



BHU LAW SCHOOL Newsletter

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INSIDE

- ACTIVITIES AT THE LAW SCHOOL
- FORTHCOMING EVENTS
- FACULTY UPDATES
- LEGISLATIVE TRENDS
- INTERNATIONAL LEGAL NEWS
- AND EVENTS
- RECENT JUDICIAL DECISIONS

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EDITORIAL



When this Newsletter is going to press, the nation mourns the death of a young student, after she was brutally gang-raped and assaulted in a moving bus in south Delhi recently. This tragic and eye-opening incident calls for reflection – reflection about laws which have so far failed to check the frequent incidents of sexual assault on women not just in the national capital but also in other parts of the country and reflection about the society in which we live in. An outraged and shocked nation demands stringent punishments for rapists including death penalty in rarest of rare cases at least. But administration of capital punishment is not without problems. Inordinate delay in sentencing and executions, growing number of death row convicts and inconsistencies in the Supreme Court's own jurisprudence on death penalty call for an informed debate over the necessity of retaining death penalty in the statute books. Furthermore, death penalty shifts the focus away from the real issue to the controversies surrounding the penalty itself.

Social outrage leads to reform; and in the wake of Delhi gang-rape case, one can hope that some far reaching criminal law reforms await us. But not just the criminal law reform-substantive and procedural but also police and judicial reforms are the need of the hour. These reforms are long overdue and should be put high on agenda.

Yet we should not live in the illusion that stringent laws can alone bring about the change we are looking for. There are other ways and which are perhaps more important. Public monitoring, media exposure, sensitizing the people towards the rights of women and children are very important not only in curbing the sexual violence only but also empowering the women and other vulnerable sections of the society.

It gives us immense pleasure that despite many pressures, we have been able to complete this issue in time. I express my deep sense of gratitude to those who have extended their help towards publication of this issue. In particular, I owe a special debt of gratitude to my former students namely, Mr. Nitesh Kalara, Miss Pallavi Srivastava and Mr. Rupesh Kumar for significantly contributing to our efforts toward publication of this Newsletter. Last but not least, I am thankful to Mr. Faizan Nasir and Mr. Abhijit Kumar, students of Law School for providing research support to the editorial team.

ACTIVITIES AT THE LAW SCHOOL

National Seminar on Science, Technology and Law Reform

As part of the celebrations to mark the 150th Birth Anniversary of Mahamana Pt Madan Mohan Malaviyaji Law School, BHU organized the National Seminar on Science, Technology and Law Reform on November 3-4, 2012. The seminar was inaugurated by the Chief Guest Hon'ble Mr. Justice Swatanter Kumar, Judge Supreme Court of India. Hon'ble Mr. Justice Dilip Gupta, Judge Allahbad High Court and Shri Rakesh Munjal, Senior Advocate, Supreme Court of India were the Guests of Honour in the inaugural session. The second issue of BHU Law School Newsletter letter was also released by Hon'ble Mr. Justice Swatanter Kumar in the inaugural session.

Inaugural session was followed by special lecture session, presided over by Prof. M. P. Singh of Law School BHU. Prof. B. N. Pandey. Prof. S. Bhatt and Prof. Balakishta Reddy were the distinguished speakers. In total six technical sessions, were conducted- each session devoted to separate theme.

Shri Bharat Ji Aggarwal, Prof. R. N. Sharma, Prof. Manik Chakroborty, Prof. V. Balakishta Reddy and Prof. Ali Mehdi chaired different technical sessions.

Prof. David Tushaus, Prof. A. Lakshminath, Mr. A. P. Singh, Prof. Shubash P. Rathore and Prof. S. Bhatt were the Guests of Honour for different technical sessions.

Hon'ble Mr. Justice A.P. Sahi, Judge, High Court of Allahabad was the Chief Guest of the valedictory session which was presided over by Prof. Dhananjay Panday, Director IIT, BHU. Dr. J P Rai, Organizing Secretary, read the welcome address and Prof. R P Rai proposed vote of thanks to all.

Special Lecture by Hon'ble Dr Justice B S Chauhan

As part of the celebrations to commemorate the 150th Birth

Anniversary of Mahamana Pt Madan Mohan Malaviyaji the Law School, BHU organized a special lecture on "Law and Morality with Special Reference to Surrogacy" by Justice B S Chauhan, Judge , Supreme Court of India on 22 December 2012. Delivering the lecture, Dr Justice Chauhan said that the subject of surrogate motherhood raised many ethical and legal issues which needed focused debate. He expressed concerns over the fate of some cases on the subject pending before Indian courts in absence of legislation on the subject.

