National Judicial Conference for Newly Elevated High Court Justices on Public Law
[1052]

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Report

Academic Coordinator

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The National Judicial Academy organized "National Judicial Conference for Newly Elevated High Court Justices on Public Law" on 13th – 15th October, 2017. The participants were newly elevated High Court Justices nominated by respective High Courts. The conference facilitated deliberations among participant justices on contemporary topics such as Information and Communications Technology in Courts and Court Management Techniques to improve efficiency and strengthen justice administration; core Constitutional principles such as the concept of Judicial Review, Federal architecture, Separation of Powers, Doctrine of Basic Structure and Fundamental Rights under our Constitutional arrangement. The Conference included interactive sessions and round table discussions on designated themes among participant justices.

Hon'ble Justice P.V. Reddi, Hon'ble Justice G.C. Bharuka, Hon'ble Justice G. Raghuram, Mr. Mohan Gopal, Mr.SudhishPai V and Mr. R. Venkataramani participated as Resource Person in these various sessions of the conference.

Day 1.

- Session 1- The Constitutional Vision of Justice
- Session 2- Court Management
- Session 3- Information and Communication Technology in Courts

Day 2.

- Session 4- Theories of Judicial Review
- Session 5- Separation of Powers
- Session 6- Allocation of Legislative Powers: The Federal Architecture

Day 3.

- Session 7- Fundamental Rights and Restrictions on Entrenched Rights
- Session 8- Theory of Basic Features: Contours
- Session 9- The Art of Hearing

Major Highlights and Suggestions from the Conference

Session 1: The Constitutional Vision of Justice

- The Constitutional vision of justice is an open ended discussion. Thus, it becomes important to determine the meaning of the term Constitution' and its purpose. The Constitution is a document of governance with certain objectives. Every country in the modern time has a Constitution. The Constitution was framed by the Constituent Assembly. Constituent Assembly consisted of some representative members and some elected members. All the Constituent Assembly members had the national goal of self-governance in their minds. The primary object of the Constitution was to secure the rights of people. These rights consists of both justiciable rights and non-justiciable rights. Apart from this, other parts of the Constitution create certain posts and functions and determine how those function have to be exercised.

- The Article 39A of the Constitution makes every participant of the legal system an active member of the legal system. The first objective of the Preamble of the Constitution is to secure justice- social, economic and political.

- The participants started giving their opinions on the idea of justice. Their views are listed below-
    a. We should make all fundamental rights known to people. All fundamental rights should be guaranteed to each and every citizen. Only then can we talk about fulfilling the constitutional vision of justice.

    b. Justice means to decide a particular case within defined legal parameters. Disposal of a case does not necessarily mean that justice has been done.

    c. Justice is actually protecting the rights of everybody.

    d. Justice is a judge's conscience whereby the judge decides a case not merely by looking at the facts but also the social surroundings. Also, this conscience should be based on reasonableness. We should bend the law but not break the law in doing so.

    e. Justice entails redressal to the accused or the aggrieved as per the system of law or some precedents so that there is some certainty.

    f. Justice means to judicially resolve a dispute in a just way and explaining the parties, the reasons for passing that particular decision.

    g. Justice is process of resolving a contentious issue according to laws established vis-à-vis the Constitution for smooth functioning of the society.

    h. Justice should ensure that the citizens are given the confidence that they are protected. Thus, justice is the state of mind of a citizen.

    i. Justice is striking a balance between right and wrong.

    j. Justice means to uphold the values of the society.

    k. Justice entails correcting the wrong use of law by the executives.

    l. In case of lacuna in law, courts should have the power to fill the gap. This, justice is a gap filling phenomenon.

    m. The society at large must be convinced that justice is done.

n. Justice must not be subjective but an objective concept derived from the Constitution.

o. Justice is upholding of the Constitution and other laws.

p. Justice has to justify the social conscience and merely the judge's conscience.

q. Justice entails reaching on a just decision within a reasonable time i.e. neither delayed nor in a hurried manner.

r. Even if society demands punishment and has a strong public opinion, we as judges need to be more reasonable. Thus, it may turn out that our judgments are at odds with the popular public opinion.

