NATIONAL JUDICIAL ACADEMY

COLLOQUIUM ON DEVELOPMENTS IN THE AREA OF CONSTITUTIONAL LAW

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February 4th & 5th, 2017

PROGRAMME REPORT

Programme coordinator:

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The National Judicial Academy organized a "Colloquium on Developments in the Area of Constitutional Law" for newly elevated Judges of High Courts on 4th & 5th, February, 2017. The colloquium aimed at augmenting the perception of the Constitutional vision of justice, boundaries of judicial review, sounds and silences of the Constitution, contours of public interest litigation, and the nature of supervisory role of High Courts over subordinate Courts.

The colloquium was divided into five sessions. 31 newly elevated justices from various High Courts participated in the two-day colloquium. Hon'ble Dr. Justice D. Y. Chandrachud, Hon'ble Mr. Justice P. V. Reddi, Mr. P. P. Rao, Mr. Arvind P. Datar and Mr. N. Venkataraman were the resource persons.

The theme of the first session was ***"The Constitutional Vision of Justice"***. It was remarked that all three organs of the government, i.e. the legislature, executive and the judiciary are expected to work together for achieving the objectives laid down by the Constitution. However, historically there has been a disconnect between the political leadership and the judiciary. It was reflected that Constitution is a political, social document and a blueprint for governance. The Constitution recognizes that the liberties are not to be exercised only in an individual sense, but have to be exercised in a collective sense as well, recognizing the need for expression of liberty by collective groups of citizens, particularly in a pluralistic society as in India.

It was emphasized that Part III and Part IV of the Constitution are not disconnected segments, instead, they are to be viewed together as a composite whole, representing social dialogue which the Constitution seeks to create in achieving social mobilization, which is one of the fundamental tenets of the Constitution. It was remarked that the Constitution could be said to be seeking to establish a regime of social, economic and political justice through institutional governance. Constitutional notion of justice was discussed. Emphasis was laid on the debate in the U.S.A. as to whether the constitutional vision of justice ought to be given originalist interpretation or, an evolving and organic notion of justice ought to be adopted. Reference was made to the position in India in this regard, wherein judiciary considers the Constitution to be an organic document, constantly evolving in the manner expounded by judicial interpretation.

It was stated that there are two aspects of the Constitutional vision of justice, firstly, what is the vision set out by the Constitution, and secondly, what are the mechanisms devised to implement the vision. It was stated that the judiciary is a mechanism or instrument that has been devised to secure vision of justice, which is evident from the fact that no other Constitutions in the world contains such elaborate provisions. It was opined that the entire vision of justice as set out by the Constitution is contained in the Preamble. It was remarked that the vision of the Constitution essentially denotes the vision of the founding fathers of the Constitution, laying emphasis on the Constituent Assembly Debates acting as a window enabling us to peep into the minds of the members of the Constituent Assembly, as to what they had in mind while framing the Constitution.

It was emphasized that large areas of dispute are being shifted from the jurisdiction of Courts to the jurisdiction of tribunals. It was suggested that the judiciary should try to avoid getting into polycentric disputes, leaving it to the legislature to address polycentric disputes by suitable legislative action. It was stated that the good or bad fortune of a nation depends on its Constitution and the way the Constitution is made to work. It was remarked that the Indian Constitution is a unique in view of the fact that the framers of the Constitution scrutinized the Constitutions of various countries of the world, and those provisions which were best suited to our polity and society were adopted, in their original or modified form to suit the needs of the nascent nation. It was noted that people have a plethora of rights derived from the Constitution, and by judicial activism, width and content of fundamental rights have been expanded while addressing the issues touching quality of life, good governance and problems of government inaction and arbitrariness.

The independence of the judiciary was highlighted for having been instrumental in enhancing credibility and utility of the judicial system. It was opined that the confidence and faith of public in judiciary is best reassured by rising to the occasion and redressing genuine grievances of the people and by infusing the Constitutional vision of justice in the adjudicatory process.

