National Judicial Academy, Bhopal

REPORT

National Conference on Development of Constitutional Law by the Supreme Court & High Courts

[P-1314]

12th & 13th November, 2022

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PROGRAMME REPORT

Programme Coordinators – Yogesh Pratap Singh & Sumit Bhattacharya Research Fellow, National Judicial Academy, Bhopal

A two day "National Conference on Development of Constitutional Law by the Supreme Court & High Courts" was organised at the Academy. The course sought to sensitize the participating justices from pan India on the key aspects and contours of Constitutional interpretations; Development of "Constitutional Morality"; the evolving jurisprudence of Affirmative Action, equal opportunity & diversity; Concept of "Judicial Review" of legislative & administrative actions; and the dichotomy between Judicial Activism *versus* Judicial Restraint. The pedagogy and the discourse stimulated intense discussions on the topical areas *vis-à-vis* global best practices and principles of law evolved therein.

The discourse was kindly guided and navigated by Senior Advocate Mr. Arvind P. Datar; Senior Advocate Mr. N.L. Rajah; Professor Prof. V. K. Dixit; Justice C. K. Thakker (Former Judge Supreme Court of India); Senior Advocate and Additional Solicitor General of India Mr. N. Venkataraman; and Senior Advocate Mr. C. Aryama Sundaram.

Session-wise Programme Schedule

Day-1

Session 1 - Constitutional Interpretations: Reflections on Transformation, Continuities & Constitution's Silences.

Session2 - Development of Constitutional Morality: Adhering to the Constitutional Norms & Ethos.

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

Day-2

Session 4 - Judicial Review: Judicial Review of Legislative & Administrative Actions.

Session 5 - Judicial Activism versus Judicial Restraint: Evolving Jurisprudence

Session 1: Constitutional Interpretations: Reflections on Transformation, Continuities & Constitution's Silences

The session was kicked-off with the proposition whether the hard laboured and evolved principles of the Constitution of India including the *Doctrine of Basic Structure* be amended, interpreted and changed? If the answer is assertive, then what should be the extent of its extrapolation? As in the philosophy of the US Constitution wherein, in "pursuit of happiness" even a prevalent constitutional principle is amenable to altered interpretation, can the guiding principles of constitutional interpretations itself be iterated? Can such established doctrines be interpreted to an extent to give birth to an altogether diametrically opposite implication under a changed socio-political scenario? The session uniquely commenced through the lenses of the dissenting opinions of the Supreme Court of India. The underlying principle of interpretation considered was "purposive interpretation" with a dash of and "transformative interpretation". The deliberation was especially accounted for, and built upon such important dissents which eventually transformed into the law of land on a later date. The cases referred included *A.K. Gopalan v. State of Madras,* (1950) SCC 228 underscoring the masterly dissent of Justice Fazl Ali, which after two decades in *R.C. Cooper v. Union of India,* (1970) 1 SCC 246 (Bank Nationalisation Case) became the law i.e. the fundamental rights are not to be considered distinctively but collectively having implications on one another and therefore Art. 14, 19 & 21 constitutes a trinity; next case discussed was *State of West Bengal v. Anwar Ali* Sarkar, (1952) 1 SCC 1 and the dissenting opinion of Justice Vivian Bose. Justice Bose insisted that an interpretation may not be exclusively based on the facts alone, it should be also considerate of the implication(s) of a particular decision. In his dissent Justice Bose notes that our Constitution is not a mummified manuscript, it is not a fossilized document, and it is a living document. Next case discussed was *Lt. Col. Khajoor SIngh v. Union of India*, AIR 1961 SC 532 wherein the dissent of Justice Subba Rao was examined. While interpreting Art 226, the dissenting view became the basis for the 13th Amendment to the Constitution of India, wherein even if a part of cause of action arises in a State the High Court can issue a Writ without worrying about an exclusive cause of action. So the test of jurisdiction was held in the dissent to be the place where the impact of a cause of action is seen and not limited to its physical presence. The next masterly dissent by Justice Subba Rao was cited and discussed was of *kharak Singh v. State of U.P,* AIR 1963 SC 1295 which was overruled by the *K.S. Puttaswamy v. UoI,* (2017) 10 SCC1. Wherein, the learning should be while considering constitutionality the Court should interpret rising above the facts of the given case to sift the impact of a "principle of law" on the society at large. The interpretations by Justice Hidayatullah & Justice Mudholkar (though not dissent *stricto sensu*) was referred citing *Sajjan Singh v. State of Rajasthan*, 1965 AIR 845. Wherein, Justice Hidayatulla's wisdom rocked the strange paradox of amending the fundamental rights with a simple majority (resulting into 17 Constitutional Amendments in 17 years of its existance) as against amending a procedure a complex State majority and 2/3rd majority doctrines (i.e. while Art 32 can be amended simply however Art 226 would demand those tenets of special majority). Justice Mudholkar registered his dissent by drawing for the first time the doctrine of "*basic feature*" wherein he notes that if the

