

NATIONAL JUDICIAL ACADEMY



NATIONAL CONFERENCE FOR HIGH COURT JUSTICES
ON
DEVELOPMENT OF CONSTITUTIONAL LAW BY THE SUPREME
COURT AND HIGH COURTS (P-1418)

19th & 20th October 2024

CONFERENCE REPORT

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OBJECTIVE OF THE CONFERENCE

National Judicial Academy organized a conference for High Court Justices on the theme “Development of Constitutional Law by the Supreme Court and High Courts” to dwell on the evolving jurisprudence in constitutional law. The discussions in the conferences involved the consideration and examination of the trends in constitutional jurisprudence. Specific focus was lent to the aspects of interpretation of constitutional silences, constitutional morality, transformative constitutionalism and dissents in the constitutional architecture. Notable contributions of the constitutional courts were highlighted in the discussion and trends in constitutional jurisprudence were mapped. Seminal topics on protection and conservation of environment and ecology, and the role of ICT in the judicial sphere also formed part of the discourse.

SESSION 1

Theme: Developments in Constitutional Law

Panel: Hon’ble Mr. Justice Ujjal Bhuyan

Prof. (Dr.) Sudhir Krishnaswamy

The first session traced the development of the constitutional jurisprudence from 1950s to the present day and noted the major decadal trends in constitutional law. The discussions dwelt on the factors which act as a catalyst for constitutional development and propel judges to advance the law. It was noted that the Constitution is the basis for the journey of constitutional jurisprudence. The significance of the Constitution as a transformative document was emphasized and the vision of the drafters of the Constitution in adopting a progressive vision for the country was lauded. The discussions on the decadal trends dwelt on notable judgments which developed the constitutional discourse including *A.K. Gopalan v. State of Madras*, 1950 SCC 228, *Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India* (1970) 1 SCC 248, *Maneka Gandhi v. Union of India*

AIR 1978 SC 597, *ADM Jabalpur v. Shiv Kant Shukla* AIR 1976 SC 1207. Discussions also examined the evolutions of the doctrine of separation of power vis-à-vis basic structure and the amendability of the Constitution. Reference was made to the judgements in *Sajjan Singh v. State of Rajasthan*, 1964 SCC OnLine SC 25, *State of Bihar v. Kameshwar Singh* (1952), *I.C. Golak Nath v. State Of Punjab* AIR 1967 SC 1643, *Kesavanada Bharti v. State of Kerala* (1973) 4 SCC 225. Reference was also made to the opinion of Justice Mudholkar in *Sajjan Singh v. State of Rajasthan*, 1964 SCC OnLine SC 25 wherein the judgment of the Pakistan Supreme Court in *Mr Fazlul Quader Chowdhry v. Mr Mohd. Abdul Haque* [1963 PLD 486] has been referred with regard to the doctrine of basic structure. Discussions was also undertaken on the issue of equality and the addressal of discrimination through affirmative action. Reference was made to the judgments in *T.Devadasan v. Union of India* AIR 1964 SC 179, *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, *Indra Sawhney v. Union of India* AIR 1993 SC 477, *Neil Aurelio Nunes v. Union Of India*, and *Janhit Abhiyan v. Union of India* (2023) 5 SCC 1.

The active role played by the judiciary from the 1980s which included the development of Public Interest Litigation and judicial activism was deliberated upon and the contributions of PIL jurisprudence in the development of human rights law, environmental law, electoral reforms and compensation jurisprudence was noted. Notable judgments highlighted in the course of the discussion include *Sunil Batra v. Delhi Administration & Others* AIR 1978 SC 1675, *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544, *Vishaka vs. State of Rajasthan* AIR 1997 SC 3011, *Safai Karamchari Andolan v. Union of India*, (2014) 11 SCC 224, *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, *Joseph Shine v. Union of India* (2018) 2 SCC 189 and *Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*, (2019) 11 SCC 1. The consistent progression of rights jurisprudence especially the rights of the marginalized was highlighted and it was emphasized that the judiciary should respect this progress and further the same through their judgments. The discussions also dwelt on notable judgments in constitutional jurisprudence.

The development of jurisprudence on Article 14 was discussed tracing its evolution through notable judgments including *State of Madras v. V.G. Row* (1952) 1 SCC 410, *Ram Krishna Dalmia v. S.R. Tendolkar*, 1958 SCC OnLine SC 6, *Kunnathat Thatehunni Moopil Nair v. State of Kerala*, 1960 SCC OnLine SC 7, *State of Gujarat v. Shri Ambica Mills Ltd.*, (1974) 4 SCC 656. The development of jurisprudence on the independence of the judiciary was discussed referring to the three judges cases (*SP Gupta v. Union of India* 1981 Supp (1) SCC 87, *Supreme Court Advocates-on-Record Association v. Union of India* AIR 1994 SC 268 and *In re Special Reference* AIR 1999 SC 1) and the NJAC judgment (*Supreme Court Advocates-on-Record Assn. v. Union of India* (NJAC) (2016) 5 SCC 1) to objectively examine the factors that led to the development of this area of constitutional law. The decadal trends in constitutional jurisprudence was traced and the persistent issues in constitutional adjudication were identified. The first issue is the right to equality and emphasis was placed on the need to address systemic discriminations as well as historical discrimination through judgments.

