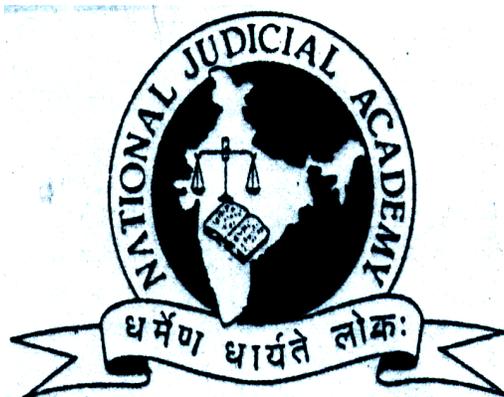


NATIONAL JUDICIAL ACADEMY



**NATIONAL CONFERENCE OF HIGH COURT JUDGES ON CONTRIBUTION OF
THE SUPREME COURT & HIGH COURTS TO DEVELOPMENT OF LAW IN 2014 –
CONSTITUTIONAL LAW & ADMINISTRATIVE LAW (P-916)**

MARCH 21&22, 2015

PROGRAMME REPORT

By

**Programme Coordinator Ms. Shruti Jane Eusebius, Law Associate, National Judicial
Academy**

Background

The National Judicial Academy organized the National Conference of High Court Judges on the Contribution of the Supreme Court and the High Courts to the Development of Law in 2014- Constitutional Law and Administrative Law on March 21-22, 2015 to focus the role played by the Supreme Court and the High Courts in shaping and adapting the law in India to meet the challenges and issues of the present time. The conference sought to highlight the contribution the Constitutional Courts play in India in upholding and giving effect to the constitutional values and vision and in making law more relevant to the present day concerns.

The objectives of the conference was –

1. To discuss and critically analyze the major contribution of the Supreme Court to the development of law in the area of Constitutional and Administrative Law.
2. To examine the jurisprudential trends in the area of Constitutional Law and Administrative Law.
3. To examine the major legal and judicial issues that arose in the year 2014.

Day I

Introduction & Thematic Context

The Programme commenced with the Introductory Address by Dr. Geeta Oberoi-Director (In Charge), National Judicial Academy. In her address, Dr. Oberoi welcomed the participants and gave a brief overview of the work that NJA has been doing since its establishment and its efforts to cater to the needs of judges from all levels from all across the length and breadth of India. Dr. Oberoi pointed out that NJA was not a place of teaching or training but rather was a place where judges could involve in discussion

on issue that impact the judicial function and the administration of the judicial system. NJA has organized 84 High Court judges conferences catering to 1851 high court judges have been organized by NJA to reflect on the various challenges that are faced in different jurisdiction and the means to ensure timely and effective justice to the litigants. Dr. Oberoi highlighted the theme and objective of the conference to be a qualitative and quantitative overview of the work of the Supreme Court and the High Courts in 2014. The conference was a forum to map out the depth and breadth of the engagement of constitutional courts with key challenges that are faced by the nation. We also can think about the kinds of litigants that approach the courts and whether the judicial decisions were driven by litigants or their counsels. There is also a need to reflect on the problems faced by the subordinate judiciary in the course of the informal discussions during the duration of the conference. This forum is a place where the participants can generate constructive suggestions to improve the system. Another area of concern is the inconsistent approach of various High Courts. Dr. Oberoi introduced the panel of experts and commenced the session

Session I

The theme of Session I was **“Contribution of the Supreme Court and the High Courts to the Development of Constitutional Law & Administrative Law in 2014.** The speakers for the session were Prof. Upendra Baxi and Mr. Sriram Panchu and the panelist for the session was Justice DM Dharmadhikari.

Prof Upendra Baxi- Prof Upendra Baxi commenced the discussions in the conference. Prof Baxi stated that unless we take the human rights of the dead seriously we cannot protect the human rights of the living. Prof. Baxi also expressed his belief in inventing human rights. Prof. Baxi expressed his disagreement with the usage of the term ‘subordinate judiciary’ in the Constitution which he considered to be hierarchical, and that every judge in his own jurisdiction is as good as any judge in the country and there is no such thing as a subordinate judge. Prof Baxi recounted an anecdote where he had

told the Chief Justice of India Justice Chandrachud that he did not find any difference between the Nyaya Sarpanch of a village and the Chief Justice of India. He reasoned that that is because no judge is subordinate. Prof. Baxi stated that his discussion would not be on the theme of judicial activism. He was of the view that judicial activism is a labeling concept and is used to label judges and the judicial function. Prof. Baxi also used the term 'juristic activism' whereby judges elaborates social meaning of the Constitution but stops short of giving the legal meaning and the linkage between the social and legal aspects of the Constitution. In Olga Tellis' case, the judge expounded on the rights of pavement dweller to shelter and housing flowing from Article 21 of the Constitution of India in elaborate detail but at the conclusion of the judgment failed to provide legal remedy. In his study and research on the judicial system, Prof Baxi stated that the judges could be tagged as eclectic judges, lazy-bonist judges and dullard judges. Lazy-bonist judges are judges who are conscious of the legal and political significance of the case but are not bothered to write the judgment and lets the other judge write the opinion. This is indicated in the study included in the reading material which shows how many judges wrote the opinion in the judgment. Dullard judges are judges who neither understand the political and legal significance of the case and cannot write a judgment on the crucial issue. Prof. Baxi dwelt on the concept of adjudicatory leadership and organizational leadership which he held to be very important in a judge and are as important a function as the decisional function exercised by a judge. The invention of the judicial collegium was an example of organizational and hermeneutic leadership. Prof. Baxi questioned the allocation of work and the mode of allocation. He pointed out that in most cases, the Supreme Court sits in panels of 2 judges. The Constitutional Bench of the Supreme Court has sat in only 7 or 8 major cases. So what is the Supreme Court ? Should constitutional questions be decided by a majority of a 2 judge bench or should it be decided by a 5 judge bench. The Supreme Courts answer to this question is a 2 judge bench.

Prof. Baxi dwelt on the concept of Demosprudence which is court appeals to the people of the country. He recounted the address of Justice P. Sathasivam on being sworn in as the Chief Justice of India wherein he said that he would fulfill the aspirations of the people of Tamil Nadu. Demosprudence is the approach of the courts to compose and recompose the law and acts in the name of the people. Demosprudence is most visible in social action litigation or public interest litigation. The problem in the adoption of demosprudence is that in such cases, jurisprudence no longer holds the field. In such cases, precedents no longer are followed. Also due to the fact that most decisions are given by 2 judge benches, the precedents are frequently overruled. However, the High Courts have adopted a method of distinguishing the precedent. The Delhi High Court judgment in Naz Foundation case is an example of such a practice. The High Court judgment was overruled by the Supreme Court. It is ironical that one of the judges in this case was also a member of the bench that delivered the judgment in the Transgender case. In Supreme Court decision in the NAZ Foundation uses the reasonable classification test under Article as if Menaka Gandhi judgment and the subsequent judgments do not exist. For a High Court judge it is difficult to understand which is the correct approach to Article 14, whether to follow the test strictly as laid down in the Constitution or to follow the test of arbitrariness and reasonableness as laid down in Menaka Gandhi's case. The Supreme Court's decision in Naz Foundation revives the classification doctrine which overrules the decision in Menaka Gandhi's case. With the advent of demosprudence in judicial decisions, the question that arises is how and on what criteria can judgments be critiqued.

