

NATIONAL JUDICIAL ACADEMY



CONFERENCE TO RESOLVE CLEAVAGE IN JUDICIAL PRONOUNCEMENT BY DIFFERENT HIGH COURTS (P-985)

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7th Semester, B.A., LL.B (Hons.)

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DAY-1

SESSION-1

DIFFERENCES IN JUDICIAL PRONOUNCEMENTS ON THE SAME ISSUE: CAUSES AND CONSEQUENCES

JUSTICE GODA RAGHURAM

Director of National Judicial Academy **Dr. (Prof.) Geeta Oberoi** started the session by wishing good morning to all the participants and key speakers and asked everyone, to start off by following the normal tradition of introducing themselves to the gathering. After everyone introduced themselves to the gathering, The Director asked Justice G. Raghuram to initiate the discussion.

Justice Goda Raghuram started by wishing good morning and by introducing himself to the gathering. He is a retired High Court judge and is presently the president of Custom Excise and Service Tax Appellate Tribunal. His session was a very interactive session. He said that the fact that he is the president of CESTAT, is more problematic as it deals with lower division due to which he faced various conflicts. So, he started to think whether judges of High Courts are problems or solutions, he said that we should try to formulate a unified doctrine among Supreme Court as the burden on High Court and Supreme Court due to increased tribunalisation is acute. Thus, he said higher courts should try to make life more comfortable for tribunals because, if they don't then ultimately the burden will fall on High Court and Supreme Court only. Then explaining an example from his personal experience he said that if there is a case in Andhra Pradesh High Court and a case in Bombay High Court having similar issues, it is very well possible that both the judges will give contradicting judgments, he said the cause of this is the different background and class that a judge belongs to. The background economic, regional, etc of both the judges differ, thus the way of thinking among them differs due to which one judge is not inclined to agree with the point of truth of another judge leading to conflicting judgments.

A speaker then gave the example of a case related to income tax provisions, wherein a bank sold its bonds to some business houses, due to which loss was suffered by these business houses and they had to sell their houses at loss. In this six high courts held that this was not a business transaction while others said that it was. Now, the judges belonging to a commercial background said that bonds were sold by the bank and thus this was a business transaction while others

thought that this is creating politics and corruption and thus was not a business transaction. So, it is the approach of individual judges which differ as per their individual perceptions. To resolve such sort of conflicts Chief Justice Chagla said in a judgment that if a High Court is deciding a judgment then the other High Courts must follow the earlier judgment unless there is a different perception and in case of such different perception, the judge must mention the reasons for such different perception. While giving a different judgment, such High Court's judge must inform about this change in perception and this different judgment to the High Court whose judgment has not been followed because these judgments are statutes for the entire nation.

Therefore when a conflict is there the judges of High Courts must follow the already existing judgments, keeping aside their personal perceptions.

Talking about conflicting decisions in High Court, the discussion took a shift towards various conflicting judgments delivered by Supreme Court. Under Section 23 of Land Acquisition Act, Supreme Court had given two judgments; in one of them 40% compensation was given and in other 60% was given. The speaker here asked the question that can this 40% and 60% compensation granted, be regarded as the ratio of the case; answering this he said that we must first look into the facts of the case and then decide the ratio. In a similar case of Section 23 Supreme Court has stated that the value of compensation can also go upto 100% depending upon the type of land.

A participant then intervened talking about the conflicting judgments of various High Courts and gave suggestions regarding the problems which we must deal with in order to end such conflicts. He said:-

1. There should be a way to make the judges of High Courts aware about the judgments of different High Courts, so that they know the ideas and concepts of other judges as well on the same issues.
2. Pointing out towards this concept that if a lower court or if lower courts of a state face some problem and have certain conflicting points then they can approach the High Court to decide on such conflicting point or issues but, there is no such concept for High Courts. It was further stated that when High Courts feel that there is conflict then, they should be allowed to approach the Supreme Court and then the Supreme Court should decide the final judgment.

After this another participant intervened requesting National Judicial Academy to identify the disputed judgments of different High Courts and put them on the website because judges themselves don't have so much time.

Justice Gyan Sudha Misra suggested that institutes like NJA can suggest High Courts to bring or to follow a mandate in cases belonging to Motor Vehicles Act or Land Acquisition Act or Hindu Marriage Act which need deliberation for bringing uniformity because cases under such acts have different issues and different set of facts like in Schedule II of Motor Vehicles Act. She also said that it's high time now that Supreme Court must bring a uniform guideline for High Courts.

Justice G. Raghuram adding to this said that, the greater wisdom of the court below must yield the higher wisdom of Supreme Court. Stating this he said that first there are problems then these problems are solved with the help of jurisprudential discipline. A judge of Andhra Pradesh High Court will not follow a judgment of Bombay High Court because this judgment is not binding on him thus; he will give the judgment arbitrarily. Some such things have entered into the discourse of judges which is conflicting the democratic discourse of our country. Explaining this point of democratic discourse Justice Raghuram gave an example, he said that a very normal example of this would be an advocate after getting judgment in his favour saying 'I am deeply obliged' to the judge, why does he say this word deeply obliged, why should he be obliged of anything; judges are delivering the judgment according to their perception of law and are getting paid for the same.

Further clarifying various questions raised by the participants, speaker said that there are a lot of observations made by the Supreme Court but they used to write various paragraphs mentioning as to why such judgments have been given, but today this vain or feel for society has vanished. He said that stability in judgments is also a basic factor which is missing and this stability must be established in both, the Supreme Court and the High Courts. At the end he concluded by discussing the Shah Judgment of 1970 of Supreme Court wherein, powers of jurisdiction vested with the Supreme Court of India under Article 141 and 142 of the Constitution of India are discussed; any order, decree or judgment passed by Supreme Court of India is binding on all courts of India.

After this a small tea break of 15 minutes was taken. Everyone was asked to gather again at 11:15 am after which second session was started.

SESSION-2

CONSTITUTIONAL AND STATUTORY INTERPRETATION: DIFFERENCE IN APPROACHES

PROF. NIGAM NUGGEHALLI

Prof. Nigam started his speech by asking a question that why are different High Courts interpreting constitutional and statutory principles differently and are there any pattern and trends in the differing interpretations of High Court, answering these he said that judges come from different backgrounds, different economic backgrounds, different regional backgrounds, different family background, etc. thus different equally reasonable interpretations of a statute are possible and there is no mechanism available to resolve such differing interpretations. These conflicts in interpretations can be resolved only organically and in an ad hoc fashion and cannot be resolved in a normal or natural manner because if High Court judges differ, they differ by giving proper reasoning and not in an arbitrary manner.

He then started to explain the difference in approaches of different High Courts while they are interpreting the constitution and various other statutes, with the help of various judgments delivered by different High Courts on similar themes or facts. He discussed the difference in Constitutional interpretation by discussing the famous cases of Hindu Family Law regarding restitution of conjugal rights. Starting with the judgment of Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkatta Subbaiah*, AIR1983AP356, in this case the issue was whether Section 9 of the HMA which deals with restitution of conjugal rights is violative of Article 14 and Article 21 of the Constitution of India, as it is basically used by the husbands to ask their wives to come back to their conjugal homes which is why it is gender biased, hence against Article 14 and thus also violates the right of privacy of a person protected under Article 21. The judgment said taking help of both Indian and American jurisprudence that Section 9 of HMA is unconstitutional as the fundamental rights are enacted for the preservation of human dignity and promotion of personal liberty thus any law cannot impose sexual cohabitation between unwilling opposite sexual partners even if it be during the matrimony of parties.

