National Law University Odisha

CONSTITUTIONAL LAW SOCIETY

THE CONSTITUTIONAL POST

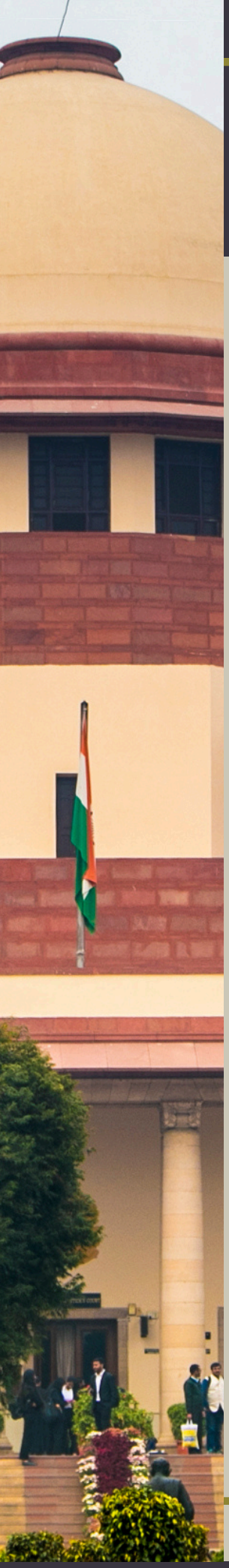
JANUARY
FEBRUARY
2025

PREFACE

The Constitutional Law Society is delighted to present the January-February Issue of the Constitutional Post. CLS is pleased to put across their efforts in making this issue of the Constitutional Law Post relevant, contemporary and engaging.

The idea of the Constitutional Post is to familiarize students and academicians with the fundamentals of law while exposing them to contemporary developments. We have received many positive words about this initiative, and we are very thankful for the support that we have got ever since its inception.

We look forward to receiving any feedback from you.



ACKNOWLEDGEMENT & DISCLAIMER

The Constitutional Law Society (CLS) is indebted to National Law University Odisha (NLUO) for giving us the platform to think freely and indulge in these activities. Without the support of Prof. Ved Kumari (Vice-Chancellor of NLUO) and Prof. Rangin Pallav Tripathy (Registrar of NLUO), the creation of 'The Constitutional Post' would not have been possible. Ms. Rishika Khare (Assistant Professor of Law at NLUO and Faculty Advisor of CLS-NLUO) has been involved with the development of this idea right from its concept development stage and her contribution has been immensely helpful for making this compendium. We also extend our gratitude to the eminent jurists, writers, and journalists who have contributed to the readings that are referred to in these write-ups for being vocal about their thoughts through their writings, which have helped us to further our goal for the dissemination of Constitutional Law knowledge to the masses among students, budding lawyers, and young legal professionals.

ARTICLE 226 AND BASIC STRUCTURE DOCTRINE

Revisiting Writ Jurisdiction in Arbitration Post-Tamil Nadu Cement Case

Introduction

"Judicial review is an integral part of our constitutional system and without it, our fundamental rights would be reduced to a mere rope of sand". Justice Patanjali Sastri's statement in State of Madras v. V.G. Row laid the foundation for the Basic Structure Doctrine, later affirmed in Kesavananda Bharati v. State of Kerala. Over time, its scope has expanded, with Article 226 now recognized as part of the Basic Structure. The scope of the basic structure doctrine has been expanded liberally, where recently, the right to approach High Courts under Article 226 has been interpreted as part of the basic structure. In Tamil Nadu Cements Corporation Ltd. v. MSEFC ("Tamil Nadu Cements Case"), the Supreme Court reaffirmed that access to High Courts cannot be ousted by arbitration mechanisms, sparking a debate about whether arbitration laws limit judicial review, or whether it is an indispensable constitutional safeguard. In this blog, the authors analyse the judgement highlighting the evolving scope of basic structure along with the exercise of writ jurisdiction in arbitration matters. The blog attempts to answer how the basic structure doctrine continues to protect access to courts in the face of evolving statutory frameworks.

