

P-1131: CONFERENCE FOR NEWLY ELEVATED HIGH COURT JUSTICES

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The National Judicial Academy organized a “Conference for Newly Elevated High Court Justices”. 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 Workshop

Session 1: Constitutional Vision of Justice

The session began with discussion on Preamble to the Constitution of India. The speakers said that the Preamble encapsulates the vision of the Constitution and is a key to solve various constitutional issues. The speakers discussed various values enshrined in the Preamble. The preamble provides for socio-economic justice and courts must strive towards this end. The needs of marginalised sections of the society must be taken care of in this regard. There should be liberty of thoughts and expression to all in society.

The speakers emphasised importance of Directive Principles of State Policy as a means to realize the constitutional vision of justice. Fundamental Duties are as important as Fundamental Rights. The speakers highlighted challenges faced by the Constituent Assembly in framing of the Indian Constitution. The speakers expressed concerns on lengthy proceedings for affluent people and scarcity of court’s time for ordinary people of India. The High Courts should act in a manner which does not shake people’s confidence in the system. Judges should keep their mind open and should not have fixed notions as justice is delivered according to facts and circumstances of each case. The participants expressed concerns on the conflicting precedents and problem in reconciling them.

Session 2: Court Management

The speakers initiated the session by highlighting features of National Court Management System Committee. The role and function of State Court Management System Committee were highlighted. The issues related to infrastructural gaps and standard model of court building were discussed. The speakers highlighted various aspects of model courts. The challenges in the appointment of judicial officers and skilled court staff was discussed. The speakers emphasised on continuous training of court staff. The impact of case information system (CIS) was discussed. The speakers expressed concern on lack of proper human resources to take care of administrative responsibilities in courts and how it affects judges’ performance. The issues related to appointment, tenure and training of court managers were discussed. The function of court managers in other countries such as determination of roster and assignment of cases was explained. The speaker opined that judicial officers should not be engaged in protocol work. The aspect of funding of

court and need of proper financial planning was discussed. The use of statistical data and its importance in planning for improvement in court's performances was highlighted. The importance of alternative dispute resolution system in reduction of case load on courts was highlighted by the speakers. The speakers concluded the session by discussing the importance of law clerks for research in courts.

Session 3: Information and Communication Technology in Courts

The speakers initiated the discussion by highlighting the importance of latest communication technology in enhancing organizational efficiency. It was emphasised that better communication systems within an organization enhances accountability, which improves efficiency. The speakers discussed various features of E-Court project in India. The speakers discussed establishment of the hardware systems in courts across India in first phase of the project and the subsequent growth of software systems. Various aspects of the CIS were discussed. The speaker demonstrated data presentation in the National Judicial Data Grid [NJDG] where disposal and pendency data for all courts can be located. The progress of cases in courts can be tracked with the help of NJDG. The challenges in implementation of E-Courts project such as data security, power backup and maintenance of the system were discussed. It was emphasized that extensive process re-engineering of the court procedures is required to be done for better functioning of ICT tools in Indian courts. The transparency brought by E-Courts project has helped in reduction of corruption as the communication between courts and litigant has become direct and easier. The lack of proper legislative impact assessment was discussed in the session.

Session 4: Theories of Judicial Review

The speakers initiated the session with discussion on basic principles and history of judicial review. The speaker said that judicial review is a public law remedy and exercised by High Courts under Art. 226 of the Constitution. The court can issue writ to any authority for enforcing fundamental rights and/or other rights. The speaker discussed the scope of ambit of various fundamental rights and the reasonable restrictions imposed on fundamental rights in public interest to achieve objectives such as sovereignty and integrity of nation, discipline and morality. The speakers referred *R.C. Cooper* case and *Maneka Gandhi* case and discussed reasonable, just and fair procedure of law. It was stated that the court can also review legislation on grounds of scope of legislative powers. The court has to assess the validity of existing action under parameters of judicial review such as, whether an action is arbitrary or not, whether the same is legal or not and whether there is procedural fairness. The speakers discussed exercise of executive powers and assessment of validity under judicial review. It was stated that various facets of arbitrariness can be checked on the basis of legality, impropriety, proportionality and irrationality. The court can check whether there is colourable exercise of power or any mala fide exercise of power. The court has to look into the decision making process undertaken by the authority in question. The judicial review in claims of breach of conditions in the tender was discussed. The speakers discussed about interim orders for stay granted by High Courts which adversely affect the development and business projects. It was suggested that such cases should be decided expeditiously by the court. Public law has moved from 'culture of authority' to 'culture of justification' in present time. All authorities are limited by law and judicial review is a tool to check violations in this regard. The judges have to enquire into limitation of powers of authority and the skills to identify limitations comes from experience, dedication and wisdom.

