

# NATIONAL JUDICIAL ACADEMY



## SEMINAR ON THE POWER OF JUDICIAL REVIEW: SCOPE & DIMENSION

18<sup>th</sup>-20<sup>th</sup> March, 2016

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## **Minutes of Seminar on the Power of Judicial Review: Scope & Dimension**

A three day Seminar on the Power of Judicial Review: Scope & Dimension was organized by The National Judicial Academy, Bhopal.

### **Day 1**

#### **Participants:-**

| <b>S. No.</b> | <b>Participant (s)</b>                     | <b>High Court</b> |
|---------------|--|-------------------|
| 1.            | Hon'ble Mr. Justice Atul S. Chandurkar     | Bombay            |
| 2.            | Hon'ble Ms. Justice Mridula Ramesh Bhatkar | Bombay            |
| 3.            | Hon'ble Mr. Justice Girish S. Kulkarni     | Bombay            |
| 4.            | Hon'ble Mr. Justice Soumen Sen             | Calcutta          |
| 5.            | Hon'ble Mr. Justice Goutam Bhaduri         | Chhattisgarh      |
| 6.            | Hon'ble Mr. Justice Vipul M. Pancholi      | Gujrat            |
| 7.            | Hon'ble Mr. Justice Sureshwar Thakur       | Himachal Pradesh  |
| 8.            | Hon'ble Mr. Justice Ali Mohammad Magrey    | Jammu & Kashmir   |
| 9.            | Hon'ble Mr. Justice K. Harilal             | Kerala            |
| 10.           | Hon'ble Mr. Justice Sheel Nagu             | Madhya Pradesh    |
| 11.           | Hon'ble Mr. Justice Jatindra Prasad Das    | Orissa            |

#### **Training Agenda:-**

- Enhancing the understanding on the basic knowledge about the Power of Judicial Review along with its scope and dimensions.
- Developing & enhancing the true and real meaning of the constitution and the power given by it within the participants.
- Developing new vistas of various legal principles which are beneficial in adjudication of cases in a better way.
- Providing knowledge for the Judicial Review, Judicial Activism v. Judicial Self Restrain, Judicial Review of Natural Resources, Best Practices of Judicial review in High Courts, Judicial Review v. Constitutional Review, Gender Equality etc.
- Disseminating the various constitutional principles in order to provide a cutting edge to the participants in order to develop as a better professional in this dynamic legal world.

#### **Key Points:-**

- The seminar started with the registration of participants.
- Address of welcome by Dr. Geeta Oberoi, Director, National Judicial Academy, India.
- Further Addressed by Ruchi Singh, Law Associate, National Judicial Academy, India.
- The conference was attended by High Court Judges of 9 different states.

### Day 1

- The program started with a series of theoretical lectures by Professor Upendra Baxi & Dr. Balram Gupta.
- After basic lectures all of them focused on the practical and conceptual part of the constitutional principles in order to give the better understanding to the constitution.
- Every participant was requested to participate in various practical activities and discussions during the session.
- After the end of every theoretical session of the day participants were requested to use the library for further reading and thereafter imparting them with the Computer Skills Training.

### Day 2

- The program started with a series of theoretical lectures by **Professor Mool Chand Sharma, Professor Upendra Baxi, Dr. Shashikala Gurpur, Mr. P.P.Rao and Dr. Arghya Sengupta.**
- After basic lectures all of them focused on the practical and conceptual part of the constitutional principles in order to give the better understanding to the subject.
- Every participants were requested to gather for a group photograph.
- After the end of every theoretical session of the day participants were requested to use the library for further reading and thereafter imparting them with the Computer Skills Training.

### Day 3

- The program started with a series of theoretical lectures by Professor Upendra Baxi, and Professor Sudhir Krishnaswamy.
- After basic lectures all of them focused on the practical and conceptual part of the subject in order to give the better understanding to the constitution.
- After the end of every theoretical session of the day participants were requested to give their valuable feedback and share their experiences.
- After the successful completion of the conference everybody has been greeted with the warm departure.