- Discretion given to the judges should be exercised by practising the principles of equity, good conscience and justice. The Supreme Court has also come up with certain basic features of the Constitution. One such feature is the 'Rule of Law' which means that no organ of the State can act contrary to law. In guise of exercising discretion judges cannot violate a law. As held in a decision by Justice J.S. Verma, the Supreme Court by virtue of Articles141, 142 and143 can come up with guidelines in case a lacuna exists in law and till the parliament comes up with a law on that matter. But only the Supreme Court has the power to do so.

- The comparison between the Objectives Resolution of India and Pakistan demonstrates that both the nations disagreed on the sanctification system of values and this was one of the major reasons for partition. In the Indian Objectives Resolution it has been stated that '*all powers and authority is derived from the people*' whereas in Pakistan's Objectives Resolution it was stated that '*sovereignty belongs to Allah alone and he has delegated the power*'. An Indian judge carries out a democratic function because sanctification for any value has to be from the people. The Constitution of India guarantees democracy, equality and freedom and justice helps in securing these values. The constitutional vision of justice means creating a society which will always value these freedoms guaranteed by the Constitution.

- The Constitution is a document of governance with certain objectives. The primary object of the Constitution is to secure the rights of people. These rights consists of both justiciable rights and non-justiciable rights. Apart from this, other parts of the Constitution create certain posts and functions and determine how those function have to be exercised. The first objective of the Preamble of the Constitution is to secure justice- social, economic and political.

- The idea of justice responds to the search of human beings about what is right and what is wrong. The word 'JUSTICE' comes from the word 'JUS'. 'Jus' is a sense of right or wrong that is validated or sanctified by some process. Judges cannot be guided by their own sense of right or wrong. We need a validation for this sense of ours and this must be objective.

- The root for the word 'judge' consists of two words 'jus' and 'decire'- it means to decide. The righteousness of conduct can be judged according to a set standard of human conduct. Law is a set of hypothetical fact pattern and the value which creates

this fact pattern is what matters. Judges should know whether their sense of right or wrong is sanctified or not as judges are the guardian of the sanctified values. Justice is the sanctified sense of right or wrong. In this sense, constitutional visions of justice becomes important because we need to locate what is right and what is wrong and this has to be located in the Constitution.

Session 2: Court Management

- The word 'management' has not been used in anywhere in the Constitution. The 14th Law Commission Report was the best law commission report relating to judicial reforms proposed. But even after 70 years of that report being passed, the reforms and deficiencies stated therein have yet not been achieved. That report was a result of demands raised in the Lok Sabha to improve the legal system of the country and to bring transparency in the judicial system. Furthermore, this was the first law commission report relating to judicial reforms.

- Court management involves managing the court requirements like number of judges, infrastructure, support systems, filling of vacancies etc. In Imtiyaz Ahmad v. State of U.P.,[1] the Court set out the norms for finding out how many additional courts were required in the country. The 120th Law Commission Report titled 'Manpower Planning' recommended that the number of judges should be decided according to the population of the place. All high courts were required to give a report on infrastructure.

- In this age of technology, challenge of judicial time management is a feasible challenge which needs to be addressed. With the Supreme Court judgment making CCTV mandatory in courts, problems of case management in some areas can be dealt in an effective manner. It was observed that sometimes judges do not sit on time and most of the time is lost in calling hours. Courts need to manage case progression. Furthermore, at least 20-30% time of judges goes in administrative work. This type of work can be effectively addressed by proper use of information and technology in courts.

- China, having a population comparable to ours, has 1 Lakh judges however we still have 20,000 judges in the country. There is a need to have more courts as this makes justice accessible. Furthermore, mere presence of a court satisfies the people that their rights will be protected.