The Supreme Court's Ruling in Tamil Nadu Cements: Analysis

The Supreme Court's decision in Tamil Nadu Cements case raises key questions about writ jurisdiction under Article 226 in arbitration. The primary issue before the Court was whether a party could directly challenge an MSEFC order under Article 226 or if it was strictly required to follow the statutory appeal process under Section 34 of the Arbitration and Conciliation Act, 1996 **("A&C Act")**. Section 18 creates an obligation upon the MSEFC to act as both a conciliator and an arbitrator for disputes involving micro and small enterprises. While this statutory framework intends to provide an efficient dispute resolution mechanism, it also introduces Section 19, which requires a 75% pre-deposit of the awarded amount before an appeal can be heard. Although the provision aims to deter frivolous litigation, it raises serious concerns about access to justice, particularly for businesses facing substantial financial liabilities. The Supreme Court reiterated that judicial review under Article 226 is a fundamental safeguard under the basic structure doctrine and cannot be completely eliminated by statutory provisions. While acknowledging that arbitration laws are designed to reduce judicial intervention, the Court maintained that writ jurisdiction remains available in exceptional cases, such as when an order is passed without jurisdiction, violates fundamental rights, or breaches principles of natural justice.

The Court also addressed conflicting judicial precedents. In Jharkhand Urja Vikas Nigam Ltd., the Supreme Court allowed writ petitions against MSEFC orders when they exceeded their jurisdiction or violated fundamental rights. However, a contrary was established in the subsequent matter of Gujarat State Civil Supplies Corporation Ltd., where the Court took a narrow approach, holding that statutory arbitration should not be easily circumvented by invoking Article 226. The Court acknowledged this inconsistency and referred the matter to a five-judge bench. Additionally, the Court questioned whether the pre-deposit requirement under Section 19 restricts access to judicial remedies. While intended to filter out baseless challenges, it creates a financial barrier that may deter genuine claims. This approach signals Supreme Court's intent to strike a balance between arbitration efficiency and constitutional right to judicial review.

Evolution of Judicial Review as a Basic Structure Principle

The principle of judicial review is a core element of the India's basic structure doctrine, ensuring that laws and executive actions remain within constitutional limits. The Supreme Court has consistently reinforced the non-negotiable nature of judicial review. In L. Chandra Kumar v. Union of India, the Court held that judicial review under Articles 226 and 227 is part of the Constitution's basic structure, meaning it cannot be diluted even by legislative action. This ruling established that tribunals and quasi-judicial bodies remain subject to High Court supervision. The Tamil Nadu Cements case is relevant because it challenges the extent to which statutory arbitration under the MSMED Act can restrict constitutional courts from reviewing arbitral award and presents a fundamental question: Can Parliament, through legislation, limit or exclude judicial review under Article 226?

The Supreme Court has struck down past attempts to shield statutory bodies from judicial scrutiny. In, Rojer Mathew v. South Indian Bank Ltd. the Supreme Court invalidated provisions that attempted to restrict High Court jurisdiction over tribunal decisions. The outcome of Tamil Nadu Cements case will have a significant impact on India's legal framework. If the five-judge bench upholds the maintainability of writ petitions in arbitration cases, it will reinforce Article 226's status as a fundamental safeguard, ensuring that arbitration remains a mechanism for dispute resolution rather than an escape from judicial scrutiny.

Conflict of Arbitration and Writ Petition Jurisdiction: When can High Courts intervene?

Section 5 of the A&C Act explicitly provides that no judicial authority shall intervene except where so provided in the Act. The provision serves to indicate the intention to minimise judicial interference in arbitration matters. In Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., it was held that the code itself is self-contained, therefore, it is reasonable to restrict judicial oversight in arbitration matters. If executed otherwise, it will defeat the very characteristics persons prefer going to arbitration, a swift and cost-effective alternative to traditional litigation.

