

# NATIONAL JUDICIAL ACADEMY



## NATIONAL CONFERENCE ON DEVELOPMENT OF CONSTITUTIONAL LAW BY THE SUPREME COURT & HIGH COURTS

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### PROGRAMME REPORT

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## **Session 1: Constitutional Interpretations: Reflection on Transformation, Continuities & Constitution's Silences**

*Speakers: Justice A.K. Jayasankaran Nambiar and Mr. Shekhar Naphade*

The session commenced by highlighting that the interpretation of Constitution by the highest court of land at times has been described as more variant than the legislature making amendments to the constitution. Achievements of the Constitution and that of judiciary over the past 75 years post-independence were also emphasized upon. Following were some question that were posed for discussion including whether we live in a democracy governed by constitutional democracy or whether we are governed by parliamentary supremacy, whether Art. 36 the amending powers are absolute and to what extent they are absolute, the scope and extent of judicial review and whether our Constitution is evolutionary and how far this theory of evolution can be adopted in and in what way by our courts.

It was outlined that the Constitution is an evolving document and that due to the transformative nature of the Constitution, the Supreme Court has interpreted it widely through its judgments. The saying of Ronald Dworkin was highlighted that when it comes to judging judges do not decide on one of the two possible views when they write a judgment because judges choose a view they think that it is the only view. It was mentioned that similarly interpretation is as subjective area. How Constitutional Interpretation is different from ordinary statutory interpretation was reflected upon wherein it was mentioned that in case of Constitutional interpretation firstly one must look into the historical background and inherent scheme of the document,

The book 'The Indian Constitution - Cornerstone of a nation' by Glanville Austin was referred highlighting that the Constitution is first and foremost a social document, essentially distinguishing it from a purely legal document or a statute. It was emphasized that when we interpret the Constitution one must keep in mind that it is not a legal document and therefore, the principles of interpretation of a legal document alone must not be applied while interpreting the provisions of a Constitution. Being a social document it must be understood that the Constitution has to keep in sync the changes that one finds in society. While a statute can be easily amended by the legislature who made it, can also repeal or replace it. It was also iterated that the Constitution is made by a constituent body and not a constituted body. It was thus opined that the interpretation must also be guided by social transformation.

The session further included an overview of the history of Constitution and its adoption wherein following judgments were referred *Sankari Prasad Singh Deo v. Union of India*, 1951 AIR 458; *I. C. Golaknath & Ors v. State of Punjab & Anr.*, 1967 AIR 1643; and *Kesavananda Bharati v. State of Kerala and Anr.*, (1973) 4 SCC 225. The words of Pt. Jawahar Lal Nehru were quoted while presenting the objective resolution. The judgement of *Janhit Abhiyan v Union of India*, 2022 SCC OnLine SC 1540 was referred wherein it was stated that framing of the Constitution is a capital, political fact and not a juridical act. That the validity of an amendment can be challenged on the ground that it is ultra vires the Constitution and every Constitution contains certain limitations, beyond which the constituted bodies cannot act. E.g. Art. 368 of the Indian Constitution. A mention was made to Art. 13(2) vis-à-vis Art. 368.

It was opined that the drafters of the Constitution was not really the representative body of *We the people of India*. Some of the Constitutional assembly debates were highlighted including limited socio economic diversity of the constituent assembly. It was highlighted that the scheme of leaving lot of things unsaid by the constituent assembly to adopt the changes evolving is what leads to incremental empowerment. The session also emphasized upon reading into the silences of the Constitution. Procedure established by law and due process of law were concepts highlighted during the course of discussion. It was mentioned that right to privacy was not there when the constitution was made but it is an evolving right. It was iterated that it is through the incremental empowerment there is transformative constitutionalism. Immediate transformation and deferred/incremental transformation is what the silences of the Constitution is meant to solve. The judiciary can interpret the words of the Constitution and give it a meaning which is more appropriate of the changing society and in the contemporary time. It was enumerated that there are two types of transformation, one is formal transformation through parliamentary amendment and other is interpretation by judiciary incorporating the need of present times.