- Court management is not merely a technical challenge but is also a tool of social change. Court management becomes difficult in cases where there is no social vision. The best tool to bring out court and case management is a judge's social vision. In S.P. Gupta v. Union of India the Supreme Court called judges to be 'social revolutionaries'.

[1] (2012) 2 SCC 688.

- The main objective in court management is to increase the access to justice. In no country, including the U.S. and the UK, the poor have access to justice. When the body of law is progressive but the society is still dominated by old oligarchy, social change is hard to come by and no judicial system will work.

- It was felt that there was a need to come out with a mechanism of making policies relating to administrative side of the judiciary. Thus, National Court Management System (NCMS), as approved by the Hon'ble Chief Justice of India S.H. Kapadia, was formed on 02.05.2012.Subsequently, State Court Management System (SCMS) was also formed. Furthermore, in some states, there are District Court Management System too. Due to the effort of NCMS, there has been an increase of 25% judge strength in the high courts and an increase of 50% judge strength of subordinate courts. The website of the Supreme Court has NCMS reports, where performance reports on infrastructure and other minimum standards to be followed by the Indian judiciary have been uploaded.

Session 3: Information and Communication Technology in Courts

- The victims of delayed disposal of cases are the litigants. Vision of justice entails court management and case management and this management can be done using information and technology in courts. Information technology was not present in the courts in the 1990s. All management decisions involve data reading capability. Thus, we must have reliable data taken from various sources.

- There is also a need to reduce the number of cases being filed in the courts today. Nowadays, appeals from all the alternate forums are filed to the district courts or high courts. This increases the burden on the judiciary. Thus, apart from increasing the number of judges in the judiciary, there is also a need to decrease the number of cases.

- All high courts are independent to develop their own software for managing their affairs. These days, high courts have their own software development teams. E-filing centres have been opened up where all documents pass through the computerised network. The data is fed by the subordinate staff and not the judge himself and this data goes to the national server. The system then auto generates data e.g. cases disposed, case filed etc.

- Nowadays, digital evidence is being accepted as evidence by the courts. Under-trial prisoners are appearing in the court through video conferencing. Thus, we are steadily moving in the direction of virtual courts.

Session 4: Theories of Judicial Review

- The purpose of public law is to discipline the public and judicial review is one of the methods. In 1995, the Supreme Court of Israel remarked that "*judicial review is the*

soul of the constitution itself." 20th Century is the century of judicial review in India. Though judicial review is sometimes called as judicial supremacy, it should not be called so because no organ of the government is supreme, only Constitution is supreme. Today, Constitution is the higher standard. Constitutionalism is limited government and limited government has divine roots in natural law. The power of judicial review also has roots in common law. In 1798, in the case of Calder v. Bull,[2] the U.S. Supreme Court used judicial review to enforce limitation outside the Constitution.

- In UK, in case of Jackson v. Attorney General[3] it is stated that "*it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the* law". This is exactly constitutional supremacy.

- Justice Mathew has remarked that "*few constitutional issues can be represented in black and white*". It is not for the judiciary to come up with something new. Judges merely find what is already there in the Constitution. The judicial review is not anti-democratic till judges know where to draw a line. In A. and Ors. v. Secretary of State, the Home Department[4] (also known as the bBelmarsh case) the court had said that there is no conflict between democracy and judicial review and judicial review merely gives effect to the will of parliament. The court had remarked that "*the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.*"

- If the constitution makers were alive today and had seen more than hundred amendments been made to the Constitution, they would have wondered if they really meant it when they drafted the Constitution. The Constitution of Switzerland contains a provision that gives the judges the power to declare a law i.e. what it is and what it does not have to be. This provision is something novel and even the worlds' oldest Constitution i.e. the U.S. Constitution does not have it.