### Conclusion

The conference was concluded by imbibing the basic principle of Judicial Review along with its scope and dimensions within the participants effectively and efficiently through various theoretical, conceptual as well as practical sessions over the time period of 3 days. This conference definitely helped all the participants to emerge as a better legal professional having a cutting edge of all the constitutional knowledge imbibed within them precisely.

## **DAY 1: 10:00 AM – 11:00 AM: SESSION 1**

### **Judicial Duty Vis a Vis Doctrine of recusal**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges. She later requested Professor Upendra Baxi to start the session.

This session basically aims at imbibing the true sense of Judicial Duty along with the duty of recusal within the participants by making them understand the true meaning of the term Recusal and helping their personality to evolve as an able professional to work within the ambit in their professional life.

He started this session by questioning why there is recusal, and whether reason for such recusal is needed or not and said that there is a Doctrine of Recusal as well as Doctrine of Duty to sit therefore these two doctrines are conflicting doctrines and a balance must be sought between the two in the interest of justice. This was somehow the conceptual session in which there was a talk about various aspects relating to the recusal its necessity and its repercussions.

Along with it he discusses about the judicial integrity & impartiality/neutrality, he tries to explain the true meaning of the term neutrality where he said neutrality means to avoid biasness. He also explains the doctrine of necessity.

Further he explained the doctrine of recusal by stating the Subrato Roy Sahara's case where Justice Khehar (in which Justice Radhakrishnan agreed) took the lead to confront the convention with the judicial oath of office under the Third Schedule of the Indian Constitution. His Lordship) strongly deprecated the recusal convention as the essence of "Calculated psychological offensives and mind games" which needs "to be strongly repulsed" and recommended a "similar approach to other Courts, when they experience such behavior". They further held that: "... not hearing the matter, would constitute an act in breach of our oath of office, which mandates us to perform the duties of our office, to the best of our ability, without fear or favor, affection or ill will". Justice Khehar followed his own logic in the NJAC Case: "A Judge may recuse at his own, from a case entrusted to him, by the Chief Justice. That would be a matter of his own choosing. But recusal at the asking

of a litigating party, unless justified, must never to be acceded to. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. A Judge before she assumes his office, takes an oath to discharge his duties without fear or favour. She would breach his oath of office, if she accepts a prayer for recusal, unless justified". The irony is lost in the NJAC decision whose strength lies in a robust defence of the judicial collegium reinforced by a rigorous approach towards respecting conventions (following judicial precedents is held to be a convention) in constitutional interpretation and change!

He also stated that In the NJAC decision, Justice Chelameswar and Goyal were further somewhat baffled by the petitioner's submission: was it the "implication of Shri Nariman's submission" that Justice Khehar "would be pre-determined to hold the impugned legislation to be invalid"? But if so, "the beneficiaries would be the petitioners only" as the respondent government of India had no objection to the continuance of the Justice. On the wider question of institutional or official bias, enshrined by the Supreme Court itself on the Indian administrative law, Justices Chelameswar and Goyal ruled that "Judges of this Court are required to exercise such "significant power", at least with respect to the appointments to or from the High Court" with which they are associated. If accepted, the argument of Shri Nariman, they said, "Would render all the Judges of this Court disqualified from hearing the present controversy". This was not a "result" legally permitted by the "doctrine of necessity". Agreeing with 1852(Dime) and 1999 (Pinochet) House of Lord Opinions, Their Lordships drew a distinction between 'automatic', considered (non- automatic), and conscientious recusal. Justice Kurian, however, specifically urges that "a Judge is required to indicate reasons for his recusal" to promote transparency and accountability which stem from the "constitutional duty, as reflected in one's oath". This would also help to "curb the tendency for forum shopping', more so because (as Justice Lokur observed) judicial recusal applications are "gaining frequency". However, Justice Lokur disagreed; finding recusal far from a "simple" affair he questioned the requirement of reasoned opinion; and urged that the issue being "quite significant" warrants fresh rules.