The "Exceptional Rarity Test", laid down in Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., further clarified that writ jurisdiction should be exercised only when there is a patent lack of jurisdiction, bad faith, or a violation of fundamental principles of justice. The same was upheld by the Supreme Court in SBP & Co. v. Patel Engg. where the court said that allowing writ petitions against arbitral tribunal orders would defeat the objective of arbitration. Later in Deep Industries Ltd. v. ONGC, the Court observed that High Courts must be extremely cautious in interfering with arbitration proceedings under Articles 226 or 227 and should do so only when an order is patently lacking in jurisdiction. However, courts have acknowledged that the existence of an arbitration clause does not bar High Court writ jurisdiction entirely. In Union of India v. Tantia Construction Pvt. Ltd., the Supreme Court reaffirmed that writ jurisdiction under Article 226 remains available despite an arbitration agreement, though its exercise should be exceptional and not routine.

Referring here to Section 18 of the MSMED Act which mandates that disputes involving MSMEs must be referred to the MSEFC, which can act as a conciliator and, if conciliation fails, as an arbitrator. This provision overrides any pre-existing arbitration agreement between the parties. In State Trading Corporation of India Ltd. v. MSEFC, the Delhi High Court upheld that the requirement of pre-deposit under Section 19 of the MSMED Act cannot be bypassed by invoking writ jurisdiction. Therefore, it is safe to conclude that courts have time and again reinforced the legislature's intent to safeguard MSMEs.

This leads to a pertinent question: Does this Act violate the basic structure? To answer this question, courts have generally upheld its validity, ruling that parties still have recourse to Section 34 of the A&C Act to challenge an award. In Punjab State Power Corporation Ltd. v. EMTA Coal Ltd., the Supreme Court held that judicial interference in arbitration is permitted only when the order is patently lacking in jurisdiction. The Tamil Nadu Cements case reaffirms that judicial review under Article 226 remains available in exceptional cases, ensuring that statutory arbitration mechanisms do not override constitutional principles.

Conclusion

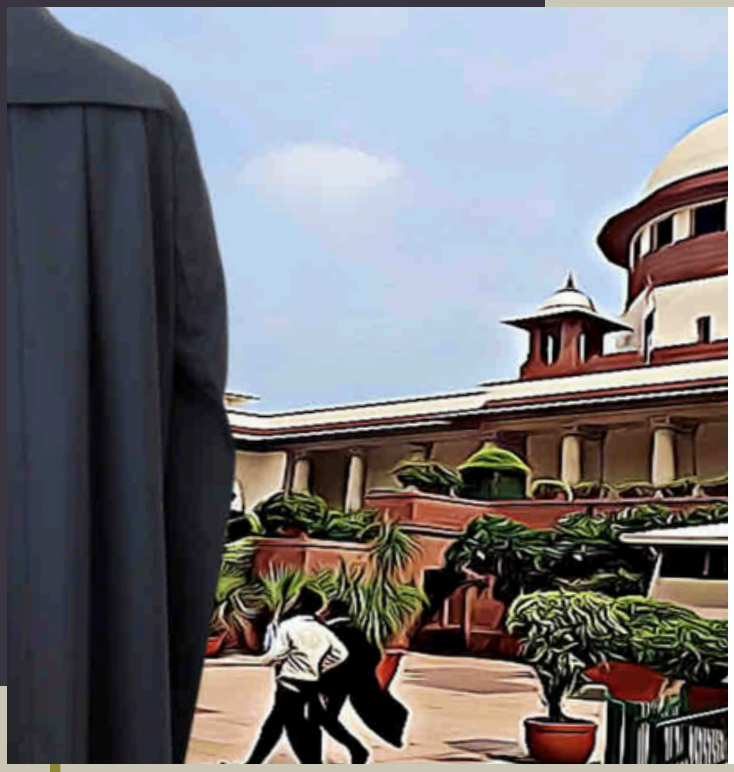
From the above discussion, the authors have accentuate that although the arbitration laws seek to limit scope of judicial intervention, it has been adjudged throughout several matters that statutory frameworks cannot entirely oust High Court's jurisdiction, particularly involving cases of jurisdictional overreach, fundamental rights violations, or breaches of natural justice. The discussion reveals dual observation, i.e., preserving arbitration is pertinent along with ensuring access to constitutional remedies. The way forward lies in a nuanced approach which means that High Courts must exercise restraint in arbitration-related writ petitions, adhering to the "exceptional rarity" standard, while also ensuring that procedural barriers do not undermine judicial access. If the five-judge bench upholds the maintainability of writ petitions in exceptional cases, it will reinforce Article 226 as a fundamental safeguard, ensuring that arbitration serves as an alternative dispute resolution mechanism rather than a shield against constitutional scrutiny.