The theme of the second session was ***'Separation of Powers – Boundaries of Judicial Review'***. It was strongly indicated that judicial review under Indian Constitution does not imply the power to usurp powers and functions of another arm of the government. Articles 13, 32 and 226 of the Constitution were cited as source from which the Constitutional Courts in India derive the power of judicial review. The phenomenon of the Supreme Court and the High Courts transforming into 'Good-governance Courts', seeking to ensure good governance within the nation, under the umbrella of judicial review was also highlighted. It was also observed that judicial intervention in matters of policy-making must be mitigated to the greatest extent possible, whereas matters of governance and policy-making must be entrusted to the executive, who are subject to popular accountability to the electorate. The role of the judiciary is to compel the executive to give effect to its functions and duties, rather than taking over its functions and duties. The judiciary ought to endeavour towards strengthening the institutions of democratic governance, instead of weakening them by assuming powers which were never entrusted to the judiciary under the Constitutional scheme.

It was remarked that the function of the legislature is law-making, the function of the executive is administration, policy-making and implementation of laws, and whereas the judiciary is entrusted with the function of resolving disputes, interpreting the Constitution and the other statutes. The practical difficulties crop up in drawing the boundaries between the functions of these three wings. The judgments which included Prakash Singh & Ors. v. Union of India & Ors. (2006) 8 SCC 1, Abhiram Singh v. C. D. Commachen & Ors. 2017 SCC Online SC 9, Ram Jawaya Kapur v. State of Punjab AIR 1955 SC 549, Vineet Narain v. Union of India, AIR 1998 SC 889; (1998) 1 SCC 226, Vishaka v. State of Rajasthan, AIR 1997 SC 3011; (1997) 6 SCC 241, Jagdambika Pal v. Union of India and Ors, 1998 (2) SCALE 83 were also discussed.

The theme of the third session was ***'Interpreting the Sounds and Silences of Constitutional Speech and Silence'.*** Silence was explained as a state of equilibrium or a state of calmness. Silence of the Constitution has to be interpreted with a view to redress the issues or problems which arise before the Courts. Reference was made to the five cardinal principles propounded by Laurence Tribe regarding the matter of dealing with the silence in Constitution, prescribing that the first endeavour of every judge faced with an issue pertaining to silence of legal provisions, should be to ascertain whether there is silence in the provisions or avoidance in the provisions with regard to a certain issue. Secondly, if it is evident from the legal provisions that there is a silence, the next step should be to assimilate the silence and interpret it as close to reality as possible, while being cautious that the interpretation should be as close as possible to the actual purpose it was intended to serve. Thirdly, there has to be cognizance of the possibility of silence coming in various forms and perspectives. Fourthly, interpretation should be objective, eliminating any kind of subjectivity as far as possible. Lastly, it was opined that the legal culture of a society is dependent on the way the Courts of such society interpret silence. Reference was also made to various categories of silence in legal provisions, as distinguished by Laurence Tribe which includes Door-opening and Door-closing silence, Structural silence and silence on individual rights, general silences and Rules of constitutional interpretation. Two modes of interpretation of constitutional silence were highlighted, namely textual interpretation, as distinguished from contextual interpretation. A textual interpretation would be aided by the tools of historical interpretation and literal construction. Contextual interpretation would be aided by the tools of purposive and progressive interpretation and harmonious construction, and would better serve the needs of changing times. To reflect the question on sounds and silences of the Constitution it was

observed that the sounds are that which the Constitution expressly states, and the silences are constituted of firstly, that which is implied by the provisions of the Constitution or which can be read into the Constitutional provisions, and secondly, that which the framers of the Constitution could not have contemplated, but had they contemplated it, they would have included similar provisions.

It was observed that in context of the Indian Constitution, there was absence of an uniform approach towards interpretation of the silences of the Constitution. A.K. Gopalan v. The State of Madras, AIR 1950 SC 27, Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458,. I. C. Golaknath & Ors. v. State Of Punjab & Anr., AIR 1967 SC 1643, Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225, Sajjan Singh v. State Of Rajasthan, AIR 1965 SC 845, R. C. Cooper v. Union of India, [1973] 3 S.C.R. 530, Maneka Gandhi v. Union of India, Air 1978 SC 597, R. D. Shetty v. International Airport Authority of India, AIR 1979 SC 1628 and E. P. Royappa v. State Of Tamil Nadu & Anr. AIR 1974 SC 555 were also highlighted and discussed as apt examples where the silences of the Constitution have been interpreted by the Supreme Court by way of reading essential Constitutional values into provisions which were silent in context of these essential values. It was observed that the Constitution has to be operated and interpreted in light of established conventions. Since the Indian Constitution has adopted the British parliamentary form of government, therefore the working of the Indian Constitution is to be guided by British conventions. Attention was also drawn to the question as to the relationship between the fundamental rights and the directive principles of state policy, which came up for consideration in The State Of Madras v. Srimathi Champakam Dorairajan, AIR 1951 SC 226 and was finally set to rest by the decision of the Supreme Court in Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.(1973) 4 SCC 225 wherein it was held that both fundamental rights and directive principles of state policy are elements constituting the basic structure of the Constitution, and thus, ought to be harmoniously constructed as complimentary and supplementary to each other.