On the other hand Delhi High Court in the case of *Harvinder Kaur v. Harmendar Kaur*, AIR1984DEL66 gave a contradicting judgment wherein, it said that Section 9 is constitutional giving the reason that introduction of constitutional law in the home is most inappropriate, Article 21 and Article 14 have no role to play in the privacy of married life, it is a sensitive sphere which is most intimate and delicate; introduction of such principles in it can result into weakening the effect of marriage bond. Supreme Court in the case of *Saroj Rani v. Suresh Kumar Chaddha*, AIR1984SC1562 agreed with the constitutional validity of Section 9 as by Delhi High Court, stating that Section 9 was made to prevent the breakup of marriage institution and both husband and wife can file cases under it hence it is not violative of either Article 14 or Article 21.

The speaker then said that if judges give reasons for their judgment and properly engage with each other discussing the issues and reasons then such problems of conflicts can be solved. He further tried to explain his point with the help of cases related to tax characterization of payment for software. He started with a judgment of Karnataka High Court, *CIT v. Samsung*, 345ITR494 in which analysis of Indian Copyright Act,1957 was done and it was said that making copy of the software is also the use of copy right, thus payment should be made as payment of software is a royalty payment; whereas in the judgement of Delhi High Court in the case of *DIT v. Infrasoft*, 264CTR329 it was said that meagre copying of the software is not a use of copy right as the payment of software are not royalty payments. Indian Copy Rights Act can be analysed in different ways but one has to understand the legal principles behind copy right.

Giving another instance of conflicting judgments of High Courts, the speaker discussed the cases related to recovery proceeding in tax. There was a dispute in the interpretation of 3rd proviso of Section 254 (2A) of Income Tax Act; interpreting it the Bombay High Court in *Narang Overseas (P) Ltd. v. Income Tax Appellate Tribunal* said that the third proviso to section 254 (2A) should be read in such a way that it is constitutional. The interpretation should make the inherent powers of appeal in the ITAT compatible with the power to grant interim relief to the assessee and thus the ITAT has the power to extend the stay despite the third proviso. This was followed in *CIT v Ronuk Industries*, 333 ITR 99. Karnataka High Court in *CIT v Ecom Gill Coffee Trading Ltd*, 362ITR235 Disagreed with Bombay High

Court stating that the third proviso to section 254 (2A) is clear and mandatory and ITAT has no power to extend the stay because of the third proviso. Another Judgment *Pepsi Foods Ltd. v ACIT* , 376ITR87 of Delhi High Court came on the same issue which stated that the third proviso to section 254 (2A) is unconstitutional because it does not make a distinction between 'well-behaved' assesses and assesses who have delayed proceedings. Mentioning these cases he said that the High Courts did not gave any reasons for their judgments and did not try to create a bridge between the two judgments.

Another example of Liquidation Proceedings was discussed by the speaker. The dispute was regarding priority as to the case of liquidation proceedings will be filed under the SARFAESI (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002) or the Companies Act, 1956. The dispute arose between the judgments of Delhi High Court in *Megnostar Telecom Pvt Ltd*, (2013)176Comp. Cases246 and of Punjab & Haryana High Court in *Pegasus Asset Reconstruction v Haryana Concast Ltd*, (2009)152Comp. Cases215 which was resolved by Supreme Court in *Pegasus Asset Reconstruction v Haryana Concast Ltd*, 2015SCCOnlineSC 1387 in January 2016 where Supreme Court agreed with the decision of Delhi High Court which said that once proceedings have started under SARFAESI then proceedings under Companies Act will have no role to play.

Explaining all this Prof. Nigam said that the main issue is how to bridge the judgments, he said that somebody might say here that the larger principles are of equity but something underlying the legal principles must be given by the judges so as to bridge this gap between two judgments. A judge can definitely diverge from the view of another judge given in a judgment but while diverging form the earlier judge's view he must think how people interpret values of democracy and rule of law; pondering upon this he might diverge giving proper reasons for his difference of opinion. Judges of High Courts can sit together and discuss their points of opinion and reach to a similar concluding decision because these conflicting opinions can never go as each and every judge belongs to a different background, but there is an urgent need to bridge the gap between these judgments through reasoning.

After Prof. Nigam's speech the floor was open for discussion. While discussing with participants **Justice G. Raghuram** said that there cannot be uniformity beyond a perception,

explaining this point he gave the example of a person who visits the Taj Mahal at different ages, how his perception of looking at the Taj Mahal changes with his age; then he gave the example of the universe that how theories of scientists get negated and then said that when things in universe cannot be fixed beyond a perception; then we are only normal human beings, as judges we have to play the role like a Bollywood actor who is very busy; we one day sit on the chair as a criminal judge, other day as a civil judge and someday we might also sit on the treaty bench. But, still there should be coherence at some level, when somebody comes to you to seek justice, you must deliver justice.

Concluding the discussion it was said that law cannot be static, it has to evolve thus we cannot have any fixed interpretation of law. Difference in opinions sometimes is important as it is a means of evolution for law and jurisprudence but, this difference must be bridged.

The discussion was extended for 15 minutes and the tea break from 12:15 to 12:30 was skipped and the next session was started in continuance.

SESSION -3

IMPORTANCE OF JUDICIAL DISCIPLINE

PROF. MOOL CHAND SHARMA

Justice G. Raghuram begin with the session referring to the advice that Justice Frankfurter gave to Mr. B.N. Rau; he said that India is a recent democracy and is experiencing a different political system, thus its Apex Court should sit on block and not on benches. But, this suggestion was not considered by the constitution makers and the bench was constituted. Today, we have 15 benches in Supreme Court and thus uniformity cannot be expected. It is true that only wiser reach the Supreme Court but still there are discrepancies because on fifteen benches, judges of different backgrounds sit with a different perception and opinion. There is a difference between a legal officer, a jurist and a judge, hence the definition of discipline for all the three is different.

A judge should always keep in mind the larger goal, the larger objective of democracy and should accept the fact that all the three organs of our democracy; legislative, executive and judiciary are equal partners in achieving this objective. If one is not superior to other, one is also not inferior to others. They are equal partners in running this democracy for governance, justice, economic upliftment etc.

There is a need for Supreme Court judges to follow the judicial discipline; this need is graver for Supreme Court Judges when compared with High Court judges. Many a times Justices have not followed this discipline like in the case of *Keval Krishna Puri* where an already established precedent of Supreme Court was over looked by the Supreme Court judges themselves. Giving another instance violation of judicial discipline **Justice G. Raghuram** said that many a time's judgments are delivered by Supreme Court which do not mention anything about being prospective in nature and become effective retrospectively. When such things happen it creates a doubt on the credibility of Indian Judiciary and people start saying that the judge is sitting on his chair, eating samosa and delivering the judgement as per his own perception or they start saying that he is sitting in the garden comfortably and delivering the judgment. When great emphasis is placed on the background of judges then also questions like samosa lawyering are raised.