three *basic features* right to life, liberty & speech is taken away or abridged, it renders the Constitution a complete structural change, doesn't that amounts to rewriting the entire Constitution? He traces the genesis of the *basic features* nested in the Preable to the Constitution of India. Lastly the intellectual dissent of justice H.R. Khanna in *A.D.M. Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207 was discussed which later acquired the force of law.

The session also provoked the point of law when a statute is struck-down by a Constitution Court subsequently after its implementation. The intermittent legal position encapsulated between its birth and repeal was probed. Yet another point of discussion delved into discerning between concept and application of "retrospective" and "retroactive" law. It was underscored that if in a case a law creates a disability based on the past facts it will be retroactive law and restrospective law *viz.* It was underscored that except in one judgement of the apex court i.e. *State Bank's Staff Union (Madras Circle) v. Union of* India, (2005) 7 SCC 584, the anomaly has not often been dealt with correctly or appropriately. In case of a "retrospective law" the factual situations do not change and the law operates from a back date. However, in the case of a "retroactive law" not only the law is pushed back, but the facts are altered too. Therefore in "retroactivity" a legal fiction is created. An example was cited for ease of conceptual consumption i.e. as on date CA's are liable to pay GST while the Lawyers are not. Suppose a statute is amended to state that the lawyers are also liable under GST from 01-04-2020 and they shall be deemed to be CA from such date, thereby the law will be a "retroactive" law (operates from backdate, facts are changed, legal fiction is created). The authorship of Ben Juratowitch – "Retroactivity and the Common Law" was referred. The point of law when a minority view, which is not in conflict with, or not considered by the majority decision was discussed. It was discussed that as per one view such minority view will be considered as a law. *Bengal Immunity Co Ltd vs. the State of Bihar*, AIR 1955 SC 661 was cited.

The discourse posed the question of importance of *locus* while challenging a Constitutional validity. It was suggested to be a very important factor even in cases of PILs (*S.P. Gupta v. UoI,* 1981 Supp SCC 87 was cited) moreover, Justice Indu Malhotra's Dissent in the *Indian Young Lawyers Association v. The State of Kerala*, (2019) 11 SCC 1 (*Sabrimala Case)* was referred wherein the *locus* was questioned by the judge. It was cautioned that the question of *locus standi* is often not tested adequately even in the Supreme court of India. However, the assertion on the importance of *locus standi* to be *sine qua non* was defended by citing *Minerva Mills v. UoI,* AIR 1980 SC 1789, thereby floating the dichotomy in law. However, a minimum threshold of *locus* check was voiced.

On the point of interpretation and the concept and application of the doctrine of "*Prospective Over Ruling*" or "*Sunbursting*" the position of law was clarified as to its application only in cases of over ruling a judicial opinions. An inquiry into what happens to the cases when a valid law is struck down after sometime of its successful implementation? What would be the status of the cases which were decided one way or the other in such interim period? The "Theory of Second Actor" was discussed. In *Smith v. East Elloe Rural District Council*, (1956) 1 All ER 855 at page 871 Lord Radcliff held that:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity [on] its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

It was underscored that any administrative law is valid until it is struck-down by a court of law. And during its validity it will be as impeccable as any other law. It was contested that “overruling” as a principle suffers infirmity because if a law has stood the test of time then overruling may not justify the reasons of its period of validity. The adversarial view-point contested that as a general principle of law, whenever a law is declared as void, it is considered as void from its inception. A judgement is a declaration of law, and declared law will apply in all scenario, unless said to be applicable prospectively. Discerning between the doctrine of “invalidity” & “Void” it was expressed that “invalid” means not operational, obliterated or not enforceable, although it exists. Whereas, “void” means it does not exist. It was also cautioned that Constitutional interpretation (especially while striking down or questioning the validity) of “protective laws” would be different than the “prosecuting laws”. It was also asserted that a judicial act does not change the law, it only makes it inoperative. If the Parliament enacts a law with hundred sections and the court strikes down six of them that will not have the effect of obliterating those sections. However, it was echoed that provisions which are struck down do not remain in the text of the book, at best they find a reference in the footnotes. It was also clarified that when a law is struck down by a court, it does not repeals it.