Prof. Baxi then drew the attention of the participants to Para 56 and 57 of the judgment of the Supreme Court in Naz Foundations case wherein the Supreme Court has left it to the Parliament to decide whether or not to legitimize gay sex. He questioned whether this observation was necessary on the part of the Supreme Court. It must be noted that if the doctrine of reasonable classification applies then parliament cannot make a law in this regard. Prof. Baxi was of the view that the High Court decision in NAZ Foundation

was the correct interpretation of the Constitution and the Supreme Court wanted to be deciding authority on the issue of the interpretation of the Constitution. The Supreme Court was originally the forum before which the PIL in the NAZ Foundation case was filed and it had directed the High Court to consider every aspect of the matter and decide the issue. In its decision the High Court has considered and examined every aspect of the matter and has given its decision. In such case, the only grounds for appeal before the Supreme Court would be only if the High Court had not considered all aspects of the matter. Prof. Baxi opined that the Supreme Court which is already overburdened should not have taken matters into its own hands if it had directed the High Court to decide the matter. Furthermore, keeping in view the fact that in the 6 decades of independent India, the Parliament had not taken the initiative to amend the Section 377 of the Indian Penal Code, the Supreme Court should have taken the matter into consideration and, instead of suggesting that the Parliament amend the law, could have dealt with the issue. Prof. Baxi was also of the opinion that 'sex against the order of nature' was a Victorian concept and it had nothing to do with the Constitution of India. In case of consensual intercourse between adults which did not involve the violation of the rights of children, animals etc. and where the element of force was not involved, the matter would not impinge on the constitutional values and would not require a detailed analysis as in the Supreme Court's judgment in NAZ Foundation.

In Lily Thomas' case of 2014, the Supreme Court held that the legislators who were convicted by the Sessions court were not eligible to be members of the Legislature and to contest elections. In this case, the judgment does not leave the matter of eligibility of persons to contest elections to be determined by the Parliament. On the contrary, the Supreme Court held that the Parliament has no power to determine the issue. The impact of this decision on the presumption of innocence of the convicts and the right of the person convicted under Articles 20 & 21 of the Constitution. Furthermore, the presumption of innocence continues till guilt is proved beyond reasonable doubt. Reasonable doubt would continue till the matter is heard by the High Court and the

Supreme Court and the right of appeal has been exhausted. In case of the conviction being overturned in appeal by the High Court or the Supreme Court, this prohibition of convicted persons to stand for election would be in violation of his rights.

Prof. Baxi raised the question as to why the Parliament has the constitutional power to make same sex relations illegal but does not have the Constitutional power to determine the eligibility conditions for contesting elections and the impact of the presumption of innocence. This differences in approach to cases impacts the precedential authority of the judgments of the Supreme Court. In Sanjay Gandhi's case, the Court held that he can be a member of Parliament until he is proved guilty. What is important to consider is that the Supreme Court has decided matters in contrasting approaches.

In the case of the Bihar Cricket Control Board, Prof. Baxi questioned the intervention by the Supreme Court and the need for and the jurisdiction of the Supreme Court to determine matters about the game of cricket. The Cricket Control Board of Bihar was not within the definition of state and hence how did the Supreme Court exercise jurisdiction to look into the functioning of a private body.

In the case of Subrata Roy Sahara, the claim by Subrata Roy that his detention for several months was contrary to the law. In this case, Prof. Baxi questioned the assumption of jurisdiction of the Supreme Court without the finding of contempt.

Prof. Baxi stressed on the need for accountability of judges in deciding cases and the need for judges to show the provisions of law that the judgment is based on. Demosprudence means not judicial activism but is making decisions to appeal to the people. Demosprudence does not mean judicial despotism. There must be limits to demosprudence and it must be curbed by the need to be accountable for the judgments and to give reasons.

Mr. Sriram Panchu – A look at the 5 judge bench decisions delivered by the Supreme Court, 2 decisions relating to minorities have been delivered by Justice AK Patnaik. The first relates to the right of the State to compel minorities to choose their mother tongue as the medium of instruction in primary schools. In this case, the Supreme Court held that the State cannot compel linguistic minorities and private unaided schools to adopt a mother tongue as the medium of instruction and the parents have the right to choose the medium of instruction. In the second case (Pramati Education Trust case) the Supreme Court held that Articles 15(5) and 21A mandate that private aided schools must provide free and compulsory education but minority aided schools cannot be placed under such obligation. The protection of minority rights would be an issue of conflict and tension in the future between the courts and the government.

The second category of the 5 bench judgments of the Supreme Court is on the issue of governance. In Manoj Narula's case, the Supreme Court went into the issue of whether a person who is chargesheeted can be a member of the Council of Ministers. The judgment discusses the concepts of constitutional morality, good governance and constitutional trust but the court held back at the end and refrains from holding that chargesheeted persons can be disqualified from becoming a member of the Council of Ministers but advises the Prime Minister to refrain from choosing such tainted persons in his Council of Ministers. In many cases including this case, the Supreme Court has given a long exposition on certain concepts but has held back at the end of the judgment from giving any concrete opinion or decision. In the concurring opinion, Justice Kurian Joseph makes an important observation. He says chargesheet is not conviction but one must think whether a reasonable and prudent master would leave the keys with a servant whose integrity is doubted. It is the duty of the Supreme Court to remind key duty holders about their role in working the Constitution and the Prime Minister is well advised to consider avoid persons who are chargesheeted in his Council of Minister. The Supreme Court often starts the judgment with a prophetic view but over a period of time, the prophetic view slowly make their way into the body of law.

So the question that arises is whether this is an indicator of the future development in law for the government to keep in mind. Another decision given by Justice TS Thakur and Justice Goel wherein it has been held that speedy trial for those in political office who are charged with criminal offences especially corruption.

Another important decision of the Supreme Court in 2014 relates to the review petition in cases of death penalty. The Supreme Court has also delivered a judgment on the dispute between Kerala and Tamil Nadu on the Mullaperiyar Dam issue. What is heartening in the decision is that the Supreme Court has stated that any amicable resolution would be good for the states as the Supreme Court is encouraging settlement.

Mr. Panchu reasoned that the Supreme Court's involvement in the Bihar Cricket Control Board case was because of the national importance of the game and its impact of the people of India.

All these decisions were headed by Justice Lodha. He served for a few months and headed 8 constitutional benches. This is a record in recent times. Justice Lodha has re-established the practice that the Chief Justice of India should head the constitutional benches.

The issue of death penalty is a constant concern for the Supreme Court. The Supreme Court does not abolish the death penalty but is repeatedly taking steps to ensure that the death penalty is not given effect to. In Shatrugan Chauhan, the Supreme Court held that too long time taken in consideration of mercy petition is sufficient grounds to commute the penalty to life imprisonment. Mr. Panchu was of the view, that if the President does not take time in considering the mercy petition, the Supreme Court is likely to commute the penalty on the grounds that the mercy petition was hastily considered. It is time for the Supreme Court to reconsider its rarest of rare criteria for the death penalty. With the rise of heinous offences and increase in the depravity there is need for another criteria other than rarest of rare criteria to judge.