The speaker further said that judges are free to write their anguish and frustration relating to a particular topic but ignoring the call of Justice while sitting on the throne of constitutional hat; that is the failure of judicial discipline, which is not acceptable. He said that the judges, have the skill of judgment writing but they lack in the skill of judicial discipline. One of the participants intervening said that when a judge writes, every word that he writes should reflect the need of society and the reasons of his judgement; this is also judicial discipline.

Now, Prof. M.C. Sharma was invited to deliver his views on the subject of judicial discipline.

Professor M.C. Sharma started his speech referring to the two books earlier referred by Justice G. Raghuram and said that from the bottom line of both the books one message is clearly conveyed that a judge should speak only when there is a need to speak; this is the basic judicial discipline. Then he said that Article 141 is an important parameter of judicial discipline and this discipline of Article 141 cannot be taken lightly. Explaining this he compared a judge to that of a pregnant woman who has to suffer the labour pain for her baby no matter whether that baby is normal or is having some inability; similarly a judge has to suffer the labour pain of being a judge. Intervening **Justice Gyan Sudha Misra** said that when you know that the labour pain which you have to suffer is that of a precedent which you don't find to be apt, then there should be a vent created for your own discussion and views and no such obligation should be imposed upon you. Answering her **Prof. M.C. Sharma** said that this burden of precedents is not to be followed always, when your level of frustration and anguish reaches a level then it should not be followed and you can diverge, but this should not be done very casually or every now and then. Further, he said that when you diverge, your divergence should not come in between the due structure of law.

Justice Gyan Sudha Misra now said if judges don't follow judicial discipline then it can lead to chaos. When a judge is faced with a case having variety of issues he should not look for variety of judgments on each issue but he should sit and think about the fairness of the case and then decide. So, according to the speaker while giving judgments you should focus largely on reasons and when you are not following a given judgment then you must properly give the reasons as to why a particular judgment is not followed. Explaining the situation she said in our normal lives also if one person talks with reason more weight is given to what he says; there must be sound reasoning when a judge is confronted with a vent so, that even the

appellate judge is satisfied. Cautioning the judges she said more reasoning is also not good for a judgment and hence there must be balanced reasoning. **Justice G. Raghuram** concluding the session said that there might be gaps in legislation sometimes but this does not mean that there is a duty on the judges to fill these gaps. Then he shared an experience of one of the cases which he had to judge when he was a sitting judge of the High Court.

After this session a lunch break was taken at 1:40 and the session was resumed after lunch at 2:40pm.

SESSION- 4

JUDICIAL DISCIPLINE

DR. C. RAJ KUMAR

DR. YOGESH PRATAP SINGH

The director introduced **Dr. C. Raj Kumar** to everyone and asked him to begin with the session.

Dr. C. Raj Kumar started by giving a brief introduction of himself and then expressing his views on the process of interpretation of law and application of doctrine of precedents. He said that the big challenges in the process of interpreting law and application of doctrine of precedents is the conflict in the process of adjudication and the heart of judicial discipline is also about judges and their role in the process of adjudication. Then he said that many High Courts are not adhering to the judgments of the larger benches of their own High Courts; maybe a reason for this is that they fail to understand the impact of their judgments on the society.

Speaker now defined what judicial discipline is and how judicial self-restraint is critical in this time for the practice of judicial discipline. He said it is not possible for judiciary to exercise self-discipline when it does not follow self-restraint. A greater degree of lack of judicial discipline can lead to arbitrariness. Asking the question that to what extent the current support system can identify the judicial discipline, he said that this is a very critical area of reform because at present time this is done in a very corrective form. There is nothing inherently wrong for different courts to interpret differently, but in order to assist courts there is a need to significantly adopt research apparatus, these can help judges to be conscious of the various decisions taken by the High Courts. There is also a need to have collaboration with law schools and their faculty members with state judicial academies, the interactions of state judicial academy with law school faculties can help. Chief Justices of various High courts can help the sub-ordinate judges. Through this an opportunity can arise to recognise that there can be corrective measures. One of the participants intervened here and said that the awareness part can be dealt by providing research assistance through apps, websites, etc.

he also suggested that for the purpose of research assistance NJA can have a system where all high court judgments can be aggregated and then can be sent to High Courts. Answering this the speaker said that there is a need to analyze the relationship of state judicial system with state judicial academies as well and then the state judicial academies can assist the high courts in research.

Justice G. Raghuram intervened saying that the gap between a cabinet minister and a minister is very less as compared to the gap between a High Court judge and a District Court judge and hence there is a need of interactions between judges intra-court keeping aside their egos, this can help both the High Court and District Court judges to reach a consensus. Sharing his experience he said that sometimes it scares a judge that no one is there to look at his judgement and what he says is the law. Then he classified people who want to be High Court judges into 4 categories and said that the improvement in state of legal education is very important.

Justice Gyan Sudha Misra concerned said that new generation is not coming on the litigation side because they have to face a lot of hardships so, it is the duty of the higher judiciary to give a thought over it.

Dr. C. Raj Kumar on this issue said that we have to accept that the system of law in our country is very undemocratic and for a first generation lawyer to join litigation is not at all possible. When we talk about a person whose generations have been in this profession then it is possible for him to join litigation but for a first generation lawyer it is very hard.

Dr. Prof. Geeta Oberoi now intervened and asked everyone to give a chance to the other speaker **Dr. Yogesh Pratap Singh** to say something on the topic and invited him to share his views.

Dr. Yogesh Pratap Singh started by introducing himself to everyone and then started by asking a question that what is the role of a judge in a modern democracy, some say that judges have taken more power while interpreting law blurring the concept of separation of power. Answering this he said that there are two possible justifications of this problem; jurisprudential and behavioral. Explaining jurisprudential justification he cited Hart saying that in some cases where legal principles do not produce legal outcomes there interpretation

has to be done by judges. This problem in legal principles arise due to problems in drafting by legislators. Explaining jurisprudential justification he said that judges behave in an attitudinal manner on the basis of that attitude they produce judgments; these judgments can also be sometimes influenced or opined by brother judges or politicians, etc.

He then said that judges can also be classified as per their behavior into judges who are prone to give capital punishment and those who are against capital punishment. Explaining this through the *Bachan Singh* Case the speaker said that in this case the concept of capital punishment was further restricted to rarest of rare.

Here, **Justice Gyan Sudha Misra** intervened saying that people only take into consideration high profile judgements and are not concerned about the judgements which are actually related with common man. Issues touching common man goes unnoticed, even the subordinate judiciary at times tend to ignore them, like cases related to Section 498A. These issues should be taken into consideration by the judiciary.

Justice G. Raghuram also gave his opinion on this issue sharing an experience of a case where the arguments on behalf of accused were that you cannot trust police and CBI because they are chamchas of union government and said that it's high time now that judges move beyond this relationship between bench and bar.

The session was concluded as the discussion shifted towards the representation of poor people and how justice is not delivered to them and how they are unable to represent themselves in the court, a participant shared one of his experience regarding the same. On which **Justice Gyan Sudha Misra** suggested that legal services authority can be used for providing legal aid services not in an abstract way but in a way that more professionals are engaged in it by having some kind of examination for them.

