

**PROGRAMME REPORT**

**NATIONAL JUDICIAL ACADEMY**



**[P-1361]**

**NATIONAL CONFERENCE FOR HIGH COURT JUSTICES ON DEVELOPMENT OF  
CONSTITUTIONAL LAW BY THE SUPREME COURT & HIGH COURTS**

**16<sup>th</sup> -17<sup>th</sup> September, 2023**

**PREPARED BY**

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**FACULTY**

**NATIONAL JUDICIAL ACADEMY**

### List of Resource Persons

<b>S.No.</b>	<b>Name of the Resource Person</b>
<b>1.</b>	<b>Justice Kurian Joseph</b>
<b>2.</b>	<b>Justice Govind Mathur</b>
<b>3.</b>	<b>Mr. N. Venkataraman</b>
<b>4.</b>	<b>Mr. Ramakrishnan Viraraghavan</b>
<b>5.</b>	<b>Mr. C.S Vaidyanathan</b>
<b>6.</b>	<b>Prof. V. K. Dixit</b>
<b>7.</b>	<b>Mr. V. Sudhish Pai</b>
<b>8.</b>	<b>Mr. Arun Shourie</b>

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

The session commenced by highlighting about the evolutionary development of the constitution that involved a shift from a stringent regulatory framework to a more proactive judicial approach, which was subsequently validated through a process of transformation. It was elaborated that this transition is from a rigid regulatory regime to a completely migratory approach is necessary for any democracy to successfully survive. Returning to the early days of democracy, when the vertical separation of powers was firmly established, with the legislature tasked with legislating, the executive with administration, and the judiciary with interpretation, the quiet progress at that time was largely attributed to the strict adherence to these doctrines, as it marked the foundational stage of development was emphasized. It was mentioned that in the past, the judiciary did not possess the authority to draft laws or express policy opinions. However, over time, societal evolution has highlighted the paramount importance of establishing a meaningful connection with citizens. It was opined that between the people and the constitution, there existed a constitutional body to facilitate the connection.

It was elucidated that at the apex of the pyramid lies the constitution, supported by four pillars, one of which is the media. The collective aim of these four pillars, namely the legislature, executive, judiciary, and media, is to establish a connection with the people. It was mentioned that judges should be free from bias is constitutional oath but they should be free from their ideology is a choice. It is a self-imposed restriction. It was emphasized that judges worldwide possess finely-tuned minds to discern their thought processes but as they develop and their accumulated experience undoubtedly factors into their decision-making. It was expanded that the connection should be with current affairs, fostering growth, development along with connecting with people is the need of the hour. The state of affairs of the nation became the matter of public importance. Difference of opinion came up before the court and in the light of this the difference or the balance between judicial activism and judicial restraint was discussed. Further, it was highlighted that activism is possible only when the other two organs are aligned. The interpretations of shifts from Part IV to Part III using Article 21 as a gateway can be termed as either activism, restraint, or perhaps, contributions. However, the ultimate goal remains the transformation. It was advised that the transformation in question transcends mere restraint or activism. As long as our actions align with the framework of the constitution, even if they lead to transformation, it is not beyond legitimacy. The constitution cannot afford to be overly rigid; it must be transformative.

It was suggested that there are two methods for examining constitutional law. The first involves reading an article, analysing it, and identifying the pertinent case laws, known as the bottom-up approach. The second method, known as the top-down approach, entails focusing on the concepts within the constitution without delving into specific articles or case laws. It was expressed that the Indian Constitution can be characterized more as a political or social document presented in a legal framework, rather than a strictly legal document. If the judicial interpretation of the constitution remains static, transformation will never occur, potentially leading to calls for a new Constitution from the people. It was opined that the basic foundation of any justice delivery system is conversation and communication.

It was suggested that relying solely on the speeches from the constituent assembly debates to interpret the constitution is an erroneous approach. Further, it is difficult to transform the constitution to meet the needs of contemporary society when the words of the dead silence the mouths of the living. The session rolled over to the discussion on the types of context; internal aids and external aids to interpretation. It was stressed that there are no wrong answers in the interpretation of the constitution.

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

The session commenced by highlighting that Constitutional trust, Constitutional Morality and Constitutional Silences is a tripod. They have equally contributed to the development of our Constitution. It has been noted that constitutional morality is an integral component of the constitutional framework and should continue to develop over time. One perspective argues against the existence of constitutional morality altogether, while another perspective, at the doctrinal level, supports the concept of constitutional morality but raises questions about the objective criteria that defines it. The notion of doctrinal proportionality is intriguing, yet none of the judgments provide its contours. The question that arises is whether constitutional morality has an objective base was discussed. Further, Constitutional morality applies to both the general public and those holding constitutional positions. It was elaborated that the underlying essence or fundamental principle lies in bridging the gap between the form of the constitution and the spirit of the constitution. Also, when one chooses to interpret the constitution in a dynamic manner, incorporating constitutional morality becomes an essential component of the constitutional spirit. It was suggested that constitutional silences is not