The speakers discussed role of court in contract execution and scope of judicial review in 'pre contract' situation. The court has to assess whether substantial tender conditions were followed or not. The validity of a contractual setup executed by executive has to be tested only against standard of public interest. The scope of judicial review seems to be narrow in this respect. The speakers emphasised that there should not be unwarranted surprise in tender allocation which vitiates the fair process. The speakers also highlighted doctrines of "Wednesbury Principle" and "reasonableness of the people at large"

Session 5: Separation of Powers

The session was initiated by speakers with basic features of separation of powers in India. The speakers opined that we do not have rigid separation of powers between three organs of the government and there is division of power rather. The speakers referred to history of conflict between organs of government in England and opined that separation of power evolved in response to such conflicts. It is now accepted that the question of content of power of legislature and executive is decided by judiciary. Politicians have tried to prevent judicial interference through argument of 'political thicket', which was rejected by the Indian Supreme Court and it ruled that powers under Art. 32, 136 and 226 are basic features of the Constitution after *Kesavananda Bharati* case and the parliament cannot touch such powers. The judicial response to such encroachment by legislature was discussed and speakers referred to *Sajjan Singh* case, *Shankari Prasad* case and *Golak Nath* case. The speakers highlighted the attempts by legislature to amend the Constitution which can have effect over fundamental rights and intervention of judiciary in this regard. The *Kesavananda Bharati* case was discussed, wherein the 'basic feature' doctrine was laid down. The speakers opined that there is no absolute power and every functionary discharges his/her duties. Wherein, the checks and balances built in the system ensure that no organ of the government is acting beyond its power provided in the Constitution. Some instances of checks and balances were cited as impeachment process, appointment of judges and judicial review. Even President's power for pardon is subjected to standards of the Indian Constitution. There is no power which is not subject to judicial review. The speakers referred to *Keshav Singh* case, *Privy Purse* case, *Bank Nationalisation* case, *Bihar land reform* case, *Cohelo* case, *D.K. Basu* case, *Jeet Singh Bisht* case and *Kehar Singh* case. The legislative lag is inherent in democracy and administrative inefficiencies has made the job of the judiciary challenging in present times. Because of huge delay and arrears the judge in cognitive institution become reactive personality instead of reflective personality.

Session 6: Allocation of Legislative Powers- The Federal Architecture

The session started with discussion on distribution of legislative power between Centre and States and basic features of Union List, State List and Concurrent List. The speakers then discussed history of allocation of legislative powers and referred to the Government of India Act, 1935 from where entries in the 3 lists were taken. Chapter 1 in Part XI of the Constitution which deals with relation between Union and States and Art. 245 and 246 which deals with allocation of legislative powers were elaborated upon. The speakers opined that legislative powers are distributed to 'general authority' and 'regional authority' which are not subordinate to one another. The speaker highlighted that there is bias in favour of the Union as the Parliament can make law for the State as well in some situations. The union can legislate for two or more States after consent. There is restriction on the legislative power and legislature is subjected to Art. 13 which is an inherent limitation on their power. Art. 249, 252, 253 of the Constitution are exceptions to the

general scheme of allocation of legislative powers. The speakers said that Union's powers to legislate corresponds to the need of national cohesion and interest and States' powers to legislate responds to local interest. The speakers opined that most disputes under this area are concerned with the issue that whether the particular legislation falls within the competence of legislature which has enacted it. Various doctrines such as 'doctrine of pith and substance', 'colourable legislation', 'repugnancy', 'incidental encroachment', 'harmonious construction' and 'occupied field governing' the interpretation of laws under this area were deliberated upon.

The speakers emphasised that each entry in the 3 lists has history in the form of precedents. The courts should refer to such history during adjudication. Each entry has a technical meaning based on the history of interpretation. Judges should refer to parliamentary debates to understand the nature of entries in lists. Generally, broad principles of interpretation giving effect to widest meaning are adhered by courts. The speakers discussed various judgments include *HS Dillon* case, *Sundar Ram Iyer*, *State of West Bengal* case, *Sea Customs Act* case, *Rajasthan Assembly* case, *Tikaramji* case and *State Bank of India v Santosh Gupta* case. Art. 248 which provides residuary powers to the Union and Art. 258 which empowers the Union to confer its power of List I to the States, were referred in the session. Other areas which formed part of discussion were division of internal sovereignty, federal supremacy, cooperative federalism, overlapping problems, sharing of revenues, ragpack legislation, taxation issues and public order issues.