- Judicial review puts a check on State action. Judicial review is necessary for keeping public authorities in bounds and upholding the Rule of Law. Constitutionalism is 'limited government' and 'limited government' has divine roots in natural law. The power of judicial review also has its roots in common law.

- No Constitution in the world has defined the limits on the power of judicial review of courts. A sizeable part of the world follows the European political traditions and thought processes. The Magna Carta symbolises the liberty of people. Over a period of time, European thought has occupied jurisprudence too.

[2] 3 U.S. 386 (1798).
[3] [2005] UKHL 56.
[4] [2004] UKHL 56.

- The line drawn between constitutional powers of the courts and civil and criminal powers of the courts is an artificial line. Whenever there is any lacuna in the existing law, constitution plugs in. It is often said that the courts cannot legislate. When we try to engraft the role of courts in an established political framework, there is a mismatch because of which conflict occurs.

- Article 13 of the Constitution is an important cornerstone which enunciates the principles of judicial review in the Indian Constitution. However, at the same time, as an institution, courts are bound by the principles which have been developed over time.
- There has been a growth of constitution in issues related to liberty, equality and social and economic rights. He made reference to the Supreme Court decision, wherein it is remarked that Part III and Part IV of the Constitution can be treated like two wheels of a chariot. Thus, the principles of Part III and Part IV were merged.

- Declaration of law by the judiciary in a way limits the power of the Parliament. The judiciary acts as a preserver and ensures that all the three organs of the government i.e. the Legislature, the Executive and the Judiciary work in an efficient and non-conflicting manner. One of the participants posed a question to the resource persons.

Session 5: Separation of Powers

- There are three organs of the government namely the Legislature, the Executive and the Judiciary. The legislature makes the law, the executive executes the law and the judiciary delivers justice. Moreover, all these three organs are equal in position and the courts are given the function of maintaining a fine balance between the three organs of the government. No organ of the government is remotely supreme. All three organs are creatures of the constitution.

- D.D. Basu who has remarked that *"none of the organs of the government can exercise power which properly belongs to the either two*." there is no strict demarcation of powers between the three organs under the Indian Constitution. In Ram Jawaya Kapoor v. State of Punjab,[5]the Supreme Court recognised that there is no absolute separation of powers. Similarly, in Panama Refining Company v. Ryan[6]the U.S. Supreme Court stated the reason for no strict demarcation of powers between the three organs of the government. In the court's opinion "*the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety.*"

[5]AIR 1955 SC 549.
[6] 293 U.S. 388 (1935).

- Since the courts today are dealing with a number of cases, judiciary is embarking on the territory of other two organs. The distinction between judicial power and legislative power is recognised in almost all the countries of the world. Lord Reed who had stated that "*saying judges do not make laws is a fairy-tale*."

- Legislature can any day come up with a law which overturns the judgement of the court. The word 'State' as used in Article 12 of the Constitution has gone a great change in the past 25 years. Furthermore, there can be no unanimity on scope of judicial power.

- There is a need to come up with a limit on this judicial power which can be done by the judges themselves by way of their experience. Legislative determination of judicial dispute is permissible however judicial determination of legislative dispute is not.

- There is no strict demarcation of powers between the three organs under the Indian Constitution. The distinction between judicial power and legislative power is recognised in almost all the countries of the world. Legislature can any day come up with a law which overturns the judgement of a court. There is a need to come up with a limit on this judicial power, which can be done by the judges themselves by way of their experience.

- In the process of tendency of the courts to legislate, many breaches like violation of distribution of powers happen. The people of India become accustomed to see Supreme Court acting like an institution for reforms. Article 142 of the Constitution is a source of power for the Supreme Court to do complete justice only in accordance with power conferred on it by the Constitution. The judges cannot use their own interpretation in doing so. A certain amount of latitude has been granted to courts to ascertain that the human rights of people are protected.