In his welcome address Head & Dean, Professor B. C. Nirmal pointed to the complex nature of the relationships arising out of the institution of surrogacy and advocated for legislative intervention. The special lecture session was presided over by Prof. R.K. Misra, former Dean of the Law School and former Vice-Chancellor of DDU Gorakhpur University. Professor B. N. Pandey introduced the Guest Speaker Justice B. S. Chauhan who also happens to be the alumni of the Law School, BHU.

Finally, Dr. Ajendra Srivastava, Associate Professor while proposing vote of thanks expressed the view that as the law on the subject was in general in state of flux and confusion legislative intervention was the need of the hour.

Youth Parliament at Law School

As part of the celebrations to commemorate the 150th Birth Anniversary of Mahamana Madam Mohan Malaviyaji the University Level Youth Parliament was organized at Law School, BHU on 13th October, 2012. More than 75 students from different faculties and affiliated colleges of BHU participated in the event. The event was inaugurated by Hon'ble Vice-Chancellor Dr. Lalji Singh. Prof. Dhananjay Pandey, Director, Indian Institute of Technology, BHU presided over the inaugural session and Prof. Kamalsheel, Vice-Chairman,

Steering Committee formed to commemorate the 150th Birth Anniversary of Mahamana Madan Mohan Malaviyaji was the Guest of Honour. Mr. Sanjeev Kumar, Faculty of Law, Ms. Smriti Kumari, Basanta Kanya Mahavidyalaya and Ms. Riya Basu were declared the Best, 2nd Best and 3rd Best parliamentarian respectively. Hon'ble Vice-Chancellor distributed the trophies and certificates to the participants. Dr. Vivek Kumar Pathak was the convener of the event

Lecture on "Restorative Justice" by Ms Joanne Katz

Ms Joanne Katz, Professor of Law, Missouri Western State University, US delivered a lecture on "Restorative Justice as a New Dimension of the Criminal Justice System of the United States", in the auspices of the Current Law Forum, Law School, BHU, on 24th November, 2012. In her illuminating and brilliant lecture she focused on the various components and processes of "restorative justice" as it is administered in the United States. Emphasizing the merits of the principle, she said that in this system of justice, the offender is asked to repair harms done to the victim as part of the community which has a very positive impact on the offenders too. In introducing the theme of the lecture, Professor BC Nirmal, Dean, Faculty of Law said that "restorative justice" is a growing approach to justice which holds an offender directly accountable to his victim and the community. While victim's concerns have been addressed in Indian Criminal Justice System, the concept of restorative justice as understood in the US has yet to be recognized in India, he further said. Finally, Dr Ajendra Srivastava, the Convenor of the Current Law Forum proposed vote of thanks to Professor Joanne Katz and all those who helped make the event successful.

Faculty level Quiz Competition

As part of celebrations to commemorate the 150th Birth Anniversary of Mahamana Madam Mohan Malaviyaji, a Faculty Level Quiz Competition was organized at Law School, BHU on 14th October, 2012. Mr Surender Mehra, Assistant Professor was the event Coordinator.

Law Day Celebrations

Delivering a lecture at Law School on law day (26 November, 2012) Mr. Om Prakash, District Judge, Varanasi underlined the need to provide an easy access to justice to poor and disadvantaged sections of society and highlighted the role played by Districts, States and National Legal Service Authority in this regard. Commending the activities of the Legal Service Center of Law School, BHU, he promised to extend his full support to his alma mater in organization of legal literacy camps.

Prof. B.C. Nirmal, Head and Dean, Faculty of Law while underlining the solemnity and significance of the Law Day, said that the Constitution with universal adult franchise, and gender equality makes India numerically the foremost nation in global democracy. Paying rich tributes to the Constitution makers he said that Fundamental Rights together with the Directive Principles of the State Policy constitute the conscience of the Indian nation. Law Day was celebrated by the Faculty in collaboration with the District Legal Services Authority, Varanasi. Prof. R. R. Jha, Prof. R. P. Pathak, Prof. Satish Rai, Prof. Rakesh Pandey and Prof. M. P. Singh also spoke on the occasion.

Release of BHU Law School Newsletter



The inaugural issue of the BHU Law School Newsletter was released by the Hon'ble Vice-Chancellor Dr. Lalji Singh at the University level youth Parliament event organized at the Law School on 13th October 2012. The Hon'ble Vice Chancellor highly appreciated the efforts of the faculty of the Law School and in particular the editorial committee in bringing such a nice and useful information resource.