“Repeal” is a legislative function it is never done by a Court or judiciary. It was further clarified “Repeal” is of entire statute but “Omit” is a provision.

The principle of “metaphysic of nullity” (i.e. void in law but valid in fact) an indept discussion on the interpretation of “(in)validity” through the lenses of US and Indian jurisprudence was done. It was discussed that a decision (often administrative) affected by “jurisdictional error” is said to be “invalid”. It was exWherein the meaning oscillated from its being “dead”, “still-born” to “inoperative”. The evolution of validity of a statute as it varied between Art 13(1) & 13(2) was explained through the chronological study of pre-constitutional judgments *viz. kesavan Madhav Menon v. State of Bombay*, 1951 AIR SC 128; and *Behram Khurshid Pesikaka v. State of Bombay*, 1955 AIR SC 123, to the post-constitutional jurisprudence evolved in *Saghir Ahmad v. State of UP,* 1954 AIR SC 728; to *Bhikaji Narain Dhakras v. State of MP*, 1955 AIR 781; to *Deep Chand v. State of UP*, 1959 AIR SC 648; to *Mahindra Lal Jaini v. State of MP*, 1962 AIR SC 1019; to *Jagannath v. Authorised Officer Land Reforms*, 1972 AIR SC 425; to *State of Gujarat v. Ambika Mills*, 1974 AIR 1300.

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

The session rolled-out by tracing the evolution & contours of “Constitutional Morality”. The agenda for discussion included the judicial approaches to “Constitutional Morality”; Doctrine of “Non-Retrogression” & “Manifest Arbitrariness”; and judicial innovation *vis-à-vis* “Constitutional Trust”. The early historic pivot to the concept of

"Constitutional Morality" (*hereinafter* CM) could be traced back in the writings of the British historian George Grote, who wrote an authoritative 12 volume history of Greece. "Cleisthenes" of Athens, (a statesman who was considered to be the founder of Athenian democracy) had to kindle, in the citizens of Athens, a "passionate attachment" to the Constitution because, "the great Athenian nobles had yet to learn the lesson of respect for any [C]onstitution". They would pursue their own ruthless ambitions "without any regard to the limits imposed by law". Hence, Cleisthenes strongly felt it necessary to "create in the multitude… that rare and difficult sentiment which we may term a constitutional morality". Grote defined CM as:

> [A] paramount reverence for the forms of the constitution, enforcing obedience to the authorities acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts, - combined too with a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be not less sacred in the eyes of his opponents than in his own.

The probe into the doctrine of CM traced its origin and pervasion into the Constitution of India, the common law evolution after its birth, and as it thrives to grow-up with its identity under the guardianship of the apex court of India. As customary, the doctrine being in its nascent stage, demands to be examined through the theoretical lenses for understanding its evolution. It was pointed out that the doctrine of CM rarely finds its traces in the Constitution Assembly Debates (*hereinafter* CAD) except for B R Ambedkar's speech wherein he urges to "school ourselves in CM" since India chose "democracy" and "Constitution" as paths to justice amongst the myriad other non-linear options. It was suggested that understanding the concept of CM would yield better, if one understands as to i) what "morality" means? ii) its interaction(s) with law, and iii) the contours of CM. The reference of the word "morality" could be traced under the Part III of Constitution of India at four places, *i.e.* twice in Art 19, and once under Art(s) 25 & 26.