The Court's role with regard to interpretation of the Constitution was highlighted through various judgments including *Naz Foundation v. The Government of NCT of Delhi*, 2009 SCC OnLine Del 1762; *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 and judgments on reservation. It was opined that if we have to advance our constitutional ideas and especially where a person has to get his rights established then judges must have a paradigm shift in their thinking to get the rights of the underprivileged section protected. It was pointed out that another way of interpreting the Constitution is in the form of Public Interest Litigations. Further the session included a discussion on theories of interpretation wherein the theory of

Dynamism, originalism, structuralism, and textualism were explained. It was also mentioned that the theory of living originalism is a blend of originalism and living constitution, which is now in practice in Constitutional interpretation. Lastly judges were posed with a thought that can any interpretation afford to bind future generations. The session also highlighted that Constitutional transformation necessarily implies some change in the architecture of the Constitution and the silences implies that it is implicit. Continuity means it may change but the essence remains. It was opined that however elaborate, long the Constitution is, it cannot incorporate all changes. An emphasis was drawn on the first amendment to the Constitution which was not merely a constitutional transformation but a constitution coup through interpretation by the judiciary.

Various landmark judgments were deliberated upon to highlight Constitutional transformation and interpretation of silences of the Constitution by court viz. *S.P Gupta v. Union of India*, AIR 1982 SC 149; *K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1; *K. S. Puttaswamy (Aadhaar) v. Union of India*, (2019) 1 SCC 1; *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 on literal and textual interpretation of Art. 21; *State of Bihar v. Kameshwar Singh* AIR 1952 SC 252 wherein certain provisions of the land reform act were struck down; *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 – wider interpretation and reading reasonableness into Art. 14; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; *ADM Jabalpur v Shukla* (1976) 2 SCC 521; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489 on Importance of Reasonableness; *RK Garg v. UOI*, (1981) 4 SCC 675; *I. R. Coelho (Dead) by Lrs. v. State of Tamil Nadu*, AIR 2007 SC 861; *Bandhua Mukti Morcha v. Union of India & Others*, 1984 AIR 802; *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545; *Sunil Batra v Delhi Admin* (1980); *Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar*, 1979 AIR 1369 – Right to Legal aid; *Kuldip Nayar vs Union of India & Ors* (2006) SC 3127; *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610; *X v the Principal Secretary, Health and Family Welfare Department, Government of NCT* – Reproductive choice – autonomy of women; *Vishaka & Ors v. State of Rajasthan & Ors*, (1997) 6 SCC 241 – international conventions become a part of the Indian legal system; and *Javed v. State of Haryana*, (2003) 8 SCC 369 – Coparcenary rights of illegitimate children.

It was highlighted that however detailed the constitution is it cannot include all changes and that is why it is evolutionary. The session included a discussion on the principle of

reasonableness, separation of powers and judicial review as the basic structure of the constitution at length.

Judgements relating to developments in Environment law were listed including *M.C. Mehta and Anr vs Union Of India* 1987 AIR 1086 and *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647. Lastly, Series of judgment on the impact on religion were also pointed out such as *Jamshedji Cursetjee Tarachand v. Soonabai and Ors*, 1 Ind Cas 834 – essential religious practice is for that community to decide.

## **Session 2: Development of Constitutional Morality: Adhering to the Constitutional Norms & Ethos**

*Speakers: Justice A.K. Jayasankaran Nambiar and Mr. Sujit Ghosh*

The session included discussion on morality touching upon jurisdiction of courts vis-à-vis constitutional trust. The session threw light on how judges adhere to the Constitutional norms, principles laid down up till now and the possible path forward. The session dwelt upon the role as a judge and tools that judges apply to interpret the law. It was opined that there is a very thin balance of separation of powers while judge's exercising their role. That there is no popular electoral support to what judges do and are subject to strict criticism. The concept of judicial deference was highlighted. An emphasis was drawn on what basis do plenary legislation and Constitutional provisions gets invalidated. It was stated that the lower law has to be in consonance with the higher law, i.e. the lower law has to be in sync with the higher law which is the fulcrum of judicial review.

