NATIONAL JUDICIAL ACADEMY

National Workshop for High Court Justices [P-1257]

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Report of the Workshop

Prepared By:
Rajesh Suman, Assistant Professor
Krishna Sisodia, Law Associate

Objective of the Workshop

The National Judicial Academy organized the online "National Workshop for High Court Justices" during 4th – 5th September, 2021. The participants were High Court Justices nominated by the respective High Courts. The workshop facilitated deliberations among participant justices on contemporary topics including Administration and Leadership Skills: Conferencing and Collegiality among Judges; Pragmatic Approaches in Decision Making; Independence of Judiciary; and Jurisprudence of Interpretation. The workshop included interactive sessions among participant justices.

Major Highlights and Suggestions from the Workshop

Session 1: Administration and Leadership Skills: Conferencing and Collegiality among Judges

The session was commenced by explaining the concept of collegiality among judges in courts. The collegiality is deliberatively cultivated attitude among judges of equals status and sometimes widely differing views and working in intimate, continuing, open and non-competitive relationship with each other. Collegiality manifest respect for the strength of the other person and restrains one's pride of authorship while respecting one's best convictions, values, patience and understanding. The speakers said that an effective judge has three attributes i.e. civility, collegiality and courage. Judges are above the political frame and they work on important issues that goes to the heart of social values. Democracy and free speech are not antithetical to civility and respect. The speakers emphasised that civility is not mere politeness but the ability to engage in a rational debate in a manner that leads to reflection. It is a platform to consider the soundness of viewpoint. The speakers said that it involves respect to one's colleague not based on status but based on the fact that each performs the same task and has an equal say in the functioning of the court. The speakers then focussed on the concept of courage and said that courage means following one's conscience and having the integrity and conviction to seek truth as one sees it even when it is inconvenient, embarrassing and unpopular. The helpful way to seek collegiality would be lively, tolerant thoughtful debate. It is the open and frank exchange of opinions. Judges appointed to high courts have variety of talents from bar and service and these talents are necessary for the institution. Judges must practice shared goal of maintaining the legitimacy of courts and enhancing public trust and confidence in the court through discussion and once an opinion is agreed upon then members of the courts can strengthen it. Differences of opinion in court do not preclude overall harmony of purpose.

It was added that there should be shared commitment to a genuine exchange of ideas at each step of the decision making process. Each high court has its own collegial practice. In field of law there is no one view cast in stone, so in the management and administration of courts. An idea discarded at one time might be relevant at some time else. It was suggested that nurturing members of the bar and lower judiciary is an important duty so that brightest minds are appointed in courts. The judicial system as a whole must be respected irrespective of specific court whether lower or higher in hierarchy. The speakers referred to judgment in Tirupati Balaji

Builder v. State of Bihar 2004 (5) SCC 1 in which the Supreme Court deliberated upon the relationship amongst various courts and how they should treat each other. The courts in different hierarchies must have mutual respect for each other. The constitutional and democratic institutions complementing and supplementing each other would land strength to the handed down traditions.

It was emphasised that judicial independence should not be confused with collegiality. The speakers expressed concern on the judges expressing their disagreements in public and said that this is not judicial independence. When a decision is taken in full court then it is a collective decision and it should be honoured in the interest of the institution. Judges are not islands of power and they represent entire institution. Disagreements should be expressed in an appropriate forum and collegiality is the only appropriate way to speak about the institution. The speakers added that there is history, culture, tradition and ethos of each separate court but goals, purpose and vision is common across all the courts and this is collegiality.

The role of committees in the High Courts for ensuring administration of courts was highlighted and functioning of some committees including Appointment Committee, Rules Making Committee and Committee on Information, Communication and Technology (ICT) or Computer Committee was discussed. It was emphasised that Rules Making Committee must look into all the changes and rules should be changed with the systemic changes which are being brought in the judiciary. The speakers appreciated the work of E-Committee of the Supreme Court for Phase 1 and Phase 2 of the E-Courts project. It was highlighted that the document on Phase 3 of the E-Courts project includes policy on artificial intelligence and machine learning. The document takes into account the entire ecosystem of judiciary and lays down the future of court administration and judges must read this document.