- The authority of courts to intervene comes from the duty cast upon it to resolve the case at hand. However, to what extent the court can intervene, is a question where separation of powers becomes necessary. Judicial despotism should not happen. Separation of powers entails that the legislature cannot legislate in an arbitrary way.

- Justice D.Y. Chandrachud's remark in Union of India v. Rajasthan High Court[7] stated that "*in a democracy based on the rule of law, government is accountable to the legislature and, through it, to the people. Justice should not be made to depend upon the individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, judges walk the path on a road well-travelled."*

[7]AIR 2017 SC 101.

- In S.P. Sampath Kumar v. Union of India[8] the court pondered upon the question whether tribunals have judicial review. Furthermore, in L. Chandra Kumar v. Union of India,[9] the Supreme Court held that the power of superintendence under Art.226 and Art.227 cannot be transferred to the tribunals as they are quasi-judicial bodies. Similarly, in Nilabati Behera v. State of Orissa,[10] Supreme Court provided victim compensation to victims of custodial death. This was something which was not thought about before. Additionally, in D.K. Basu v. State of West Bengal, [11]Supreme Court came up with several directions relating to warrant and arrest. A certain amount of latitude has been granted to courts to make sure that the human rights of people are protected.

- All rights are connected to each other and quoted a statement made in a Supreme Court decision wherein it remarked that "*life is not merely an animal existence*". The authority of courts to intervene comes from the duty cast upon it to resolve the case at hand. However, to what extent the court can intervene is a question where separation of powers becomes necessary? Judicial despotism should not happen. Separation of powers entails that the legislature cannot legislate in an arbitrary way.

- One of the participants asked whether high courts have the power to direct the legislature to being an act in force which has been enacted by the legislature but has yet not been brought in force. The resource person responded that in A.K. Roy v. Union of India,[12]the court held that this cannot be done as bringing a law in force should be left to legislative expediency. In Altamish Rahim case, the Court had said that it is time the law should be brought in force but it did not issue any mandamus.

- Directing the legislature to bring the act into force would in fact be giving effect to the will of the parliament but still, it should be left to the legislature. The Land Acquisition Act, 2013 states that the law would come into force after six months of it getting assent of the president. Making such provisions in the act itself is a better way of making sure that the law comes into force on time.

Session 6: **Allocation of Legislative Powers: The Federal Architecture**

- The Constitution of India provides for allocation of powers between the centre and the States. Under Article 1 of the Constitution, India has been held to be a 'Union of States' and not a 'Federation of States'.

- Federal supremacy is seen in the provision of Article 246. It states that in case of overlap between List I and List II, List I shall prevail whereas in case of overlap between List II and List III, the union law prevails. Union and States legislatures are sovereign in their own spheres. However, more powers are provided to the Union

[8](1985) 4 SCC 458.
[9]AIR 1997 SC 1125.
[10]AIR 1993 SC 1960.
[11] AIR 1997 SC 610.
[12]AIR 1982 SC 710.

legislature. Article 249 gives Parliament the power to legislate with respect to a matter in the State List in the national interest.

- Article 250 of the Constitution provides power to the Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation. Article 252 states that "*if it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly*." Article 253 states that "*Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention*."

- Supreme Court comes in as a guardian of the federal structure of the Constitution. No other Constitution of the world contains such an elaborate fiscal relationship between the Union and the States as has been provided in the Indian Constitution. The federation between the Union and the States has moved forward in the last 25 years with the enactment of Panchayati Raj under 72nd and 73rd amendment to the Constitution. These reforms can be considered as the birth of 3-tier federalism in India and can be called a 'federation of federations'.

- Schedule V and VI of the Constitution are also concerned with allocation of legislative powers. Under both these schedules, governors have the legislative powers. Schedule VII of the Constitution is the source of allocation of legislative powers. If we remove this schedule, there would be no distribution of powers.

- The Constitution itself contains provisions relating to federalism which talk about division of society into centre and states. Before the enactment of the Constitution, the Montague-Chelmsford Reforms in 1919, the Simon Commission Report of 1929 and the Government of India Act, 1935 talked about federalism.