The sessions for the day were concluded. **Dr. (Prof.) Geeta Oberoi** informed everyone that the sessions from next day will begin at 10:00am.

DAY-2

SESSION-5

**DIFFERENCE IN JUDICIAL PRONOUNCEMENTS: EMERGING TRENDS AND
PERSPECTIVES**

SESSION-6

DILEMMAS IN APPLYING PRECEDENTS

JUSTICE A.K. GOEL

JUSTICE KURIAN JOSEPH

Dr. (Prof.) Geeta Oberoi wished good morning and welcomed everyone. She introduced everyone with the two new participants and welcomed the key speakers for the session **Justice A.K. Goel** and **Justice V.S. Sirpurkar**. Then she asked Justice A.K. Goel to start with the session.

Session 5 and 6 were combined together in this session as the key speaker and the chair felt that both the topics are overlapping and should be discussed together.

Justice A.K. Goel started the session by saying that he does not know why this conference is only limited to High Court judges and not Supreme Court. Then, discussing Indian model of judiciary he said that there is so much disparity in judgments in India that one judge is following one thing and other is following something different; we say that this disparity is causing conflicts and problems whereas President Obama gives a diametrically opposite view on the same, he is concerned that why U.S. courts don't follow the Indian model of judiciary where there is difference in sentences and where every judge gives his own opinion. The reason for this concern of President Obama is the statistics of prison population in U.S.; prison population of total world is 90 lakhs people out of which 25% that is 2.5 million is in U.S. prisons out of which 90% are black and poor, these are those who are mechanically given high sentence. Whereas in India we have a better situation still it is said that there are 15 Supreme Courts and not one. The reason this is said is because on one subject you will find more than one judgment giving different opinions. Supreme Court's judgment should be

certain so that people can rely on it, object of law of precedence is to have certainty so that sub-ordinate courts can deliver judgment with ease.

The speaker now defines what precedent is; the principle which lays down a universal application of some law is a precedent. While applying a precedent on a case, a judge must see the facts of both the cases and compare them, if then he feels that there is an identical situation then the judge can follow the precedent. The application of a precedent also depends on brevity of offence; in such cases your judgment should be based on independent corroboration. Many a times in criminal cases there are thousands of precedents available still appeal is filled, this is the reason concept of quashing is included, when such a case comes in the appellate court then quashing can be done. Quoting the words a senior judge, the speaker said that the precedence are not to be followed mechanically, a judge should not be bothered about the precedent; he should first see the facts of the case, then the law and then such precedents should be applied which advances justice. But, in cases where precedents available are very clear and are certainly binding then a judge has to follow such precedents.

Solving a debatable issue that when a dispute arises in the judgment of a single judge or in a division bench judgment, is it mandatory to file a case in the larger bench; the speaker cited a decision laid down in a judgement where it was said that if a judge does not agree with 3 judges bench then he cannot file the case in a higher bench, that is 5 judges bench; but can refer it to the Chief Justice of the High Court and then the chief justice can refer it to a bench which may or may not be a larger bench.

Justice Kurian Joseph intervening said that what will be the quorum for the bench shall be decide by the Chief Justice. Clarifying he said that a constitutional bench does not always mean 5 judges, it says not less than 5 judges, so it can be anything more than 5 as decided by the Chief Justice. He said that single judge must follow the order of a division bench unless there is some dispute or the order is *per incuriam* otherwise it would amount to judicial indiscipline. In a case when there is a conflict between the division bench judgment and the High Court points out that the division bench judgment is not proper and has not followed the law or has not followed an established precedent, then such judgments become *per incuriam*. A participant intervened here and said that there was a judgement of a trial court which came

to him, that judgement gave a wrong order, so he amended the order and issued a circular to all the trial courts of the state informing the correction in the order. To this, **Justice Kurian Joseph** said that circulars should not be issued by division bench of the High Court and it should be on the discretion of the Chief Justice. If a circular is to be issued to sub-ordinate courts, it should only be done by a full bench because when a circular is issued it becomes a mandatory law for the trial courts. Such a situation causes confusion for a trial court, and the trial judge becomes the sufferer.

A participant intervening said that when a case is referred by a judge to a larger bench then the judge who referred the case should also be allowed to be a part of the bench. Responding to this **Justice A.K. Goel** said that in Punjab High Court the judge who refers the case to a larger bench, it is mandatory for him to be a part of such larger bench. He said that every state has its different court rules but this rule should be followed in all High Courts. Another participant intervening said that what a judge should do when there are 2 conflicting decisions of Supreme Court on the same issue by the same number of bench. Answering this the speaker said that in such a case you must give the reason for following one judgement and not following the other. He said that for evolution of law conflicting judgments and difference in opinion is necessary sometimes. Explaining this he gave the example of *Meneka Gandhi* judgment in which due process of law was incorporated whereas the same was not incorporated in the *Golaknath case*; this is how law evolves. Then he gave another example to explain that the judgment of higher bench is binding on the lower bench; he discussed the case of *Southern Pharmaceuticals* of 1983, where a 3 judge bench declined the judgment given by a 7 judge bench in the case of *Keval Krishnapuri* in 1962; but this case of 1962 was again held to be valid by a division bench of Supreme Court in which it was said that how can a 3 judge bench overrule a 7 judge bench judgment and held that till today the constitutional bench of Justice Subbarao in *Keval Krishnapuri* is binding.

Resolving another issue raised by a participant **Justice A.K. Goel** said that application of reasonable restriction depends from case to case as per the facts of the case. When applying a precedent always see that if there is a principle which applies to the facts of the case and is very clear in your mind and is also very clearly laid down in a precedent then you must apply or follow that precedent in your case. But, when applying you must reconcile and analyse the

whole case, relate the facts of your case with that of the precedent case, if still the principle laid down clearly applies in your case then you should apply. When there is a dispute in which precedent to be followed when there are two conflicting precedents from different periods; then a judge should neither follow the earlier one nor the new one, the correct one which applies aptly should be followed. The ultimate task assigned to the judges is to reconcile and for this the guiding principle should be the delivery of justice. **Justice Kurian Joseph** giving his view on this point said that High Court's duty is not only to deliver justice but also to see that the justice delivered is administered properly.

Justice V.S. Sirpurkar sharing one of his experience when he was a practicing lawyer in the High Court how he also had to face the conflicting judgements of the Supreme Court and the High Courts. He said that this dispute of judgements is not only between High Courts of different state but also between the benches of High Courts within a state. Like in Maharashtra the bench at Bombay High Court will say that the judgement given by Nagpur High Court is ab-original, this attaching of a golden scale with the judgement delivered by Bombay High Court should not be done. Justice A.K. Goel here said that this can be classified as bench cleavages. After this a few participants suggested that there be some authority who can list these conflicting judgements like NJA, or else there could be availability of a bench in Supreme Court which could decide upon these cases.

There was a discussion related to death sentences, how they have evolved and how in a case a participant had to appoint an amicus curiae in order to help her with the already decided cases, so as to help her in deciding the case related to death penalty.