SPARE THE CHILD, KID YOU NOT

The Bench of Justice P.V. Kunhikrishnan at the High Court of Kerala has directed that a preliminary enquiry must be conducted if a complaint is received against any teacher for their conduct inside an educational institute according to the mandate of Section 173(3) of the BNSS. The petitioner in the bail application case had been accused of assaulting the complainant's son, a child studying in the 6th standard, after the child spread the news that the petitioner drove the car in which the petitioner's son met with an accident. The petitioner was booked for offences under Section 118(1) of the Bharatiya Nyaya Sanhita and Section 75 of the Juvenile Justice (Care and Protection of Children) Act. The petitioner has denied the alleged incident, stating that it is the child's lackadaisical attitude which has motivated him to spread such news and lodge a false complaint. The bench observed that persons acting in loco parentis can take punitive measures and "apply a reasonable degree of force to their children or pupils to understand the purpose of which the act was done." Justice Kunhikrishnan further affirmed the observations in Geetha Manoharan v State of Kerala with approval which stated that a teacher who "beats a student bona fide to maintain discipline" has received "implied consent by the parent". Section 17(1) of the Right to Education Act strictly prohibits the physical punishment or mental harassment of a child.

In cases such as Tushar Gandhi v State of U.P. the apex court has observed that the a child's right to be free from harm and harassment in educational spaces flows from Article 21A of the Indian Constitution and ordered for the strict implementation of Section 17(1) of the RTE Act.

Section 173(3) of the BNSS mandates preliminary enquiry in case of cognisable offences punishable for a minimum of three and a maximum of seven years to determine the existence of a prima facie case. Section 118 of the BNS is punishable with a maximum of three years while Section 75 of the JJ Act is punishable with a maximum of five years. While the Honourable Court's finding of the mandate of preliminary enquiry is correct with respect to the facts of the present case and the specific offences alleged, a blanket requirement for any offences by a teacher and the direction to issue circular for the same by the state police chief may be unwarranted. The Hon'ble Bench's remarks about the justification for students being "pinched or pushed or poked without any malice" contradicts the complete prohibition provided in Section 17(1) of the RTE Act on "subjecting a child to physical punishment or mental harassment." Even juveniles in detention are not to be subjected to corporal punishment and plethora of scientific evidence shows the ill effect of using fear and physical punishment as a means of disciplining children. In such circumstances, the Bench's order encouraging teachers to "carry a cane" and use it when need for its "psychological effect in the student community" severely hampers children's rights in educational spaces and their liberty to attain education safely.



PROCESS OF DESIGNATION OF SENIOR ADVOCATES

A division bench of the Supreme Court of India comprising of Abhay S Oka and Ujjal Bhuyan, JJ recently flagged certain concerns with the process of appointment of Senior Advocates. The Bench said that it raised concerns to refer this to a larger bench. Notably, this came right after the Delhi High Court approved a list to designate 70 Advocates as Seniors. Concerns were raised regarding the process of such appointments because it was alleged that the process was conducted without the permission of one of the members of the Committee for designation of senior advocates, in the Delhi High Court.

Currently, the system of designation of senior advocates is governed by a judgement of the Supreme Court in Indira Jaisingh v. Supreme Court of India. The Petitioners contended that Section 16 of the Advocates Act, which created the designation of the Senior Advocate was unconstitutional. They also contended that the present system of designation was opaque, non-transparent and discriminatory. The Court held the following:

1. Section 16 of the Act is not unconstitutional as long as designation is done by means of uniform criteria set up by the Court.
2. The designation is not in violation of Article 14 of the Constitution because it is a means to give special distinction to highly qualified advocates who have contributed extensively and have a special standing at the Bar.
3. Section 16 is not in violation of Article 18 because "Senior Advocate" is not a title. It is a distinction.

The Court also created a permanent committee responsible for the designation of Senior Advocates which was to be chaired by the Chief Justice, the two seniormost judges, the Attorney General or Advocate General (for the High Court), and the above 4 members will nominate a 5th member.

