

National Judicial Conference for Newly Elevated High Court Justices on Public Law [1052]

13th – 15th October, 2017

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The National Judicial Academy organized “National Judicial Conference for Newly Elevated High Court Justices on Public Law” on 13th – 15th October, 2017. The participants were newly elevated High Court Justices nominated by respective High Courts. The conference facilitated deliberations among participant justices on contemporary topics such as Information and Communications Technology in Courts and Court Management Techniques to improve efficiency and strengthen justice administration; core Constitutional principles such as the concept of Judicial Review, Federal architecture, Separation of Powers, Doctrine of Basic Structure and Fundamental Rights under our Constitutional arrangement. The Conference included interactive sessions and round table discussions on designated themes among participant justices.

Major Highlights and Suggestions from the Conference

Session 1: The Constitutional Vision of Justice

- The Constitution is a document of governance with certain objectives. The primary object of the Constitution is to secure the rights of people. These rights consists of both justiciable rights and non-justiciable rights. Apart from this, other parts of the Constitution create certain posts and functions and determine how those function have to be exercised. The first objective of the Preamble of the Constitution is to secure justice- social, economic and political.
- The idea of justice responds to the search of human beings about what is right and what is wrong. The word ‘JUSTICE’ comes from the word ‘JUS’. ‘Jus’ is a sense of right or wrong that is validated or sanctified by some process. Judges cannot be guided by their own sense of right or wrong. We need a validation for this sense of ours and this must be objective.
- The root for the word ‘judge’ consists of two words ‘jus’ and ‘decire’- it means to decide. The righteousness of conduct can be judged according to a set standard of human conduct. Law is a set of hypothetical fact pattern and the value which creates this fact pattern is what matters. Judges should know whether their sense of right or wrong is sanctified or not as judges are the guardian of the sanctified values. Justice is the sanctified sense of right or wrong. In this sense, constitutional visions of justice becomes important because we need to locate what is right and what is wrong and this has to be located in the Constitution.

Session 2: Court Management

- Court management involves managing the court requirements like number of judges, infrastructure, support systems, filling of vacancies etc. In *Imtiyaz Ahmad v. State of U.P.*,¹ the Court set out the norms for finding out how many additional courts were required in the country. The 120th Law Commission Report titled 'Manpower Planning' recommended that the number of judges should be decided according to the population of the place. All high courts were required to give a report on infrastructure.
- In this age of technology, challenge of judicial time management is a feasible challenge which needs to be addressed. With the Supreme Court judgment making CCTV mandatory in courts, problems of case management in some areas can be dealt in an effective manner. It was observed that sometimes judges do not sit on time and most of the time is lost in calling hours. Courts need to manage case progression. Furthermore, at least 20-30% time of judges goes in administrative work. This type of work can be effectively addressed by proper use of information and technology in courts.
- Due to the effort of NCMS, there has been an increase of 25% judge strength in the high courts and an increase of 50% judge strength of subordinate courts. The website of the Supreme Court has NCMS reports, where performance reports on infrastructure and other minimum standards to be followed by the Indian judiciary have been uploaded.

Session 3: Information and Communication Technology in Courts

- The victims of delayed disposal of cases are the litigants. Vision of justice entails court management and case management and this management can be done using information and technology in courts. Information technology was not present in the courts in the 1990s. All management decisions involve data reading capability. Thus, we must have reliable data taken from various sources.
- All high courts are independent to develop their own software for managing their affairs. These days, high courts have their own software development teams. E-filing centres have been opened up where all documents pass through the computerised network. The data is fed by the subordinate staff and not the judge himself and this data goes to the national server. The system then auto generates data e.g. cases disposed, case filed etc.
- Nowadays, digital evidence is being accepted as evidence by the courts. Under-trial prisoners are appearing in the court through video conferencing. Thus, we are steadily moving in the direction of virtual courts.

¹ (2012) 2 SCC 688.

Session 4: Theories of Judicial Review

- Judicial review puts a check on State action. Judicial review is necessary for keeping public authorities in bounds and upholding the Rule of Law. Constitutionalism is 'limited government' and 'limited government' has divine roots in natural law. The power of judicial review also has its roots in common law.
- No Constitution in the world has defined the limits on the power of judicial review of courts. A sizeable part of the world follows the European political traditions and thought processes. The Magna Carta symbolises the liberty of people. Over a period of time, European thought has occupied jurisprudence too.
- The line drawn between constitutional powers of the courts and civil and criminal powers of the courts is an artificial line. Whenever there is any lacuna in the existing law, constitution plugs in. It is often said that the courts cannot legislate. When we try to engraft the role of courts in an established political framework, there is a mismatch because of which conflict occurs.