The speakers then referred to the area of departmental enquiry where judges can contribute to the judicial administration. The speakers said that enquiry should not be pending for a long time because pendency in such matters demoralizes the entire structure of the judiciary. Judges must be vigilant and quick about departmental enquiries. The speakers highlighted the importance of case management and said that judges should rationalise and prioritize their work rather than leaving it on the registry and court masters. The speakers then focussed on leadership and said that a leader should have qualities and attributes including good communicator, approachable, articulate, empathy, self-confidence, ability to inspire, self-esteem, trust worthiness, accepting responsibility and ownership, accepting minority views, ability to see patterns, predictability and having balanced views. The session was concluded by emphasising that judges should be part of the entire ecosystem of the judiciary and should take interest in management and administration of the court. The judges must perform their administrative functions within the policy and value system of the judiciary and the powers delegated by the Chief Justice.

Session 2: Independence of Judiciary

The speakers initiated the discussion by explaining various aspects of judicial independence. The first aspect is judicial functioning of judges and its limits. The second aspect is administrative independence and it includes administrative functioning of the court and functioning of the collegium. Third is financial independence which includes issues of finance from legislature and executive. The fourth is the pitfalls about these issues faced by the judiciary. The speakers said that judges should be able to decide a case free from all such problems.

Regarding independence of judges in courts, the speakers said that the foremost duty of the judges is to decide cases according to the law and the Constitution and not according to personal views. The speakers said that the judges must follow the discipline of precedent. The speakers said that we are independent but we are bound by certain norms, customs and traditions in the spirit of independence. Language of the judgments has to be simple and everyone should be able to understand and should focus on the relevant issues of the case.

Regarding administrative independence, the speakers referred to the collegium system of appointment of judges. The speakers said that the order of immediate and overnight transfer of judges without giving any time to dispose part heard matters and pronouncement of reserve judgments is an interference with independence. The government also create delay in approving recommendation for appointment of judges. The selections by the Supreme Court for appointments in tribunals are rejected by the government and it impacts the independence of judiciary in the long term. Regarding financial independence, the speakers said that we don't have strict financial control but the problem is that we don't know how to use that money. The judiciary has to return 4000/- crores grant of Thirteenth Finance Commission as it remain unutilized.

The speakers discussed on the allegation of bias against judges and the issue of recusal of judge and the ways of dealing with such issues. The speakers referred to the United Nations' concept of judicial independence which states that judiciary shall decide matters before them without restrictions and influences and pressures and interferences from any quarter. They referred to the Chief Justice Coke who said that the king shall be under no man but under the God and the law which reflect the concept of judicial independence. The speakers referred to various judgments of the Supreme Court for explaining the principles of judicial independence. The speakers emphasized that judges should be not only be independent of outside influences and but they should be free from inside influences within the judiciary as well. The speakers said that independence of the bar has to be respected and being independent is not showmanship but to uphold the Constitution and laws and freedom from other controls. The independent of judges also dependent on how they respond to the current affairs of the society and transformations in social political and economic spheres.

The speakers said that India is an open society and institutions should adhere to the values of open society and should be fearless. The judiciary plays an integral part in nation building and it

keeps democracy workable. Judges should be careful in expression of opinion and should refrain from pronouncing opinions on irrelevant issues which are not connected with the case before them. The allegations and imputations should never influence a judge. It was underlined that judges have to insulate themselves from views of the media and they should be only concerned with matters before them.

Session 3: Jurisprudence of Interpretation

On the theme of *Jurisprudence of Interpretation,* the discussion commenced by providing definition of jurisprudence as "the study of the science of law, the concept of law in itself, the principles of law and the philosophy behind law". It was stressed that the need for interpretation arises when things are unclear or when literal construction leads to absurdity. It was emphasized that the best forms of interpretation are the ones which understands the aspirations of the people, customs and their expectations at a given time. The point was further stressed by citing the right to privacy case. The major contention against the right to privacy to be made a fundamental right was that in the constituent assembly debates it was specifically decided that right to privacy should not be made a fundamental right. In other words, when the framers of the Constitution framed the Constitution they did it in keeping with the aspirations of the people at that time. The Supreme Court in the privacy case held that the Constitution is a living document and it needs to be interpreted keeping with the times. Subsequently, the doctrine of purposive construction through various judgments was discussed. In *Southern Electricity Supply Company of Orissa v. Sri Seetaram Rice Mill (2012) 2 SCC 108* the Supreme Court defined purposive construction and practical interpretation. In *Union of India v. Tata Chemicals Limited (2014) 6 SCC 335,* the Supreme Court referred to the natural, ordinary or popular sense to be followed commensurate to the object of legislation. In *Subramanium Swamy v. Raju (2014) 8 SCC 390,* the Supreme Court expounded the doctrine of reading down a statute. In *Vipulbhai M. Chaudhary v. Gujarat Cooperative Milk Market Federation (2015) 8 SCC 1,* the Supreme Court summarized the growth of English Law and held that it is the duty of the court to sometimes exercise legislative power. It was suggested that such exercise should be done in exceptional circumstances only. In *Bengal Immunity Co. Ltd. v. State of Bihar AIR 1955 661,* the Supreme Court gave the four tests of exercising mischief rule i.e. what was the common law before the making of the Act? What was the mischief or defect for which the common law did not provide? What remedy the Parliament had resolved and appointed to cure the defect? What is the true reason for the remedy? The judgments in cases *Southern Motors v. State of Karnataka (2017) 3 SCC 467, State of Jharkhand v. Tata Steel Limited (2016) 11 SCC 147, Dharani Sugars and Chemicals Ltd v. Union of India (2019) 5 SCC 480* and *P. Gopalkrishnan v. State of Kerela (2020) 9 SCC 161* were also discussed.