- Sir Morris was the principle draftsman of the Government of India Act, 1935. The Government of India Act had three lists namely the Union List, the State List and the Concurrent List. Furthermore, the Governor General was given the residuary power of making additions to the lists. Under the Indian Constitution though there are three lists, the residuary power has been given to the parliament. The Constitution distributes the legislative powers between the union and the states with a bias towards the union. However, in case of defence and security of the state, unitary character is acquired. In case of conflict between union law and state law, the union law prevails.

    - The resource personnext discussed some concepts relating to legislations. They are as follows-

a. Doctrine of colourable legislation- it entails indirect transgression of powers of legislation. Justice Krishna Iyer in R.S. Joshi v. Ajit Mills,[13] explained this doctrine by stating that "*in this branch of law, 'colourable' is not tainted with bad faith or evil motive'; it is not pejorative or crooked. Conceptually, 'colourability' is bound up with incompetency. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it and then it is colourable legislation.*"

b. Doctrine of pith and substance- when a court is called upon to judge the validity of a law, the court would examine it in pith and substance. In doing so it has to be ascertained that mere incidental encroachment foes not hit the validity of the law but only a substantial encroachment does.

c. Doctrine of occupied field- it means that if the centre has made a legislation on a particular field, the state cannot make a law on that particular field. Also, if a special law covers a subject, general law stands automatically excluded because that field of law is already occupied.

d. Doctrine of reading down

e. Doctrine of severability- it states that if only a part of the law is unconstitutional and it can be severed then only the unconstitutional part can be severed and the constitutional part would be upheld.

f. Concept of double aspect theory- this theory was developed in Canada. Purpose of this doctrine is to prevent conflict between the same lists.

g. Rag-bag legislation- these types of legislations are those legislations which are referable to a number of entries. For example- a budget.

- Whether there a need to give a larger power to the Parliament under the Indian Constitution or it was simply copied from the Government of India Act, 1935? It was thought by the law makers that the state may not be interested in dealing with very vast matters like education etc. (which are a part of the union list), thus, it was given to the centre.
- Constitutional integrity is as important as protection of fundamental rights and this constitutional integrity is federalism. A grey area exists in the Constitution in the form of Art. 300A. 'what is property' has not been defined. It can have several meanings. Thus, if the centre and the state both come up with their own land acquisition acts, how will this repugnancy be solved is not provided under the Constitution.

[13]AIR 1977 SC 2279.

Session 7: Fundamental Rights and Restrictions on Entrenched Rights

- In 1990's it was felt that there should be an academy for judges on the same lines as those existing for the administrative officers and police officers. Thus, the idea of building NJA was conceived. The physical structure of NJA was built in 2002, NJA started its first academic session in 2004. Judging requires to be learnt as it is a cultural inheritance and not genetic inheritance.

- Justice Raghuram remarked that knowledge is a progressive elimination of ignorance. Years in law does not make one a good judge. An instance of judicial faltering on the idea of justice can be seen in the case of ADM Jabalpur v. Shivkant Shukla.[14]Justice Raghuram added that as judges, we hold a position of trust and to execute this truth it is essential that we have a better understanding of law. He next requested Justice Reddi to take the session forward.

- The restrictions can be categorised into two categories - firstly, expressed restrictions provided in the Constitution and secondly, restrictions which can be implied or inferred in national public interest. Restrictions provided under Article 19 (2) of the Constitution are express restrictions whereas the interpretation that no rights are absolute, can be taken to be an implied restriction. The implied restrictions have been put because it is said that certain limitations are engraved on the right itself.

- Even silence in the Constitution has become source of Constitutional developments. In Maneka Gandhi v. Union of India,[15] interpretation of Article 14, Article 19 and Article 21 was done in a wide manner. The interrelation between Articles 14, 19 and 21 which started from the Maneka Gandhi case has been explained in cases decided by the courts even today. Recently in Justice Puttuswamy v. Union of India,[16] Justice Chelameshwar has opined that "Article 21 is the bedrock of privacy".