The Committee will consider the following criteria for designation:

1. All applications shall be submitted to the Secretariat.
2. The Committee shall conduct data on reputation, conduct, integrity, and participation in pro bono work, and reported judgement over the last 5 years.
3. The names shall be selected and sent to the Permanent Committee and those cleared by the Committee shall go to the full Court.
4. The full Court shall vote. Secret ballots shall be done when majority members of the full court consider it.
5. Incase an applicant is not selected, they shall be eligible after 2 years.

It is clear that transparency is the need of the hour when it comes to such prestigious designations if we are to abate the reputation of the legal profession as one that is rife with nepotism. The Supreme Court must play an active role in this.

EARNED LEAVE AS PROPERTY

Gujarat HC's Landmark Ruling Upholds Employee Rights

In a ground-breaking judgment that reinforces the sanctity of employee rights, the Gujarat High Court recently ruled that earned leave encashment constitutes a constitutional right, equating it to "property" protected under Article 300A of the Indian Constitution. The case of Ahmedabad Municipal Corporation vs. Sadgunbhai Semulbhai Solanki (2023) has set a powerful precedent, affirming that employers cannot arbitrarily withhold accrued leave benefits without valid statutory grounds. This decision not only underscores the legal obligations of employers but also elevates labour rights to the realm of constitutional safeguards, marking a significant victory for workers across India.

Background of the Case

The dispute originated in 2013 when Sadgunbhai Semulbhai Solanki, an employee of the Ahmedabad Municipal Corporation (AMC) since 1975, faced repeated demotions due to his inability to clear departmental exams. After being reverted from junior clerk to helper, Solanki submitted a voluntary resignation in March 2013, proposing retirement effective March 7, 2013. However, AMC delayed its response for seven months, eventually demanding a one-month notice pay (₹9,090) for acceptance—a requirement Solanki contested, citing physical incapacity and social responsibilities.

By April 30, 2014, Solanki reached the age of superannuation (retirement). Upon retiring, he sought encashment of 299 days of earned leave, amounting to ₹2.83 lakh, which AMC denied, alleging unauthorized absence from March 2013 to April 2014. Solanki challenged this denial before the Labour Court under Section 33C(2) of the Industrial Disputes Act, 1947, which facilitates recovery of owed benefits. The Labour Court ruled in his favour, directing AMC to pay ₹1.63 lakh as leave encashment. AMC's subsequent appeal to the Gujarat High Court culminated in a landmark dismissal, upholding the Labour Court's decision.

Key Legal Issues and the Court's Analysis

The High Court's ruling hinged on three critical questions:

1. Unauthorized Absence vs. Entitlement to Leave Encashment

AMC argued that Solanki's resignation was never formally accepted due to non-payment of notice pay, rendering his absence from March 2013 unauthorized. However, Justice M.K. Thakker emphasized that under Gujarat Civil Service Rules (GCSR), an employee is "deemed retired" if a resignation remains unaddressed for 90 days. Since AMC failed to respond within this period, Solanki's retirement was automatically validated. The court further noted AMC's failure to initiate disciplinary proceedings for the alleged absence, undermining its credibility.

2. Maintainability Under Section 33C(2) of the ID Act

AMC contested the Labour Court's jurisdiction, claiming Solanki had no "pre-existing right" to leave encashment. The High Court rejected this, citing Solanki's employment records, which confirmed 299 days of accrued leave. The court clarified that Section 33C(2) applies when an employee's entitlement is undisputed, and since AMC had already paid gratuity and other benefits, leave encashment could not be arbitrarily withheld.

3. Constitutional Rights and Leave Encashment as "Property"

The most significant aspect of the judgment was the court's interpretation of leave encashment as a form of "property." Relying on GCSR Rules 22 and 63, which entitle employees to encash unused leave unless explicitly forfeited by statute, the court held that depriving Solanki of this benefit violated Article 300A. This constitutional provision prohibits the deprivation of property without legal authority, effectively elevating leave encashment from a contractual benefit to a constitutionally protected right.