Morality and law in the western society was juxtaposed with the Indian society. It was opined that while in the western common law system saw law as command of sovereign, India being a more duty based society, saw that even the king had to abide by certain cultural, social, religious norms. The interplay between morality and governance was examined to flag the transition of emphasis, from development of "personal values" to "duty or obligation towards virtuous society" was exemplified. It was also discussed that in Indian context the concept of "dharma" amongst its myriad meanings included law and moral both. It was expressed that however, law and morality were and are not synonymous. By virtue of lack of clear distinction majority of the laws found its origin in what is morally correct or acceptable to the society. In the modern day context, CM had been dealt with in the *Indian Young Lawyers Association v. The State of Kerala*, (2019) 11 SCC 1 (*Sabrimala Case)*. It was emphasized that there is no standardized norms or Rules which could be mechanically applied to arrive at a standard result in a given question of deciding on CM. Typically *Sabrimala Case* was cited wherein all the judges narrated their opinion considering CM from various viewpoints. A caution was sounded echoing that, like "public policy" CM should not

become a unruly horse. Elucidating "Public Morality v. CM" *State of Bombay v. R.M.D. Chamarabaugwala,* AIR 1957 SC 199 was discussed wherein whether gambling as a right would fall under the scope of Art 19(1)(g) was the issue. The SC opined that, "the proper approach to the task of construction of these provisions…is to start with absolute freedom and then to permit the State to cut it down, if necessary, by restrictions which may even extend to total prohibition". In the similar lines justifying "public expediency and public morality" particularly in trade of obnoxious material *viz.* liquor *Nashirwar v. State of M.P.* (1975) 1 SCC 29 and *State of Punjab v. Devans Modern Breweries Ltd*., (2004) 11 SCC 26 was referred. The power of the State to regulate or even completely prohibit the sale of liquor was affirmed and such trade being *res extra commercium* was underscored by the apex court. "Public morality" tipping one fundamental right over another was a deciding factor in '*X' v. Hospital 'Z'* (1998) 8 SCC 296. Resounding *Navtej Singh Joharv. Union of India*, the discourse highlighted that CM is a "mental attitude" which citizens must imbibe, first through society, and when society fails, then through the court as an "external facilitator".

Session 3: Affirmative Action, Equal Opportunity & Diversity: An Evolving Jurisprudence

The session involved an erudite deliberation on affirmative action *vis-a-vis* reservation, substantive equality sought to be achieved, and the constitutional goal enshrined under Art. 16 of the Constitution of India. Referring to Constitutional debates, the session commenced with a brief deliberation on the legislative history of Article 15 & 16 surrounding reservation policy for the schedule cast ('SCs'), schedule tribe ('STs') and other backward classes (OBCs). The meaning of backwardness, social backwardness, sociological debates underlining relation between caste & class was explained and discussed. The meaning & scope of economic backwardness class was also explained during the session. Referring to landmark judgements, the affirmative action jurisprudence developed by the Supreme Court in the context of the philosophy of equality was deliberated upon. The principle of equality of opportunity, or formal equality, at its core is aimed at preserving the individual's right of equality was discussed. The developing jurisprudence by the Supreme Court in the context of individual liberties versus the state and whether affirmative action can be examined in the context of full personhood was an area reflected upon during the discussion. It was pointed out that the principle behind affirmative action is a policy initiative aimed at eliminating differences and discrimination creating barriers in economic, social, gender, and others between various sections of the population. Deliberations also reflected on various constitutional amendments concerning reservations including the 1st Amendment 1951, 93rd Amendment 2005, 102nd Amendment 2018, 103rd Amendment 2019, and 105th Amendment 2021. The deliberations also involved a mention of how Article 15 and 16 related cases were dealt with by the Court wherein reference was made to the following judgments; *Indira Sawhney v. Union of India* (1992) supp. (3) SCC 217; *Janhit Abhiyan v. Union of India* 2022 SCC OnLine SC 1540; *State of Madras v. Champakam Dorairajan* 1951 SCR 525; *MR Balaji v. State of Mysore* 1962 SCR Supl. (1) 439; *R. Chitralekha v. State of Mysore* (1964) 6 SCR 368*; KS Jayasree v. State of Kerala* (1976) 3 SCC 730; *State of Kerala v. NM Thomas* (1976) 2 SCC 310; *KC Vasanth v. State of Karnataka* (1985) Supp SCC 714. The

creamy layer issue, its exclusion, and challenges on creamy layer were areas dealt with in detail with the help of various cases including *Ashok Kumar Thakur v. State of Bihar* (1995) 5 SCC 403, *Nair Service Society v State of Kerala* (2007) 4 SCC 1 etc.

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

The session proposed to cover areas including "Judicial Review" of legislative process, legislative competence and constitutional limitations; Institutional limitations of the judiciary in reviewing the legislative actions; Contours of "Due Process" & "Procedural Fairness"; Grounds for "Judicial Review" of administrative action - Illegality, irrationality, procedural impropriety & proportionality; and Principles of "Judicial Review" & "Proportionality".

