee also suggested for a new statutory provision or an amendment of existing law. The apex court stated that as the subject comes under concurrent list of seventh schedule, consultations with the state governments are being carried out before amending any provisions of law. Furthermore, it is for the union govt. to decide whether law should be amended or not. Also, a writ of mandamus can't be issued to legislate on a subject matter. But, the court voiced its view that the Ministry of Home Affairs needs to take positive steps to monitor the redressal of issues relating to racial discrimination against people of north-east in order to inculcate and improve a sense of security and inclusion. For carrying out the said functions, constitution of a committee is also recommended which would monitor, oversee, pursue and review the implementation of the Bezbarauh Committee and monitor the initiatives taken by the government to curb and deal with the incidents of racial atrocities. This ruling is a move towards strengthening the values of secularism enshrined in our Constitution. However, an effective implementation of these guidelines is must to stamp out the racism squarely.

Vandana Mahalwar

Jindal Stainless Steel Ltd.* v. *State of Haryana

2016(11) SCALE 1

Decided on November 11, 2016

Various states in India have passed and notified entry tax legislations under Entry 52 of the state list for imposing taxes on the entry of goods into local areas,

for consumption, use or sale therein. The levy of entry tax appears to be valid in the constitutional scheme under article 246 read with entry 52 of the state list. However, the constitutional validity of entry tax legislations has been challenged before different high courts several times on the ground of violation of freedom of trade, commerce and intercourse guaranteed under article 301 of part XIII of the Constitution of India. The apex court devised a working test of "compensatory taxes" in *Automobile Transport (Raj) Ltd* v *Union of India* (AIR 1962 SC 1406) holding that an entry tax, which was not in the nature of a 'tax' hit by article 301 but rather a compensatory levy for the use of trading facilities provided by the state, does not violate article 301. This working test was followed for almost six decades undisputedly.

The Supreme Court, in a historic judgment pronounced on November 11, 2016, upholding the validity of entry tax legislations, unanimously rejected this "compensatory tax" theory propounded by a seven-judge bench in *Automobile* case holding that the concept of compensatory tax is faulty and has no juristic basis.

The court held that constitutional limitation on the power of taxation must be express and all exceptions under which freedom of trade, commerce and intercourse guaranteed under article 301 can be overridden are provided under part XIII itself (under article 304(a) and (b)) and compensatory tax not being included as one of the exceptions; the same cannot be added as an exception by any judicial interpretation.

According to the court, only such taxes which are discriminatory to goods imported against goods locally manufactured/ produced are prohibited by article 304(a), therefore, levy of a non-discriminatory tax would not constitute an infraction of article 301. Article 304 (a) frowns upon discrimination and not on mere differentiation. Therefore, the grant of small time incentives, exemptions/ set-offs etc. to specific class of dealers aimed at the development of the economically backward areas of the state would not violate article 304(a).

Further, according to the judgment, the restrictions referred to in article 304(b) are non-fiscal in nature. Therefore, the constitutional validity of any taxing statute has to be tested only on the anvil of article 304(a). The majority view also held article 304(a) and article 304(b) of the Constitution have to be read disjunctively and therefore, a levy that violates article 304(a) on account of being discriminatory in nature cannot be saved by a presidential sanction under article 304(b). The question whether the levies in a particular case indeed satisfy this test is left to be determined by the regular benches hearing the matters. The apex court also over-ruled its earlier five judge bench judgment in *Atiabari Tea Co. Ltd* (AIR 1961 SC 232) holding that taxes *simpliciter* are not within the contemplation of Part XIII of the Constitution of India. The word 'Free' used in article 301 does not mean "free from taxation".

The petitioner in the present case had challenged the constitutional validity of the Haryana Local Area Development Act, 2000 (the Act hereinafter) before a Division Bench of the Supreme Court which was further referred to a nine-judge Constitution Bench before the same headed by Chief Justice T. S. Thakur (with Justices D. Y. Chandrachud and Ashok Bhushan dissenting from the majority view).The Act provides for levy and collection of entry tax on the entry of goods in the states for the consumption or use therein. The challenge before the bench was to balance

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freedom of trade and commerce in article 301 *vis-a-vis* the states' authority to levy taxes under article 245 and article 246 of the Constitution.