Human Rights Day Celebration at the Law School

A Round Table discussion on Human Rights in Hindu, Buddhist and Jain Tradition was organized in the Faculty of Law on 10th December 2012. At this occasion while delivering welcome note

Dean, Faculty of Law, Prof. B.C.Nirmal said that Human Rights were embedded in our culture as our old epic claims: "Law is a king of kings; nothing is superior to Law". Prof. Kaushlendra Pandey, Department of Sahitya, S.V.D.V. said that human rights movement gathered momentum only after the Second World War which came to be reflected in the Universal Declaration of Human Rights. Prof. Pramod Kumar Bagade, Department of Philosophy and Religion, BHU found the elements of human rights in several doctrines of Buddha. Dr.Vivek Kumar Pathak said that in Vedas human right were protected very well. Finally, Vote of thanks was proposed by Dr.Ajay Kumar Singh, Assistant Professor. Dr. Rajnish Kumar Patel acted as master of ceremony.

Mahamana Memorial Legal Exhibition



The Legal Aid Clinic of the Faculty of Law organized the Mahamana Memorial Legal Awareness Exhibition at Swatantrata Bhawan, BHU on November, 3, 2012. The Legal Aid Clinic of the Law School was established in July 1977 to spread legal literacy and awareness among poor and vulnerable sections of the society.

FORTHCOMING ACTIVITIES

- International Conference on International Environmental Law, Trade Law, Information Technology Law and Legal Education is scheduled to be held on 2-3 March, 2013.
- Mahamana Malaviya National Moot Court Competition is to be organized on 9-10 March, 2013. 20 Teams from different parts of the country are expected to participate in the event.
- Annual Festival of the Law School 'Srijan' is to be organized on 11 February, 2013 at Swatantrata Bhawan, BHU.
- 14th Convocation of the Faculty of Law as part of the 95th Convocation of the University is scheduled to be held on March 2, 2013.
- 95th Convocation of Banaras Hindu University is scheduled to be held on March 3, 2013.
- Launch of a new Journal on Environmental & Intellectual Property Rights Law.

FACULTY UPDATES

Professor B C Nirmal, Head and Dean, Faculty of Law delivered a Lecture on "Changing Structures of Human Rights" in the Indian Law Institute, New Delhi on 21 November 2012. He was the Chief Guest in a National seminar on "Protection of Human Rights in India: Problems and Perspectives" organized by PG College, Bansdih, Ballia, U.P. on 9 December 2012. He also participated in the National Workshop organized by National Commission on Protection of Child Rights and UNICEF at India Habitat Centre on 11 December 2012. Professor B C Nirmal published an Article "Legal Regulation of Remote Sensing: Some Critical Issues" in the Journal of Indian Law Institute (JILI), vol 54(4), pp451-79. He also delivered a lecture on "Refugee Protection in India in the Round Table Conference organized by Hidayatulla National Law University, Raipur on 7th October 2012 and on 15th October 2012, Professor Nirmal delivered a pre-Convocation Special Lecture on "Justification and Desirability of Capital Punishment" in DDU Gorakhpur University.

Dr D K Mishra, Associate Professor, participated in the Symposium on "Education To Indians: Present Action and Future Directions 2030" organized by MG Kashi Vidyapith on October, 18, 2012.

Dr D K Srivastava, Associate Professor participated and presented a paper in International BHU Alumni Meet & Seminar on "Mahamana's Vision of Nation Building" organized by Banaras Hindu University on 24-25 December, 2012.

Dr. Sibaram Tripathy, Associate Professor, participated and presented a paper in I International BHU Alumni Meet & Seminar on "Mahamana's Vision of Nation Building" organized by Banaras Hindu University on 24-25 December, 2012.

Dr Ajendra Srivastava, Associate Professor and Managing Editor of BHU Law School Newsletter participated and presented a paper "Mahamana on Education" in International BHU Alumni Meet & Seminar on "Mahamana's Vision of Nation Building" organized by Banaras Hindu University on 24-25 December, 2012.

Dr. V. K. Pathak delivered Guest Lecture on the topic “Legislative Framework to Conserve the Environment in India: With Special Reference to Biodiversity Act, 2002” in National Seminar on “Role of Bio Science to Save Environment”, organized by Department of Chemistry, Kisan PG College, Bahraich, U.P. on 6 – 7 October 2012. He also chaired the valedictory session in the same seminar. He also participated and presented a paper titled “Globalisation, Legal Education and Malaviyaji” in a National Conference on “Mahamana's Vision and Thought”, organized by Banaras Hindu University on 8–9 December 2012.

Dr Rajnish kumar Singh participated and presented paper in National Seminar on “Role of Bio Science to Save Environment”, organized by Department of Chemistry, Kisan PG College, Bahraich, U.P. on 6 –7 October 2012. He also participated and presented a paper in the National Conference on “Mahamana's Vision and Thought”, organized by Banaras Hindu University on 8 – 9 December 2012. He has become a member of Editorial Board for commemorative volume on Mahamana Pandit Madan Malaviyaji, published on the occasion of 150th Birth Anniversary of Mahamana malaviyaji.