SESSION 2

Theme: Trends in Constitutional Interpretation

Panel: Hon'ble Mr. Justice Ujjal Bhuyan

Hon'ble Dr. Justice A.K. Jayasankaran Nambiar

The second session commenced with a discussion on the evolution of the doctrine of basic structure. The separation of powers and supremacy of the Constitution were dwelt upon. Reference was made to the judgments in *Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India* (1970) 1 SCC 248, *Kesavanada Bharti v. State of Kerala* (1973) 4 SCC 225, *Minerva Mills v. Union of India* AIR 1980 SC 1789, *Kihoto Hollohan v. Zachillhu* 1992 Supp (2) SCC 651, *SR Bommai v. Union of India* AIR 1994 SC 1918, *L Chandra Kumar v. Union of India* [1997] 2 S.C.R. 1186, *M. Nagaraj v. Union of India* (2006) 8 SCC 212, *I.R. Coelho v. State of Tamil Nadu* AIR 2007 SC 861 and *Supreme Court Advocates-on-Record Assn. v. Union of India* (NJAC) (2016) 5 SCC 1.

The evolution of the doctrine of basic structure was traced and the notable criticism of basic structure as anti-democratic was noted. It was stated that the doctrine of basic structure has withstood the test of time. It prohibits the legislature and executive from striking at the foundations of the Constitution. The adaptive nature of the basic structure which enables generational increments to be made to the same was dwelt upon. Further the contributions of the judiciary through judicial activism was discussed that the criticism of judicial activism i.e. 'tyranny of the unelected' was considered. It was asserted that judicial review is necessary to preserve the Constitution and to protect democracy.

The role of the judiciary as Sentinels of *Qui Vive*, as interpreters of the Constitution was discussed. It was stated that judges, while interpreting the Constitution, need to keep in mind that the Constitution is a social document and should not be read as a legal document. The judgment in *A.K. Gopalan v. State of Madras*, 1950 SCC 228 was referenced to emphasize that the Constitution should not be interpreted in a legalistic manner. Further, the necessity of objectivity while interpreting the Constitution was emphasized upon.

Discussions on interpretation of constitutional silences considered the features of Parts III and IV of the Constitution. Part III recognizes the inalienable rights of the individual. Notably Article 32 requires the state to not abridge the rights but leaves space for expansion of the frontier of these rights. This is a silence in the Constitution which ensures that the Fundamental Rights are not a rigid checklist for literal application, and thereby leaves space for expansion. Part IV of the Constitution reiterates the substance of Part III to emphasize on principles which should guide the implementation of provisions of Part III. Parts III & IV of the Constitution of India are guides to the State in making law. The silences in the Constitution were discussed and it was noted that the Right to privacy and separation of powers were silences which were later recognized as features of the Constitution. The issue of the appropriate authority who should fill the silences in the Constitution especially in aspects which are not legal issues was deliberated upon. The judges were advised to exercise caution while interpreting the constitutional silences. It

was also advised that constitutional interpretation should be rooted in constitutional text to ensure legitimacy. The issues examined in the course of discussion include interpretation of the Constitution, separation of powers and judicial overreach, and amendability of the Constitution and the necessity of flexibility in light of the evolving social milieu. The judgments in *Janhit Abhiyan v. Union of India* (2023) 5 SCC 1, and *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421 were discussed.

SESSION 3

Theme: Dissents in the Constitutional Architecture

Panel: Hon'ble Dr. Justice A.K. Jayasankaran Nambiar

Mr. N. Venkataraman

In this session, the discussion dwelt upon dissent in judgments and its constitutional basis and relevance. Reference was made to Article 145(5) of the Constitution of India which requires that the judgment of the Supreme Court should be with the concurrence of a majority of the judges, thereby leaving room for minority and dissenting views. Dissent was emphasized as a facet of judicial independence. Consensus was underscored as the golden rule thereby requiring convergence rather than divergence. Dissent was stated to be the exception which is necessitated where convergence is not possible. This places emphasis on the pluralistic character of judicial thinking which is intrinsic in a constitutional democracy. The types of dissents were discussed *viz.* reargued action dissent, observation dissent, eruptive dissent, and analytical dissent. Discussions were undertaken on necessity of dissent and the social digestibility of dissenting views expressed in judgments. A line of distinction was drawn between acceptability and digestibility to underscore that social acceptability should not drive the judicial view. It was emphasized that dissent is a strength of the democracy, but it must be ensured that this strength does not become the weakness. Further, it must also be examined whether dissent can potentially be used to popularize an unpopular cause and whether such act amounts to the use of the judicial forum for propaganda of such cause. It was stated that

judicial interpretation is a search for context. Judges are trained with epistemic humility and the interpretation of the text is based on one's perception and understanding of the text. Dissent is in furtherance of this interpretation of constitutional text which indicates the disagreement with the perception which drives the interpretation of the text. Emphasis was placed on dissent as an indication of the application of judicial mind. Contrary views in judgments act as persuasion for judges of the future to herald in a change in the jurisprudence. It does not suppose that the present view is wrong or the reasoning of the present judges is unsound. Judges were advised to exercise caution especially regarding the language used while dissenting. The factors which prompt judges to dissent was also deliberated over.