Three concepts were highlighted including the doctrine of reasonableness wherein Art. 14 was pointed out that the said article is divided into two part positive and negative, that the doctrine of reasonability was formed out of latter part of Art. 14 which is equal protection of law. The next doctrine that was discussed was the basic structure doctrine and the third concept emphasized upon was constitutional morality wherein it was discussed whether constitutional morality is a tool or an object, an aim to achieve a certain goal. In was mentioned that in some cases Constitutional Morality has been used as a tool to achieve the goal and in some cases it has been used as an end objective to interpret the Constitution or its provision. It was highlighted that the word Constitutional Morality was evolved from a Greek philosopher

Grotius, that the concept of allegiance to the Constitutional document. Need for consistency in governance and peaceful existence.

It was put forth that the basis for Constitutional Morality is essentially a way of life, a behaviour pattern for reaching to some kind of peaceful governance for living in a civilised society. It was mentioned that the concept of Constitutional Morality was brought in broadly in the Delhi High Court judgment in the case *Naz Foundation v. Government of NCT and Ors.* 2009 SCC OnLine Del 1762, wherein it was mentioned that the morality of the society has to be considered different than the Constitutional Morality. It was opined that the public morality will have to be trumped through the Constitutional Morality i.e. what may be moral for one may not be moral to the other. How does judges ascertain what Constitutional Morality is, is a tricky area as to what will be Constitutional Morality at a given space or time.

The case law jurisprudence with regard to development of Constitutional Morality was outlined wherein following judgments of the Supreme Court were mentioned *Kesavananda Bharati v. State of Kerala and Anr.*, (1973) 4 SCC 225 [Rudimentary elements of Constitutional Morality]; *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 (First Judges case – Constitutional Morality not used as a tool but as an aim); *Yugal Kishore Singh v. State of Bihar*, AIR 1985 SC 265 [the powers of judicial review were restricted because of 'constitutional morality' to honour and respect the legislature's wisdom]; *Shayara Bano v. Union of India*, (2017) 9 SCC 1 [For the first time the Supreme Court used Constitutional Morality as a tool to invalidate the legislation]; *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501 [Morality is used by the judiciary to fill the vacuum left by the parliament in the statutes]; and *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 [Constitutional Morality is a creation which is need of the hour. Creative attribute towards judicial decision making wherein the faith and allegiance is bestowed on the Constitution]

It was opined that structural reading of the Constitution in a way is constitutional morality as a tool of interpretation, that Constitutional Morality is nothing but a means to an end and an end in itself. It was highlighted that the liberty, dignity, fraternity are values of individual aspirations and cannot be put to bar by State subrogation. The session also threw light upon Art. 25 of the Constitution that uses the term Morality in context of religion. In this regard a reference was made to the following judgments of *Indian Young Lawyers Assn. v. State of Kerala*, (2019) 11 SCC 1 and *Kantaru Rajeevaru v. Indian Young Lawyers Assn.* (2020) 3 SCC 52 (wherein emphasis was upon what is the scope and extent of the word "morality" under Art.

25 & 26 of the Constitution and whether it is meant to include Constitutional Morality. On common morality a mention was made to the case *Joseph Shine v. Union of India*, (2019) 3 SCC 39. The session further focussed on various aspects, including the scrutiny of constitutional morality, the role of parliament in representing common morality, and the potential consequences of vague and amorphous concepts in the judiciary's exercise of power.

The session highlighted the evolving nature of constitutional justifications and their impact on judicial decision-making. Various cases were referred to, such as the *K.S. Puttaswamy* wherein, application of the right to privacy, where the understanding of constitutional principles changed over time. The concept of constitutional morality was examined in relation to the common morality represented by the legislature, raising questions about the separation of powers and the role of judicial review. The discussion emphasized that the Indian system of separation of powers is based on functional specialization rather than a strict trifurcation. The judiciary's role in interpreting the law and deriving meaning from constitutional texts was emphasized. The Golden Rule of interpretation was mentioned, highlighting that judges should resort to interpretation only when there is ambiguity. It was argued that judges should not exceed their expertise and venture into areas beyond their competence. The participants discussed several challenges and criticisms related to constitutional justifications and the separation of powers. The imprecise and tortuous nature of constitutional exposition was mentioned, which could lead to uncertainty and unpredictability in legal and constitutional issues. The concept of constitutional morality was deemed vague and amorphous, potentially resulting in chaotic consequences. Concerns were raised about the judiciary's exercise of power and the expansion of jurisdiction beyond constitutional limits.