He said that five categories of recusal emerge from the above discourse. The first is when the concerned Judge declines to sit on the Bench for reasons conveyed to the CJI. Since the litigating or general public never knows what information is thus exchanged, we will never know why such recusal occurs. Automatic recusal, second, occurs when it is demonstrated that the Judge has a

pecuniary bias; but when a judge denies these, ‘real danger’ evidence to the integrity of the judicial system as a whole has to be provided. The third category of considered recusal, though the Supreme Court does not so name it this way, occurs when there is ‘real likelihood’ of non-pecuniary bias or conflicts of interest. In both these situations, if necessary, the Brethren sit on judgment concerning the consequences of individual judicial recusal (or non-recusal) conduct. The fourth ground of recusal is that of official or institutional bias. The NJAC decision can be said to hold either that there is no such thing as institutional bias, or the doctrine of necessity (i.e. the Court has to decide) operates; and both can be justified by the judicial oath. This is a fine point because the Court both follows (as in this case) the collective wisdom of past judicial precedents and also departs from it massively! The fifth category is problematic in that ‘conscience’ here conflicts with express provisions of judicial oath. If the Constitution creates a duty to adjudicate, may a Justice recuse himself or herself without violating that obligation? Conversely, should ‘conscience’ be considered so supreme that any Justice may on that ground escape the constitutional judicial obligation to hear and decide a matter? Should Justices resign their offices to serve the judicial conscience or should they be permitted, upon hearing the full arguments on the substance, to recuse themselves in individual cases? Should the Brethren or the Bar be allowed to override individual judicial conscience? What are the ethical obligations of the Bar in regard to recusal and do they extend to individual lawyers, in case the Justice pleads a constitutional duty to adjudicate the matter? And finally (without here being exhaustive) would a rule made by the Court and/or the legislature ever solve the issue of conscientious recusal? The NJAC decision presents us with a bouquet of concerns, going at the heart of the so-called public virtues of ‘transparency’ and ‘accountability’.

**DAY 1: 11:30 AM – 12:30 PM: SESSION 2**

**Does the Constitutional Court forbid Recusal?**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges after the Tea Break. She later requested Professor Upendra Baxi to start the session.

The session basically narrated whether the constitutional courts actually forbids recusal or not?

Professor Upendra Baxi started the session by explaining the Doctrine of necessity as invoked by Justice Chelameswar in regard to recusal.

He said On the wider question of institutional or official bias, enshrined by the Supreme Court itself on the Indian administrative law, Justices Chelameswar and Goyal ruled that “Judges of this Court are required to exercise such “significant power”, at least with respect to the appointments to or from the High Court” with which they are associated. If accepted, the argument of Shri Nariman, they said, “Would render all the Judges of this Court disqualified from hearing the present controversy”. This was not a “result” legally permitted by the “doctrine of necessity”.

He also said that the most important aspect of the NJAC decision is the most ignored but it is impossible to read the judgment without studying the threshold decision on recusal. Such is the gravitational pull of the issue of the constitutional validity of the NJAC decision, replete with surprise, that the issue of judicial recusal in certain situations is not discussed at all. But we should recall that NJAC decision is made possible only by a primary ruling concerning when and indeed whether individual Justices should recuse themselves.

He further stated that by a long standing convention, recusal whether by the concerned Justice or at the instance of the Bar, is an individual affair; the Court as an institution is not involved. The institutional interest becomes of course engaged when there is allegation of pecuniary bias or any other possibility of conflict of interest.

## **DAY 1: 1:30 PM – 2:30 PM: SESSION 3**

### **Judicial Review & Challenge of Durability & Longevity of Indian Constitution**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges after the Lunch Break. She later requested Dr. Balram Gupta, Director, Chandigarh State Judicial Academy to start the session.

The session basically narrated the concept of Judicial Review in terms of its Durability & Longevity of the Indian Constitution.

Dr. Balram Gupta started the session by explaining the Concept of Judicial Review and explains the Durability & Longevity of our Indian Constitution.

Further he explains the role of Judicial Review as enshrined in our Constitution and said that if today we have to draft our Indian Constitution, it would be next to impossible.

He further said that the law must be interpreted with the help of Judicial Review in such a manner so that the objective of Article 142 must be achieved.