Dr. Raju Majhi participated and presented paper on “Role of Bio Science to Save Environment”, in the National Seminar organized by Department of Chemistry, Kisan PG College, Bahraich, U.P. on 6 – 7 October 2012. He also participated and presented a paper in the National Conference on “Mahamana's Vision and Thought”, organized by Banaras Hindu University on 8 – 9 December 2012.

Dr. C.P. Upadhyay participated and presented paper on “Role of Bio Science to Save Environment”, in National Seminar organized by Department of Chemistry, Kisan PG College, Bahraich, U.P. on 6 – 7 October 2012. He also participated and presented a paper in the National Conference on “Mahamana's Vision and Thought”, organized by Banaras Hindu University on 8 – 9 December 2012.

Dr V P Singh participated and presented paper on “Role of Bio Science to Save Environment”, in National Seminar organized by Department of Chemistry,

Kisan PG College, Bahraich, U.P. on 6 – 7 October 2012. He also participated and presented a paper in the National Conference on “Mahamana's Vision and Thought”, organized by Banaras Hindu University on 8–9 December 2012.

Dr. Rajneesh Patel participated and presented a paper in National Seminar on Science Technology and Law Reform, organized by Law School BHU on 3 – 4 November 2012. He also participated and presented a paper titled in a National Conference on “Mahamana's Vision and Thought”, organized by Banaras Hindu University on 8–9 December 2012.

Dr Bibha Tripathi, delivered a lecture along with Professor David Tushaus on “Domestic Violence against Women: A Comparison of India and the US Law” in Faculty of Political Science, BHU on November 23, 2012. She also delivered lectures along with Professor David Tushaus on “Domestic Violence against Women: A Comparison of India and the US Law” in the Department of law, University of Kerala, Trivandrum on 9th of December 2012. and on “Domestic Violence against Women and Civil- Legal Protections” in the University of Dhaka, Bangladesh. Dr Bibha Tripathi also worked as Session Manager in the International BHU Alumni Meet & Seminar on “Mahamana's Vision of Nation Building” organized by Banaras Hindu University on 24-25 December, 2012. She has joined as a member the Editorial Board for commemorative volume on Mahamana Pandit Madan Malaviyaji, published on the occasion of 150th Birth Anniversary of Mahamana malaviyaji.

Dr V K Saroj, Assistant Professor published an Article “Dalit Manavadhikar” in Anish (July 2011-June 2012 issue) pp4-5.

LEGISLATIVE TRENDS



During winter session, 2012 of Parliament which commenced on 22nd of November, 2012 and concluded on the 20th of December, nine Bills (seven in the

Lok Sabha and two in the Rajya Sabha) were introduced. The Bills introduced in the Lok Sabha are: (1) The Coal Mines (Conservatin and Development) Amendment Bill, 2012; (2) The Central Universities (Amendment) Bill, 2012; (3) the Criminal Law (Amendment) Bill, 2012; (4) the Competition (Amendment) Bill, 2012; (5) the Appropriation (No 4) Bill, 2012; (6) the Governors (Emoluments, Allowancwes and Privileges) Amendment Bill, 2012; and (7) the Constitution (Scheduled Tribes) Order (Second Amendment) Bill, 2012. The Bill introduced in the Rajya Sabha are: (1) the Child Labour (Prohibition and Regulation) Amendment Bill, 2012; and (2) the Indecent Representation of Women (Prohibition) Amendment Bill, 2012.

The Lok Sabha passed seven Bills and the Rajya Sabha passed eight Bills during the session. Total number of Bills passed by the Parliament is seven. These are: (1) the North Eastern Areas(Reorganization) Amendment Bill, 2012; (2) the Prevention of Money-Laundering (Amendment) Bill, 2012; (3) The Appropriation (No 4) Bill, 2012; (4) the Constitution (One Hundred Eighteenth Amendment) Bill, 2012; (5) The Unlawful Activities (Prevention) Amendment Bill, 2012; (6) the Banking Laws (Amendment) Bill, 2012; and (7) the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Bill, 2012. Of these, the Prevention of Money Laundering (Amendment) Bill, 2012, the Banking Laws (Amendment) Bill, 2011 and the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Bill, 2011 are significant as they have a bearing on the policy of liberalization of economy. The Constitution (One Hundred Seventeenth Amendment) Bill, 2012 which seeks to protect the interest of Scheduled Castes and Scheduled Tribes by providing reservation in Government Services was passed by the Rajyya Sabha but could not be passed by the Lok Sabha. Similarly, the Companies Bill, 2012 was passed by the Lok Sabha but could not be passed by the Rajya Sabha.