Justice A.K. Goel concluding said that there is need of all this, a helping wing which can help the judges, but all this is the vision of Chief Justice, at some point of time all the participants could be chief justices so then they can do this, because this falls under the administration of Chief Justice. After this participants discussed few more experiences of problems faced by them while deciding cases on which **Justice A.K. Goel** resolving the issues said that every Supreme Court judgement does not lay down law some only lay down facts. At the end he suggested that there is only one thing to be kept in mind while deciding a case that you decide for the ends of justice.

After this a tea break was taken for 15 minutes was taken and then the seventh session begin from 12:15.

SESSION-7

PERSUASIVE VALUES V. BINDING RATIO DECIDENDI

JUSTICE V.S. SIRPURKAR

JUSTICE A.K. GOEL

Justice Kurian Joseph started the session by saying that the title of the session is a super clause and is also a wrong indication because ratios are always binding. Then he invited **Justice V.S. Sirpurkar** to present his views.

Justice V.S. Sirpurkar started by defining what ratio decidendi and what a prescriptive ratio is. Ratio decidendi is the rule of law on which judgment is based, it is the reason for deciding a particular case; finding the ratio decidendi of a judgement is in itself a task. Formulating ratio decidendi of a judgement is a creative task, a judge has to first discover the material facts, then he should base the decision on these material facts and then he should lay down the principle of law applicable to the legal problems. Prescriptive ratio is for the courts below to follow, the judges have to qualify and widen these ratios to achieve the results which they think to be just. Judge has a positive duty to legitimately interpret the words mentioned in the authorities and use it for justice.

For the purpose of explaining the concept of widening the ratio, the speaker gave an example of the *Ginger Beer* case, that how the application of its principle has been expanded by applying it to lemonade bottles, then to food and drinks and later also to all type of manufactured goods. Then, he mentioned a situation that if in a judgement reasoning is given in only one line, then how a judge will determine what the ratio is. He mentioned various cases in order to resolve this issue, the cases he cited were *Vishal Kalsaria v. BOI*, *UOI v. Dhanwanti Rao* 1996(6)SCC14, *Lakshmi Devi v. State of Bihar* 2015(10)SCC41.

The speaker further said that I would disagree if all the judges say that they know how to lay down a ratio decidendi, while laying down the ratio decidendi judges must keep in mind that free use of obiter dicta in their judgments can have a castrating effect on sub-ordinate judiciary. Obiter dicta is the non-binding part of a judgement which only has persuasive value for sub-ordinate courts. An example of this situation is the judgement on bail

application of Kanhaiya Kumar, the judgement started with a Hindi song of some Bollywood movie, then talked about patriotism, then constitutional values, then border guarded by army, etc. all these things mentioned in the judgement are of no use and these are the areas where a judge should exercise self-restraint. If a judge is interested in writing about social issues then he can maintain a blog or can write an article on it, but judgements should not include these things. After this the speaker left the floor open for discussion.

Justice A.K. Goel said that judgement as per defined by Order XX of CPC should consist of facts, issues, reasons and decision; but all of these are not binding, only the rule of law and its application are binding. A judge is never bound by what the fact is or the issue is, he is only bound by the legal rule. But it is required by a judge to check the fact situation because when he looks at the fact situation of a particular judgement and compares it with his case then he does not need to go for plethora of cases. When a judge follows a ratio he must apply it reasonably by creating a nexus between the ratio and the facts of the case. Obiter dicta only has persuasive value and is not binding; if a precedent is there on a subject then judge only has to follow the ratio decidendi. But, in every case it will be the judge's view that is important.

A participant discussing the case of *Kaiser Aluminum* said that ratio decidendi has a major and a minor premise. So, this is also to be decided by the judge that what is the jurisprudence of the major premise on which the minor premise is based. **Justice V.S. Sirpurkar** cited the *Saudenkar* case where ratio has been explained in a subsequent trial. A participant intervening said that a decision is only an authority only the ratio is binding and every discussion done in the case is not important. Another participant intervening said that it is the job of academicians that judges are doing, there is a need of academicians to reinstate the law.

Justice A.K. Goel putting his view said that in American Apex Court there are 9 judges and most of the judgements delivered are in the ratio of 5:4. So law is a subject where there are bound to be difference of opinion. A participant asked a question that will footnotes of a precedent be binding while applying it in the case. Justice A.K. Goel said that footnotes cannot be considered as binding, the simple reason for this is that they are not ratio decidendi, but footnotes can always be used by a judge for reaching his own decision.

Participants now started to raise the problems that they have faced due to wrong interpretations done by the Supreme Court like in interpretation of proviso of Section 326 of CrPC referring to the case of *Nitin Bhai v. Mannu Bhai* 2011SCC238 and reliance by a participant on Justice Sinha's minority opinion in the case of *Zee Telefilms* while deciding a judgement. For this **Justice A.K. Goel** said to the participants that judges of High Courts are constitutional body and are respected by Supreme Court also; so, if any such problem comes to you or is noticed by you then you can write a letter to the Chief Justice of India stating that this is erroneous so please correct it and it can be corrected as a precedent as well. Here, **Justice G. Raghuram** also said that when there is plurality potential in an opinion then there can be discussion among judges so as to avoid nuances and through this sub-ordinary judiciary will also not face any problem. Now, the discussion continued on this aspect, referring to Section 138 of CrPC, then to summary trials, Section 258 of CrPC, then to recording substance of evidence, then to Section 141 of Negotiable Instruments act.

Justice Kurian Joseph said that there should be clarity on one aspect that the law declared by Supreme Court of India is not the law of the land, it is only binding on the judiciary and on no other branch of constitution. Tribunals also fall under the branch of judiciary and thus these are binding on tribunals as well. Then he said that here we are only 15-20 judges sitting and we all are having our different observations and opinions. Talking about the high population of prisoners in America in which 90% are poor or blacks; he says that this is not the case in India because we have a system to respect the hierarchy. There are situations where a judge has difference of opinion but, he does not apply his own perception and respects the precedents, he looks at it with a microscopic lens and applies it. This habit of our country has helped the judiciary of our nation to become stable.

In order to explain this concept, the speaker took help of a few illustrations, he said that the moment a judge feels that the judgement delivered by a single judge is not laid down properly, he should not overrule it very lightly and must analyse it first. This Nagpur and Bombay High Court thing should not be there as it has very adverse impact on the judiciary. Comity among judges must be there as it leads to comity of laws. Giving another instance he said that if there would have been a court above Supreme Court, more than 50% of cases would have been overruled this happens because humans have a tendency to change what

others do, or judges have a tendency to change what their brothers and sisters write because sometimes judges don't even read the judgement they read the person who wrote the judgement. This is an instance of utter judicial indiscipline. Thus, judges must respect this comity and should not deal lightly with the judgements.

Justice V.S. Sirpurkar discussed a few cases; 2014(13)SCC 799, 2001(2)SCC 247, *Syntex Pipes Ltd. V. UOI* and *Oriental Insurance v. Raj Kumar and ors.*, 2007(12)SCC 768. After this he quoted what Justice Fali S. Nariman had said in a lecture that the service nuances of every state are entirely different and Supreme Court judges come from different states having different backgrounds, so they see conflicts in context with their background and service nuances of their state this leads to conflicting decisions of Supreme Court. **Justice Kurian Joseph** intervened saying that still Supreme Court remains Supreme Court.