Implications of the Judgment

The ruling carries profound implications for both employees and employers:

1. Reinforcement of Employee Rights: By classifying leave encashment as property, the judgment shields it from arbitrary denial. Employees now have stronger legal recourse to challenge unlawful withholding of accrued benefits.
2. Employer Accountability: Employers must adhere strictly to procedural timelines, particularly when responding to resignations or retirement notices. Failure to act within statutory periods (e.g., GCSR's 90-day rule) can result in deemed acceptance of employee claims.
3. Constitutional Safeguards: The decision bridges labour law with constitutional law, ensuring that fundamental employee benefits are protected under the broader framework of property rights.

Conclusion

The Gujarat High Court's ruling in Ahmedabad Municipal Corporation vs. Solanki is a watershed moment in labour jurisprudence. By anchoring leave encashment within the constitutional right to property, the judgment fortifies employee protections against bureaucratic or procedural overreach. For employers, it serves as a stark reminder that earned benefits are not mere privileges but legally enforceable entitlements.

As India's workforce continues to navigate evolving employment landscapes, this decision reaffirms the judiciary's role as a guardian of equitable labor practices—ensuring that dignity and fairness remain at the heart of employer-employee relationships.

In an era where labour rights are increasingly scrutinized, this landmark ruling sets a precedent that will resonate far beyond Gujarat, inspiring confidence in millions of employees that their hard-earned benefits are, indeed, their constitutional right.

NAVIGATING THE FRAMEWORK GOVERNING APPOINTMENT OF THE CEC/EC'S

The formation and nomination of selection panels for different statutory organizations have remained issues of legal and constitutional concern in India for a long time. While institutions, such as the Central Vigilance Commission and the National Human Rights Commission, function on the basis of executive predominance, the same pattern for the Election Commission (EC) has been held as unconstitutional. This reasons for the same can be traced to its constitutional standing under Article 324 and its irreplaceable position in safeguarding democracy and providing free and fair elections.

In this regard, the Supreme Court has repeatedly emphasized that free and fair elections form a basic structure of the Constitution. In cases like Association for Democratic Reforms and People's Union for Civil Liberties, the Court reiterated the importance of having an independent EC in ensuring the purity of parliamentary democracy. The Anoop Baranwal v. Union of India ruling went further to differentiate the role of the EC by relating it with that of the Comptroller and Auditor General of India, which is another constitutionally created authority. This judgment fortified the fact that the independence of the EC is not only an administrative requirement but a constitutional imperative, leading to the proposed three-member panel for selection of the EC which comprised the Prime Minister, the Chief Justice of India, and the Leader of the Opposition

Despite these legal precedents, recent developments have raised concerns about the EC's independence. On February 19, 2025, two new Election Commissioners were appointed under the framework established by the Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service, and Term of Office) Act, 2023. This Act replaced the judiciary's role in the selection process. Critics argue that this structure enables executive dominance over the selection process, undermining judicial efforts to insulate the EC from political influence.

At this juncture, it is important to recognize that the recommended panel itself presents challenges. It may lead to deadlocks, as the Chief Justice of India may have limited knowledge beyond the CVs of applicants, while the Leader of the Opposition could consistently reject nominations put forth by the Prime Minister. To minimize the panel's role, the government is currently exploiting a caveat in the ruling that states appointments will follow this process "until a law is brought in by Parliament." This allows the government to argue that the new Act does not explicitly violate Article 324.

A broader concern herein, often reiterated, is judicial overreach. Article 324 of the Constitution does not prescribe a specific selection panel, and historically, appointments have been made by the Council of Ministers through the President. Comparative examples from countries such as Nepal and South Africa provide alternative models where election commissioners are appointed through parliamentary oversight rather than unilateral executive discretion. These approaches ensure greater transparency and public trust in the electoral process without direct judicial involvement. A transparent, bipartisan, and constitutionally sound appointment process is essential to maintaining public confidence in the electoral system and upholding the democratic ideals enshrined in the Constitution.

CONTENT

Ananya Dutta
Anubhav Mukherjee
Karishma Arora
Rahul Ranjan
Vishal Vaibhav Singh

EDITING

Ansruta Debnath

DESIGNING

Lakshya Chopra
Trisha Bhardwaj

STAY CONNECTED WITH CLS:

clsnluo.com nluo_cls Constitutional Law Society