The Constitution prohibits a fiscal scenario of hostile discrimination only which creates a trade barrier between the states. Chief Justice T.S. Thakur along with Dr. A.K. Sikri, S.A. Bobde, Shiva Kirti Singh, N.V. Ramana, R. Banumathi and A.M. Khanwilkar, JJ(giving the majority view) through this ruling has upheld the autonomy and sovereignty of the states in designing their fiscal legislations by raising the threshold of challenge so high making the survival of future challenges difficult. The judgment no doubt gives due weight to the state's legislative jurisdiction but in practicality, entry tax imposed by different states on different rates and in various forms-octroi, market fee, local body tax etc. does affect the efficiency of trade on a pan India basis significantly. It is responsible for numerous disputes relating to compliance/ enforcement and may result in double taxation also at times, the burden of which ultimately falls upon the industry and the consumer in terms of delay and costs. Further, with the GST coming up in the next financial year, and the power of state to impose entry tax gone, this judgment can lead to consequential increase in revenue figures of the states putting challenge before the central government's compensation obligation under the GST framework.

Deepa Kharb

State Bank of India* v. *Santosh Gupta

2016(12) SCALE 1044
Decided on December 16, 2016

The present case is about the State of Jammu and Kashmir *vis`-a-vis`* the Union of India, in so far as legislative relations between the two are concerned. The appeals arose out of a judgment on July 16, 2015 passed by the High Court of Jammu and Kashmir at Jammu, in which it was been held that various key provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter "SARFAESI") were outside the legislative competence of Parliament, as they would collide with section 140 of the Transfer of Property Act of Jammu and Kashmir, 1920. The Supreme Court examined in detail the applicability of SARFAESI to the State of Jammu and Kashmir in the present case. Important questions (which were interrelated in nature) that arose before the court were: (i) Whether the SARFAESI Act, in pith and substance, relates to "transfer of property" and not "banking" and would, therefore, be outside the competence of Parliament and exclusively within the competence of the state legislature. (ii) Whether section 140 of the Jammu and Kashmir Transfer of Property Act is in direct conflict with section 13 of SARFAESI Act? If so which one should prevail?

The case under comment also dealt with the concept of sovereignty and brief highlights of the court's observation are as follows: The question was whether the Constitution of India and the Constitution of Jammu and Kashmir have equal status? If the answer is in the negative, can one be said to be subordinate to the other given the fact that both are expressions of the sovereign will of the people? The court referred to the Preamble to the Constitution of Jammu and Kashmir, 1957 and compared it to that of the Constitution of India, 1950 and noted that in the opening paragraph of the constitution of Jammu and Kashmir, there is no reference to sovereignty.

[1]SARFAESI is an enactment which *inter alia* entitles banks to enforce their security interest outside the court's process.

Other important questions which the court answered in this judgment were:- (i) Whether the power of Parliament is expressly "limited" under article 370(1)(b) of the Constitution of India whereas under the Constitution of Jammu and Kashmir, the State Legislature has plenary powers over all matters, except those where the Parliament has power to make laws. (ii) Whether the concurrence of state government must be obtained or is conferment of power on parliament by a presidential order by virtue of article 370 is enough before such law can operate in the state of Jammu and Kashmir?

Stanzin Chostak

State Bank of India* v. *Santosh Gupta[*]

2016(12) SCALE 1044

Decided on: December 16, 2016

In the fast changing global financial scenario, and to meet the domestic financial challenges, it was deemed imperative to have a legislation, which would ensure speedy and hassle free recovery of finances from the borrowers. This challenge resulted in the enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) in the year 2002 in India. It was enacted to facilitate, to ensure immediate recovery of finances which is due to financial institutions from the borrowers. The constitutionality of this legislation was earlier upheld by the apex court in *Mardia Chemicals Ltd.* v. *Union of India* [2003 (9) SCALE 185]. Inspite of the enactment of this legislation, the recovery of finance by the lending institutions from borrowers in our country is proceeding on snail's pace affecting the financial health of the country. In this scenario, this is a very remarkable judgment delivered by the apex court in the banking law jurisprudence.