Adding to the above he said that if Supreme Court finds any law not meeting the ends of justice, then they must strike it out by interpreting it with the help of Judicial Review and just orientation must be paramount with the help of Judicial Review.

He said that we must try to breathe life into the law & make the law functional, meeting the ends of justice, it is the bound & duty of a lawyer. He further explains the concept of Judicial Activism in terms of interpreting various laws through large number of case laws by our Supreme Court, he stated the case of Shankari Prasad, Sajjan Singh, Golaknath, Minerva Mills, Maneka Gandhi, Indira Sawhney etc through which supreme court has interpreted the law with the help of Judicial Review in order to secure the ends of Justice.

At last he said that we have bright and a long future of our Constitution but only when as long as we have a Power of Judicial Review in our hand as given by the Constitution.



## **DAY 1: 3:00 PM – 4:00 PM: SESSION 4**

### **Judicial Review in the Context of Tax Decisions**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges after the TeaBreak. She later requested Arshad Hidayatullah to start the session.

The session basically narrated the concept of Judicial Review in terms Tax decisions taken by our courts.

Arshad Hidayatullah started the session by explaining the Concept of Judicial Review and explains the Judicial Review of Quasi-Judicial decisions in tax matters.

He said that Judicial Review is the most powerful weapon in the armoury of a Judge to shoot down a decision and grant relief to an oppressed assessee. This power is conferred by the Constitution under Article 226. It is a plenary power which has no Constitutional limitations but is an exercise of power only within the self-imposed restraints of a particular judge applying its principles of review which have evolved over the ages.

He also added that this often raises a dilemma in the mind of a Judge whether to exercise the powers conferred by Article 226 or not. This speech seeks to highlight when that power has to be used to control excessive or arbitrary action by a statutory functionary under a taxing statute which makes the decision in excess of jurisdiction and / or without jurisdiction.

He further added that in the armory of the Judge the quiver has many arrows. They are:-

- **The Writ of Certiorari**
- **The Writ of Mandamus**
- **The Writ of Habeas Corpus**
- **The Writ of Prohibition**

From the above all writs he mainly talks about the Writ of Certiorari by saying that it is the most effective redress among all the others.

He further said that in the context of examining a quasi-judicial decision made by a functionary under powers under the excise Act, Customs Act or the Sales Tax Act, two arrows are used frequently. The easiest way to describe the nature of writ of certiorari is from the pleading and the prayers in a writ petition. For invoking the writ of certiorari the Petitioner, ideally and separately sets out the facts leading to the passing of the decision called the impugned order and thereafter gives the grounds for the relief which he seeks.

He explains the above Writ as, The Writ of certiorari is an age old writ issued by the Court of Chancery in England. Its manifestation and scope in India is best described in the celebrated Judgment delivered by S. R. Das CJ in State of U. P. V. Mohammad Nooh (AIR 1958 SC 86). It was a case of bias in that a person recorded his testimony and nevertheless proceeded to adjudicate the case against the Petitioner. Though it was not a tax case, the principles which were laid down in the context of the writ of certiorari are applicable in all tax cases where an Order is passed by a statutory functionary.

Finally, he added that this was the starting point of Judicial Review by invoking writ of certiorari. He further stated the case of UOI V. Tarachand Gupta (1983 (13) ELT 1456 (SC)) (after reviewing the authorities) where the concept of an Order being “without jurisdiction” was elaborated. Quoting from Lord Reid in the case of Anisminic Ltd. V. The Foreign Compensation Commission the Court held that the decision or order passed by an Officer of Customs under the Act must be a real and not a purported determination.

**DAY 2: 9:00 AM – 10:00 AM: SESSION 5**

**Judicial Review of Natural Resources & Infrastructural Projects**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges. She later requested Professor Mool Chand Sharma to start the session.

This session basically aims at imbibing the true sense of Judicial Review in terms of Natural Resources and various Infrastructural Projects.

He started this session by saying that I have no doubt whatsoever in my mind that among all common law countries, India, has been home to the most rapid development in the field of judicial review. While in England or in the United States a step forward need the gradual and harmonious development of a single aspect of administrative law, in India, with a large number of High Courts and a large number of Benches of the Apex Court of the country, the progress in this field of administrative law has been by leaps, rapid and swift.