- The fundamental rights are not the gift of law or the elected government. Though, in ADM Jabalpur case it was held that fundamental rights were given by law, it was then decided wrongly. Article 32 of the Constitution which Dr. Ambedkar referred as the 'heart and soul of Constitution' is itself a fundamental right. Thus, to enforce a fundamental right is itself a fundamental right.

- In the Sahara India Real Estate Corp Ltd. v. Securities & Exchange Board of India[17] (2012) which related to the issue of media's freedom in covering court proceedings, the court held that no right is absolute and it is the duty of the courts to strike a balance between the rights. In this case, the court balanced people's right to information under Article 19 (1)(a) with the individual's right to privacy under Article 21 and consequently it temporality restrained the media from covering the court proceedings.

[14]AIR 1976 SC 1207.
[15]AIR 1978 SC 597.
[16]2017 (10) SCALE 1.
[17]AIR 2012 SC 3829.

- In Submramanuium Swamy v. Union of India the balancing of fundamental rights was done and it was held by the court that balancing of rights is a constitutional necessity. Reference was next made to the TMA Pai[18] case wherein the court interpreted Article 30 of the Constitution. Supreme Court in this case opined that every right conferred on the minority is not an unfettered right. Thus, in national interest or morality, restrictions can be put on the rights. In Ahmedabad St. Xavier's College Society v. State of Gujarat[19] case the court held that the right to administer does not include the right to mal-administer. In the Olga Tellis v.Bombay Municipal Corporation[20] case which is popularly known as the pavement dweller's case, the court while upholding the livelihood of pavement dwellers also remarked that the right of public to use the pavement cannot be ignored. In State of Madras v. V.G. Row,[21] it was stated that "*in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self- restrict and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.*"

- Indian Constitution is reflective of our needs. Constitution provides for stability without stagnation and growth without destruction. The fundamental rights are not the gift of law or the elected government. Though, in ADM Jabalpur case it was held that fundamental rights were given by law, it was decided wrongly. The Government of India Act, 1935 did not have a bill of rights. Article 32 of the Constitution which Dr.Ambedkar quoted to be the 'heart and soul of constitution' is itself a fundamental right. Thus, to enforce a fundamental right is itself a fundamental right. The six fundamental rights are guaranteed by the constitution. These are:

    1. Right to Equality (Art. 14-18)
    2. Right to Freedom (Art. 19-22)
    3. Right against Exploitation (Art. 23-24)
    4. Right to Freedom of Religion (Art. 25-28)
    5. Cultural and Educational Rights (Art. 29-30)
    6. Right to Constitutional Remedies (Art. 32)

- One of the participants put up a question that there may be instances where due to a state's limited resources, it is not practicable to enforce the fundamental rights of a

[18](1994) 2 SCC 195.
[19]AIR 1974 SC 1389.
[20]AIR 1986 SC 180.
[21]AIR 1952 SC 196.

citizen. What can be done in such cases? The resource person said that realistic enforcement of rights has been a problem, however, existence of right and enforce of rights are two different things. Having a right, though not currently enforceable, is more important than not having the right. Furthermore, practical impossibilities should not deter us from passing orders. Next question put up by another participant was whether the judiciary does not oversteps its limit in passing an omnibus order relating to fundamental rights where executive is also involved. In such cases judiciary does not overstep its boundaries. If there is consistent inaction, the courts will have to step in.

Session 8: **Theory of Basic Features: Contours**

- The theory of basic features as propounded by the Supreme Court in the Kesavananda Bharati case is unique. The theory of basic features confers power to the judiciary to expound sounds of silence in the Constitution.

