

NATIONAL JUDICIAL ACADEMY



DEVELOPMENT OF CONSTITUTIONAL LAW BY SUPREME COURT AND HIGH COURTS

5th - 6th March, 2022

Programme Coordinators

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The National Judicial Academy, Bhopal organized a two day online programme on Development of Constitutional Law by Supreme Court & High Courts on 5th and 6th March, 2022 which was attended by 31 participants.

Session 1 - Constitutional Interpretations: Reflections on Transformation, Continuities & Constitution's Silences

It was stated that architecturally, the ideals of liberty, equality and fraternity were borrowed from France. The dynamic nature of justice and its relevance and scope at individual, societal and contextual level was highlighted. It was emphasized that all dimensions of justice have been encompassed in the preamble to the Constitution. It was stated that the constitution provides a charter of rights; and is alive and evolving. The significance of fraternity was also highlighted and it was opined that it can be achieved by ensuring and practicing non-discrimination. It was emphasized that a spirit of understanding in civil society is important, and principle of non-discrimination and equality in society allows for diversity of opinion and contrarian opinion. It was opined that asymmetry of power can be addressed by constitutional processes and dialogue. The various phases in the history of the Supreme Court and the transformation of the role of Supreme Court were discussed. It was stated that in early years of the Supreme Court, it adopted a textual interpretation approach. Thereafter, there was a change in approach towards doctrinalism wherein the court extracted the ratio from the precedent and applied the principle to contemporaneous constitutional law issues. The concept and application of purposive interpretation was also elucidated and it was mentioned that in this method of interpretation the provision is interpreted in a manner that serves and advances the purpose of the Constitution. Furthermore, the concept of transformative constitutionalism was expounded and it was stated that the courts interpret the Constitution to transform society. The judgment of *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1 and *Joseph Shine v. Union of India* (2019) 3 SCC 39 were referred as examples of transformative constitutionalism wherein constitutional morality overrode societal or majoritarian ethos or morality. Transformative constitutionalism ensures that the basic values in the Constitution are upheld to bring about social change. The judicial role in upholding Fundamental rights and in steering society towards the democratic and egalitarian goals was

emphasized. Furthermore, the participants were advised to exercise caution while handling ecclesiastical matters and dealing with issues of essential religious practice. The participants were also advised to utilize the silences of the constitution to expand and develop the law.

Session 2 - Progressive Development of Constitutional Morality: Adhering the Innate Voice of Constitutional Norms & Ethos

The constitution apart from providing fundamental rights and universal suffrage to every citizen also aspires to ensure equality of opportunity. It was opined that basic structure is one of the strand of constitutional morality. The issues of law, morality and constitutional morality were discussed with reference to *R.K. Garg v. Union of India* A.I.R. 1981 SC 2138 and *State of Punjab v. Devan's Modern Breweries*, 2004 (11) SCC 26 . It was opined that the concept of constitutional morality has resulted in development and advancement of individual rights of citizens. The issue of conflicting claims between fundamental rights and constitutional morality, and the method to address it was also deliberated upon. It was opined that it is very difficult to circumscribe or provide an exact definition of the concept of constitutional morality. Concerns were also raised regarding the subjective nature of the doctrine and the courts exercising power of legislative nature. The basic features of “constitutional morality” as propounded by George Grote alongwith the elucidation of the term by Dr. B.R. Ambedkar in the Constituent Assembly; and the application of the doctrine to religious practices and scope of interference in religious matters were discussed. It was opined that the legislature is the ultimate arbiter of morality but if the public morality is in conflict with constitutional morality, then constitutional morality will prevail. The judgement in *Navtej Singh Johar v Union of India* and *Naz Foundation v. Government of NCT of Delhi* [160 (2009) DLT 277 160] were highlighted to showcase development of constitutional morality and it was stated that the concept is still in a fluid state.

Session 3: Affirmative Action, Equal Opportunity & Diversity: The Court’s Adoption and Jurisprudential Evolution of Affirmative Action

The session involved an erudite deliberation on affirmative action vis-a-vis reservation, substantive equality sought to be achieved, and the constitutional goal enshrined under Art. 16 of the Constitution of India. The session commenced with a brief note on the constitutional history surrounding Articles 14, 15, and 16 and a reference to India’s Founding Moments. Sustainable

Development Goals (SDGs) 2030 were highlighted, more specifically SDG 10 on reduced inequalities and SDG 16 on peace, justice, and strong institutions were stressed upon. It was pointed out that affirmative action may be considered a tool to achieve Sustainable Development Goals. It was emphasized that SDG 16 focuses on the promotion of a peaceful and inclusive society which is important as it highlights rule of law and promotes non-discriminatory policies across our society. On the issue of caste, participants were suggested to look beyond the traditional categories enumerated in the Constitution entitled to affirmative action to include larger categories such as transgender and differently-abled persons. The developing jurisprudence by the Supreme Court in the context of individual liberties *versus* the state and whether affirmative action can be examined in the context of full personhood was an area reflected upon during the discussion. In this regard, it was pointed out that affirmative action and basic structure doctrine encompass an elevated debate on the extent courts can retain to traditional notions of equality and non-discrimination as we move forward to a more equal and less imperfect society. Further, a reference was also made to SDG 4 (quality education), SDG 5 (gender equality) & SDG 8 (decent work & economic growth) mentioning that these form the heart of the affirmative action reservation debate in the country.