INTERNATIONAL LEGAL
NEWS & EVENTS

United Nations


UN Climate Change Conference in Doha (COP 18)/CMP 8 adopted amendment to launch a second commitment period under the Kyoto Protocol

The 18th Session of the Conference of the Parties (COP 18) to the United Nations Framework Convention on Climate Change and the Eighth Session of the COP serving as the Meeting of the Parties to the Kyoto Protocol (CMP 8) opened on Monday, 26 November 2012 and continued until Saturday, 8 December 2012 in Doha, Qatar. At Doha Climate Change Conference several decisions of far reaching implications were taken. Of these, the most notable one is the adoption of the Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 launching a new commitment period which will begin on 1 January 2013 and will end on 31 December 2020. As per the decision, a new Annex B will replace the existing Annex B to the Kyoto Protocol setting out quantified emission limitation or reduction commitment (2013-2020).

COP 11 to the Convention on Biological Diversity (CBD) concluded on 19 October, 2012 in Hyderabad

The Eleventh meeting of the Conference of the Parties (COP 11) was held in Hyderabad, India from 8-19 October 2012. The meeting took place during the UN Decade on Biodiversity. At COP 11, developed countries agreed to double funding by 2015 to support efforts towards meeting the Aichi Biodiversity Targets. In addition, all Parties agreed to substantially increase domestic expenditures for biodiversity protection over the same period. The COP 11 also set targets to increase the number of countries that have included biodiversity in their development plans, and prepared national financial plans for biodiversity, by 2015. These targets, and progress towards them, will be reviewed in 2014.

Former Assistant Commander of the Bosnian Serb Army sentenced to life imprisonment by the International
Criminal Tribunal for former Yugoslavia (ICTY)

Zdravko Tolimir, former Assistant Commander and Chief for Intelligence and Security of the Main Staff of the Bosnian Serb Army (VRS), was on 12 December 2012 sentenced to life imprisonment for genocide, crimes against humanity and war crimes committed in 1995 after the fall of the enclaves of Srebrenica and Zepa, Bosnia and Herzegovina. Tolimir was found guilty by the majority of Trial Chamber II of genocide, conspiracy to commit genocide, murder as a violation of the laws or customs of war, as well as extermination, persecutions, inhumane acts through forcible transfer and murder as crimes against humanity. The Trial Chamber II found that crimes committed "were massive in scale, severe in their intensity and devastating in their effect."

18 Countries elected to serve on UN Human Rights Council

The UN General Assembly on 12 November 2012 elected 18 countries to serve on the United Nations Human Rights Council for a period of three years beginning on 1 January 2013. These countries are: Argentina, Brazil, Cote d'Ivoire, Estonia, Ethiopia, Gabon, Germany, Ireland, Japan, Kazakhstan, Kenya, Montenegro, Pakistan, Republic of Korea, Sierra Leone, United Arab Emirates, United States and Venezuela.

Members of HRC serve for a period of three years and are not eligible for immediate re election after serving two consecutive terms. The Council, composed of 47 members, is an inter-governmental body within the UN system responsible for the promotion and protection of human Rights across the world and for addressing situations of human rights violations and make recommendations on them. It was created by the UN General Assembly on 15 March 2006 by Resolution 60/251. The HRC replaced the former Commission on Human Rights which was established in 1946.

Detention of terror suspect by Macedonia amounted to "enforced disappearance": ECHR

In a judgment of great importance released on 13 December 2012 the European Court of Human Rights (ECHR) ruled that the applicant El-Marsi, a

German national was illegally detained and handed over into the custody of the US authorities in Afghanistan by "the former Yugoslav Republic of Macedonia". On the facts of the case, the Court found that the acts of Macedonian authorities were in breach of Article 3 (Prohibition of torture), 5 (Right to liberty and security), 8 (Right to respect for private and family life) and 13 (right to an effective remedy) of the European Convention on Human Rights and Fundamental Freedoms. On 31 December 2003 the applicant was taken to a hotel room in Skopje by the Macedonian authorities where he was secretly kept for 23 days. In January 2004, he was flown to Kabul where he was held captive for five months. During detention he was subjected to inhuman and degrading treatment at the hands of Macedonian and US authorities.

The Court found that the secret nature of detention of the applicant in a hotel room amounted to torture, inhuman and degrading treatment. It was further held that the applicant's transfer into the custody of CIA agents amounted to 'extraordinary rendition' which entailed detention outside the normal judicial process and which was anathema to the rule of law. The Court also ruled the applicant's detention also amounted to "enforced disappearance."

