

National Judicial Conference for High Court Justices [1091] 23-25 March, 2018

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The National Judicial Academy organized “National Judicial Conferences for High Court Justices” during 23-25 March, 2018. The participants were High Court Justices nominated by respective High Courts. The objective of the conference was to provide a platform, for justices to share experiences, insights and suggestions with a panel of distinguished resource persons from the judicial branch and other relevant domain experts. The conference was designed to facilitate discussions on issues related to supervision and guidance of district judiciary, tribunalization of justice, judicial review within the democratic framework, contemporary challenges for judicial review, policing governance within separation of powers framework, construing the sounds of Constitution’s speech and free and fair elections. The conference also focused on corporate fraud and jurisprudence of the PC & PNDT Act.

Major Highlights and Suggestions from the Conference

Session 1: High Courts: Guardians of District Judiciary

The speakers commenced the session by highlighting the constitutional scheme related to judicial and administrative powers of high courts over the subordinate courts. The expansion of powers of high court concerning district court through judicial interpretation was discussed. The need to enhance fairness and reduction of bias on the part of high court towards district judiciary was emphasized. The influence of bar members on high courts’ administrative decisions resulting in pressure on district judiciary was discussed. The enquiry against judicial officer should be done with proper care and information from all sides must be considered before arriving at a conclusion. The principle of preponderance of probability should be applied because strict proof of evidence is not available in all cases. For writing the annual confidential report of a judicial officer, the judgements for the assessment should be called in random manner rather than accepting good judgements by judicial officer concerned.

Session 2: Tribunalization of Justice: Boon or Bane

The speaker commenced the session by highlighting the evolution of the system of tribunalization in India. The 42nd amendment of the constitution after 1976 brought changes in legal regime and introduced tribunals. The amendment was to dissect Article 226 and 32 of the constitution to reduce powers of high courts and Supreme Court. The intention was to deprive the Article 226 of the constitution of its original power as high courts during emergency took decision against the government. The main idea behind tribunalization was that high courts do not possess adequate expertise. Tribunals are created for providing specialized forum for specific legal dispute requiring expeditious disposal. The idea is to reduce burden on high courts. The tribunals face shortage of infrastructure and manpower. Now in many tribunals one will find that only administrative members are functioning and there is no appointment of judicial members.

On the positive side of tribunals, the speakers added that tribunals take away lot of burden from high courts and reduced litigation in high courts. This is a boon of tribunalization. The final determination of facts happens at tribunals and only cases having substantial question of law come to high courts. Some tribunals such as income tax tribunals and CESTAT function very effectively.

Session 3: Superior Courts: Managing Judicial Review within the Democratic Framework

The speakers commenced the session by explaining the meaning of judicial review and democratic framework. The judicial review is based on the assumption that the governing power should be subjected to constitutional limitations. The democratic framework involves constitution, laws framed by the parliament and binding precedents i.e. law interpreted by the Supreme Court. If parliament decide to make a law and unless it is repugnant to the constitution, the court should not interfere with such laws on subjective reasons. Within the democratic framework the court can do experiment but not beyond this. Judges should not bring in their personal opinions in judgements. It has been observed that many times superior courts have to reverse their orders due to improper exercise of judicial review. High courts during review of decision from subordinate judiciary should refrain from public admonishment and criticism. Strictures against judicial officer should be last resort and not the first resort. High courts should not direct the trial court for time bound disposal without assessment of situation in the trial court. The behavior of high court judges towards trial court judges should be democratic.

Session 4: Contemporary challenges for Judicial Review, Policing Governance within Separation of Powers framework

The speakers commenced the session by explaining the origin of the doctrine of separation of power and judicial review. The speaker said that judicial review in India is of two kinds. One is judicial review of legislation and another is judicial review of administrative authority. We follow Wednesbury principle of proportionality where the reasonability of decision is assessed. Any decision which is outrageous warrant interference. The court can declare a decision arbitrary if it suffers from capricious and unreasonable assumptions. The manifest arbitrariness can be a ground to strike down legislation. Highlighting the Constituent Assembly Debates, speakers added that while framing of the Indian constitution, the due process clause was replaced by procedure established by law in the Article 21 of the constitution. The main concern was that whether the court should be conferred with the power to interfere with legislation specially the social welfare legislation on the basis of due process clause. However the Supreme Court evolved the procedural fairness through judicial interpretation in Maneka Gandhi case reversing the majority opinion in Golaknath case. So any law can be challenged on the basis of procedural due process. Another element is substantive due process where the Supreme Court has challenged legislations. The speaker raised concern that the court has to ensure that the constitutional mandate is given effect when legislature fails to enact laws for required situation. However the problem arise when different benches applies different meaning of constitutional mandate.