Another decision of the Supreme Court by a bench of 3 judges held that they were unable to declare the right to adopt as a fundamental right as there is no uniform civil code. Here the Supreme Court has expressed the need for the dissipation of conflicting thought processes and practices prevalent in the country in order to create a situation for recognition of the right. In another case, the issue of whether the right to life includes the right to die with dignity was left unanswered as the matter was referred by the court to a constitutional bench.

There were 2 judgments of outstanding social sensitivity in 2014. The first was the Safai Karamchari judgment which mandated the prohibition of employment of persons in manual scavenging and the rehabilitation of the persons employed in scavenging. The second was the National Legal Services Authority (Transgender) judgment. In this judgment the Supreme Court made an interesting observation –“limited understanding and public knowledge of the same sex sexual orientation and people whose identity and gender are incongruent with their biological sex” which seems to be aimed at the judges who delivered the NAZ foundation judgment. In this case, the Supreme Court held that the transgenders have a right to vote, to marry, to formal identity, to education and employment, to be treated as a socially and educationally backward class and that these rights flow from their constitutionally guaranteed rights. It is a remarkable decision in the year 2014.

One concern is that if one looks to the period 1950-54, 5 judge benches constituted 15% of all decisions of the Supreme Court. In 1960-65, 5 judge benches of the Supreme Court delivered 134 judgments a year on an average. In 2005-09, the percentage drops to 6.4 decisions a year on an average with a vastly expanded court in numbers which is 1.2% of the decisions in a year. With the increase in the number of judges, there are fewer and fewer 5 judge bench decisions. So the concern that arises is that the Supreme Court seems to have become a final appellate court rather than a constitutional court deciding substantial questions of law. It is true that many cases before the Supreme Court are important but they are not substantial questions of constitutional law. The 5 judge

benches of the Supreme Court are required to resolve disputes, amplify the law, correct law and decisions, re-look decisions and build up the body of constitutional jurisprudence which is not happening. 2 days out of the 5 working days in a week go in looking at special leave petitions. With the heavy work load, there is hardly any time available to the Supreme Court judges for reflection and for writing good judgments. There is cause for concern in the way the Supreme Court functions. The Supreme Court needs to take a call whether it is a final appellate court or a constitutional court. It would be better if the Supreme Court was divided into appellate benches and constitutional benches as the Supreme Court is not serving what the court ordains it to do. In all these decisions the question that arises is what is the mental make up of the judges giving the decisions. How is the mental makeup of the judges who have delivered the Naz Foundation judgment different from the judges who delivered the transgender judgment. We must remember that judges are individuals. Hence, a 5 judge bench would round off these differences to provide a uniformity and balance in the decisions of the Supreme Court. There are a huge number of cases that need to be decided by a 5 judge bench. Another issue is who mans the Constitution bench? Usually it is manned by the Chief Justice and the Chief Justice is very rarely in a minority in the decisions. It would be appropriate that the senior most 5 judges of the Supreme Court constitute the Constitution bench.

Justice DM Dharmadhikari – There is a noticeable encroachment by the Indian judiciary in areas and the reason for the same is the present political scenario and the current status of democracy in India. The Constitution has purposefully not given a cast iron compartmentalization of functions of the wings of the State. When the legislature is dormant and not legislating on the areas that is not necessary and the executive is corrupt, the last hope of the people is the judiciary. The judiciary cannot remain mute where the other wings of the State fail to do their job. In Subrata Roy's case, if the Supreme Court had not taken cognizance there was every likelihood that justice would not have been done to the people. It is true that the Supreme Court has overburdened

itself with an expanded jurisdiction. The Supreme Court should be exercising limited and exclusive jurisdiction. There is need for decentralization of judicial functions. Article 32 jurisdiction can be exercised by the District Judiciary. Only substantial questions of law should be left to the Supreme Court. It is already provided in the Constitution and needs just to be exercised. It is better to increase the jurisdiction of the District Judge rather than increasing the number of benches of the High Court.

Session II

The theme of this session was “**Development of Administrative Law in the year 2014**”. The resource person for this session was Professor Upendra Baxi and Mr. Arshad Hidayatullah and the panelists for the session were Justice DM Dharmadhikari and Mr. Sriram Panchu.

Mr. Arshad Hidayatullah – On the theme of Natural Justice, till very recently there was no concept of giving a hearing as a principle of natural justice in administrative actions as it was confined to judicial functions. The Right of hearing now is presumed to be a requirement unless the statute excludes it. What is interesting is that the Supreme Court extended the right of hearing to the extent of the duty to give reasons. The right to give reasons has recently been extended to administrative functions. The second theme of discussion is the judicial interference in policy decisions. Though the decision in the Bennett Coleman’s case laid down the law that the court will not interfere in policy decisions of the executive, but in recent times the High Courts have often involved themselves in policy decisions. In the 2014 case of *Census v. R. Krishnamurthy* the Supreme Court observed that “it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. ” Hence, now policy decisions can be interfered with by

the courts. This same reasoning has repeatedly been used to justify the judicial review of a quasi judicial function. The question that arises whether it is the function of the court to sit in judgment over government policy decisions. In the 2014 judgment in *Rishi Kiran Logistics v. Board of Trustees of Kandla Port Trust* the Supreme Court interfered in the matter of a tender under a policy, and held that the particular authority has a right not to accept the highest tender and to even prefer a tender other than the highest tender, but the authority's action in accepting or refusing the bid should not be arbitrary or based on favoritism. The Supreme Court held that it was the duty of the court in the context of judicial review. What is notable is the Wednesbury Principle of Unreasonableness was reiterated and the Court observed that if the power of making policy decisions is exercised for any collateral purpose, it is liable to be struck down by the court. Hence, now the Courts are interfering in policy decisions of the government.

On the theme of delegated legislation, the question is that whether there are any exceptions to the rule that delegate has no power to delegate. In the 2015 judgment by Justice Chelameshwar and Justice Bobde in *Keshavlal v. Union of India* set out certain principles on the extent of permissible delegation of legislation but left us with the proposition and did not apply it to the facts of the case. The proposition that an essential function cannot be delegated does not appear to be a clearly settled proposition. In this case the function of defining expressions used in a statute was held to be a non-essential function of the legislature. This judgment does not tell us whether an essential function can or cannot be delegated. Where the statute is silent on the meaning of an expression, the court can coin the meaning of the expression to suit the requirement of the statute. In a leading judgment in the case of *Subramanian Swamy v. CBI* the court dealt with the question of delegation in the context of Article 14 of the Constitution of India.

Two interesting things to be noted is that - 1.) Very often, the concerned authority tries to implement a policy which prima facie finds unsustainable. So the Court is invited to

pronounce the policy as invalid. In *Pune Municipal Corporation v. Kausarbag Co-operative Housing Society*, a bench of Justice Gogoi and Justice Eqbal pointed out the practice of the government to disown and challenges its self professed standards as given in its policy. Such practice of the government to depart from its self professed norms is neither permissible nor would the court be required to consider the same.

