

NATIONAL SEMINAR FOR PRINCIPAL DISTRICT AND SESSIONS JUDGES ON
CONSTITUTIONAL AND ADMINISTRATIVE LAW (P-1081)
JANUARY 19-21, 2018

PROGRAMME REPORT

By

Programme Co-ordinator – Ms. Shruti Jane Eusebius, Law Associate, NJA

OBJECTIVE

National Judicial Academy organized the Seminar for Principal District and Sessions Judges on the theme of ‘Constitutional and Administrative Law with the objective of engaging participant judges in deliberations of Constitutional and Administrative law and the application of these public law norms during adjudication within their jurisdiction. The seminar was conceived with a view to root District level judicial officers in the Constitutional vision of justice, acquaint participants with social context judging, and sensitize them to the imperatives of adhering to and applying constitutional and administrative law norms while interpreting and executing the substantive and procedural legislative mandates applicable to causes coming before their court. The sessions included deliberations on the role of courts in enforcing constitutional rights and principles of natural justice alongside other seminal principles of public law which substrate all laws.

SESSION 1

Separation of Powers & Contours of Judicial Review

Speaker: Prof. V.K. Dixit

The speaker commenced the discussion by explaining the concept of separation of powers to the participants. The speaker stated that the idea of separation of powers is very old but its implementation is very recent. The district judiciary in India was in control of the executive until recent times when it was brought under the High Court. The speaker discussed the concept of Rule of Law and its relation and linkage to the concept of separation of power. The speaker

stressed that absolute power corrupts absolutely and hence there is need for separation of powers and for check and balances in the exercise of the power to ensure that power is not abused.

The speaker then dwelt on the recent trend of specialisation of knowledge and its impact on the organs of the state. He stated that in the spate of specialisation, the legislature and the judiciary suffer as they do not possess the requisite knowledge of specialised areas. The speaker then discussed delegated legislation as a method of specialisation of legislative function. The concern expressed in this regard was that many essential functions are delegated. The speaker then highlighted the tremendous increase in powers of executive and judiciary. The functions of the legislature are decreasing as the powers of the legislature are being taken over by the executive and the judiciary. The speaker stressed on the necessity that some impartial body exercises control on legislature as legislature is the one organ that is populist. The speaker then dwelt on the creation of bodies like SEBI, Competition Commission of India, LIC RBI etc. '*headless bodies*' which hold all powers – legislative, executive and judicial as an example of the failure of separation of powers. The speaker cited the faith deficit in the executive and legislature as a cause of the rise of such bodies.

The speaker stated that separation of power was good in theory but bad in practice. The speaker raised the question that when other organs of the state are not functioning effectively, whether it is legitimate on the part of the judiciary to usurp their functions? A view expressed was that two options exist in this situation; one option being that the judiciary carries the extra burden indefinitely and the second option of allowing the system to function with all its inadequacies and failures as an exercise in learning and development. It was stated that in a democratic system, the second option of allowing all wings to function in their domains and not to usurp the functions of the other wings should be followed.

A question raised was that wouldn't it be good if agencies like SEBI with specialised knowledge exercise legislative function and whether the term '*headless bodies*' would apply to such agencies?. To this, it was stated that though there is a system of check on the function of SEBI and the delegated legislation made by SEBI through the system of approval through the Parliament, this check is rarely, if ever exercised and there is hardly any discussion on the delegated legislation.

The speaker then dwelt on the issue of whether the current system works. The speaker stated that in the era of populist governments, the state has become the official resume of society. The current system is not perfect but a work in progress. Separation of powers and checks and balances has its own utility in a democratic system.

A participant shared the experiences in Meghalaya where separation of power is taking place currently. The tribal areas in Meghalaya hitherto were governed by tribal laws

SESSION 2

Social Context Adjudication

Speaker: Prof. V.K. Dixit

The speaker dwelt on the concepts of law and justice and stated that law which does not impart justice cannot be called law. The speaker then discussed the inherent inequalities in the judicial system and differentiated between ascribed inequalities and acquired inequalities. Ascribed inequalities are the inequalities that are ascribed by birth, e.g. caste, race, gender. Acquired inequalities are inequalities that are attributed to merit, education etc. Modern society is unequal but the inequality is not ascribed but acquired.

In an unequal society, liberties are available to all but the means to exercise the liberty are available to few. While it is true that courts are accessible to all, the reality is different. The speaker discussed the causes of such inequality – the lack of money, lack of education, lack of material resources, asymmetry of information, cultural inequality, power imbalance and language. The speaker dwelt on inquisitorial adjudication and adversarial adjudication and the impact of inequalities in these judicial systems. The speaker then discussed the major legislative actions towards removal of inequalities in the judicial process. The speaker then discussed initiatives towards gender equality and the landmark judgments on gender equality. The speaker dwelt on cultural realities as a cause of inequalities and the need to factor in these causes in deciding cases. The speaker then discussed the concept of power, the source of power and the concentration of power as a cause of inequality.