Judgment of the ICJ in Nicaragua v Colombia, 19 November 2012

In its judgment of 19 November 2012 in the case concerning the Territorial and Maritime Dispute (Nicaragua v Colombia), the International Court of Justice (ICJ), the principal judicial organ of the United Nations found, unanimously, that the Republic of Colombia has sovereignty over the islands located in the Caribbean Sea, namely, the Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueno, Serranilla and Bajo Nuevo. All these remain above water at high tide and thus, as islands, they are capable of appropriation.

The case mainly relates to acquisition of title to the disputed maritime features. The issue was whether sovereignty could be established on the basis of a State's acts manifesting a display of authority on a given territory. The Court found that for many decades Colombia had continuously and consistently acted a

titre de souverain in respect of the maritime features in dispute. This exercise of sovereignty was public and there was no evidence that it had met with any protest from Nicaragua prior to 1969, when the dispute crystallized.

Remigiuse Henczel of Poland elected as President-elect of the Human Rights Council

In its organizational meeting held on 10 December 2012, the Human Rights Council elected Remigiuse Henczel of Poland its President for the year 2013. Cheikh Ahmd Ould Zahaf of Mauritania, Iruthisham Adam of the Maldives, Luis Gallegos Chiriboga of Ecuador, and Alexandre Faselmof Switzerland were elected as Vice-Presidents-elect of the Council.

New global telecoms treaty signed in Dubai

Delegates from 193 countries agreed a new global treaty- the new International Telecommunication Regulations (new ITRs) at 12th World Conference on International Telecommunications (WCIT-12) concluded in Dubai on 14 December 2012. The new ITRs will help pave the way to a hyper-connected world that will bring the power of information and telecommunication technologies (ICTs) to people everywhere. The treaty set out general principles for ensuring the free flow of information around the world. New treaty places special emphasis on future efforts to assist developing countries, on promoting accessibility to persons with disabilities, and on asserting all people's right to freedom of expression over ICT networks.

RECENT JUDICIAL DECISIONS



Radhakrishna Nagesh v State of Andhra Pradesh

'Penetration is not necessary to prove the offence of rape'

The Supreme Court has given a landmark judgment on December 13, 2012 in case of Radhakrishna Nagesh v. State of Andhra Pradesh. The apex court has

upheld the conviction of Andhra Pradesh High Court to an accused for raping an 11-year-old girl despite there being no evidence of penetration. While upholding the sentence of 10 years imprisonment passed against the accused on rape charges by the High Court of Judicature at Hyderabad, Andhra Pradesh, a Bench of Justice Swatanter Kumar and Gyan Sudha Mishra observed that 'penetration itself proves the offence of Rape, but the contrary is not true that is even if there is no penetration, it does not necessarily mean that there is no rape.' The Court further said that penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case.

The factual matrix of the case as per the prosecution is- 'In 1997, a ball-boy at Sri Venkateswara University tennis court in Tirupati lured a minor girl on the pretext to purchase gold colour plastic bangles for her, bought and took her to the store room near the tennis court and raped'. The Trial Court acquitted the accused on the ground that there was no proof of penetration as required by the statute to constitute sexual intercourse under explanation to Section 375 of IPC to constitute the Offence of rape. Furthermore, there were discrepancies in witness statement and serious contradiction between the ocular and the medical evidence. In appeal, the Andhra Pradesh High Court set aside the acquittal order of the trial court and awarded sentence of 10 years imprisonment to the accused. While dismissing the appeal preferred against the Judgment of the High Court, the Supreme Court pulled up the trial court for acquitting the accused and observed that the Court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl.

Thus, the Court concluded that in its opinion the trial court has failed to appreciate the evidence on record cumulatively and in its correct perspective by ignoring the material piece of evidence and improper appreciation of evidence. The judgment

of the Supreme Court of India is very timely and sends a strong message to the contemporary society too.

Dr. Dharmendra Kumar Mishra,
Associate Professor

Sangeet v State of Haryana

AIR 2013 SC 447

Supreme Court for 'principle based sentencing'

The question of sentencing unfortunately has not been taken up seriously in India. In this case the Supreme Court observed that the sentencing process has become judge-centric rather than principled sentencing. The principle of rarest of rare in awarding death sentence is not being followed consistently. The award of death sentence has varied from considering the 'nature of crime' to 'crime and criminal' both. The case in hand is important from two angles. First, whether the trend of the courts in considering the nature of offence only and not the criminal is in consonance with the judgment given in *Bachan Singh* case? and, secondly, whether the trend of the court in imposing sentence of incarceration for a minimum period of 25 or 30 years is in accordance with the legislative policy?