Justice Thakur and Justice Khalifulla in the Bihar Cricket Control Board Case held that the functions of the board are clearly public functions even though they are exercised by a registered society and hence is amenable to writ jurisdiction. The impact of the decision would be to open the flood gates of litigation and it may not be a good step for administrative law as such as the parameters for judicial intervention have been widened.

Prof. Baxi – Continuous exercise of jurisdiction and supervision of matters can only be successful if the District Courts are empowered in this regard. The Bihar Cricket Control Board would open the flood gates of litigation. The question that arises is whether multinational companies exercising functions akin to public functions would be amenable to writ jurisdiction.

In Administrative Law, there are a few principles of natural justice. These are elementary requirements to good governance. Why is it such an issue to adopt these principles in administration and why is there endless litigation over these principles? Why do governments and bureaucrats internalize these rules. In the 2014 decision in Bishwanath Bhattacharya's case the Supreme Court held that there was no universal principle that, where there is a requirement for the reasons to be recorded before initiating administrative action, the reasons must be communicated. Why is there not a universal rule that the reasons need to be communicated? There must be a logical reason for the decision. Similar situation arose in the Public Interest Litigation filed in the Bhopal Gas Tragedy case where the decision was given without hearing all the parties and a nominal post-decisional hearing was thereafter given to the parties not

heard. Judges are required to give reasons for their decision otherwise there are only exercising power and not their reason. In such cases, the judges have failed to exercise the very same principles of natural justice.

Administrative Law is adjudicatory policy regarding governance. Should judges adhere to their own adjudicatory policy? According to the theory of Demosprudence the answer would be in the negative and that the decision must be suited to the people, while jurisprudence says that the decision should be according to the adjudicatory policy. In Delhi Laws Case, policy was defined as the statement of conduct whose essential feature is the power to annex sanctions.

In the Goa Hotels Case the policy was not under law. The question that arises is what is difference between adjudicatory policy and executive (political) policy. Administrative Law is currently unable to answer but should answer.

Discussion by the Participants – Justice Nagamuthu referred to the decision of the Supreme Court in the *National Legal Services Authority (Transgender)* case and the observations of the Court in Para 129 wherein the Supreme Court has recognized transgenders as the third gender but has left the issue of providing legal recognition under the statutes unanswered. The issue raised was what was the position of transgenders in the present scenario. Suppose a hindu male dies leaving behind a daughter, a son and a transgender. Will the transgender become a member of the coparcenary and will he get rights to have his share in the father's property. Also if a Hindu transgender dies what is the law regarding the devolution of his property? Supreme Court has declared the transgenders as a third gender. It has not directed the Legislature to make laws in this regard. If the Supreme Court has made a law creating a third gender, it should also define the rights of the third gender. This problem will arise in the future before the courts. Also, the decision upholds the transgender person's right to identify his gender. So if a person identifies himself as a transgender what is the criteria and mode for determining he is a transgender? Who is the authority

to decide on this issue? As transgenders are to be recognized as a socially and educationally backward community, there is a potential for misuse and false claims.

A factual problem arose where a person born as female got a job as a police woman on a post reserved for women. On medical examination she was found to be a transgender. She was discharged from service. In this case, the decision of the Supreme Court on transgender rights has failed to aid her. The High Courts are now flooded with cases like these. The High Court of Madras has determined this issue and has held that it is the identity that the person adopts that is relevant. So long as the person identifies herself as female, that is the gender identity that must be considered.

Justice Dharmadhikari – The Supreme Court after giving recognition to transgenders has indicated that a lot of legislation is required in this field and have stopped there. This area is required to be taken up by the legislature. Indeed there is a potential for misuse but the Supreme Court has directed that the third gender should also be recognized in all matters. It is a new area and in uncharted and Supreme Court has rightly held that we must look into this matter. A similar case as mentioned by Justice Nagamuthu also happened in the case of the Mayor of Katni where the Supreme Court held that the eunuch had no right to stand for election for a seat reserved for women.

Mr. Sriram Panchu – This issue of legal recognition is step 2 and it is more likely that the High Courts may be called upon to decide these issues in the future.

Participant – The Raoji's case on death sentence was overruled and following the Raoji's case many death sentences were confirmed. By that time the jurists came to know of this and a memorandum was given to the President of India. What has happened in this regard?

Prof. Baxi – There isn't any information on the memorandum but sooner or later the President will have to consider and give a reply on the issue. Also on this issue the interesting fact is the Supreme Court itself strikes down its own rules in subsequent

decision. The problem of delay is only for the rarest of rare cases. But the question is what about the delay in other cases. What are the implications of the Shatrugan Chauhan decision on non capital punishment cases and on under trial prisoners? The principle laid down in this case needs to be extended to under trials, suspects and all other cases.

Observation by a Participant – In a case the person had already served more than 14 years in prison. The question that arises is that if a person is required to stay in prison for the rest of his life what is the purpose of reformation in the current judicial system. This question has yet to be answered by the Supreme Court. There is a human rights issue involved in these cases.

Session III

The theme of this session was “**Judicial Initiatives for achieving Social Justice in 2014**”. The speakers for this session were Justice V. Gopalagowda and Justice DM Dharmadhikari and the panelists for the session were Prof. Upendra Baxi, Mr. Sriram Panchu and Mr. Arshad Hidayatullah.

Justice V. Gopalagowda – The theme for this session is very relevant in the Indian context. India became a republic on 26th January 1950. We accepted the Constitution of India which according to the Supreme Court in Kesvananda Bharti’s case while interpreting the document was held to be a political and an organic document. In SR Bommai’s case, it was held to be a political document. Political science in my opinion is human science. The Preamble to the Constitution of India and Chapter 3 & 4 of the Constitution of India are very important in the theme of social justice. The preamble which has been held to be a basic feature of the Constitution in the Kesavananda Bharti’s case. After 1977, the 42nd amendment to the Constitution and the term ‘socialist’ was incorporated into the Constitution. However, even before the

introduction of the term into the preamble, the judicial understanding of the Constitution was that socialist. The proactive judges of the Supreme Court including Justice Krishna Iyer, Justice Bhagwati and Justice Chinnappa Reddy gave life to the Directive Principles of State Policy. Their contribution is great in the field of social justice.