The session started with a contrasting view point on the development or existence of administrative law. According to A.V. Dicey (the British jurist) administrative law is an antithesis to the concept of "liberty". "Police State" i.e. the responsibility of law and order was of the State, was the system governing the then society. It was considered that a Government which governs the least was the best form of Government. As against the juxtaposition that, today the law governs a society from the cradle to graveyard. The advent of "Welfare State" introduced the concept that the "Rule of Law" prevails as advocated by Prof. Wade. With the development of the society and the social interactions everything could not have been done by the State through police or courts. The complexities of the social functions required administration. Therefore, administrative law was born. In Britain it slowly became popular that administrative law had become the need of the hour and it has been born to stay. The genesis of the branch of law could be traced back from its civil law origins in France as *droit administratif*. The concept of JR has been inspired by the US model. Establishing the need for "Judicial Review" (JR) especially in legislative and administrative actions it was resounded that JR is a sentinel because "power tends to corrupt, and absolute power corrupts absolutely" as rightly affirmed by the English historian Lord Acton (1834–1902) in a letter to Bishop Mandell Creighton. The power of JR has been expressly provided to the higher judiciary to examine and declare a law *ultra vires* notwithstanding the correctness or otherwise of an action administered. It was examined and argued that whether in the absence of Art. 32 the established rights (including Fundamental, Constitutional, Statutory, Customary or any other) could be protected and any form of JR possible therein? It was held that JR would still have been possible as envisaged by the maxim *ubi jus ibi remedium* to the extent that without a remedy a right may not exist. The failure of Supreme Court of India exhibited in the case of *S.P. Sampath Kumar v. UoI,* 1987 (1) SCC 124*,* completely ignoring *Kesavananda Bharti v. State of Kerala,* (1973) 4 SCC 225, was underscored as a dark stain where the doctrine of JR was diluted. Although later cases in *L. Chandra Kumar v. UoI,* 1995 SCC (1) 400 and others a course correction was effected. The essence of JR as expounded under the latest apex court judgment i.e. *Janhit Abhiyan v. UoI,* 2022 SCC OnLine SC 1540 (EWS Case) as delved into. It attempts to explore the nature and properties of the *Doctrine of Basic Structure* for its structural rigidity, flexibility, or malleability. Does "Basic Structure" means a static structure in an otherwise evolving society? It was asserted that there is no doubts that "Basic

Structure" must be preserved, but what form part of the doctrine should must be left to time. The judgment states that the said doctrine is a judicial innovation. The question posed was should the doctrine in its present form be continued with preservation and protection? Or considering the dynamic and organic nature of the society and its changing faces India should consider moving from preservation and protection to progression making the doctrine a mobile philosophy. However, the "overarching principles" in the doctrine needs to be static. Therefore, concepts which can move must be discerned from those which can't *viz.* democracy, secularism, JR, Rule of Law, the impermissibility to question or discuss the authorship of the Constitution of India (as static concepts), however, the aspirations of the next generation should now find place in the basic structure. It was held that although Art. 14, 15, 16, 17 are foundation and static in nature but, the exception under Art. 15(2)-(5) may not fall under the doctrine of "Basic Structure" since they are only tools to achieve the goal set out under Art.15, and which might require change, alteration, iteration with the passage of time and development. It was held that if the distinction is not drawn, then it will be self-defeating and eventually lead to the creation of a vested right in the Constitution unduly shielded by the doctrine of "Basic Structure". In other words equality is a "Basic Structure" but aiming for equality is a flexible point and hence should not qualify to be considered as a "Basic Structure", in order to avoid creation of vested rights. A few best practices for the judges while interpreting the Constitution was resounded as principles namely: 1) Never examine or comment on the legitimacy of framing of a Constitution; 2) Constitution is "Supreme and above all laws", therefore never draw parity with statutory laws; 3) While interpreting conflicting terms or provisions or views in the Constitution in a JR, the Rule is to resort to "Harmonious Construction" first and if that fails then consider any other befitting tool; 4) While in JR, allow the Constitution to have flexibility rather than rigidity which essentially leads to stagnation. As flexibility accommodates aspirations, needs of time, changes led by time; 5) Past, Present and Future needs to be factored while deciding a Constitutional interpretation – one can fall back on the history, but consider the present and the future too. While considering "present" not only the citizen's aspirations, media etc. but also the contemporary governance issue must be considered for a good interpretation; 6) As a normal practice in statutory interpretation wherein one follows the "Golden rule", where an express view impliedly negates many, so a judge must not apply it as a straight jacket theory, since "Constitutional Silences"; 7) A judge must start with a presumption of validity and then progressively examine the infirmity or issue of Constitutionality. It was asserted that the distinction between a *doctrine of basic structure, & overarching principles* must be understood with clarity for correct and appropriate interpretation of Constitution. The core concept of basic structure as understood by democracies are "Constitutional Identities". Although the contours of the doctrine are amorphous, however, the apex court on myriad occasions have relied on such changes to the Constitution, if it impacts the "identity of the Constitution", may be considered to be examined on the anvil doctrine of Basic Structure. It was explained that any superimposition over the "Constitutional Identity" which attempts to be recognised itself as an "Identity" should fail the test. Therefore, identifications of such superimpositions from the constitutional identity must be endeavoured by a judge.