Session 7: Fundamental Rights and Restrictions on Entrenched Rights

The speakers commenced the session by differentiating fundamental rights from entrenched rights and opined that all fundamental rights are not entrenched rights. The impact of first amendment to Art. 13 of the Constitution and creation of Art. 31A, 31B and IX Schedule to the Constitution was discussed. This was the first attempt by legislature to make law affecting fundamental rights. The *Shankari Prasad* case and *Sajjan Singh* case upholding first amendment to the Constitution was discussed. The *Golak Nath* case ruled that fundamental rights are inviolable and consequently the legislature passed 24th and 25th amendment to the Constitution to dilute provisions of the Constitution including Part III. Finally, *Kesavanada Bharati* case laid down basic structure doctrine which no law can violate. The basic structure doctrine broadly include supremacy of the Constitution, republican and democratic form of government, secular character of the Constitution, separation of powers between legislature, executive and judiciary and federal character of the Constitution. The speakers discussed various cases dealing with restrictions on the fundamental rights including *Shankari Prasad* case, *Sajjan Singh* case, *Golaknath* case, *IR Coelho* case, *Bhim Singhji* case, *Protector of Democracy* case, *Kesavananda Bharati* case and *Privacy* case. The power of amendment of the Constitution affecting fundamental rights was discussed in the session. The issue as to which fundamental rights are part of 'basic features' and which are not was discussed. Parliament can pass a law affecting fundamental rights, but court has the power to assess its validity on the basis of 'basic features' doctrine. The Effect Test of *IR Coelho* which mandates that the constitutional validity should be tested on the basis of whether there is an effect on 'basic structure', was discussed. The five principles of 'Wednesbury test' were discussed. The court should also see that whether the judgment written by the court is executable or not, otherwise there may be problems as seen in interstate water dispute and fifty percent ceiling on reservation among others. The longevity of a judgment depends on the social digestibility of the outcome. The court should refrain from passing orders which are impractical and non-executable. The issue related to ban on firecrackers was discussed.

Session 8: Theory of ‘Basic Features’: Contours

The speakers initiated the discussion by explaining the 'basic features' doctrine under the Constitutional law and origin of the ‘basic structure’ doctrine. The concern of the Supreme Court with regard to the parliament’s power to amend *vis-a-vis* ‘basic structure’ of the Constitution and restrictions on the power of amendment of the parliament through judicial interpretation was discussed. The speakers discussed various judgments of the Supreme Court where the ‘basic structure’ doctrine was interpreted. Various judgments viz. *Golaknath* case, '*Shankari Prasad*' case, '*Sajjan Singh*' case, '*Kesavananda Bharati*' case, '*S.P. Gupta*' case, '*Minerva Mills*' case, '*Indira Gandhi*' case, '*Indira Sawhney*' case, '*Bommai*' case, '*Privacy*' case and '*NJAC*' case were discussed. The First Constitution Amendment Act which introduced 31 A, 31B and the IX Schedule was also discussed. The speakers expressed concern on the diverse nature of interpretation by the court with regard to ‘basic structure’ doctrine and emphasised that challenge to legislative action has to be assessed according to merits in each case. The dissenting opinion in the NJAC case, explaining the difference between ‘basic feature’ and ‘basic structure’ was discussed. It is the violation of ‘basic features’ which court should be concerned about. Other issues discussed included importance of Part III of the Constitution, standard of “public interest” and in restricting fundamental rights, concept of “societal equality” and Preamble as part of basic structure. The speaker emphasised that the test which courts should use is that if a legislative act attempts to rewriting the Constitution then there is a violation of basic feature.

Session 9: The Art of Hearing

The speaker began the session by highlighting the importance of restraint while hearing arguments in the court. Judges should refrain from expressing his/her personal opinion in open court during hearing. The judges should cease to become a lawyer in court and should not argue like a lawyer. Judges should have a fair sense of justice. Judges should ask question from lawyers only after reading the file. Judges should never allow lawyers to conduct proceedings and should retain control on the proceedings. Judges must make it clear to the lawyers that their case has been heard properly and duly understood. Judges must allow lawyers to present their points.