The session threw light upon the post-Covid-19 situation and the reservation & quotas system globally which have continued over for more than 7 decades. It was put forward that the reservation measures taken by state governments have become purely electoral initiatives, community-wise it is not clear whether there have been any advances and benefits of these reservations. The discussion also involved a mention of how Art. 15 and Art. 16 cases were dealt with by the Court wherein reference was made to the following judgments *State of Madras v. Champakam Dorairajan* 1951 SCR 525; *MR Balaji v. State of Mysore* 1962 SCR Supl. (1) 439; *R. Chitralakha v. State of Mysore* (1964) 6 SCR 368; *KS Jayasree v. State of Kerala* (1976) 3 SCC 730; *State of Kerala v. NM Thomas* (1976) 2 SCC 310; *KC Vasanth v. State of Karnataka* (1985) Supp SCC 714. It was underscored that in the case *Indira Sawhney v. Union of India* (1992) supp. (3) SCC 217 following aspects came up viz. caste is a valid starting point, socially and economically backward class includes caste excluding creamy layer and no reservations in promotions. The creamy layer issue, its exclusion, and challenges on creamy layer were areas dealt with in detail with the help of various cases including *Ashok Kumar Thakur v. State of Bihar* (1995) 5 SCC 403, *Nair Service Society v State of Kerala* (2007) 4 SCC 1, etc. Deliberations also reflected on various constitutional amendments concerning reservations including the 1st Amendment 1951, 93rd

Amendment 2005, 102nd Amendment 2018, 103rd Amendment 2019, and 105th Amendment 2021. The session also involved a discussion on Article 16(4A) on reservation in promotion for SCs & STs, 'Quantifiable data' in light of the application of judgment in *Nagaraj v. Union of India* (2006) 8 SCC 212, identification of backward class and community-specific reservations. It was opined that over the decade there has been too much emphasis on the equality provision and its impact on reservation, merit *versus* quota which create cleavages in groups, loyalties, and political affiliations along with those trends which are not what the constitutional makers intended. It was highlighted that the principle behind affirmative action is a policy initiative aimed at eliminating differences and discrimination creating barriers in economic, social, gender, and others between various sections of the population. Termed as a positive action, employment equity, standardization, compensatory discrimination, and positive discrimination in different jurisdictions. Issues relating to reorganization of States and its impact on Scheduled Caste and Scheduled tribes were areas also dealt with in detail during the session.

Some other judgments highlighted during the course of the discussion included *BK Pavitra v. Union of India* (2019) 16 SCC 129, *Jarnail Singh v. Lachhmi Narain Gupta* (2022) SCC Online SC 96, *Pravakar Mallick v State of Orissa* (2020) 15 SCC 297, *State of Punjab v. Davinder Singh* (2020) 8 SCC 1, and *Jaisri Laxmanrao Patil v. State of Maharashtra* (2021) 8 SCC 1.

Session 4: Judicial Review, Activism and Overreach: Evolving Jurisprudence through Judicial Pronouncements by the Supreme Court & High Courts

The session dwelt upon the wednesbury unreasonableness by referring the case of *Council of Civil Service Unions v. Minister for Civil Service*, [1985] 1 AC 374. Various stages of proportionality including; legitimate goal stage, suitability or rational connection, necessity and balancing stage formed part of the discussion. With regard to proportionality a reference was made to the case of *K. S. Puttaswamy v. Union of India*, (2019) 1 SCC 1 and *Modern Dental College & Research Centre v. State of M.P.*, (2016) 7 SCC. The case of *Internet & Mobile Assn. of India v. RBI*, (2020) 10 SCC 274, was referred wherein it was held that, RBI's Circular - preventing entities regulated by RBI from dealing with virtual currencies or providing services for facilitating any person or entity in dealing with the same - was disproportionate and liable to be struck down. The session also emphasized upon different approaches adopted in German and Canadian Constitution to identify the importance of proportionality. With regard to judicial review of legislative action

various landmark cases were discussed viz. *Madras Bar Association v. Union of India* 2021 SCC OnLine SC 463, *Seaford Court Estates LD. v Asher*, [1949] 2 K.B. 481, *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165, *Independent Thought v. Union of India*, (2017) 10 SCC 800, and *U.P. Bhoodan Yagna Samiti v. Braj Kishore*, (1988) 4 SCC 274. Judicial review with regard to economic matters, national security, environmental matters, and elections were deliberated upon at length. The session also highlighted new forms of judicial review such as; bounded-deliberative review, continuing mandamus and *Suo Moto* cognizance.

A reference was also made to the doctrines of judicial deference and wide latitude. The session gave a comparative overview of judicial review in economic and fiscal legislations as adopted by Dutch, American and Indian Constitution. The concept of due process vis-à-vis legislative action also formed part of the deliberation. A reference was made to the case of *R.K. Garg and Ors. v. Union of India* 1982 133 ITR 239 SC. The session also involved discussion on emergence and adoption of reasonability test and judicial restraint in fiscal matters. A reference was made to the International Covenant on Civil and Political Rights and European Convention on Human Rights linking it to Articles 120 and 94 of the Netherlands Constitution. It was opined that economic justice is equally important as social justice, wherein Article 38 of the Indian Constitution was emphasized upon.