The theme of Session 4 was '***Defining the Contours of Public Interest Litigation and its Enforcement.'*** It was stated that often people whose rights are infringed might not get access to justice. The purpose behind evolving and vitalizing public interest litigations, is to discharge the constitutional obligation towards protecting and enforcing the fundamental rights as well as other statutory rights of the people who are not in a position to redress their grievance. Public interest litigation has been devised as a means of providing effective access to justice, through public-spirited individuals or organizations. It was opined that the judiciary has to necessarily play an activist role in ensuring effective redressal of infringements of rights of the people and also ensure that their rights, especially those pertaining to social welfare are made available to them. The areas where Courts have been granting remedy in exercise of Public Interest Litigation jurisdiction are human rights issues particularly pertaining to personal liberty, issues concerning environmental protection and matters of public accountability of the State over arbitrary exercise and abuse of power, to name only a few. The Courts ought to apply the doctrine of necessity while exercising Public Interest Litigation jurisdiction, to ensure whether the case before them warrants intervention by the Court. It would be considered a pragmatic judicial enforcement of rights. It was deliberated that courts will have to distinguish between inability and unwillingness on the part of the state to give effect to rights of the people through appropriate policies. It has to be found out in every case invoking public interest litigation, whether state is capable of giving effect to a particular policy or not. If in spite of being capable of executing a policy, the state is still unwilling to do so, then the Courts can and should intervene on the ground of public interest. It was suggested that the Courts must be vigilant that Public Interest Litigation is kept confined to public interest litigation, and must not be adulterated into 'political interest litigation' or 'publicity interest litigation'.

The Theme of session 5 was ***"Supervisory Powers of High Courts over Subordinate Courts - Mentor or Monitor."*** The difference between Articles 226 and 227 of the Indian Constitution was enunciated. The areas wherein the High Courts have had the opportunity of exercising their supervisory powers under Article 227 of the Constitution were enumerated which includes non-following of binding precedents and delivering of stereotyped decisions/orders by the subordinate Courts; non-adherence by subordinate courts to the directions issued by the High Court; orders being passed by quasi-judicial bodies in utter disregard or ignorance of the law; when it is clearly evident without going into the depth of arguments that apparent injustice has been done to the aggrieved party/person; when matters before the subordinate Courts purely involve a question of law which does not necessitate long-drawn arguments; Interlocutory orders which do not provide scope for an appellate mechanism. It was expressed that High Courts are appellate as well as Constitutional Courts. It was opined that to maintain independence of the judiciary, which is an essential and inalienable feature of a democratic Constitution, power of control over the subordinate Courts has been vested in the High Courts by way of Article 227, which confers power of judicial supervision and control over subordinate Courts, as well as by Article 235, which confers power of administrative control over subordinate Courts.

It was observed that the subordinate courts are the face of the judicial mechanism to the common public of the country. The overall efficacy of the judiciary is assessed by the yardstick of the performance of the subordinate Courts, which necessitates the High Courts to effectively exercise the supervisory powers granted by the Constitution, discharging the role of both a mentor and a monitor to the subordinate Courts. The need to conduct periodical reviews and inspections from time to time was emphasized as a prerequisite to exercise effective control. It was stated that there is a need to extend appropriate advice and guidance to judicial officers of subordinate Courts whenever they face with any issues while discharging their functions and duties, as well as the need to extend protection to judicial officers who are sincere and honest in the discharge of their functions and duties, was highlighted. The need of intensive review of the functioning of subordinate Courts, from judicial officers to ministerial staff in the Courts, was also emphasized so as to achieve efficacious functioning of the judicial mechanism. The deliberations of the colloquium were concluded with the observations to the effect that in a democracy, public offices are not to be construed as offices of power, rather they are to be construed as offices of responsibility. The conference concluded with the concluding remarks by Hon'ble Justice G. Raghuram, Director, National Judicial Academy.