In this case, six persons including the appellants were accused of multiple murders and were charge sheeted for various offences under the Indian Penal Code, 1860 and the Arms Act, 1959. They were convicted for offence under sections 302, 307, 449, 148 read with Section 149 of the Indian Penal Code and five accused out of six were also convicted under Section 25 (1A) of the Arms Act. While one of the appellants, on the issue of sentencing before the trial court, pleaded that he was married and had a five year old daughter and aged parents to look after the other appellant pleaded that he had old parents to look after. The trial court, nevertheless, handed down the death sentence which was confirmed by the High Court. The Supreme Court had to consider the issue limited to the question of death sentence awarded to the appellants.

The Supreme Court in this case got an opportunity to discuss the entire gamut of case laws on the issue of death sentence. The First Phase of sentencing policy, enshrined in Section 367 (5) of the Criminal Procedure Code, 1898 and reflected by the Supreme Court in *Jagmohan Singh* case (AIR 1973 SC 947)

laid emphasis on the seriousness of the crime while awarding the death sentence. While upholding the constitutional validity of death sentence, *Bachan Singh* case (AIR 1980 SC 898) emphasized that 'the court must have regard to every relevant circumstance relating to crime as well as the criminal.' In awarding death sentence, it introduced the circumstances of the criminal and ignored the aggravating and mitigating circumstances of a crime and it was one of the significant departures from *Jagmohan Singh* case and opened up the Second Phase of sentencing policy. Despite *Bachan Singh* case, the courts gave primacy to the nature of crime and the circumstances of the criminal took back seat in the sentencing process. In *Machhi Singh* (AIR 1983 SC 957) the Supreme Court revived the "balance sheet" theory. It made an attempt to compare aggravating circumstances pertaining to crime with the mitigating circumstances pertaining to a criminal. According to *Sangeet*, these two elements are distinct and cannot be compared and thus balance sheet cannot be prepared by taking two different and distinct constituents. In the case at hand the Supreme Court opined that *Bachan Singh* case which intended for 'principled sentencing' has been lost in transit and sentencing has now really become judge centric and thus there was a need to have a fresh look on the balance sheet approach. It was thus held that in the sentencing process, both the crime and the criminal are equally important. The issue in the Third Phase has been that punishment to be given in cases where death penalty ought not to be awarded and life sentence is inadequate in view of the power of remission available with the appropriate government under section 432 of the Criminal Procedure Code. Recently the courts have started to impose imprisonment for a minimum period of 20 or 25 or 30 years in order to limit the power of remission. The power of remission given to the appropriate government is statutory and the courts cannot put restriction on the exercise of such power. The legislative provision to prevent the arbitrary exercise of power is inbuilt and there is a need to enforce those faithfully. In *Sangeet* the Supreme Court found that incarceration for a

minimum period of 25 or 30 years was unnecessary. The appropriate governments have arbitrarily and artificially have considered the period of life imprisonment as 20 years and the Supreme Court has prohibited this calculation of life imprisonment in *Ratan Singh* (AIR 1976 SC 1552). The Supreme Court has thus tacitly refused to enter in Phase Three of the sentencing policy.

Dr. Akhilendra Kumar Pandey

Associate Professor

Tukaram Kana Joshi and Ors thr Power of Attorney Holder v MIDC

2012 (11) SCALE 04

On November 02, 2012 the Supreme Court of India has delivered an important judgment in relation to law of compensation in the appeal against the judgment and order passed by the High Court of Bombay by way of which the High Court had rejected the claim of appellants for any compensation due to them for the land taken by the respondent authorities without resorting to any procedure prescribed by law. The Supreme Court expressed serious concern at the inordinate delay in payment of compensation to farmers for land.

In the instant case, the appellant farmers in Maharashtra belonged to a class which did not have any other vocation or business for earning their livelihood. The appellants have been deprived of their legitimate dues for about half a century. The Court stated that the appellants have been seriously discriminated against other persons, whose land was acquired as some of them were given the benefit of acquisition including compensation. The court observed that such kind of discrimination not only breeds corruption but is also creates disrespect for governance as it leads to frustration. Furthermore, such a kind of discrimination forces the persons to take law into their own hands.

In this regard, the Supreme Court of India made the following important observations:

1. That the inordinate delay in payment of compensation to farmers for their land amounts to deprivation of livelihood, which is the violation of right to life under Article 21 of the Indian Constitution;
2. That even under valid acquisition

proceedings there is a legal obligation on the authorities to complete the proceedings at the earliest and to make the payment of the compensation.

3. That it is not permissible for any welfare state to uproot a person and deprived him of his fundamental or constitutional or human rights under the garb of industrial development.

4. That statutory authority are not only bound to pay adequate compensation but also legally obliged to rehabilitate such persons.

5. That a welfare state governed by rule of law cannot arrogate to itself a status beyond one that is provided by the constitution.