SESSION 4

Theme: Protection and Conservation of Environment & Ecology

Panel: Hon'ble Mr. Justice Devan Ramachandran

Prof. (Dr.) Sairam Bhat

The fourth session commenced dwelling on the development of jurisprudence of environmental rule of law. The jurisprudence has evolved from the recognition of the right to clean environment under Article 21 to the right to be protected from the adverse impact of climate change in *MK Ranjitsinh v. Union of India* 2024 SCC OnLine SC 570. This indicates the linking of environmental law to other legislations. However, the National Green Tribunal is not vested with the jurisdiction to deal with these interlinked aspects. The jurisdictional limits of the National Green Tribunal was noted. Reference was made to the judgment in *Citizens for Green Doon v. Union of India*, 2019 SCC OnLine SC 2146 to highlight the issue of balancing development activities and environmental protection. Environmental clearance was highlighted as a measure of environmental rule of law and requires that projects and establishments have requisite approval with regard to the environmental impact of the project or establishment. The grant of ex post facto environmental clearance was discussed at length and the arguments for and against the

grant of such clearance were noted. The issue was examined from the lens of sustainable development as well as from a rule of law perspective. The factors that are weighed while granting ex post facto clearance were dwelt upon. Reference was made to *Common Cause v. Union of India*, (2019) 11 SCC 674, *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati*, (2020) 17 SCC 157, *Electrosteel Steels Ltd. v. Union of India*, (2023) 6 SCC 615, *Pahwa Plastics (P) Ltd. v. Dastak NGO*, 2022 SCC OnLine SC 362, *D. Swamy v. Karnataka State Pollution Control Board*, 2022 SCC OnLine SC 1278 and *Vanashakti v. Union of India*, 2024 SCC OnLine SC 135.

The paradigm shift in environmental law from a reactive to a proactive jurisprudence was noted. The necessity of developmental activities and its impact on the environment and the challenge of balancing both competing aspects was dwelt upon. It was noted that environmental issues are dealt with on a case-to-case basis which poses a challenge in establishing a uniform approach in environmental jurisprudence. The paradigm shift in jurisprudence from anthropocentric environmental jurisprudence to eco-centric jurisprudence. Earth jurisprudence was referred to as a shift from anthropocentric jurisprudence to eco-centric jurisprudence. The present challenges which pose an environmental concern were discussed including waste management, technology and its impact on environment, preservation of coastal zones, biodiversity and extinction of species, and marine pollution. The issue of rights of sui juris entities was discussed. Emphasis was placed on the proactive role of the High Courts in environmental jurisprudence. Reference was made to the judgment in *State of Telangana v. Mohd. Abdul Qasim*, (2024) 6 SCC 461.

SESSION 5

Theme: ICT as a Game Changer in the Judicial Sphere

Panel: Hon'ble Ms. Justice Anu Sivaraman

Hon'ble Mr. Justice Raja Vijayaraghavan V.

In the fifth session discussions were undertaken on the evolving nature of technology and its impact on adjudication. Firstly, the increasing involvement of technology in litigation was examined. The expanding scope of offences which include technology based crimes especially under the new criminal laws was noted. It was underscored that technology will alter the nature of legal disputes with significant litigation being related to technology based activities like online banking and digital payment systems, online fraud, cyber pornography etc. The advent of social media has generated new nature of crimes such as identity theft, online defamation and libel, deep fakes etc. Technology can also be used as a tool for commission of crime. Emphasis was placed on capacity building of judges to deal with the evolving nature of such crimes. Specific focus was given to the provisions under the new criminal laws which require the use of digital technology. The challenges in preservation of such data and the need for checking of the authenticity of the same was dwelt upon. The issues of storage, chain of custody, proof of the digital data, need for standard operating procedures for handling such data were highlighted in the course of the discussion.

Discussions were undertaken on the ICT transformation of the Indian judiciary as a measure to create a digital ecosystem for the judicial system. The innovations in this context were highlighted including digital service of process and summons, e-services for judges, virtual courts, e-services for litigants, e-sewa kendras and National Judicial Data Grid. The advantages of e-judicial system for judges were noted and emphasis was placed on the need for judges to embrace technology and adapt to the evolving situations and the needs of the present day. Technology was noted as a means to ensure accessibility to justice and expeditious justice.