The concept of social justice is integral in the concept of justice in the generic sense. Justice is the genus of which social justice is one of the species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, tribal and deprived sections of society to enable them to live a life of dignity. The phrase 'fraternity' in the constitution speaks of the dignity of a human being. Article 14 envisages equality and equal protection of laws. Article 15 states that irrespective of caste, colour, religion etc. all persons must be treated equal. Article 39A of the Directive Principles of State Policy provides equal opportunity to both men and women. The Constitution is for good governance and Part 3 & 4 must be rigorously implemented. The State particularly the judiciary as stated in the Kesvananda Bharti's case is that the judiciary is also accountable to the people of the country. While interpreting law and giving effect to the Constitutional principles we are answerable to the people of the country. Good governance is contemplated in the Constitution. From this perspective, the Constitutional Courts and the judges have interpreted the Constitution and though in Kesavananda Bharti, the term 'socialist' was not included in the Preamble to the Constitution, the Constitution bench has said that Part 3 and Part 4 of the Constitution constitute the heart and soul of the Constitution. From that judgment onwards, there is a great contribution made to achieve social justice. The concept of social justice is implicit in both in the agrarian law, the industrial law. The aim of social justice is to achieve substantial degree of social and economic equality. The concept of social equality is not a new concept and has been present in the Constitution of India. In the 42nd amendment, the word 'social order' does not refer to 'law and order' but refers to Karl Marx's view of economic justice. The first Prime Minister stated in the Constituent

Assembly that India is primarily an agrarian country. If land reforms are not made then the interests of the tiller will not be protected. Article 19(1)(g) of the Constitution of India is interrelated to Article 14 to achieve the concept of equality and equal opportunity. The Supreme Court has interpreted Article 21 of the Constitution of India to include livelihood within the meaning of life.

In Champakam Dorairaju's case providing reservation in educational institutions resulted in the amendment of the Constitution of India. Thereafter in keeping with the interpretation of Article 47 and the Directive Principles of State Policy to achieve equality, an amendment was made to the Constitution of India. These laws have been accepted by the Supreme Court. In Unnikrishnan's case, there is a great contribution made by the Supreme Court to the right to education. In this case, the emphasis is made with reference to what is the importance of education in Para 144.

In the public interest litigation in the Asiad Games case, Justice Bhagwati has dwelt on the matter of non payment of minimum wages by the contractor to the workmen. Here it was held that the court is not just for the rich. In Bandhua Mukti Morcha's case, the Supreme Court has given a broad interpretation and connotation to the Right to live with human dignity. The Apex court has developed the concept of distributive justice and has observed that the constitutional mandate is that the State has to provide justice and equal opportunity to all. In Waman Rao's case it has been said by the Supreme Court that to own a property is a status of a person.

The Supreme Court has also acted as an instrument of social justice and given adequate support to weaker sections of society in interpreting the amendment to the Industrial Disputes Act. Section 11A of the Industrial Disputes Act post the amendment in 1971 empowers the Labour Courts to render justice as the original jurisdictional court. In this case it was held that the labour court has the power to reappraise the evidence. 1973 Firestone case. Labour courts and tribunals have the power to interpret and find out the proportionality of the punishment imposed by the

employer. The implications of this case is that in order to achieve the vision of social justice, the labour courts and tribunals are required to interfere with the punishment taking into consideration the gravity of the misconduct and extenuating circumstances. This case is a milestone in law. After 1973, Justice Krishna Iyer in the Ratlam Municipality's case held that the defence of lack of revenue cannot be accepted. The role of the judiciary with respect to certain unenumerated rights such as right to shelter, right to be rehabilitated, right to food, right to livelihood is unquestionable. The judiciary through its activism has transgressed into the domain reserved for the legislature and executive and has held the fundamental rights are not islands and have to be read along with other rights. On a reading of Article 14, 19 and 21 it is held that the procedure established by law as mentioned in the Constitution means not just any procedure but should be a just, fair and reasonable procedure because it is governed by Article 14 of the Constitution of India.

In a case relating to sentencing policy Supreme Court has said that while awarding sentence a judicial determination was required and it was a statutory obligation to determine the case and to act fairly and consider the various aspect relating to the convict while sentencing.

Justice DM Dharmadhikari – What is perceptible and pronounced from the decisions is that Supreme Court is carrying the same march of expanding Articles 21 & 14 post emergency. We have to consider the expansion will go to what extent. The preamble is the polestar but it guides not only the judiciary but also the other wings and functionaries of the State. If the judiciary assumes too much of responsibility of not only enforcing the fundamental rights under the Constitution but also improving the quality of life of the people as provided in the Directive Principles, then to what extent the judiciary will succeed? In this forum we can consider how much progress we have made in the march of providing social justice to the people. Ratlam Municipality's case is one of the earliest cases to achieve social justice. But judgment has not had any impact on the situation in Ratlam. Similarly, the Ganga Yamuna pollution there seems

to be no end in sight. The founders have made a very clear distinction between the rights that cannot be tinkered with or snatched and rights and needs which are required to be fulfilled. There is a clear directive that the rights under Part 4 of the Constitution are not to be enforced by the courts. In Olga Tellis case, the involvement of the Supreme Court is justified on account of the gravity and emergency of the issue on the lives of the people. The Supreme Court can involve itself in matters relating to the minimum requirement of human life but in issues of the right to access to health services, right to education, right to clean air and water – how can the Supreme Court guarantee the same? The Supreme Court does not have the sword and the purse but only has the moral authority. The question is to what extent can the court exercise its moral authority and to what result? There is need to undertake study on the impact of the Supreme Court judgments.

In the march of social justice there is no doubt that the Supreme Court has contributed to a great extent. But the question is how many more rights are the courts going to provide to the people under the Right to Life under the Constitution of India. The difficulty of taking so much of responsibility by the courts for providing social justice then what will the other 2 wings do? The result of this is that the legislature is becoming slack and expecting the judiciary to take all the necessary action. The vigilant action by the Supreme Court will also have its adverse result in that the other wings will not perform their functions and leave everything on the Courts. We are at a stage where the judiciary has to exercise some kind of social restraint. We need to entrust responsibilities on the executive and the legislature.

Session IV

The theme of Session IV was **“Jurisprudence relating to Allocation of Public Resources”**. The speaker for the session was Hon’ble Justice AK Patnaik and the

panelists were Justice V. Gopalagowda, Justice DM Dharmadhikari, Prof. Upendra Baxi, Mr. Sriram Panchu and Mr. Arshad Hidayatullah

Justice AK Patnaik – Can judiciary do something with activism? Firstly, Article 226 of the Constitution provides that the jurisdiction may be exercised for enforcement of fundamental rights or for any other purpose. The Supreme Court has held that any other purpose should be interpreted in the parameters of the writ jurisdiction under Article 226. Secondly, the constitutional principle of separation of powers specify that policy matters are within the exclusive domain of the Executive and are not to be interfered with by the Courts. Thirdly, the Directive Principles of State Policy cannot be enforced in any court of law. In view of these limitation the question that arises is how do courts intervene in matters of social significance.

Though Article 39B of the Constitution provides that the State must ensure that the control of material resources of the community are distributed to best serve the common good. This is the vision and the mandate to the Parliament and the Legislature with regard to the use and distribution of the material resources of the country. The policy on utilization of material resources though is left to be decided by the Parliament and the Executive, the policy must be guided by Article 39B. The Courts cannot specify the policy that is to be adopted. Hence, in these limitations, the courts need to intervene in the allocation of public resources.

Until recently, the government was formulating its own policies for allocation of resource, choosing the beneficiaries and allocating the resources to such beneficiaries to ensure that the industry grows through the privatization process.

A new jurisprudence was developed by the Supreme Court in this area. One aspect of public resources is land and its acquisition. This issue was decided by the Supreme Court in the Narmada Bachao Aandolan's case wherein it was held that the land cannot be utilized and submerged for building a dam unless and until rehabilitation measures are taken to rehabilitate the affected people. Natural resources and its

allocation affects the lives of people in a tremendous way and has great significance for the country. It cannot be left as a mere matter of policy and the courts must protect the rights of the people under Article 21 of the Constitution.