SESSION 5: Construing the Sounds of Constitution's Speech: Meanings Beyond Texts

The speaker commenced the session by explaining the meaning of silences in the constitution. The speakers said that rights are not just rights mentioned in the Constitution. These rights are empty vessels that have to be filled by future generations. It is left to the judiciary to interpret the fundamental rights. There is nothing wrong in reading certain rights as fundamental rights. Constitution is dynamic and it has to be read in the context of changing time. Over the years many new rights have been read into the Article 21 of the constitution. Recently the right to privacy has been read into fundamental rights. Focusing on the recent judgment of the right to privacy, the speakers said that at the time of Constituent Assembly debates it was decided that right to privacy must not be included in the constitution. However the Supreme Court read right to privacy under fundamental rights as they declared that our constitution is an evolving constitution. The speakers emphasized that fundamental rights are mentioned in the constitution but the content and scope of fundamental rights can be determined through judicial interpretation.

SESSION 6: Free and Fair Elections: Vitalizing Our Democratic Fabric: The way forward

The speaker commenced the discussion by highlighting low rank of India in terms of democratic credentials. India is a successful functioning democracy to some extent as we have competitive elections, political freedom for all, peaceful transfer of power and real power rests with elected government. There are two underappreciated but remarkable accomplishment of democracy and those are linguistic diversity, federalism and other constitutional processes like finance commissions and economic stabilization etc. The speaker emphasized that the first problem with Indian democracy is that the power to do good is very limited. The political process which ought to be the solution has become the problem itself. The system should allow people to participate and attract finest people into the public domain so that they pay attention to the collective good rather than the private good. Once selected to office, the leader must be able to deliver the promises made. Almost all these criteria in political system are washed off. This is the reason why we are unhappy with the mechanisms and political outcomes and there is a serious disquiet across large parts of the country. This is largely because we have not created conditions initially that are necessary for a democracy to grow. The speaker concluded by saying that the most important thing in the democracy is decentralization and a strong grass root level citizenship. In India there is centralization of power and at grass root level democracy is not powerful.

SESSION 7: Corporate Fraud and Manipulation: Repercussions, Deterrent Mechanism & Judicial Approach

The speakers commenced the session by discussing various aspects of corporate fraud which include concealment of fact or abuse of position by any person and an act done with an intention to deceive a company or a person. Asset misappropriation, consumer fraud and cybercrime were the most reported frauds across the country. The speakers highlighted fraud in Indian defense sector and opined that the magnitude of fraud has increased in last 5-10 years. Globally, economic crime in the defense sector is one of the least reported crime as the defense industry is very secretive. Various nuances of the contract for defense goods were discussed. The speaker

also highlighted role of courts if fraud happens in relation to defense contract. The aspects of blacklisting and its impact on defense contracts was explained. The speaker also discussed shell companies and their way of doing business and committing fraud. The IPO fraud in share market and fraud through fake demat accounts were also highlighted. The speaker concluded the session by discussing magnitude of bank frauds in Indian and their impact on the Indian banking sector.

SESSION 8: Jurisprudence of the PC and PNDT Act & Cultural, Social and Economic Factors that Promote Gender Bias: Context of the PC & PNDT Act in India

The speakers commenced the session by explaining falling male to female sex ratio in India. The gap is very steep and low. The gender equity index of India for girl child too fell from 108th rank to 87th rank. The advent of technologies which were invented to determine abnormalities of fetus are misused to determine the sex of the child. The speakers highlighted that the problem of decline in sex ratio is seen more in urban areas where people have access to technology while in rural areas as people have limited or no access to the technology, women keep on giving birth to girl child unless they have a boy. The estimate of missing girls per year is 5 lakhs and in 2012, 4.5 lakh girls were not allowed to be born. The causes of sex selection are dowry, family lineage and old age support. The speakers focused on the limitation of right to privacy viz-à-viz disclosure of information about sex of the child to parents.

Participants' Suggestions and Views

- Reasons should be recorded even in administrative tasks to ensure fairness in administration. The processes on administrative side of high courts should be kept separate from judicial side.
- For writing ACR in proper way it is necessary that the portfolio or guardian judge knows the concerned judges from the district. Therefore the appeal against judgments from a district court should be placed before the concerned guardian judge so that the guardian judge can know the thinking of judges from the district court.
- In income tax tribunal system, the middle level authority i.e. the Commissioner [Appeals] should be removed and income tax tribunals should be made the first appellate authority after the assessing authority. This arrangement will solve lot of problems in terms of delay and cost.
- Tribunals should have judicial members because of unbiased and independent nature of judicial personality. In absence of judicial member in tribunals, the determination of legal right should not be allowed as rule of law must be followed in this regard.
- The capacity and powers of high court should be enhanced rather than creating more tribunals because in appeal the matter ultimately reach to high courts and to the Supreme Court where judges decide issues.
- In the matter of bank loan recovery the system is not accessible to debtors who have to travel all the way to state capital to represent his/her case. There should be an additional

court of civil judge for cases [usually 50 cases per court] filed by banks for recovery. Each district court should have such kind of arrangement for resolving bank recovery disputes.

- The court can frame law in areas where the legislature fails to make law leaving a void concerning rights and liabilities of people. In such situation judiciary can move beyond the separation of power doctrine to act in the interest of society.