In this case, the apex court had an occasion to discuss the application of constitutional principles in the area of banking law. It addressed the issue in the realm of commercial activities, whether the special constitutional status granted to the State of Jammu and Kashmir can be invoked to curtail the powers of Parliament to legislate in the State. The apex court tried to interpret the expressions like "banking" and "administration of justice" which weighed so heavily in the minds of the High Court of Jammu and Kashmir. The respondent argued vehemently that the sovereignty of the State of Jammu and Kashmir vests outside the Constitution of India and both the Constitution of India and the Constitution of Jammu and Kashmir have equal status which also constitutes the residents in the state a separate class of citizens as far as the application securitization law under banking is concerned.

This case is an appeal from the decision of High Court of Jammu and Kashmir which held that the Parliament does not have any legislative competence to make laws contained in section 13, 17 (A), 18 (B), 34, 36 under the SARFAESI Act, as they are in conflict with section 140 of the Transfer of Property Act of Jammu and Kashmir, 1920 so far as they relate to the State of Jammu and Kashmir.

The moot question was whether SARFAESI in its application to State of Jammu and Kashmir would be held to be within the legislative competence of Parliament or not. It was argued by the respondent that the section 17A and 18B of the SARFAESI Act, being sections relatable to administration of justice will fall under the state subject and therefore *ulta vires* Parliament.

[*]This case has been dealt in this newsletter exclusively on Constitutional perspective also and sufficient care has been taken by the contributors to avoid repetitions. The approach taken by this contributor is from banking law perspective.

The apex court upheld the applicability of SARFAESI Act to the State of Jammu & Kashmir and set aside the decision of High Court of Jammu and Kashmir. It also agreed that by applying the doctrine of pith and substance to SARFAESI Act, it is clear that in pith & substance the entire Act is referable to entry 45 list I read with entry 95 list I of the Constitution which deals with recovery of debts due to banks and financial institutions, *inter alia* through facilitating SARFAESI Act and sets up a machinery in order to enforce the provisions of the Act and does not deal with "transfer of property". It further held that the State of Jammu and Kashmir has no vestige of sovereignty outside the Constitution of India and hence its residents do not constitute a separate and distinct class in themselves.

It is a matter for concern when borrowers after availing the loan from the banking institutions fails to repay it and take shelter under the other legislations like the Transfer of Property Act in this case and delay the repayment of loan which hampers the economic development of state in particular and country in general. Therefore, a technical interpretation as initiated by the High Court of Jammu and Kashmir needs to be overlooked in the interest of economic development of the nation. Nonethless, the apex court in this case has not defined the banking function, rather mainly focused on the constitutional interpretations.

Susmitha P Mallaya

Hiral P. Harsora* v. *Kusum Narottamdas Harsora

(2016) 10 SCC 165

Decided on October 6, 2016

The Protection of Women from Domestic Violence Act, 2005 (DV Act) which came into force after a prolonged feminist campaign is a well-thought-out piece of legislation. The provisions of the Act show that it is not couched in universal or uniform terms but each provision is drafted with careful consideration of women's lived experience within the home. It was agreed that the law should not be gender-neutral due to the gendered nature of the violence faced by women in the domestic sphere. In holding domestic violence as gender neutral, the present case is regressive in as much as it wiped off years of labour expended by the women's movement with a callous stroke of judicial pen.

Kusum Narottam Harsora and her mother had filed a complaint against their brother/son, his wife and two sisters/ daughters. The female respondents were discharged by the court and that order attained finality. Thereafter, the complainants filed a writ petition in the Bombay High Court (2014 SCC Online Bom 1624) challenging the constitutionality of section 2(q) of the DV Act which defined 'respondent' as any 'adult male person' in a domestic relationship with the aggrieved person. The proviso to this section added that an aggrieved wife or live-in partner "may also file a complaint against the relative of the husband or the male partner." The high court, endorsing the decision of the Delhi High Court in *Kusum Lata Sharma* case (2011 SCC Online Del 3710) read down the provision and observed that complaints against the daughter-in-law, daughters or sisters would be maintainable, where they are co-respondent(s) in a complaint against an adult male person, but not otherwise. The order was appealed in the Supreme Court.