The importance of humility in individuals holding positions of power was emphasized upon. It was opined that the judiciary's focus should not be on whether a law is desirable but rather on determining if the legislature had the constitutional competence to enact it. If a law lacks legislative competence or violates any provisions of the Constitution, it should be struck down by the judiciary as *ultra vires*. The session reflected upon the concept of manifest arbitrariness, Constitutional morality, the basic structure doctrine, and the rule of law. It was pointed out that although there is no explicit definition of these terms in the Constitution, they are understood as guiding principles for governance. The rule of law acknowledges that all individuals are governed by the Constitution, and nobody is above the law. Constitutional morality refers to the values and principles of justice, liberty, equality, fraternity, and dignity, which serve as the foundation for the rule of law and the protection of human rights.

It was mentioned that judges, as unelected representatives, should not impose their personal beliefs on the interpretation of dignity. The session reflected upon the evolution of the protection of fundamental rights in India's Constitution, specifically focusing on the shift in perspective and approach. It was noted that the initial understanding of fundamental rights, until *RC Cooper* case [*R.C Cooper v. Union of India*, 1970 AIR 564], emphasized the prevention of arbitrary state action to secure individual rights. However, a perceptible shift occurred from *RC Cooper* onwards, where the emphasis shifted to examining the impact of state action on individual rights, known as the effects test. The session highlighted the central thread running through the articles in Part III of the Constitution, which include the protection of religious minority freedom and individual rights (such as Articles 14, 15, and 16). It was emphasized that the crucial feature of Part III is the protection of these rights against majority interests, offering anti-majoritarian protection. It was pointed out that while the legislature makes laws, the executive implements them, and the judiciary interprets them, policy decisions are primarily made by the legislature, representing the people. Regarding Article 14, its two limbs were listed: non-arbitrariness and non-discrimination. It was highlighted that striking down legislation on the grounds of arbitrariness has always been problematic and was not previously recognized as a valid ground.

Concern was expressed over the dangerous precedent of justifying arbitrary decisions and emphasis was drawn on the importance of confining judgments to legitimate grounds. The doctrine of wide latitude in fiscal laws was highlighted. The idea of injecting the doctrine of arbitrariness into fiscal laws was proposed, questioning whether wide latitude can still be considered valid if it is found to be arbitrary. It was suggested that economic justice, a guiding principle in the Indian Constitution, should encompass fair tax treatment, leading to the invalidation of unfair fiscal legislations. The session further put forth a distinction between the US Constitution and the Indian Constitution regarding economic justice wherein it was mentioned that while the US Constitution lacks a concept of economic justice, the Indian Constitution recognizes it as an essential element. A reference was made to the 9th and 14th amendments in the US Constitution, with the 9th amendment allowing the reading of new rights not explicitly enumerated. However, it was highlighted that such provisions do not exist in the Indian Constitution, yet concepts like substantive due process have been incorporated.

Following judgements were discussed during the session: *The State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84; *PD Dinakaran v. Judicial Inquiry Committee*, (2011) 8 SCC 380; *Hindustan Construction Company Ltd. v. Union of India*, 2019 SCC OnLine SC 1520.



### **Session 3: Affirmative Actions, Equal Opportunity & Diversity: An Evolving Jurisprudence**

Speakers: Justice A.K. Jayasankaran Nambiar and Mr. Sujit Ghosh

The session dwelt upon Affirmative Action and Constitutional Justifications, exploring the concept of reservation and Social Justice. The session delved into the evolution of affirmative action, particularly focusing on reservations for socially and economically disadvantaged groups. The speakers also touch upon the recent judgment in the case *Janhit Abhiyan v Union of India*, 2022 SCC OnLine SC 1540 on reservations for economically weaker sections and its implications on the basic structure doctrine. The session explored the debate surrounding the reservation amendment and its compatibility with the basic structure of the Constitution. The discussion hinted at the potential narrowing down of the debate on the basic structure doctrine due to the recent judgment. The session primarily focussed on the extent to which constitutional justifications support the issues related to affirmative action and its role in fostering social justice. The session highlighted that affirmative action has been addressed through various judgments, starting from case of *Indra Sawhney v. Union of India And Others*, AIR 1993 SC 477 to *M Nagaraj v. UOI*, AIR 2007 SC 71, shedding light on the topic. It was highlighted that the recent amendment introducing reservations for economically weaker sections has sparked a new debate. The judgment on this matter resulted in a split decision of 3 to 2, with implications for the basic structure doctrine. Implications for the Basic Structure Doctrine was discussed with the help of judgments and their impact.