He further said that being the Government's distribution of leases, licenses, permits and grants in regard to infrastructural projects and those involving natural resources, which are the wealth of the country, as all of us are aware, in the last few years, India has been developing economically at a fast rate and projects in the nature of airports, power plants and ports have been granted in large numbers. Leases of valuable minerals have been a source of enormous wealth to the beneficiaries. Privatization of industries controlled by the Government has been a source of vast revenues to the State. Licenses, especially in the area of telecommunications, have not only fetched great revenues to the State but also to those whom these licenses were granted. Massive infrastructure projects in the nature of townships and highways have been awarded by the Government, in a rapidly expanding economy.

He stated the case of **Ramana Dayararam Shetty v. International Airport Authority**, 1979 3 SCC 489 where this branch of law was developed. He said that it was recognized by that judgment that there was a new type of wealth or a 'new property' which was in the nature of licenses, permits, leases and so on, which gave immense economic benefits to the grantee, and If through judicial

review, limitations were to be imposed on the arbitrary distribution of such largesse, was it the Government alone which could be prohibited or regulated in its action or could it also extend to agencies of the Government in the nature of Corporations, companies controlled by the Government or even societies controlled by the Government. All these were issues of great importance to the progress of the nation.

He further added that the one big aspect which the courts had to struggle with were challenges to such grants which involved issues of policy where the courts would substitute their own perception on what should be the policy in the state case for that of the Government. Would not policy issues be purely within the domain of governance and would not the separation of powers required by the Constitution be violated, if the Courts were to embark upon judicial review of policy issues.

Finally he added that once judicial review of this dimension was evolved, the floodgates were opened as it were, because no single grant of leases, licenses, permits or award of contracts for infrastructural projects escaped attack by unsuccessful competitors, who approached the courts by way of judicial review. A total new jurisprudence developed, therefore, around the grant of such benefits. The seekers of judicial review were not restricted to those who fail in the competition. A new branch of jurisprudence known as Public Interest Litigation came into existence, which did away with the issue of locus standi, thereby permitting an NGO or a lawyer to espouse the cause of an individual or group which was unable to approach the Court to seek relief for itself.

**DAY 2: 10:30 AM – 11:30 AM: SESSION 6**

**Judicial Review: Critical Analysis of Best Practices in High Courts**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges after the Tea Break. She later requested Dr. Shashikala Gurbur, Director, Symbiosis Law School, Pune to start the session.

The session basically narrated the critical analysis of best practices of Judicial Review in various High Courts, and said that she has taken a wide survey in various High Courts of our country in order to derive the appropriate critical analysis of best practices of the Judicial Review of the Judicial Performance.

Dr. Shashikala Gurbur started the session by saying that her presentation will be based on best practices of High Courts for a Judicial Review of Judicial Performance, therefore she basically focuses on the Judicial Review of the Judicial Performance.

She said that judicial reasoning and judicial process both are at the core of Judicial Review, adding to it she said that Judicial Review is always aimed at achieving the purpose of law as originator of peace, justice & equilibrium.

She further added that the fundamental subject of Judicial Review in the present Constitution of India basically deals with the following:-

- **Enactment of Legislative Act.**
- **Violation of Fundamental Rights**
- **Violation of various other constitutional restrictions embodied in the constitution**
- **Delegation of essential legislative powers by the legislature to the executive or any other body.**

She further said that the vantage point of her investigation emerges from the following:-

- **Recent statements of CJI about the credibility of judiciary being at stake.**
- **From where such credibility drawn from?**

- **Is it the vanishing trust or doubt in its authority?**

Further she explains some remedy to tackle the backlog cases in various High Courts and lastly suggested that Client-friendly courts which are responsive to both internal and external customers are needed and added that we must look at what judges do with what they say.

**DAY 2: 12:00 PM – 1:00 PM: SESSION 7**

**Judicial Activism V. Judicial Self-Restraint**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges after the Tea Break. She later requested Mr. P.P. Rao, Senior Advocate, Supreme Court of India to start the session.