In the 2G spectrum case, the Supreme Court held that auction would be the best method for distribution of the resources. In Para 75 the Court held the State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Also that spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to States as per international norms. This judgment is a departure from the earlier practice of non-interference in policy decision of the Government and requires the policy makers to keep the doctrines of equality and of constitutional trust in mind while formulating the policy. Also the courts requires that the procedure under the policy must be fair. The Supreme Court also held that as natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-a-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-a-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.

The Supreme Court has been criticized for holding that auction is the best method for distribution of resources. This decision faced much criticism and it was opined that the ruling that auction was the best method for allocation of resources had resulted in raising the cost of spectrum. This resulted in the reference to the Supreme Court under Article 143 as to whether public auction was the only option to the state. The Supreme Court held that the court cannot conduct a comparative study and suggest the most efficient method of allocation of natural resources. If there is a universal method in the first place, it respects the mandate and wisdom of the legislative for such matters. Hence, this decision restored the position that the courts were not to interfere in policy decisions. The method of allocation is a matter of policy and entails intricate economic choices and the court lacks the necessary expertise to make them. The court cannot mandate one method to be followed in all matters of allocation. Hence, auction cannot be conferred the status of a constitutional principles and is not the only method for allocation of resources. However, when such policy decision is not backed by social welfare purposes and could be challenged on other grounds. Rather than prescribing a method for allocation, the Supreme Court held that a judicial scrutiny of the method can be undertaken.

In Goa Foundations case, the mining leases were being used beyond the renewal period. The Supreme Court held that renewal would not be automatic and the renewal may be made by the government for reasons to be recorded if it is of the opinion that the renewal may be in the interests of development.

In Manoharlal Sharma's case, the Supreme Court held that 'the exercise undertaken by the Central Government in allocating the coal blocks or, in other words, the selection of beneficiaries, is not traceable either to the 1957 Act or the CMN Act. No such legislative policy (allocation of coal blocks by the Central Government) is discernible from these two enactments. Insofar as Article 73 of the Constitution is concerned, there is no doubt that the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws and the executive instructions can fill up the gaps

not covered by statutory provisions but it is equally well settled that the executive instructions cannot be in derogation of the statutory provisions. The practice and procedure for allocation of coal blocks by the Central Government through administrative route is clearly inconsistent with the law already enacted or the rules framed.' The Supreme Court also held that 'the argument that auction is a best way to select private parties as per Article 39(b) does not merit acceptance. The emphasis on the word "best" in Article 39(b) by the learned senior counsel for the intervener does not deserve further discussion in light of the legal position expounded by the Constitution Bench in *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* [(2012) 10 SCC 1] with reference to Article 39(b). We are fortified in our view by a recent decision of this Court (3-Judge Bench) in *Goa Foundation v. Union of India and Ors.* (2014) 6 SCC 590] wherein following *Natural Resources Allocation, In re, Special Reference No. 1 of 2012 : (2012) 10 SCC 1*, it is stated, "*.....it is for the State Government to decide as a matter of policy in what manner the leases of these mineral resources would be granted, but this decision has to be taken in accordance with the provisions of the MMDR Act and the Rules made thereunder and in consonance with the constitutional provisions.....*".' Following this decision, the column written by Mr. Kapil Sibal read as 'the government has won but the country has lost'. Mr. Sibal's argument was that with the decision on coal resources and its allocation, the cost of electricity was bound to rise. This decision will also raise the price of steel, cement etc. Infrastructure cost and power cost would rise and this would be harmful for the country. With these judgments and the ordinance that has passed the law regarding to allocation of resources is that the licenses upto the first renewal can be granted for 50 years but after the first renewal, the licenses lapse and the distribution should be made by auction. So the impact of these judgments is to be seen in the future. But judges should avoid encroaching into the legislative and executive field. But we must also ensure that the principle of Article 39A along with Article 14 of the Constitution is followed and the allocation is made to subserve the common good.

Justice V. Gopalagowda – Under the guise of making policy, the public trust doctrine is being blatantly violated. The Supreme Court has taken the proactive role to protect the preamble, the fundamental rights and the Directive principles of state policy. In the area of allocation of public resources, the natural wealth of the nation is being completely destroyed in favour of the private entrepreneurs under the guise of disinvestment. In BALCO's case, the Supreme Court has held that the court cannot interfere in policy decisions, contrary to the view of the Constitution bench of the Supreme Court. The Policy of the government is indicated in the law. If agrarian reforms is the policy of the government to achieve the constitutional object is held to be valid despite violation of fundamental rights, how can this policy of material resources serve the common good and achieve the constitutional mandate of Article 14 and Article 39A. In Narmada Bachao Andolan's case, no rehabilitation policy has been framed till now. If the policy is contrary to the constitutional mandate it is a fraud played on the people. In the Land Acquisition Act, the land can be acquired in the interest of the company. Where the rights of the people are being infringed upon in the allocation of resources, the court cannot fold its hand and refuse to intervene on the grounds that it is the policy decision of the government. In State of West Bengal v. Anwar Ali it was held that even on the question of law an arbitrary and unreasonable action can be struck down. What happened to the 7 judge bench decision in Ranganath Reddy's case where it was held that the work of contract carriage is a material resource. There is a need to be concerned about the disinvestment policy of the country as all essential functions and resources of the state are being utilized by private players. There is need to be concerned otherwise the people of the country will lose faith in the system of governance and in democracy.

Mr. Arshad Hidayatullah – In a recent judgment by Justice Dipak Misra, Justice Nariman and Justice Lalit, the Supreme Court has set out the exact scope of interference by a court in a policy. It states that it not the domain of the court to embark

on an enquiry into the issue of whether a policy was wise. However, the court will interfere if the policy is capricious or not informed by reason or totally arbitrary. In this judgment they have also stated that the court can interfere if the policy is arbitrary or based on favoritism.

Justice Dharmadhikari – As far as government policy decisions are concerned, international environmental norms can be utilized for exploitation of resources and sustainable development

Day II

Session V

The theme of this session was “**Tribunalisation of Justice- Boon or Bane**”. The speaker for this Session was Mr. PK Malhotra and the panelists were Justice DM Dharmadhikari, Justice VS Sirpurkar, Mr. Arun Shourie and Mr. V. Sudhish Pai.

Mr. Malhotra – This topic has generated lot of interest as most of the powers of the High Courts are being transferred to the Tribunals and there is a concern as to divestation of judicial functions to the tribunals. At first reference is made to the editorial which appeared in the Hindu on March 18 with regard to the judgment of the Madras High Court striking down certain provisions which relate to the Intellectual Property Appellate Board.