The Supreme Court of India expressed a serious apprehension that non fulfillment of their obligations by statutory authorities in this regard would be equivalent to forcing the uprooted persons to become vagrant or to indulge in anti-national activities as such sentiments would be born in them on account of such kind of ill treatment without resorting to any procedure prescribed by law. The Supreme Court directed the authorities to complete the acquisition proceedings expeditiously to award the compensation in accordance with the current market value and to make payments to the claimants or the persons interested immediately.

Dr. V.K. Pathak

Assistant Professor

OMA @ Omprakash v State of Tamil Nadu

MANU/SC/1080/2012

Trial Courts should not be influenced by the views on private forums

The Supreme Court in its judgment on December 11, 2012 has observed that the Criminal Court should exercise the judicial function independently on the basis of its own assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducement, pressures, threats or interference, direct or indirect from any quarter or for any reason. The trial court should not be guided or influenced by the views or opinions expressed by Judges on a private platform.

Appellants in this case were awarded death sentence by the trial court after having found them guilty under Sections 395, 396 and 397 of the Indian Penal

Code. The trial court opined that as the accused came from a State about 2000 km from our State and they did not think that the victims were also human like them but they thought only about the well being of their family and their own life and committed the fear of death amongst the common public of our State by committing robbery and murder for about 11 years. The case falls in the rarest of the rare cases category and death sentence imposed upon them would create a fear amongst the criminals who commit such crime.

It should also be noted that the trial court was also influenced by the speech delivered by the Chief Justice of High Court of Madras at Madurai wherein Justice A.P. Shah had said that strict laws should be enacted as regard to child abuse and the persons committing the crime should be punished accordingly. Taking serious note of this, the Supreme Court observed: "We are disturbed by the casual approach made by the Sessions Court in awarding the death sentence. The 'special reasons' weighed with the trial judge to say the least, was only one's predilection or inclination to award death sentence, purely judge-centric."

In *Omprakash*, the Supreme Court cautioned the trial courts not to be influenced by the views expressed by the judges or academicians on a private platform, while determining cases and imposing punishment. A bench of Justices K.S. Radhakrishnan and Dipak Misra while quashing life imprisonment awarded by the Madras High Court stated that "Criminal Courts while deciding criminal cases shall not be guided or influenced by Judges on private platform..." The Supreme Court set aside the order of conviction and directed that the Appellant be set at liberty forthwith unless he is required to be detained in any other case.

V. P. Singh

Assistant Professor

The Deputy Inspector General of Police & Anr. v S.Samuthiram

2012 (11) SCALE 420

Supreme Court issued guidelines to curb eve-teasing at public places

Eve-teasing in present time has become pernicious, horrid and disgusting practice and in order to curb the menace of eve-teasing the Supreme Court issued various

guidelines in this case. The Hon'ble Court stated that sexual harassment like eve-teasing is a euphemism, and an effecting legislation is the need of the hour. It had been observed by the Hon'ble High Court that provisions of the Protection of Woman against Sexual Harassment at Workplace Bill, 2010 were not sufficient to curb the menace of eve-teasing and in this light a Division Bench comprising K.S.P. Radhakrishnan and Deepak Mishra JJ. issued following guidelines to curb the incidents of eve-teasing at public places:

(1) All the State Governments and Union Territories should depute plain clothed female police officers in the precincts of bus-stands and stops, railway stations, metro stations, cinema theaters, shopping malls, parks, beaches, public service vehicles, places of worship etc. so as to monitor and supervise incidents of eve-teasing.

(2) The State Government and Union Territories should install CCTV in strategic positions which itself would be a deterrent and if detected, the offender could be caught.

(3) Persons in-charge of the educational institutions, places of worship, cinema theaters, railway stations, bus-stands have to take steps as they deem fit to prevent eve-teasing, within their precincts and, on a complaint being made, they must pass on the information to the nearest police station or the Women's Help Centre.

(4) Where any incident of eve-teasing

is committed in a public service vehicle either by the passengers or the persons in charge of the vehicle, the crew of such vehicle shall, on a complaint made by the aggrieved person, take such vehicle to the nearest police station and give information to the police. Failure to do so should lead to cancellation of the permit to ply.

(5) State Governments and Union Territories should establish Women Helpline in various cities and towns, so as to curb eve-teasing within three months.

(6) Suitable boards cautioning such act of eve-teasing be exhibited in all public places including precincts of educational institutions, bus stands, railway stations, cinema theatres, parties, beaches, public service vehicles, places of worship etc.

(7) Responsibility is also on the passers-by and on noticing such incident, they should also report the same to the nearest police station or to Women Helpline to save the victims from such crimes.

(8) The State Governments and Union Territories of India would take adequate and effective measures by issuing suitable instructions to the concerned authorities including the District Collectors and the District Superintendent of Police so as to take effective and proper measures to curb such incidents of eve-teasing.

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