The speaker then dwelt on the concept of justice, justice as mentioned in the preamble and stated that the term 'justice' is not defined in the Constitution. The speaker dwelt on what kind of justice is to be attained by the judiciary. The speaker then discussed the concept of distributive justice. Public interest Litigation as a tool for social context adjudication was discussed and change in the role and goals of PILs – from concerns of the poor like food, clothing etc. to concerns of middle class like clean environment etc., was highlighted. The speaker stated that justice must be given according to law. It may be that law is defective or inadequate. The speaker discussed the legal and judicial realities that hinder the achievement of justice as envisaged by the Constitution of India.

A participant shared a concern on the grant of bail on humanitarian grounds to persons from another state, and the interests of justice requires that the person enlarged on bail should not abscond. In such cases the court should while granting bail, direct the police to escort the person.

SESSION 3

Fair Trial Rights: Role of the Judge

Speaker: Prof. V.K. Dixit

The speaker discussed the common law system and its origins. The speaker then discussed the rules of natural justice and its evolution. The speaker highlighted the *James Bagg* case as the modest beginning of the rules of natural justice wherein it was held that a person has the right to be heard before condemnation. The speaker then discussed the case of *R v. University of Cambridge* where it was stated that if God can give Adam and Eve an opportunity to be heard then why humans can't give the same opportunity. The speaker discussed the case *State of UP v. Mohd. Nooh* as an example of how not to decide a case as the principles of natural justice were violated in the course of an inquiry proceedings. The speaker then discussed the case of *Hiranath Mishra v. Principal, Rajendra Medical College, Ranchi* where the accused were not given an opportunity to cross-examine the witnesses. In this case, the principles of natural justice were held to be sacrosanct by the court.

The speaker dwelt on the dynamism of the rules of natural justice and the evolving and expanding range of rules that are included in its domain. The speaker elaborated on the various rights that are necessary elements of a fair trial viz. right against torturous and inhuman punishment, right to be recognised as a person before law, access to legal system, impartial courts, speedy trial, effective hearing, speaking order, self-incrimination and public hearing. The speaker emphasized that the judge should not be a mute spectator. Different cases and persons need different approaches and the judge should be vigilant to ensure that the person approaching the court should be provided a fair trial and should be ensured all the rights that are a necessary concomitant to fair trial.

SESSION 4

The Indian Constitution: An Overview

Speakers: Justice P.V. Reddi, Justice M.S. Sonak & Mr. V. Sudhish Pai

Justice P.V. Reddi stated that the Constitution of India is remarkable by any standards and has withstood the tests of time. The preamble to the Constitution is the heart and soul of the Constitution. The preamble, Parts III and IV of the Constitution spell out the vision and ideals envisioned by the Constitution. Tremendous developments in Constitutional law have been made in the new millennium and the Supreme Court has been instrumental in enlarging the fundamental rights and in evolving a mechanism for checking abuse of power. Epoch making decisions have made a remarkable impact on the constitutional jurisprudence. Justice Reddi discussed the landmark judgments in *Kesavananda Bharti*, *Minerva Mills*, *E.P. Royappa*, *Maneka Gandhi*, *Unnikrishnan* and *S.R. Bommai* that evolved new dimensions of Articles 14 and 21. Justice Reddi dwelt on the role of the judiciary in enforcing fundamental rights and stressed on need for purposive interpretation of the Constitution rather than a literal interpretation.

Mr. V. Sudhish Pai emphasised that the Constitution is a social document that furthers the goals of social revolution. The Constitution of India is a remarkable document. It is often criticised as an elephantine document. What is important is how the Constitution has been applied. The basis of the Constitution and fundamental rights is the fact that humans are bearers of rights. The spirit of accommodation and consensus is the ethos of the Constitution. The fundamental rights received impetus after the World War II and the need was felt to state, recognise and protect the rights of man due to the realisation that men are not always good and are capable of inflicting atrocities on people. Article 32 – the right to judicial remedy for enforcement of fundamental rights- is the unique feature of the Indian Constitution and was called the heart and soul of the Constitution by Dr. Ambedkar. Mr. Pai distinguished between the usage of the word ‘fundamental’ in Part III and Part IV of the Constitution and stated that in Part III the word ‘fundamental’ indicates that the rights are basic and essential while in Part IV the usage of the word indicates that the goals of Part IV are fundamental. The fundamental rights have a negative connotation as they impose a limit on the state’s power which the Directive Principles of State Policy have a positive connotation as they provide a goal/ direction to the State. Mr. Pai dwelt on federalism as an essential feature of the Indian Constitution.

Justice M.S. Sonak stated that there is a misconception that the district judiciary need not know about the Constitution. The district judiciary is enforcing the constitution. The Constitution is

the basic document and the entire concept of fair trial springs from the Constitution. Several concepts which are necessary concomitants to fair trial also spring from the Constitution such as right against double jeopardy, right against self-incrimination and the right to fair trial. The opening words of the Preamble – ‘We the people’ is the most important part of the Constitution and it indicates that the Constitution of India is a social contract and a social experiment in democracy. If there is no state to enforce rights then the law of nature and law of might is right would prevail. Hence, the people of India have entered into a social contract to protect their rights. Justice Sonak dwelt on the inalienability of fundamental rights and the evolution of the status of fundamental rights through judicial precedents. In the *Habeas Corpus* case, the minority opinion of Justice H.R. Khanna is significant as it holds that fundamental rights are inalienable and not the gift of the Constitution. These rights are merely recognised by the Constitution and are not granted or created by the Constitution. The Directive Principles of State Policy, though not justiciable, set goals for India and are fundamental in governance. Justice Sonak briefly threw light on the federal structure of the Indian State and the distribution of powers between the Union and the States.