Prof. M.C. Sharma concluding the session said that one cannot translate the jurisprudence of precedents without following judicial discipline. Being chosen as a judge burdens you with the responsibility of following the judicial discipline. Judges have a special training which others don't have, this special training prepares them with a special mindset thus, they have a responsibility that the consensual demands are not dismissed and the discipline is maintained.

A lunch break was taken after this session for one hour and the next session begun at 2:45pm.

SESSION-8

LEGAL REALISM V. LEGAL FORMALISM

PROF. M.C. SHARMA

JUSTICE GYAN SUDHA MISRA

Justice G. Raghuram welcomed back the participants and the speaker, introducing Prof M.C. Sharma and Justice Gyan Sudha Misra; he asked Justice Gyan Sudha Misra to begin with the session.

Justice Gyan Sudha Misra started by saying that she does not understand what legal realism and legal formalism means and how it is related with the topic of the conference; saying this she asked Prof. M.C. Sharma to enlighten everyone about this and she will intervene wherever she feels.

Prof. M.C. Sharma started by saying that when we ask this question that what is the role of judicial interpretation in democracy then the role of these two school of thoughts come. Referring to the president's speech which he delivered during the retreat, speaker says that the bottom line of that speech was to caution judiciary to remain within the boundaries and not to interfere into the space of other bodies; public interest litigation is a great contribution of Indian judiciary but this PIL should not lead to interference in different wings of state instead it should be taken as a change as well as an opportunity, role of judicial interpretation and role of a judge in a democracy should be such that democracy does not suffer.

Speaker shared his own experience when he was called to assist Chief Justice of India, Justice Bhagwati in forming this concept of PIL. Giving instances of cases which have created anti-democratic structure of judiciary he cited the high profile case of BCCI where Mr. Srinivasan was removed and Sunil Gavaskar was appointed, these was still conflict of interest and who was the court to appoint Sunil Gavaskar; then he discussed the case of Sahara fraud, liability of Rupees 20,000 crore was imposed on Sahara and for the purpose of granting bail an amount of Rupees 10,000 crore was demanded due to which bail has not been granted till date. The problem lies in the caution given by the president, judiciary must know its boundaries and with public responsibility comes public accountability.

Now, the speaker explained the two school of thoughts. Former school is that you read the law, then you read the facts and apply the law mechanically on the facts, no more no less. On the other hand in Realist school the legal rules may be imposed but judicial perception of public policy is considered more important than legal rules. So, in realist school when a matter comes to a judge, he presumes that he knows the judicial perception of public policy and then he decides. Neither legal realism nor legal formalism can resolve the kind of crisis faced by the judiciary. He gave the example of Justice Kedar a greatly intellectual judge who was greatly misunderstood and greatly hailed off; took the position of a stark realist but in a very scientific and articulate way and said that interpretation is reading the text and applying it. At the most if you are interpreting a law you can go down the time when it was made and see its application in that time and now assign the meaning to the words of that law as per today's time or contemplate it by thinking how the person who made the law at that time would contemplate it today because it is important for the law to grow and hence while interpreting you must decide the law in today's context. Within realism, functionalism was started, it said that before delivering a judgement you must look at the object of the function you are assigned to do, that is public welfare and then you must use the tools of law and precedents for delivery of justice and for public welfare.

Today, no school exists but, there is a need in judiciary to maintain a balance between both the schools and to apply them. Quoting Pandit Nehru speaker said that only those people should read the public pulses who understand them and not the judges. Placing his views speaker says that Indian judiciary has done a great job and the person who added this concept of judicial review in the constitution of India has done the greatest favour to politicians of India. The job of the judges is to derive at stable equilibrium as Judiciary, Executive and Legislative, the three organs of Indian constitution are equal partners to achieve the object of we the people that is democracy. This stable equilibrium cannot be achieved unless the other organs do not accept it. Speaker shared the feelings that Justice Eisenhower felt while delivering the judgement in the case of *Brown v. Board of Education*, Justice Eisenhower has helped his friend to become the chief justice and now he was delivering a judgement against him; Justice Eisenhower classified this as one of the failure of his life. Similar was the situation which Justice Khanna faced while delivering the dissenting judgement in the case of *ADM Jabalpur*. The concept of due process was declined in the case of *Golaknath* but was

later allowed in the Maneka Gandhi case; the high profile 2G scam case, coal case. Discussing these cases the speaker said that activism in itself is not bad as long as it is creative.

Justice Gyan Sudha Misra now intervened saying that theory of separation of power and judicial discipline are also an essential ingredient of this activism. She thinks that these scholars only complicate the things more, like your teacher who instead of saying $5+5=10$ would say $4+2+4+2=10$, now it's time that we stop discussing the theoretical aspect. Whenever creativity touches any part of executive and legislative there clash arises. It is time that judiciary make honest deliberations while giving judgement through which it must serve for the cause of justice or else it would affect some part of the organ. All three organs of the state should first judge their own actions that whether there actions are for the upliftment of society and citizens, only then this stable equilibrium can work.

Sharing her experience, the speaker said that she was invited by a T.V. channel to speak on the debate regarding NJAC, which she refused on advice of her well-wisher who said that the media knows that you will criticize it and that is the reason they have invited you. She says that when the case for NJAC was filled she felt that there would be improvement in the system but there was no improvement either on this side or the other side. It is required by every organ to do introspection as to the act that they are doing is done for state benefit or not and if this is done and there is no loop hole in the system then there would be no problem.

Justice G. Raghuram quoting Austin said that it is better that democracy is permitted to deal widely with its choices otherwise it will perish, democracy means people are entitled to make their wise choices. Citing TMA Pai foundation case, Marbury v. Madison and Keshavnanda Bharti case; the speaker said that some of the contemplations of human society are based on myths and suggested judges that text is the thing they can play with, many judges have the profundity to identify the truth but they should restraint to the text and not go beyond it.

Prof M.C. Sharma concluding the session said that both neither textual approach nor perfect realist approach is correct, with the changing democracy and changing Indian society there is a need of some hybrid approach. It is expected that judge's wisdom, creativity and capacity is higher than that of a common man; the special training provided to judges gives them the capacity to imagine. Before deciding a case a judge must look at the facts, the text, and

history of the text, the legal terrain and the precedent. Constitution has to evolve but a judge must follow the culture and the text; text is very important but a judge cannot adhere to the text to which meaning was given many years back.

DAY-3

SESSION-9

IMPACT OF VARIANCE ON JUDICIAL PRONOUNCEMENTS ON SUBSEQUENT DECISION MAKING

JUSTICE M.K. SHARMA

JUSTICE GYAN SUDHA MISRA

Dr. (Prof.) Geeta Oberoi wished good morning and welcomed everyone. She told everyone that this is the last day of the conference where there will be 2 sessions only and gave a brief about the discussion done in past 2 days. She introduced **Justice M.K. Sharma** to everyone, and then asked him to start with the session.