Before the apex court, it was contended that the expression "adult male person" in section 2(q) is not based on intelligible differentia and does not have any rational relation with the object of the legislation- the objective of the legislation being to extend maximum protection to a woman from domestic violence from

both male and female members of the shared household. It was further argued that since the mother-in-law or the sister-in-law could only be aggrieved against adult male members and not any female member of the household (*e.g.* the daughter-in-law or the sister-in-law), this restriction stultifies the Act and makes the relief under the Act unworkable (since the female abettors would not be covered). Accepting these contentions, the court set aside the Bombay High Court decision. The court struck down the words "adult male" before the word "person" on the ground that these expressions violate article 14 of the Constitution. In the court's words, "the microscopic difference between male and female, adult and non-adult, regard being had to the object sought to be achieved by the 2005 Act, is neither real or substantial nor does it have any rational relation to the object of the legislation" (para 39). According to the court, since the definition of "domestic relationship" (section 2(f)) is very wide, "[t]his necessarily brings within such domestic relationships males as well as female in-laws, quite apart from male and female members of a family related by blood." In view of this, the proviso to the section 2(q) was rendered otiose. Further, the court opined that in the view of severability principle, even after striking down the impugned expression, the rest of the Act remains intact and the object of the legislation can be achieved.

The reasoning of the court needs a close examination in order to appreciate how, and to what extent the court went wrong. In order to ascertain the object sought to be achieved by the Act, the court reviewed the Statement of Objects, the Preamble and the provisions of the Act. Noting that the Preamble states that the Act seeks to protect "victims of violence *of any kind* occurring within the family", the court observed that "the perpetrators and abettors of such violence can, in given situations, be women themselves" (para 18). The expression "any kind" is significant because DV Act was the first legislative moment that conceptualized violence in such clear and wide terms and described various facets of violence. "Any kind" clarifies that there is more than one type of violence; it acknowledges the expansive definition of violence provided in the Act. However, this expression in no way suggests that different kinds of violence include violence by women on women. In fact, it is clear quite from the statement of objects that while the Act "enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, *it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner*." Unfortunately, in its selective reading, the court chose to overlook the import of this part of the statement of object.

The court reasoned that in the light of the amendments to section 6 of Hindu Succession Act, 1956, "the definition of "shared household" in section 2(s) of the Act would include a household which may belong to a joint family of which respondent is a member. The aggrieved person can therefore make, after 2006, her sister, for example, a respondent, if the Hindu Succession Act amendment is to be looked at." This, the court observed, created "one glaring anomaly"- between the wide scope of section 2(s) and the restrictive view of respondent in section 2(q). However, it needs to be clarified that there was no anomaly whatsoever. It is completely misplaced to think that section 6 amendments have, in any way, widened the definition of shared household. From the very inception, the DV Act gave women the right to reside in the shared household even if they did not possess a formal title to the property. What section 6 amendment did was to create a coparcenary right for

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the daughters in the joint undivided family, while section 2(s) definition always assured women of a shared household protection against dispossession.

The court was perplexed by the differential treatment accorded to the daughter-in-law/ female live-in partner *vis-à-vis* the mother-in-law nor sister-in-law on account of its complete ignorance of the legislative process that culminated into the DV Act. The 2002 Bill (approvingly referred in the judgment) was subjected to staunch critique by many feminists who feared it dangerous implications, if it were ever enacted! The present DV Act, it may be noted, is based on the draft bill prepared by the Lawyers Collective in consultation with the women's movement. Whether women could be made respondents in case of domestic violence was an important issue of deliberation in the consultations. In an earlier version of their draft bill the 'aggrieved' was a woman and the respondent a male. The proviso was added later to make the law consistent with section 498A of the IPC where complaint can be filed against husband's relatives who were complicit with the violence. Commenting on the previous version of the bill (where dispossession orders could be passed against both men and women), Indira Jaising has pointed out how after extensive debates a proviso was also added to section 19 (1) to "[limit] the effect of dispossession to men alone", even as she says that "[t]]he intention of this law was not to classify offenders according to sex" (XLIV(44) *EPW* 2009).

Another very problematic part of the decision is the inclusion of 16-17 years old members (both male and female) of the household within the meaning of respondent. Much like the recent amendments to the juvenile law, the court sought to protect women at the cost of the rights of the children. This comment does not intend to even remotely suggest that the court went wrong because women cannot commit against other women, or that 16-17 years old cannot abet or aid violence against women. The point, however, is that conceptualisation of violence within the domestic sphere requires a nuanced understanding of the power structures that operate within familial spaces.

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