- Basic feature doctrine was a product of experience. It was a high point of judicial craftsmanship. By way of basic features doctrine, certain implied limitations were put on the amending power of the legislatures. Way before Kesavananda Bharati, the cases of Sajjan Singh v. State of Punjab[22] and Golak Nath v. State of Punjab[23] paved the way for consideration on the issue of requirement of basic structure doctrine. Although Kesavananda Bharati case came up with the doctrine of basic features, it was Indira Gandhi v. Raj Narain where this doctrine was applied for the first time.

- Politically motivated measures to undermine judicial independence was struck down by the basic features doctrine. Judicial review and judicial independence as constitutional values are always respected by the Supreme Court and these values have been kept intact by working in this direction.

- The Supreme Court many a times held that, Constitutional amendments only can be tested on the parameters of basic structure. However, it has been observed that courts have also been using the basic features theory to ascertain the validity of ordinary laws. Doing so results in passing of *per incuriam* decisions.

- The ability to read the speech and silence is the requisite skill which a judge should have. The theory of basic features as propounded by the Supreme Court in the Kesavananda Bharati case is unique. Even Professor Lawrence Tribe said it to be a meta-precedent. The theory of basic features confers power to the judiciary to expound sounds of silence in the constitution. The shelf life of a judgment does not depend upon the grammar or syntax but on its social digestivity.

- With the course of time, basic features and essential features have interchangeably been used for the words ‘basic structure’. A long list of what constitutes the basic

[22]AIR 1964 SC 464.
[23] AIR 1957 SC 1643.

structure has been given by Justice Chelameshwar in the NJAC judgement. the question as to what extent can fundamental rights be abridged was answered by the supreme court in Waman Rao v. Union of India,[24]where Justice Chandrachud says that "*we would like to add that every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quint-essential to the basic structure of the Constitution.*"

- Basic structure doctrine is Supreme Court's contribution to constitutional law. The first echo of basic structure was seen in the Sajjan singh and Golaknath case. Basic structure doctrine is like the doctrine of implied limitation. Kesavananda Bharati judgment was an anxious response of an active court. Although Kesavananda Bharati case came up with the doctrine of basic structure, it was Indira Gandhi v. Raj Narain where this doctrine applied for the first time. Kuldeep Nayar[25]unequivocally lays down that constitutional amendments also can be tested on basic structure doctrine and not ordinary laws.

- Justice Krishna Iyer in Ambika Prasad Mishra v. State of U.P.,[26]stated that "*it is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow-up. This, if permitted, may well be a kind of judicial destabilization of State action too dangerous to be indulged in save where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shake-up*."

Session 9: **Art of Hearing**

- Training of a lawyer is combative in nature. However, as a judge, he has to play many roles. A judge has to understand the case and the facts manufactured by the parties. Lawyer is the one who presents the case in a palatable format to the judge.

- A judge has the responsibility of nurturing the next generation of lawyers and for that it is very necessary that they let the lawyer speak. Art of hearing involves the art of letting the lawyers speak. This makes it easier for the judge to write a well-reasoned judgment. Judges need to act like a catalyst.

- A judge should make sure that the case is disposed after hearing the parties properly. It is so because the litigants should have the satisfaction that their case was decided

[24](1981) 2 SCC 362.
[25] (2006) 7 SCC 1.
[26]AIR 1980 SC 1762.

properly. Certain amount of humility needs to be shown by the judges so that the litigants get a sense of belongingness.

- A judge's judgment should reflect his/her own thought process too. Judge should not become a photo state machine whereby he merely cites the previous decisions in coming to a decision. A judge's judgement should not be a case book but should be an autobiography of his intellect. The judgement should show analytical powers too.

- Justice Raghuram concluded the Conference by thanking the resource persons and the participants for making this Conference interactive and a good learning experience for everyone. Feedback forms were distributed amongst the participants to evaluate the workshop & other facilities provided by the academy. Suggestions were also invited by the participant judges to improve future programmes at the academy.

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