without a purpose and different contours of constitutional morality was debated. It was suggested that the democratic republic's social conscience is embodied in its constitution, which we now refer to as constitutional morality and judges are the keeper or the interpreter of that social conscience. It was further elaborated that as citizens of a sovereign nation, they have entrusted their sovereignty to the state, as reflected by the delegation of power among the three organs, with the constitution retaining its supreme authority. Presumption of constitutional validity was debated during the discourse. It was suggested that when considering proportionality in the context of imposing a restriction on Article 19, one should examine whether such a restriction is absolutely necessary. It's important to explore if a less restrictive measure could achieve the same objective. It was opined that the intention of the principles of the constitution is to outline detail than to engrave details.

### **Session 3- Affirmative Action, Equal Opportunity & Diversity: The Court's Adoption and Jurisprudential Evolution**

The session began with a discussion on Article 15 and Article 16, which pertain to reservations in favour of SC/ST. However, in the case of OBCs, Article 15 grants reservation for socially and educationally backwards classes of citizens, while Article 16 provides reservation only for backward classes of citizens. It was opined that some expressed the viewpoint that the implementation of reservations could be seen as a failure of the state. However, from an alternative perspective, it is considered essential to demonstrate that if certain individuals can benefit from reservations, there's no reason why others cannot do the same. It was highlighted that reservation is intended for the backward class but the use of the term class interchangeably with caste in the context of reservation for backward group has raised concerns. It was mentioned that caste has an enduring category whereas class is not. Also, caste remains constant but a person may certainly change his class. The session dwelled upon Article 141, affirming that there is no hindrance for a judge to articulate any reservations they may have about a Supreme Court's judgment in the utmost respectful and courteous manner. The Judicial discipline and oath about judicial conscience were elaborated in the light of number of judgements. It was suggested that a reservation is nothing more than ensuring equality between disadvantaged groups and the rest of society.

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

The session commenced by explaining the significance of two Latin phrases 'ad *indra*' meaning from within and 'ad *extra*' meaning from outside in the context of judicial review. The session emphasized the importance and rationale behind conducting a judicial review. The authority for conducting a judicial review stems from Article 13 and Article 32 within the constitution. The question of what purpose does judicial review serve in a democratic country like India is raised during the discourse. It was mentioned that only one of the state's organs carries out judicial review, while the other organs conduct reviews that are not of a judicial nature. It was opined that the transformation in the interpretation of the constitution has happened openly and by establishing new precedent. The recommendation was to draw upon the rationalizations made by judges from various countries when they were facing the transition. It was suggested to change the mind set from closed system to an open democratic system. Judicial review with regard to economic matters, national security, environmental matters, and elections were deliberated upon at length. A reference was also made to the doctrines of judicial deference and wide latitude. The concept of due process vis-à-vis legislative action also formed part of the deliberation. It was opined that economic justice is equally important as social justice, wherein Article 38 of the Indian Constitution was emphasized upon. Finally, the session concluded with briefly touching upon the grounds for Judicial Review of Administrative Action *viz*: Illegality, Irrationality, and Procedural Impropriety & Proportionality.

#### **Session 5- Judicial Activism versus Judicial Restraint: Evolving Jurisprudence**

The session underscored the thin line of demarcation between judicial activism and judicial restraint and propelled a discussion about the limitation of the jurisdiction of the constitutional courts. It was expounded that judge administer justice in accordance with law but is there any jurisdiction to check whether law is according to justice. It was advised that to check whether justice is according to law is the sole prerogative of the judiciary. Further, the interference in legislative actions differs slightly for legislature and judiciary because legislature has to follow a certain policy but judiciary has inherent power and constitutional duty. It was highlight that writ of certiorari cannot be issued against administrative actions, it can only be issued against legislative action. It was informed that people have high faith and they expect a lot from the judiciary. The judiciary should maintain its independence and avoid acting like the executive branch. Every decision made by the judges is subject to scrutiny. While the concept of judicial

activism had been present since 1947, it gained significant momentum after the 1980 case of *Municipal Council, Ratlam v. Shri Vardhichand & Others*, 1980 AIR 1622, 1981 SCR (1) 97. This case underscored that it is the judiciary that interprets the law and elucidated the concept of judicial activism. In the context of the *Hari Vishnu Kamath vs Syed Ahmad Ishaque and Others* 1955 AIR 233, the writ of certiorari was deliberated upon. It was advised to the participant judges to be little more active while taking so moto cognizance and also be fearless while working. The session concluded with the words of the then Chief Justice R. C Lahoti “*to preserve the sanctity and credibility of the judicial process and to overcome the criticism of judicial activism, it is necessary to practice self-restraint while innovating new tools*. The need of the hour is to emphasize the development of new tools and sharpen the edge of judicial activism.