The session basically narrated the concept of Judicial Activism and comparing it with the concept of Judicial Self-Restraint.

Mr. P.P. Rao started the session by saying that the term Judicial Activism & Judicial Self-Restraint are the two face of the same coin.

He said that Judicial Activism is helpful, needful & fruitful to the people only if the judges are those persons who are committed to the constitution of the country.

He explains the term Judicial Activism & Judicial Self-Restraint as judicial activism and judicial restraint are true opposite approaches. Judicial activism is the interpretation of the Constitution to advocate contemporary values and conditions. On the other hand, judicial restraint is limiting the powers of the judges to strike down a law.

He added that in judicial restraint, the court should uphold all acts of the Congress and the state legislatures unless they are violating the Constitution of the country. In judicial restraint, the courts generally defer to interpretations of the Constitution by the Congress or any other constitutional body.

In the matter of judicial activism, the judges are required to use their power to correct any injustice especially when the other constitutional bodies are not acting. This means that judicial activism has a great role in formulating social policies on issues like protection of rights of an individual, civil rights, public morality, and political unfairness.

Judicial restraint and judicial activism have different goals. Judicial restraint helps in preserving a balance among the three branches of government; judiciary, executive, and legislative. In this case, the judges and the court encourage reviewing an existing law rather than modifying the existing law. When talking about the goals or powers of judicial activism, it gives the power to overrule certain acts or judgments. For example, the Supreme Court or an appellate court can reverse some previous decisions if they were faulty. This judicial system also acts as checks and balances and prevents the three branches of government; judiciary, executive and legislative from becoming powerful.

He further talks about the casteless society and classless society and said that we require highest quality of leadership and need more Judicial Activism of more positive kind & creative kind.

Further he added that Judicial Activism exists where there is inertia of other elements of the government are present.



## DAY 2: 2:00 PM – 3:00 PM: SESSION 8

### Proportionality and Judicial Review: A view from the United Kingdom

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges after the Lunch Break. She later requested Mr. Arghya Sengupta to start the session.

The session basically narrated the concept of proportionality and Judicial Review in the context of United Kingdom.

Mr. Arghya Sengupta started the session by saying that there has been illusion made to the proportionality in many cases in India and said that our judiciary is lying on a very thin ice. He basically tries to explain the concept of proportionality with the help of a three folds, these are:-

- Rational
- Necessary
- Balance

He further stated some advantages of proportionality, which are as follows:-

- It allows judges to balance fundamental rights.
- It find balance in judgments which are not binary.
- It allows judges to hold government accountable.

Along with proportionality he also talks about **Wednesbury Principle** in which he stated the most famous statement of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

He then draws a difference between proportionality and Wednesbury. He finally concluded by saying that ipso facto *Ipsa facto* leads to higher intensity of review thereby having potential to exercise a greater check on decision-makers and allowing courts the strategic tool to perform this exercise.

## **DAY 2: 3:30 PM – 4:30 PM: SESSION 9**

### **Judicial Review v. Constitutional Review**

**Hon'ble Ms. Justice Gyan Sudha Mishra** requested Professor Upendra Baxi to start the session.

The session basically narrated the concept of Judicial Review by comparing it with the concept of Constitutional Review.

Professor Upendra Baxi started the session by saying that the unity in this world is divided into two broad categories, these are as follows:-

- **Unity in Diversity &**
- **Unity in Perversity**

Along with it he stated that while delivering any judgement a judge apart from applying the appropriate law must also exercise his/her Artificial Intelligence i.e. AI so that the justice can be delivered passionately.

He explained the above two concepts by saying that, process of measuring acts and actions against a constitutional template is what guarantees the supremacy of the constitution and determines the assumptions of the constitutional order. But that sort of review is not a process that can only be exercised judicially or only be manifest through a strong power to strike down a law after a formal hearing. It might, for example, be implemented through a review of the constitutionality of acts or actions that took place before they occurred, rather than afterwards. Arguably that sort of light, preliminary power of review was in effect during some of the period of parliamentary sovereignty in Great Britain, for example, where constitutional review took place during parliamentary debate, rather than through a process that declared acts unconstitutional after they had been formally implemented.