Justice M.K. Sharma started by wishing good morning and telling the topic to everyone after which he presented his view on variance in pronouncements. He said that two people are different with difference in thinking process and have different perceptions therefore variance has to happen, this is the reason there has always been variance in legal pronouncements of Supreme Court and High Courts as well. This variance in legal pronouncements on same issue becomes a problem for judge. Discussing civil law and common law countries, he said that being a common law country we treat precedents as law, supreme court judgements guide and help the other courts of our country and are binding on them, whereas in civil law countries there is no concept of precedents and thus judgements of higher courts are not binding on sub-ordinate and they can give their own judgement with ease. Discussing more about variance the speaker says that variance can arise due to various reasons one of which is dissenting judgements, these dissenting judgements should be welcomed as they give a new approach and dimension to law. The dissenting judgement of Justice H.R Khanna is now the law of the land, as the majority judgement was in negation.

Moving towards the judgements delivered by Supreme Court of India, the speaker said that these are law of the land as per Article 141, but there are variance in Supreme Court judgements as well, the reason for this is burden of cases and poor assistance of lawyers due

to which judges don't get time to look at the already given judgement, and give the new judgement as per their perception; there is variance also in which precedent in time to be followed, whether the earlier one or later, different judgements say different. Even the judgements of High Courts are binding in their particular territorial jurisdiction over the subordinate courts and the tribunals. But when the question regarding referring a matter by single judge or by division bench to a larger bench, there is also variance in judgements. Quoting Mr. Fali S. Nariman from what he has said in a memorial lecture, the speaker said that he has opined that the division bench judgements should not be binding and should not have the effect of Article 141 of constitution of India, as there are so many judgements given by division bench of Supreme Court. This according to the speaker can create problems as total strength of Supreme Court judges is 31 and at present there are only 25 or 26 judges so, if a larger bench's decision was to become law, then the burden on Supreme court would increase. Now, giving his view on which decision should be followed he said, that the judgement delivered later in time should be followed if that judgement has referred the earlier judgement, if it has not then the one earlier in time should be followed. Stating this he asked Justice Gyan Sudha Misra to speak on the topic.

Justice Gyan Sudha Misra said that if judges are to follow one particular precedent only that would create difficulties and thus divergence and dissenting opinion is good for the development of law. Sharing experiences from her personal life when she was a practitioner, she said that when two judges are sitting in the division bench, there should not be a mindset among the judges that the other judge is a senior judge so speaking against his view would be audacity. Giving an illustration from her life she stated, when she was a practicing as a lawyer, there was a matter in which notice was to be served, which was not served, it was served to one respondent only so she asked to proceed the matter against the one on whom notice has been served, the junior judge was in favour of this but senior was not, so the matter was dismissed, this lead to a momentary anguish and frustration. So this not expressing of views by the junior judge sitting in the division bench also affects the lawyer; non-expression of views becomes a stumbling block in the purpose of creation of a division bench. Many times it happens that the senior judge behaves as if he is the big brother and the junior must not speak against him this creates an impression in the mind of the lawyer that the junior judge has no value and he only has to impress and convince the senior judge.

Sharing her experience she said that once when she was sitting with a senior judge in the division bench, he said to the attender that don't give water to her as after that she would ask more questions due to which matter will take more time to get disposed of, and another instance where a judge asked her that what do you understand about the matter, on which she replied that don't you understand what I have understood from the questions I am asking; then she said to him that sir please don't judge the judge and judge the case. Saying this she said that humans have a tendency to cover up things and hide your experience, this is not a healthy practice for the institution of Judiciary.

Discussing about dissenting opinion, she said that dissent looks very good theoretically but when it comes to real life situation then the value of dissent is not much. Dissenting opinion must be given value and a judge while dissenting must give some reasons for the dissent and should create a balance as to where to dissent and where no to; dissenting should not be only for the sake of dissent. Quoting a text from a newspaper Rajasthan Patrika, she said that all the judges know about the constitutional right of Freedom of Speech and Expression but do they really practice it. Giving another illustration from the Euthanasia Judgement, where she was sitting with Justice Katju, she said the Justice Katju was allowing the petition on first day itself but she stopped him by saying that this is an important view and there must be arguments, she took a conservative view. Then in one of the hearings of this case when it was decided that passive euthanasia shall be granted, she questioned the senior advocate that who will have the *locus standii* for filling the case of passive euthanasia, so Justice Katju called her in his chamber and said what do you know about locus standii, why are you raising such issues and said that the bench should disperse, but nothing as such happened. Sharing another experience where a journalist asked her moments of pain and pleasure, she said moment of pleasure are many but pain are that my judgements get approval only when they reach a larger bench. Sharing these she said that there is a need for removal of this mindset where a judge fears before giving a dissenting view that his dissent view could mean dis-respect for a senior judge.

Justice M.K. Sharma discussing the law commission report provided in the reading material said that when there is a decision of a High Court on the provision of a central act, will that decision be binding on other High Courts as well. Raising this question he asked everyone to

participate and give their opinions on the same. One participant said that if persuasive value is given to such judgement then other High Court can take a different view so, this should be made binding so that no disputes arise, here participants also discussed judgements dealing with Section 10A of Industrial Disputes Act. Other participant said that by making this binding it will go against the federal system and thus a judge while giving a judgement must respect its persuasive value and think that disputes will not arise. Saying this the participant gave an illustration from his own experience where the Chief Justice of Patna High Court declared a HUF created by a single coparcenary to be invalid, such judgements if made binding can create problems. A participant suggested that in case of disputed judgements, either Supreme Court should take up the matter suo moto or High Court should be allowed to refer the matter to Supreme Court.

Justice G. Raghuram sharing his experience as a part of a tribunal, CESTAT gave his opinion saying that the process of invalidation and interpretation of a statute looks similar, if a judgement of a High Court interpreting the statute has persuasive value on other High Courts then a judgement invalidating a statute should also have persuasive value only. Then talking about a federal statute he says that these difference of opinions are bound to exist and if one High Court is bound by invalidation of other, then they should also be bound by in pari materia statutes of other states. After this one participant said that according to his view if one High Court invalidates a particular act, it must be invalidated in other High Courts also. Other said that what would be binding then if two High Courts on the same day give contradicting opinions. Another participant said that High Court must be given power to refer matter to High Court in case of interstate disputes; there has to be certainty and uniformity across the country.

After this a tea break was taken and the session was closed. Everyone was asked to re-assemble at 11:35 after the tea break.

SESSION-10

BINDING JUDICIAL CONSENSUS OVER JUDICIAL PRONOUNCEMENTS: ISSUES AND CHALLENGES

JUSTICE M.K. SHARMA

PROF. M.C. SHARMA

Justice M.K. Sharma welcomed back everyone and informed them that this is the last session so, everything can be combined and judges can add in between whatever they want. Introducing the theme of the session, he said that binding judicial consensus can only be obtained when the case goes to the Supreme Court but in that case also it is unknown that in how many days the judgement comes. In his view having a consensus on an opinion is not possible and that too judicial consensus is not possible, with this he invited Prof. M.C. Sharma to speak on the topic.