It was mentioned that while equality is expected from the governing agencies of the state, reservation carves out a specific benefit for a particular section of society, which is not available to others. The speakers delved into the rationales and philosophical justifications for reservation policies. It was emphasized that reservation serves as an atonement for historical social injustices, such as the subjugation of the have-nots by the haves and landowners. The notion of reservation as a means of rectifying past inequalities was highlighted, suggesting that it is a way to give back more to those who have been historically deprived. Principles of Proportionate equality and inclusivity was deliberated upon wherein the principles underlying reservation policies were discussed. The concept of proportionate equality, as advocated by American philosopher Rawls was highlighted. The idea that all social values, including liberty, opportunity, and wealth, should be distributed equally unless an unequal distribution benefits

the larger good was presented. Inclusivity in legislation and governance was emphasized as a key aspect of achieving social justice.

Various justifications and limitations of reservation policies in India were enumerated, with a focus on the constitutional provisions and relevant jurisprudence. It was emphasized that the principle of affirmative state action seeks to alleviate and ameliorate the lives of marginalized individuals, enabling them to join the mainstream society, so, they can contribute to the nation-building process, which will benefit the entire country. Three philosophies of social justice were highlighted including the socialist approach, which advocates for distributive justice based on individual needs. The second focuses on social justice in the context of rights and determines the distribution of rights based on need and eligibility. The third philosophy is proportional equality, which includes providing incentives and resources to marginalized individuals to bring them into the mainstream. It was opined that reservation is identified as a form of affirmative state action and a means to achieve proportional equality. Through reservation, the Constitution aims to confer inclusive rights to all citizens, enabling them to pursue their aspirations. The session discussed the jurisprudence surrounding the limits of reservation. A reference was made to the judgment in *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649 (1962), which struck down a 60% reservation in medical colleges. It was pointed out that the court established a threshold of 50% for reservation, not based on empirical data but due to the 103rd constitutional amendment, which introduced reservation for economically weaker sections. The session further outlined the relevant constitutional provisions on reservation, particularly Article 15. It was mentioned that the jurisprudence of reservation was primarily based on Article 15(4) and 15(5). The session also reflected upon the introduction of the 103rd Constitutional Amendment which added clause 6 to Article 15, introducing a ceiling of 10% for reservation for economically weaker sections.

The recent judgment in the *Janhit Abhiyan* case was succinctly discussed as the first case where economic justice was openly spoken. It was mentioned that the Parliament refrained from providing a specific definition and left it to the government to determine based on needs and situational factors. The session discussed the challenges mounted against this constitutional amendment, particularly whether it violated the basic structure of the constitution. The majority decision considered it a reasonable classification. The court clarified that the reservation quota for socially and educationally backward classes remained intact, and the additional 10% quota for economically weaker sections did not encroach upon it. Those belonging to socially and educationally backward classes, who were not impacted by the new reservation, could not

claim a breach. The majority decision relied on the adequacy of the reservation provided for socially and educationally backward classes, citing previous judgments. The session threw light upon the implications of introducing additional categories for reservation in the future and the potential impact on the general public. The session raised the question of whether a pragmatic approach is permissible for interpreting the Indian constitution. It was suggested that a pragmatic approach, also known as purposeful interpretation, focuses on achieving the purpose and consequences of a constitutional provision. The need for objectivity and adherence to the constitutional document in constitutional interpretation was emphasised. The shift from textual to contextual and purposive interpretation in various areas of law, including fiscal legislation by the Indian judiciary was pointed out.

Various issues related to reservation and exemptions in the context of Article 15 of the Indian Constitution were deliberated upon. The Supreme Court's validation of the legislation granting exemption to a specific class under Article 15(4) was discussed. The session emphasized upon the introduction of Article 15(4) through the First Amendment to address the concerns raised in the *Champakam Durai Raj* case, which questioned the quotas for specific communities in educational institutions. The tension between equality and special provisions was examined, considering the basic structure doctrine established in *Keshavananda Bharati* case. It was suggested that the *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490 case and subsequent judgments provided a way to reconcile the power of making special provisions under Article 15(4) with the principle of equality.