Further, deliberating on cooperative federalism it was pointed out that the Good and Services Tax (GST) is neither union levy nor state levy nor concurrent levy rather it is a simultaneous levy. Further, distinction was drawn between simultaneous levy and concurrent levy. It was stated that

concurrent levy can be tested on the doctrine of repugnancy. However the issue that whether simultaneous levy can be tested on the doctrine of repugnancy is in the realm of uncertainty. Thereafter contours of natural justice with respect to legislative actions, delegated legislative actions and regulatory actions were deliberated. It was opined that legislative actions cannot be tested on natural justice since it is in the domain of policymaking, however, it can be tested by courts on arbitrariness, equality, discrimination and *malafide*. Further the judgment in *Riggs v. Palmer 115 N.Y. (1889)* was discussed to highlight the rule of "social purpose" of statutory construction wherein the courts look beyond the text of law for the ends of justice. The session was concluded by stressing that ultimately interpretation is nothing but discretion and that exercise of discretion should not be bereft of the law.

Session 4: Pragmatic Approaches in Decision Making

On the theme of *Pragmatic Approaches in Decision Making,* the deliberations commenced by providing an overview of the jurisprudence of judicial decision making. Legal formalism, legal realism and legal pragmatism were discussed in detail. Expounding on pragmatism it was stated that it has four elements- context, lack of foundations, instrumental nature of law and unavoidable presence of alternate perspectives. The strengths of pragmatism is to resolve truly novel cases and account for legislative shortcomings, however the weakness is judicial tyranny and overdependence on social sciences. It was emphasized that pragmatism does not mean putting personal wisdom ahead of collective wisdom. Thereafter, it was opined that some part of law across times remains constant and some part of law requires dynamism keeping with the times. Therefore, it requires a delicate balance of activism and restraint as sometimes it becomes difficult to border activism with overreach. Futher, *Kumari Madhuri Patil vs Addl. Commissioner 1994 SCC (6) 241* and *Vishaka v. State of Rajasthan (1997) 6 SCC 241* were highlighted wherein the court stepped in not only to fill legislative vacuum but also mandated legislature to frame law in a particular manner. Subsequently, *I.C. Golaknath v. State of Punjab 1967 AIR 1643* and *Bharat Aluminium Co v. Kaiser Aluminium Technical (2012) 9 SCC 552* were discussed to expound on the principle of prospective overruling. Thereafter, two orders passed by the Supreme Court during pandemic were opined as pragmatic. First, where all statutory limitations were suspended for filing appeals, suits, applications, revision and any other proceedings. Second, where all virtual hearings during the pandemic were legalized and the need for such pragmatism was highlighted.

Further, the contours of equity jurisdiction according to the Section 482 Cr.P.C. and appellate jurisdiction was expounded in the light of pragmatism. It was enunciated that equity jurisdiction has larger scope of pragmatism/activism than appellate jurisdiction. Thereafter, Dworkin's "chain novel theory" was discussed. The chain novel metaphor suggests that the judicial use of precedent can be likened to a group of authors writing a novel seriatim, in which the accumulation of chapters increasingly constrains the choices and freedom of subsequent writers. In other words, each deciding judge writes upon a background to which he or she must adhere, thereby influencing his decisions. The session was concluded by quoting Justice Subba Rao that

“a socially sensitized judge is a crucial armor in the justice delivery system than long clauses of penal provisions, containing complex provisions and complicated provisos. The credibility and legitimacy of the judicial decisions depends not only in its merit and soundness in law, but equally on public perception of impartiality and objectivity of a judge”.

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