A distinction between “Secularism” and “Egalitarianism” was discerned. It was heralded that *doctrine of egalitarianism* is devoid of the colours of secularism (viz. political, regional, racial, religious etc.) and embraces great potential to progress towards a unified nation. “Egalitarianism” is an aspiration wherein no two person should be distinguished on any grounds. It was asserted that while “secularism” is subjective in nature, “egalitarianism” is much objective in nature. Hence, for a judge the principle of “egalitarianism” should trump as a better and more objective test. It would also then meet and align with Art(s). 38, 39, & 46 of the Constitution of India.

It was also narrated that every change in a Constitution should not be necessarily be seen through the lenses of challenge to the “Basic Structure” doctrine. It was narrated that whenever a judge examines the constitutionality of the amending power of the Constitution of India, there are three important aspects to be noted: 1) A judge should not assume an ‘implied limitations of the amending power’ of the Constitution of India. A judge should not put his/her own filters first (pre-judging through personal filters). 2) Globally the democracies have conceived amending powers to be as wide as possible and not narrow. 3) While redefining fundamental rights, a judge should not focus on the restrictions, limitations of powers to do so.

Wednesbury principle of proportionality was discussed. It was cautioned that application of proportionality might not be a correct option while dealing with economic policies. Economic policies is a matter of specialized domain and courts should try to maintain reasonable reservation while interpreting into such areas of super specialization ordinarily. There are three standards of JR to be considered in such cases, namely: 1) “Minimum Basic Structure” (it is a very conservative theory, and static in nature); 2) “Disproportionate Violation Standard” wherein, drawing from the purpose of “Proportionality Test”, wherein proportionality generally requires that a violation of a constitutional right has a ‘proper purpose;’ that there is a rational connection between the violation and that purpose. A disproportionate violation of a constitutional right would be considered unconstitutional and thus void. This standard emphasises the “balancing of conflicting interests”. 3) “Fundamental Abandonment Standard” which is a lowest standard of routinization of whether a Constitutional amendment would be annulled. According to this standard, only an extraordinary infringement of unamendable principles, one that changes and ‘fundamentally abandons’ them, would allow judicial annulment of constitutional amendments. It was underscored that while interpreting the Constitution a judge should consider the ballpark of being static by holding on to the past and amending to a change in the constitutional identity, and (s)he should nurse the aspirations of change which can be accommodated in between the two extremes.

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

The session was structured to deal with the evolving jurisprudence in India wherein the Constitutional Courts are caught between the extremes of “judicial activism” and “judicial restraint” while expounding through their power of ‘*suo moto*’ cognizance; or while striving to strengthen the “Rule of Law”. The session explored the contemporary scenarios arising out of “Judicial Activism” and “Overreach”; “Separation of Power”; or while dealing with media. It was opined that “*suo moto*” power is necessary for the