Prof. M.C. Sharma started by referring to a saying, that law is not logic, it is more experience of life. He says that the brain of a judge is not that of an ordinary human, he has to keep in mind the perspective of entire society and development of law in mind, he has to think deeper and wider, thus to think that he will sit with a closed and vacant mind only in order to produce consensus on judgement would defeat the enterprise of justice administration. He agrees that coming on consensus is a requirement and it is a good demand but asking for consensus at the cost of openness of mind, intellectual thought process and intellectual morality invites trouble. If a judge is coming to a consensus because he consents, then it is good but if a judge is coming to a consensus because he has a vacant mind or he has been forced into it, then there is a serious problem. He says consensus can be arrived only if there is debate, discussion, and dialogue and then these are converted into discourse. Before a judge arrives at a dissent or before a judge denies a dissent he must look at it with openness of mind, this openness of mind is to look at the nuances of the case. Consensus in the real sense which emerges from openness of mind and not because of hierarchies or modern pressures or work pressure or due to an egoistic approach.

Discussing Frankfurter and his importance in the evolution of Indian Constitution, the speaker says the reason why Frankfurter became Frankfurter was due to one dissenting judgement that he gave, this judgement was not written very easily and was not for the sake of dissent, it was written after having fully considered others opinion and demand, by using his intellect, moralities and yardsticks he could not digest and his reasons were so compelling and his reason bought intellectual morality and not ego, not hierarchies and not imperialistic approach. This is what is required by a judge when he given his dissenting view. Judge has two roles to play, one as a jurist and one as a decision maker, these both should go hand in hand, because if he resigns being a jurist his judgments will suffer. Quoting Rosco Pound, the speaker now explained the concept of Social Engineering, he says social engineering is striking a balance between conflicts of two. Society considers judges as the epitome of wisdom, thus there is a need that judges build debate from dialogue and from dialogue to discourse, and this does not happen in the parliament of this country but, this is a necessity when it comes to the institution of Judiciary. He says judges have great judicial power but there is a need to awaken wisdom in them; reaching consensus and having a similar view is very difficult but judges have the discipline of Article 141 and with discipline comes responsibility so while exercising discipline judges should do social engineering to that extent that they are able to arrive at some meaningful consensus and if not meaningful consensus then they have the courage, conviction, commitment and craftsmanship to write their difference of opinion, well considered, well thought and well-reasoned out.

Now, **Justice M.K. Sharma** invited everyone to give their suggestions on the root for building consensus. Each participant had to give his view. One said that division bench is one plus one and not one plus zero thus the view of division bench should be considered while deciding, a judge must be treated as an equal and there must be democratic functioning. Other participant agreed with this view and discussed a case regarding time being the essence of the contract in respect of immovable properties in the case having citation 2011(12)SCC 18, where he raised a doubt that can High Court give a different judgement without applying an already existing precedent. Other participant answering said that High Court cannot ignore the judgment of Supreme Court and shared his experience while sitting as a judge in a 5 judge bench and in a 6 judge bench, where in order to reach the consensus all the judges already studied all the existing precedents on the topic having views on both the sides, these

they studied with the help of newly graduated national law university's students and then after analysing they could reach at a consensus. On this Justice M.K. Sharma asked him that is this a healthy process to which he clarified that judges were free to raise questions. On this Justice Gyan Sudha Misra also said that the purpose of having a larger bench is diluted in such a situation where lawyers don't get a chance to support and confront a view. To this he said that this is a consensus so that we don't start taking divergent views on small issues. Another participant shared his experience that how he was guided by a senior judge to not to express views in an open court. To this Justice M.K. Sharma said that he has a different view.

One participant shared his experience is a judgement which he has delivered in which he has referred to a judgement of Supreme Court having citation 2001(6) SCC 254 and then said that all this exercise that a judge does is for the purpose of delivering justice to the poor man of this country and it is time that judges understand that the purpose of this institution is to give justice to people. Another participant quoted from the case of *Lebron v. United States*. Other participant said that there must be consensus between the judges of a division bench or else the lawyer will try to create distance and grudges among them. Other participant said that bringing consensus among two humans is also very difficult, there are two types of judges liberal and conservative, in America also there are 9 judges in there apex court out of which 4 are liberal, 4 conservative and two side with any of these, but judicial discipline can help manage this system and there is a need to improve the legal education. Other participant placing his views said that whenever a case comes the judge should first ponder on the facts, then the law applicable, then compare facts and then have the objective assessment, then arrive at a tentative decision and then give the pronouncement and said that a judge should equally treat his junior judge. Another participant said that on important matters consensus must be there with an open mind, if there is some important issue on which a judge differs then that is fine, but this should not lead to delaying of matter. Then another participant a woman judge from Gujarat High Court shared her views that how and what sort of problems she had to face, on which **Justice Gyan Sudha Misra** said that we have faced identical problems and sharing her experience in the BCCI conflict of interest issue case said that might be this is some kind of a gender issue, upon discussion she said that this may differ from person to person or this might be the seniority, big brotherly feeling issue that senior judges have.

Now, another participant before giving his view informed everyone about a judgement which Justice A.K. Goel had told him, calling him up day before regarding Section 326 CrPC on which great discussion had taken place on the second day. The judgement was *G.V. Baharuni and ors. v. State of Gujarat* 2014(10) SCC494, the ratio was that even if some part of the evidence has been recorded by the earlier presiding officer, the successor can continue from that stage onward, this was applicable for both trials. Sharing his experience he said that his experience was happy, he delivered a criminal judgement within few days from when he sat on the division bench. Another participant said that a judge must exercise judicial restraint while sitting on that chair and must be patience, he quoted Vinobha Bhave saying that were there is anger there is destruction and he also quoted Md. Iqbal. Another participant giving his view said that he has a problem with the quality of judges of the country and with the cattle rule of seniority that judges follow, he says that in order to resolve this problem the judges must exercise self-restraint and have respect towards the opinion of other judges.

Justice G. Raghuram concluding said that as far as facts are concerned, there should be consensus as far as possible, on principles of law consensus is desirable but to coerce consensus is like raising consent in a democracy. But, complete consensus can make the judgement definitional which is not the purpose of the judgement, dissenting judgement is good for the development of law. He further said that consensus are elusive and in cases where a judge is not able to convince his brother judge, it is a failure on his part; as a lawyer is selling his product that is arguments to a judge and is convincing a judge, similarly a judge is also a legal salesman or a jurisprudential, he has to sell his product to his brother or sister judge and if he fails to do this then there is something wrong with his salesmanship. Then he said that there are no absolutes in law, any faith or assumptions of law or morality are bound to be fallacious sooner or later. He says referring to a book that judgement is also politics, it is principle politics which is not for personal gains therefore judge should acquire skills to negotiate as all other are only captive audience.

Justice Gyan Sudha Misra adding a comment said that in this profession language is considered a very important tool but there should be focus on reasoning and analytical ability also.

The session ended here, **Dr. (Prof.) Geeta Oberoi** asked everyone to give a round of applause for the panelists and the organizers. The conference ended with this session.

Feedback and Evaluation

Everyone was given a feedback form by the organizers and they were asked to fill this form giving their comments about the conference and the stay at National Judicial Academy. Everyone filled the forms and submitted them to the organizers. Everyone thanked the National Judicial Academy, the director and the organizers for the conference.