SESSION 5

The Indian Constitution: An Overview

Speakers: Justice P.V. Reddi, Justice M.S. Sonak & Mr. V. Sudhish Pai

The speakers discussed the concept of rights and differentiated between enumerated, unenumerated and derivative rights. The speakers dwelt on the value of fundamental rights in a democracy. The speakers highlighted the Vishaka case as an example of the role that the judiciary plays in enforcing fundamental rights. Discussions were undertaken on the rights of marginalised sections of society and the need to redress the inequality. The speakers dwelt on the value of Fundamental Rights in a democracy and stated that Constitutional Rights are an important tool for social transformation in India. The core values in the Constitution are inalienable. The speakers highlighted the Judiciary as a crucial agency to protect constitutional rights. The speakers dwelt on the division of powers between the 3 organs of the State. The speakers also dwelt on the provisions in the Constitution dealing with interstate trade and commerce and the recent judgment in Jindal Steel. The speakers impressed on the participants to view their function from the lens of the Constitution and also view statutes through the perspective of the Constitution.

The participants raised the concern that there is a problem of implementation of human rights as no mechanism is provided for District Judiciary to enforce human rights. A participant raised a question as to whether the order of Civil Court can be reviewed under the power of judicial review by the High Court, to which the speakers replied that the order cannot be reviewed under Article 226 but can be reviewed in exercise of supervisory powers of the High Court under Article 227.

SESSION 6

The Indian Constitution: An Overview

Speakers: Justice P.V. Reddi, Justice M.S. Sonak & Mr. V. Sudhish Pai

The speakers discussed the judicial role in social change and highlighted the issue of judicial activism being perceived as judicial overreach. The speakers dwelt on the power to amend the Constitution and stated that when the Constitution is amended the legislative exercise is a more profound power than legislative power and is a constituent power. The speakers highlighted the minority view of Justice Hidayatullah in *Sajjan Singh's* case where it was held that amending power cannot be used to escape absolute constitutional restriction and it is not a plaything of absolute majority. Justice Khanna's judgment in *Kesavananda Bharti* was cited as an example of judicial adherence to the values of the Constitution. It was stated that the Constitution is a living organ and not a fossil. The speakers dwelt on Article 13, the interpretation of the word 'law' and whether law made under Article 368 would be law. It was stated that law is a product of legislative exercise and not a product of the exercise of constituent power. The speakers then discussed the jurisprudence with regard to the amendment of the Constitution. The speakers also dwelt on the meaning of the word 'amendment' as expounded by Justice Khanna in *Kesavananda Bharti*, to indicate that the original Constitution and identity must not be altered by amendment. The speakers also dwelt on the basic structure doctrine and briefly laid out the criticism levelled against the doctrine. The speakers emphasised that the power of amendment of the Constitution as a Constituent power which must be used circumspectly.

SESSION 7

Article 141 as a Necessary Element of Judicial Stability

Speakers: Justice Anjana Prakash & Justice M.S. Sonak

The speakers discussed the dependence of precedence in criminal matters. It was stated that there is a recent trend of overdependence on precedents even in factual cases and the question was raised to whether so much reliance on precedent is necessary. It was stressed that judges need to apply their mind to the facts of the case rather than to merely apply precedents without considering whether the precedent applies to the case or not. The speaker stated that judges must see the ratio and reasoning in a precedent and then decide if it applies to your case. Precedents are irrelevant in procedural matter. Where the provision of law is clear and unambiguous, precedents are not required to decide the case. The speakers also dwelt on the tendency to follow precedents due to the fear that the judge would be face strictures for not following the higher court's judgments. The speakers opined that if the law is applied properly then the judge must not be afraid.

SESSION 8

Art of Hearing

Speakers: Justice Anjana Prakash & Justice M.S. Sonak

The speakers stated that the judge should be an active participant in the courtroom and must be vocal rather than a silent spectator. One of the reasons for not speaking in the court is that the judge is not prepared. Another cause is the belief that if the judge speaks in the court he will be perceived to be prejudiced. The speaker drew a difference between comment and queries and urged the judges to ask pertinent question in the court to direct the discussion. Judges should not let the bar control the court. The speakers differentiated between hearing and listening. Hearing implies a conscious participation. Judges must not hesitate to interact with the parties and think that interaction is interrupting. Interaction helps to focus the discussions and arguments. Hearing requires the judge to have an open mind without forming prior opinions. Hearing should not be mechanical. Patience is an important requirement in hearing. Another important element that was stressed on was the body language as a demonstration of hearing skills.