He also stated the example of the arguments set out in the Virginia and Kentucky resolutions were essentially claims that in a federal system a power of constitutional review could (and should) rest in the sovereign governments of the states that made up the federation. The precise contours of

that (potential) power were not completely spelled out in those resolutions. Both documents assume that the power of review rested in state legislatures (as representatives of the sovereign states), but they are less clear about whether the power of review was a power held by a single state or by the states acting in concert. It was also unclear whether the resolutions were declarations that the state, or states had a direct power of constitutional review, which meant they could declare a federal law unconstitutional, or whether the states simply could join together to ask Congress to reconsider a law on the grounds that it was unconstitutional.

At last he has termed the judges as “**Shopkeepers of Justice**” and said that they must act very passionately while delivering the judgements so that the ends of justice must be secured in every manner.

**DAY 3: 9:00 AM – 10:00 AM: SESSION 10**

**Reflection on Progressive strategies for PIL in India**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges. She later requested Professor Upendra Baxi to start the session.

The session basically narrated the concept of Social Action Litigation and its charismatic phase.

Professor Upendra Baxi started the session by saying that the real heart of production lies within the production of desire.

Further he put up the following questions to the participants:-

- **What is Constitutional Desire?**
- **What is Social Action Litigation?**

He stated that desires has many institutional contradictions. Further he said that one must always stay closer to the heart of the vicious circle of the contradictions because one can't change that vicious circle of contradictions into the virtual circle.

He further talked about the concept and charismatic phase of Social Action Litigation. He added that there is no doubt that SAL, and its demos-prudential adjudicative leadership is made possible in India simultaneously both by adjudication that is independent of social action and movement and dependent on it and the commentariat (the media campus based and public intellectuals, and human rights social action groups)—now substituting the old vanguard proletariat and Relative autonomy from the state and the market, the polity and economy, is made possible primarily through social action litigation (SAL), still miscalled as public interest litigation(PIL).

He also added that, a distinct theory of constituted time is adjudicative time. The Indian constitutional experience and development presents singular difficulties in understanding adjudicative time. In the main so, because the Supreme Court of India presents itself as a sole residuary legatee of the originary constituent moment; thus it ordains a doctrine of basic structure and essential features of the Indian constitution. Originally strictly confined to adjudging the

validity of constitutional amendments, the basic structure doctrine now extends widely and vastly to all manner of public decisions. Further, the horizons of adjudicative time constantly expand with the invention of SAL jurisdictional and jurisprudential practices and the adjudicative jurisprudential leadership is fusion of constitutional and adjudicative time demand some typical (even paradigmatic) ways of Indian adjudicatory leadership.

Finally he said that leaving aside the rather crucial question concerning how the Kesavananda Bharathi fusion of two orders of time may have gestated forms of inaugural SAL time in the Judicial Eighties, it is clear enough that in some remarkable ways, the SAL adjudicative time disrupts conventional understanding of this as an 'eternal yesterday' (borrowing here a phrase from Max Weber<sup>26</sup> Put starkly, SAL writes, as it were, on a clean adjudicative slate, generating in turn its very own distinctive normative/doctrinal past times.

Now, **Hon'ble Ms. Justice Gyan Sudha Mishra** requested Professor Sudhir Krishnaswamy to add some of his view point on the same issue.

Professor Sudhir Krishnaswamy started his presentation by saying that if we introduce groups into the adjudication, then it is difficult to differentiate between the judicial decision and a political decision.

He further classified these groups into two broad categories, these are as follows:-

- **Associative Standing (having little traction & few cases)**
- **Representative Standing (having large traction & more cases)**

Therefore, while classifying the groups into above broad categories he suggested that we must shift ourselves from the Representative Standing to the Associative Standing which will be beneficial for the courts and the litigants in the long run.

He further stated that Social Action Litigation (SAL) is a completely new model of adjudication.