Tribunals are special alternative institutional mechanisms usually brought into existence by or under a statute usually arising with reference to a particular statute or to the controversies arising out of any administrative law. In L. Chandra Kumar’s Case, the Supreme Court observed that the tribunals perform supplemental function to the court. Similarly, in 2010 a constitution bench speaking through Justice Raveendran has

stated the difference between a court and a tribunal. The Income Tax Appellate Tribunal is one of the earliest examples of a successful tribunal system in India and probably is the catalyst for the creation of all other tribunals in India. By the 42nd amendment Article 323A and 323B were inserted into the Constitution of India which empowered union and state governments to set up certain adjudicatory tribunals. The reasons given while introducing the 42nd amendment was to reduce the mounting arrears in the High Courts and to provide speedy disposal of service matters, the revenue matters and other matters of social importance. It is interesting to note that not a single tribunal in the country has been constituted under Article 323B. One of the issues that arises is whether we need so many tribunals. It proves to be a burden on the exchequer. The government has undertaken an exercise to see if any tribunals can be merged on grounds of overlap in the functions or insufficient work. Another issue for discussion is whether the tribunals have been successful in reducing the pendency of cases. An analysis of the statistics relating to the Central Administrative Tribunal reveals that as on June 2013 the pendency was 31000 cases. As regards the other tribunals, the pendency that remains is mostly due to non-filling up of the posts in the Tribunal.

The judicial pronouncements on the issue of Tribunalisation begin from the insertion of Article 323A and 323B. In Sampath Kumar's case, it was held that if the tribunals are a substitute for the court then the efficacy, qualification and independence should be of the same level as is existing in the court and they should not be subserving or subordinate to the executive. In this case, the jurisdiction issue of the taking away of the power under Article 226 was not raised and this issue was raised later in L. Chandra Kumar's case. In L. Chandra Kumar's case the 7 judge bench held that what is given to the tribunal is the appeal power. If a statutory power is given to the High Court the same can be cast on the tribunal. But if the constitutional power is cast on the High Court the same cannot be exercised by the Tribunals. In 2010, Justice Raveendran speaking for the 7 judge bench of the Supreme Court held that legislature can enact a

law transferring the jurisdiction regarding certain specified subjects under any statute. Any tribunal to which the existing jurisdiction of the courts is transferred should have the same conditions of service as the court. Tribunals should have technical members. However, the issue that arises is that if technical members are required to that the High Court suggested that the technical members working with the executive should not work in judicial capacity. If that is so then the issue that arises is where to get the technical members. In 2014 the constitutional validity of the National Tax Tribunal was challenged. It has taken the Supreme Court 14 years to decide whether the tribunal should be constituted or not.

In Madras Bar Association Case the Supreme Court held that the parliament has the power to enact legislation and to vest the adjudicatory function earlier vested in the High Courts on any other court or tribunal. Such power would not violate the basic structure of the Constitution. The basic structure would only be violated if when constituting the tribunal the salient characteristics of the court are not adhered to. The salient characteristics and the conventions of the court sought to be replaced are not incorporated in the tribunal. What requires consideration is the net effect of these judgments.

The effect of these judgments is that the court is upholding the constitutional validity of Article 323A and Article 323B of the Constitution and holding that tribunals can be constituted. Further, it has been held that company secretaries are ineligible to represent although it a specialized tribunal where company secretaries and chartered accountants are technical experts but as they are not legally qualified they cannot appear. Also the provisions under the Act which prescribe the qualification, method of appointment, tenure etc are not in accordance with the principles of law as the persons appointed are not equal in rank or don't have the judicial capacity of a High Court judge and hence are unconstitutional. The inference that can be drawn from these judgments is that the Supreme Court while appreciating the need of tribunals has upheld the power of the Parliament to constitute tribunals. The recommendations that

can be culled out from the various Supreme Court judgments are independence, security of tenure and capacity of the members to handle the disputes, efficacy of the tribunal and accessibility. Another important recommendation is uniformity and a single umbrella organization and independent appointment procedure.

The advantages of tribunals that has been recognized by the Supreme Court are the decisions are made jointly by panel members who pool in the technical and expert knowledge and legal knowledge related to the issue. Also the hearing would be simpler and more informal than the courts. The question that arises is whether the principles laid down by the Supreme Court are being exactly followed. If the qualification of the members of the tribunal is required to be judicial and if the procedure under the Civil Procedure Code is being adopted and the advocates are appearing before the tribunal, then how can simpler methods and procedure be adopted. If the judges are manning the tribunal, then the mindset of the judge and their way of functioning would be used in the tribunal. It would better serve the interests of justice if technical members constitute a tribunal and the technical experts appear before the tribunal then the procedure rigmarole can be reduced and the redressal will be quicker. Quoting an example of the Consumer court, it is obvious that though we are constituting tribunals to replace the courts but the tribunals are also following the same procedural rigours as followed in the courts and that probably is one of the reasons for delay in deciding disputes by the tribunals.

The independence of the tribunal and the qualifications of the members cannot be compromised but at the same time there is a need for technical members to be a part of the tribunal and the procedural rigours must be reduced. The way forward as is rightly identified by the Supreme Court is to appoint the members of the tribunals without delay. A similar system as proposed in the LLegatt Committee report which recommended for uniform service conditions for all tribunal members in UK needs to be adopted in India. Steps have been taken to this effect in India. A bill for uniform service conditions for member of the tribunals has been introduced in the Parliament

last year. The object of the bill specified that the qualification of the members of the tribunal will remain different as the requirement of the tribunals are different and the procedure will also be different as in the hierarchy certain tribunals are replacing the district courts, some are replacing the high courts.

The Selection of the members including the technical members are made in most cases by a selection committee headed by a Supreme Court judge who is a nominee of the Supreme Court of India. Other members may be secretaries to the Government of India. But if such a high level committee is sitting and making selection of the members it is necessary that wide options must be given as to where the candidates for selection may be sourced from. Also if selection is made by such high level committees then why is the allegation made that the members are not able to discharge their duties in the tribunals. It can be because the law is not making a wide choice of candidates available to the selection committee. If the members are appointed and the vacancies are filled, there is no reason why the pendency cannot be reduced. There is a need for a review of the selection procedure. If the selection is made by a high level committee then the procedure for approval by the government can be reduced.

On the issue of the linking of retirement age to the source of recruitment. The retirement age should be same for all members. If for the last 7-8 years we have been able to contain the pendency and keep it static at about 3 crores it is only because of the functioning of the tribunal and the adoption of ADR at a mass scale. Had this not been done the pendency and workload with the judiciary would have been much more than it is today.

Justice Sirpurkar – The umbrella legislation that was proposed to be enacted to bring uniformity in the conditions of service of the members of the tribunals is yet to see the light of day and there is very little hope of it coming into force in the near future. Quoting an example of the function of the Competition Appellate Tribunal, it is important to note that there is hardly any assistance to the members of the tribunal in

performing their functions. Despite the complexity of the matters, the members are required to decide the matters by themselves. In these cases, the stakes are very high and there is need to give reasoned orders. Very often the decisions do not provide reasons for the order. Another question that must be considered is why the appointments to the vacant posts in the tribunals are not expedited.

Participant – The Labour Appellate Tribunal was constituted in 1953 and abolished in 1963. There are cases of the year 1982 that are still pending. Is it possible that the tribunal can be reconstituted.

Justice Dharmadhikari - As a judge of the High Court can take cognizance of it and in case of a public interest litigation you can direct the State to constitute the tribunal.