Vertical and Horizontal reservation was also discussed during the course of the session. Lastly the session explored the notion of class legislation and how it is now permitted in furtherance of the equality principle. The judgment in Maratha Reservation Case [*Dr. Jaishri Laxmanrao Patil v. The Chief Minister*, 2021 SCC OnLine SC 362] was also discussed.

#### **Session 4: Judicial Review: Judicial Review of Legislative & Administrative Actions**

Speakers: Justice U.U.Lalit and Mr. Arun Shourie

The session commenced by discussing Kelsen's theory of Grundnorm. It was highlighted that India follows Kelsen's theory, in the sense that the Constitution India is the basic document. All actions of the legislature, which are executive in nature must endorse to the principles emanating from the constitution. While discussing the basic structure doctrine *Shankari Prasad Singh Deo v. Union of India*, 1951 AIR 458 was referred. The Supreme Court in the said case held that the power to amend the Constitution comprising the Fundamental Rights is conferred

under Article 368, and the word 'Law' as mentioned under Article 13(2) does not comprise of an amendment of the Constitution. There is a difference amongst the law making power of the parliament, or the legislative power and parliament's power to amend or constituent powers. Subsequent to this judgment several amendments were brought to the constitution. The scope of these amendments were challenged in *Sajjan Singh v. State of Rajasthan, 1965 AIR 845* the five-judge bench dealt with the validity of the 17<sup>th</sup> Constitutional Amendment which had added around 44 statutes to the 9<sup>th</sup> Schedule. Though all of the judges agreed with the decision of *Shankari Prasad* but for the first time in the concurring opinion qualms were raised on the unbound power of the parliament to amend the Constitution and restrain the fundamental rights of the citizens. Consequently, in *Golak Nath v. State of Punjab, 1967 AIR 1643* the Supreme Court held that the fundamental rights were external to the purview of the amendment of the Constitution. However, the 1<sup>st</sup>, 4<sup>th</sup>, and 17<sup>th</sup> Amendments were not declared invalid by the Court as the ruling was given a prospective effect. The cases of *Shankari Prasad* case and *Sajjan Singh case* were declared bad in law by the Court to the extent that Article 13(2) does not include a Constitutional amendment under Article 368. Subsequently, the historic judgment in *Kesvananda Bharti v. State of Kerala* was delivered by a 13-judge bench and with a majority of 7:6, which over ruled the *Golak Nath case*. It was held that the power of Parliament to amend the Constitution is far and wide and extends to all the Articles but it is not unlimited to an extent that it destroys certain basic features or framework of the Constitution. It was stressed that there are certain ideas which our constitution has embraced and which are significant for human beings as well as to the apparatus of the state. Therefore, the judges did not provide what constitutes the basic structure but provided an illustrative list of elements that may constitute the basic structure i.e., adult suffrage, parliamentary democracy, independence of the judiciary etc.

Thereafter, some of the laws that were tested on these principles as laid down in *Kesvananda Bharti*. In *Indra Nehru Gandhi v. Raj Narain, 1975 AIR 865* the Supreme Court relying on the decision of *Kesavananda Bharati* quantified that democracy is an essential feature of the Constitution and forms part of the basic structure. The court further added certain other features to the list of the basic structure, which was- Rule of Law and the power of Judicial Review.

In *Minerva Mills Ltd. v. Union of India*, the Supreme Court while providing clarity to the doctrine also laid down that the power of amendment under Article 368 is limited and exercise of such power cannot be absolute. A limited amending power was very well part of the basic structure doctrine of the Constitution. Further, the harmony and balance between fundamental

rights and directive principles are also part of the basic structure, and anything that destroys the balance is an ipso facto violation of the doctrine.

*L. Chandra Kumar v. Union of India* again stated that the power of judicial review under Article 32 of the Supreme Court and Article 226 of the High Court is part of the basic structure doctrine and these powers cannot be diluted by transferring them to administrative tribunals.

In *Janhit Abhiyan v Union of India*, 2022 SCC OnLine SC 1540, in a 3:2 majority, the Supreme Court upheld the 103rd Constitutional Amendment providing EWS reservation. However, the minority observed that the affirmative principles under the constitution contemplates that there can be reservations for certain classes or communities which are marginalized, traditionally and economically backward and there cannot be reservation other than for the category specified.