He also added that following points must be given a true importance:-

- **Legitimacy of Representation**
- **Legitimacy of Accountability**

And said that the legitimacy arises from the very primary function of the court itself therefore it's not just about standing it's all about how you decide the cases & must be seen as a courts forming forums to solve the actual public problems in a better way to secure the ends of justice.

### **DAY 3: 10:30 AM – 11:30 AM: SESSION 11**

#### **Use of continuous mandamus to secure Gender Equality**

**Hon'ble Ms. Justice Gyan Sudha Mishra** welcomed the gathering of High Court Judges after the Tea Break. She later requested Ms. Pritarani Jha to start the session.

The session basically narrated the concept of Gender Equality and the power of Judicial Review to uphold the fundamental rights of women to live without various kinds of gender based violence and discrimination.

Ms. Pritarani Jha started the session by saying that We argue that robust judicial reviews, continuous monitoring and oversight are required given the persistent failure of gender just legislation targeting social evils such as sex selective abortion, sexual violence and harassment and the most common form of violence that women in India and world over face, domestic violence in intimate relationships. India is exceptional in that the whole concept and introduction/innovation of PIL was a “Judge led”/judge dominated movement” by Supreme court Judges who envisioned the PIL as a tool to plug in the huge gaping holes in the delivery of legal aid services such that the vast majority of Indians were not able to access and sadly still are not able to access competent and timely legal representation. The relaxation of the rules in the late 1970's and early 1980's, essentially by doing away with formal rules and requirements so that even a post card or a letter from concerned persons or affected individuals could be treated as a writ petition. These developments coupled with the commitment to issues of socio-economic justice towards those socially and economically exploited, marginalized led to a boom in Public Interest litigation covering rights of bonded laborer, prisoners, rickshaw pullers, sex workers and many others.

Further she stated the case of **Vishaka v. Union of India** where the Supreme Courts took a leap when it drew on the provisions of CEDAW to redress the grievance of sexual harassment faced by women at workplace, when there was no statute to draw upon or enforce, but of course article 14

and 15 and 21 of the constitution were also relied upon by the belated Justice Verma in the Vishaka Judgment, which predictably was poorly implemented.

She also said that We propose the vehicle of continuing mandamus as already enunciated by the Supreme Court in Vineet vs Narain<sup>4</sup> and used to protect fundamental rights in many important cases such as: **Bandhua Mukti Morcha Vs union of India, Upendra Baxi vs state of Uttar Pradesh, Prakash Singh and others vs Union of India** PIL spanning more than a decade and still ongoing case, **Bachpan Bachao Andolan PIL** litigation spanning many years on issue of child rights. In each of these cases, the courts have made a mandatory order, ordering the state to act in order to implement a piece of social welfare legislation such as Minimum Wages Act 1948, Bonded Labour (Abolition) Act 1968 to prevent violation of the right to live with dignity under article 21. In many of these cases, the Supreme Court, did not stop with just making the mandatory order, but it also ordered a timeframe under which the order was to be complied and essentially monitored the progress by requiring the state to report at regular intervals to the court.

She also talks about the non-implementation of the domestic violence legislation and role of lower judiciary in its implementation.

She also added that **“Rape, sexual assault, eve-teasing and stalking are serious matters of concern-not only because of physical, emotional and psychological trauma which they engender in the victim, but also because they are practices which are being tolerated by a society ostensibly wedded to the rule of law”**.

Finally she suggested that the Indian state will need to ensure the following functioning good quality infrastructure support to survivors to not only meet the due-diligence standard we have agreed to by signing **CEDAW** and Declaration on rights of Victims but also to prevent the persistent and continuing violation of article 21 , article 14 and 15 whose combined reading requires that the state must comply with its duties “ to provide a safe environment at all times, for women who constitute half the nation’s population; and failure in discharging this public duty renders it accountable for the lapse.

Finally she added “It is unfortunate that such a horrific gang rape (and subsequent death of the victim was required to trigger the response for the preservation of the rule of law-the bedrock of a



republic democracy. Let us hope that this tragedy would occasion better governance, with the state taking all necessary measures to ensure a safe environment for the women in this country”.