Session VI

Session VI was a Book Reading Session in which the Mr. Arun Shourie and Mr. V. Sudhish Pai presented their views as expressed in books authored by them.

Mr. Arun Shourie – Mr Shourie presented his views as expressed in his book “Falling Over Backwards: An Essay against Reservations and Against Judicial Populism”. He opined that because of bending to the intellectual fashions of the day, the courts had legitimized the worst instincts of the politicians and that which was forbidden in the Constitution such as caste as basis for reservations has become the norm. By analyzing judgments from 1950 onwards, the changes in the trend of judicial pronouncements on reservation have been traced.

The public accountability that exists in India is due to the judges and in a small part to the media. For the common people, the courts have been the great bastion for freedom of speech. I do not agree with people who find fault with the judiciary for what is called their excesses because wherever the judiciary has been active it has been so

because the executive has neglected its duty. Some of the most salutary improvements that have taken place have come only because the judges have overstepped the limit and legislated. For example the impact of the Lily Thomas judgment by the Supreme Court is that the self serving element in the Representation of Peoples Act has been done away with. Earlier, the person who would stand disqualified would file an appeal and prolong the case as it would delay the application of the disqualification. Now after this judgment the person would prefer to expedite the case as the disqualification would apply till he is acquitted. With the alarming deterioration in the quality of the legislators and the executive in India, the only limb of the Constitution which is left for recourse is the Judiciary.

As regards accountability of public servants, no adjournments should be granted in cases relating to public servants. The judiciary is too lenient to lawyers. In the case of public servants, we should shift in matters of the burden of proof from 'beyond reasonable doubt' to the 'preponderance of probability'. The public servants should not be allowed to get away with legalisms. Focus must be on the brute facts otherwise the lawyers will derail every case. The judges should see through the deals which are being made outside the courtroom by politicians and should be taken notice of by the Judges and the lawyers and the prosecution should be confronted in cases like these.

Another need is for accountability of the judiciary. The judgments should be critically examined. One important issue is that the judgments of the Supreme Court are not being read. In fact advocates are not reading the judgments and are relying on the briefing given by their juniors. It is a sort of 'head-note jurisprudence'. There is need for employing sub editors by the courts to ensure that small errors do not occur.

A review of the judgments on reservations reveals that the courts have written judgments in great length. It seems that the sequence in the decision is missing as if the judgment was written in parts and merged. In the Supreme Court decision in 2009 in *Abhay Nath v. University of Delhi*, the Supreme Court set out to clarify what they had

held in the 2004 decision in *Buddhiprakash Sharma v. Union of India*. The *Buddhiprakash* decision was delivered to clarify what was held in *Saurabh Chaudhary v. Union of India* in 2003 which in turn was necessitated in view of the Supreme Court judgment in *Dinesh Kumar II* in 1986. *Dinesh Kumar II* had to be delivered to clarify the scheme set out in *Dinesh Kumar I*. *Dinesh Kumar I* was in turn a result of the decision in *Pradeep Jain's* case in 1984. In *Abhay Nath*, there were typographical errors which create confusion in the judgment. The uncertainty of law that the plethora of judgments creates causes hardship to the court as well as the people and would increase the workload. A similar confusion has happened in *TMA Pai's* case. First is the *St. Stephens College* decision which was delivered by a 5 judges bench in 1992. Then in a petition by the *Islamic Academy* in 1993 before a 5 judges bench, the court holds that the *St. Stephens* decision needs to be reviewed. Hence, a 11 judges bench in *TMA Pai's* Case in 2002 gives a judgment which is interpreted in various ways. Hence to clarify the decision, the *Inamdar's* case the 5 judges bench attempts to cull out the law. Despite the number of pronouncements, many issues are yet to be clarified.

Lastly, it appears from a reading of judgments that often the judgments are not written by the judges. In *Indian Medical Association v. Union of India*, where the question was whether the school run by the *Army Wives Association* was part of the State or not, it seems that some one has written a school essay on topics like Liberalization, Globalization etc. Too often the content and decision seems to be influenced by the intellectual fashions of the day.

On the issue of reservation, what was impermissible under the Constitution has now been legitimized through the judgments of the Supreme Court. We need to re-look at the way our country operates in view of the current global scenario. Other countries are not going to slow down for us if we are not able to solve our internal problems.

We also need to keep in mind the judicial system and its approachability for the common man. There is need to make the courts more accessible to the people and to understand the expectations of the people from the judiciary.

Mr. Pai – Mr. Pai discussed the views expressed by him in his book “Working of the Constitution: Checks and Balances”. Mr. Pai dwelt on the need for critical legal literature and the academic evaluation of the judiciary’s role and contribution. The writings in the book follow the theme ‘Constitutionalism as a limitation on the government and the control of exercise of power’

Mr. Pai discussed his views on the issue of privileges of the members of the Parliament. In *SR Chaudhary v. State of Punjab* the court held that a non-elected member of the house could not continue as a minister. Having said that the court further observed that the privilege to vote in the house is conferred on a member of the house and does not extend to non-elected members. In Mr. Pai’s opinion this is not the correct view and the court need not have gone into this issue. In view of the express provisions, the impact of the decision is to rewrite the provisions of the Constitution.

Another area that is discussed in the book is the field of law making. The law makers have an obligation to make the law known to the people. Though bills are published in the Gazette but it is suggested that greater publicity, circulation and debate should be made on the law and every effort be made that law be made known to the people. If the State has not made reasonable efforts to make the law known, a citizen should have the right to claim that he is not bound by it and the court must uphold that stand.

In respect of the exercise of writ jurisdiction, it is opined that the Supreme Court and the High Courts have restrained themselves with unnecessary fetters. Also the Supreme Court has reduced itself to a court of appeal which was not envisaged by the Constitution. The result is that the court has no time or inclination to take up serious constitutional work which it was intended to undertake.

In *Rajiv Sarin v. State of Uttarakhand* and in *KT Plantations v. State of Karnataka* the error made by the court in one judgment is repeated in the second later judgment. Another important area is the failure to bring laws that are enacted into force.

Justice Dharmadhikari – In the morning session we heard Mr. PK Malhotra and Justice Sirpurkar on the issue of Tribunalisation of Justice. The purpose of tribunalisation is to reduce the workload of the Courts, to provide expert assisted decisions in technical cases, to provide quick and easy dispensation of justice and to reduce pendency. The difficulty is on the issue of how to man these tribunals. The fact is that the tribunals have not achieved their purpose. The reasons for this are poor infrastructure, delay in appointments and lack of people with the relevant expertise to assist the tribunals.

As regards the independence of judiciary, it would be suitable to give lifetime appointments to judges of the Supreme Court. This will ensure that they maintain their independence and will not go after executive posts. The Constitution permits this in Article 127 and Article 128. Rather than creating tribunals it would be better to invite retired judges on ad hoc basis to deal with the caseload.

There is a need to the court into the Supreme Court and High Court - Constitutional court and appellate court. Further, the decentralization of the justice delivery system is necessary.

The programme concluded with the concluding remarks by Dr. Geeta Oberoi - the Director (In Charge), National Judicial Academy.