In *Punjab State Power Corporation Limited and Another v. Emta Coal Limited*, 2021 SCC OnLine SC 766 the court held that while exercising powers of judicial review, the Court is not concerned with the ultimate decision but the decision-making process. The limited areas in which the court can enquire are as to whether a decision-making authority has exceeded its powers, committed an error of law or committed breach of principle of natural justice. It can examine as to whether an authority has reached a decision which no reasonable Tribunal would have reached or has abused its powers. It is not for the court to determine whether a particular policy or a particular decision taken in the fulfilment of that policy is fair. The court will examine as to whether the decision of an authority is vitiated by illegality, irrationality or procedural impropriety.

It was stressed that administrative measures affecting basic freedoms (Articles 19 and 21) in India have always been judged on doctrine of proportionality criteria, even when the doctrine of proportionality is not clearly expressed. The concept of doctrine of proportionality applies to judicial review of administrative actions that violate the Indian Constitution's Articles 19 and 21. Referring to *Union of India v. Ganayutham*, (1997) 7 SCC 463 it was underscored that the rule of proportionality is fully applicable in constitutional adjudication where the court has to decide on the reasonableness of a restriction on the exercise of fundamental rights. However, its application in the field of administrative law is still in an evolving stage. At the present, the doctrine is not available in administrative law in the sense that the court cannot go into the question of choice made and priority fixed by the administrator.

## **Session5: Judicial Activism versus Judicial Restraint: Evolving Jurisprudence**

Speakers: Justice U.U.Lalit and Mr. Salman Khurshid

The session commenced by emphasizing that with changing times the citizens expect judiciary to perform its duties in accordance with the changing scenario and this of course brings in many challenges while imparting justice. Hence, the concepts of judicial activism and judicial restraint comes into the picture. These conceptions describes the ideas used by judges in their judicial decisions. It was underscored that judicial activism reached its peak in the landmark case of *Vishaka and Ors. v. State of Rajasthan and Ors. (1997) 6 SCC 241*. Thereafter, in *TMA Pai Foundation & Ors vs. State of Karnataka & Ors (2002 8 SCC 481)* by a wafer thin majority of six-five, the apex court not only upheld the right of minorities to “establish and administer educational institutions of their choice”, but also extended this right to all citizens (including non-minorities) under Article 19 (1) (g) which confers a fundamental right upon all citizens to “practice any profession, or to carry on any occupation, trade or business”. Emphasizing the “essentially charitable nature” of providing education which rules out education as a business, the apex court held that provision of education is a legitimate “occupation”.

Subsequently in, *Islamic Academy of Education v. State of Karnataka, AIR 2003 SC 3724*, the Supreme Court interpreted the T. M. A. Pai judgment as having declared that unaided professional institutions are entitled to autonomy in their administration, but at the same time they should not forgo or discard the principle of merit. Secondly, it held that in unaided non-minority professional colleges a certain percentage of seats could be reserved by the management for students who had passed the Common Entrance Test held by itself or by the state/University, while the rest of the seats might be filled up on the basis of counselling by the state agency. Thirdly, the Bench suggested that unaided professional colleges should also make provisions for students from the poorer and backward sections of society. It was emphasised that in such cases the court was legislating since there was no law to that effect. The court is interpreting something by binding principles which are to be followed. This was judicial activism which was the need of the hour. These case highlight that the legislature has taken the judicial dictum as a guiding feature and have thereafter modelled their legislations on the directions issued by the court.

Some of classic cases in this regard are *Mohini Jain v. State of Karnataka, (1992) 3 SCC 666* and *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors. 1993 SCC (1) 645*, these cases recognised the right to primary education for children.

While discussing *Manish Kumar v. Union of India*, (2021) 5 SCC 1, the observation of the bench was highlighted viz., “There is nothing like a perfect law and as with all human institutions, there are bound to be imperfections. What is significant is however for the court ruling on constitutionality, the law must present a clear departure from constitutional limits.” In this case the court upheld the validity of several provisions of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, albeit with directions given in exercise of powers under Article 142 of the Constitution of India.