court wherein owing to certain conditions justice delivery mechanism is slowed, impaired, or misguided, or even paralyzed. To proactively guard such systemic paralysis and enable effective and timely access to justice "*suo moto*" power is resorted to by the courts at the higher level starting from District and Sessions Court to High Court to the Apex Court. Exercise of Art. 227 by the High Courts, and Art. 136 of Supreme Court, as "*suo moto*" was discussed. Often exercising the "*suo moto*" power the higher courts passes appropriate orders in the larger interest of justice. Tracing the source of "judicial activism" (JA) it was narrated that way back sometime in the 17th century (1610) in England wherein Parliament was the supreme, and in the absentia of any written Constitution, it was Lord Coke, who acknowledged "judicial review" to resounded that if the law made by Parliament breached the principles of common law and reason, then it could be reviewed and adjudicated as void by the judiciary and declared as the law ought to be. It might be underscored that the JA was evolved through the process of judicial review. Justice Anthony Kennedy of US Supreme Court was quoted, "An activist court is a court that makes a decision you don't like." It was asserted that a keen investigation must be made to explore the contours, as to where do JA ends and "judicial legislation" starts manifesting. Quoting Benjamin Cardozo who expressed:

> [T]he power to declare the law carries with it the power, and within limits the duty, to make law when none exists, I do not mean to range myself with the jurists who seem to hold that in reality there is no law except the decisions of the courts. I think the truth is midway between the extremes that are represented at one end by Coke and Hale and Blackstone and at the other by such authors as Austin and Holland and Gray and Jethro Brown. The theory of the older writers was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of the customary law. All that the judges did, was to throw off the wrappings, and expose the statute to our view.

Landmark judgments of different timeline were relied upon to trace the contours of JA jurisprudence in India. *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 rejected the argument for "due process" and held that "procedure established by law" to be the touchstone of examination by a court. Although the judgment was subsequently overruled, but what was important was the *caveat* laid down therein, which qualified the procedure to be "fair", "just", and "reasonable" which perhaps shows that the legislature was bridled by a guiding activism. In *Kesavananda Bharti v. State of Kerala,* (1973) 4 SCC 225, the activism gave judicial birth to the concept of "basic structure". It was delineated that the said doctrine left an inclusive scope of interpreting what constitutes a "basic structure". Thereby, allowing a purposive play in the joints to enlarge the role of judicial interpretation, by restricting the legislature and executive to attempt inroads to vicissitude the constitutional rights of citizens. Plethora of vital Supreme Court judgments remodelled and dilated the Art. 21 with novel aspects including, education, clean environment, food, dignity, privacy and more. It was resounded that judges must however appreciate and discern between "judicial cavalierism" [sic]; "judicial adventurism"; and "judicial activism". 1979 saw the JA through the lenses of *Hussainara Khatoon (I) v. State of Bihar*, (1980) 1 SCC 81, when the newspaper reporting of the pathetic life conditions of the under-trial prisoners was

noted by the Supreme Court to activate the “right to speedy trial” as a fundamental right under Art. 21. Citing *Sheela Barse v. State of Maharashtra*, (1983 2 SCC 96 the JA was conspicuous, when the apex court treated a letter by the journalist as a writ petition, to take cognizance of the custodial violence on the women prisoners. Amongst the catena of landmark judgments relied upon to exhibit the journey of JA by the apex court, left no stone unturned to interpret the Constitutional provisions especially under Part III to emancipate citizens from hardships. *Swapnil Tripathi v. Supreme Court of India*, (2018) 10 SCC 639, was an example wherein, the “right to justice” was further extrapolated to right to have ease of access to justice were recounted as decadal masterpieces establishing “Rule of Law” through JA in India. A caution was sounded to the judges on the grounds of interpretation, which eventually would lead to a JA or a “Judicial Restrain”. The caution was flagged on two major counts: 1) whether a judge believes that the law at the time of legislation would have accounted for the possibilities arising out of the implications of a changing and mutating society? And hence, would he prefer to stick to the original text, considerations of the framers? Or would prefer a purposive interpretation to embrace and accommodate such inevitable and organic societal changes?; 2) In the event if the answer is in the assertive, then would the judge be objective, and place his conclusions on empirical data to interpret the law exhibiting activism. While dealing with role of media in the democracy, it was heralded that media being the fourth virtual pillar, was acknowledged to have three definite roles *viz.* Role of an informant to the public; role of an opinion builder; and lastly role for calling for accountability. The issue starts when media transgresses its bounds to usurp the powers of judiciary and tries to run its agenda based and motivated illegitimate verdict delivery system. In doing so media completely discounts the legitimate judicially established process to build a narrative, which at times are provocative to the extent that it runs in contempt and damages the democratically stable fabric. One of the gold standards to stop the menace by media is to promote the rule of “subjudice”.