Session 5: Separation of Powers

- There is no strict demarcation of powers between the three organs under the Indian Constitution. The distinction between judicial power and legislative power is recognised in almost all the countries of the world. Legislature can any day come up with a law which overturns the judgement of a court. There is a need to come up with a limit on this judicial power, which can be done by the judges themselves by way of their experience.
- In the process of tendency of the courts to legislate, many breaches like violation of distribution of powers happen. The people of India become accustomed to see Supreme Court acting like an institution for reforms. Article 142 of the Constitution is a source of power for the Supreme Court to do complete justice only in accordance with power conferred on it by the Constitution. The judges cannot use their own interpretation in doing so. A certain amount of latitude has been granted to courts to ascertain that the human rights of people are protected.
- The authority of courts to intervene comes from the duty cast upon it to resolve the case at hand. However, to what extent the court can intervene, is a question where separation of powers becomes necessary. Judicial despotism should not happen. Separation of powers entails that the legislature cannot legislate in an arbitrary way.

Session 6: Allocation of Legislative Powers: The Federal Architecture

- The Constitution of India provides for allocation of powers between the centre and the States. Under Article 1 of the Constitution, India has been held to be a 'Union of States' and not a 'Federation of States'.

- Federal supremacy is seen in the provision of Article 246. It states that in case of overlap between List I and List II, List I shall prevail whereas in case of overlap between List II and List III, the union law prevails. Union and States legislatures are sovereign in their own spheres. However, more powers are provided to the Union legislature. Article 249 gives Parliament the power to legislate with respect to a matter in the State List in the national interest.
- Supreme Court comes in as a guardian of the federal structure of the Constitution. No other Constitution of the world contains such an elaborate fiscal relationship between the Union and the States as has been provided in the Indian Constitution. The federation between the Union and the States has moved forward in the last 25 years with the enactment of Panchayati Raj under 72nd and 73rd amendment to the Constitution. These reforms can be considered as the birth of 3-tier federalism in India and can be called a 'federation of federations'.
- Schedule V and VI of the Constitution are also concerned with allocation of legislative powers. Under both these schedules, governors have the legislative powers. Schedule VII of the Constitution is the source of allocation of legislative powers. If we remove this schedule, there would be no distribution of powers.

Session 7: Fundamental Rights and Restrictions on Entrenched Rights

- The restrictions can be categorised into two categories - firstly, expressed restrictions provided in the Constitution and secondly, restrictions which can be implied or inferred in national public interest. Restrictions provided under Article 19 (2) of the Constitution are express restrictions whereas the interpretation that no rights are absolute, can be taken to be an implied restriction. The implied restrictions have been put because it is said that certain limitations are engraved on the right itself.
- Even silence in the Constitution has become source of Constitutional developments. In *Maneka Gandhi v. Union of India*,² interpretation of Article 14, Article 19 and Article 21 was done in a wide manner. The interrelation between Articles 14, 19 and 21 which started from the *Maneka Gandhi* case has been explained in cases decided by the courts even today. Recently in *Justice Puttuswamy v. Union of India*,³ Justice Chelameshwar has opined that "Article 21 is the bedrock of privacy".
- The fundamental rights are not the gift of law or the elected government. Though, in *ADM Jabalpur* case it was held that fundamental rights were given by law, it was then decided wrongly. Article 32 of the Constitution which Dr. Ambedkar referred as the 'heart and soul of Constitution' is itself a fundamental right. Thus, to enforce a fundamental right is itself a fundamental right.

²AIR 1978 SC 597.

³2017 (10) SCALE 1.

Session 8: Theory of Basic Features: Contours

- The theory of basic features as propounded by the Supreme Court in the Kesavananda Bharati case is unique. The theory of basic features confers power to the judiciary to expound sounds of silence in the Constitution.
- Basic feature doctrine was a product of experience. It was a high point of judicial craftsmanship. By way of basic features doctrine, certain implied limitations were put on the amending power of the legislatures. Way before Kesavananda Bharati, the cases of Sajjan Singh v. State of Punjab⁴ and Golak Nath v. State of Punjab⁵ paved the way for consideration on the issue of requirement of basic structure doctrine. Although Kesavananda Bharati case came up with the doctrine of basic features, it was Indira Gandhi v. Raj Narain where this doctrine was applied for the first time.
- Politically motivated measures to undermine judicial independence was struck down by the basic features doctrine. Judicial review and judicial independence as constitutional values are always respected by the Supreme Court and these values have been kept intact by working in this direction.
- The Supreme Court many a times held that, Constitutional amendments only can be tested on the parameters of basic structure. However, it has been observed that courts have also been using the basic features theory to ascertain the validity of ordinary laws. Doing so results in passing of *per incuriam* decisions.

Session 9: Art of Hearing

- Training of a lawyer is combative in nature. However, as a judge, he has to play many roles. A judge has to understand the case and the facts manufactured by the parties. Lawyer is the one who presents the case in a palatable format to the judge.
- A judge has the responsibility of nurturing the next generation of lawyers and for that it is very necessary that they let the lawyer speak. Art of hearing involves the art of letting the lawyers speak. This makes it easier for the judge to write a well-reasoned judgment. Judges need to act like a catalyst.
- A judge should make sure that the case is disposed after hearing the parties properly. It is so because the litigants should have the satisfaction that their case was decided properly. Certain amount of humility needs to be shown by the judges so that the litigants get a sense of belongingness.

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⁴AIR 1964 SC 464.

⁵ AIR 1957 SC 1643.