FIFTH EDITION OF

THE COURTS AND THE CONSTITUTION

CONFERENCE

30th - 31st March, 2024
NALSAR University of Law

NALSAR HYDERABAD

LAW AND OTHER THINGS

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THE COURTS AND THE CONSTITUTION CONFERENCE

ABOUT

The Courts and The Constitution Conference envisages furthering engagement and scholarship on public law by way of review of the major constitutional law developments in and outside courts, taking place in India. The Conference aims to broadly reflect on the past, present, and future of Indian constitutionalism. It is an attempt to bring together diverse voices from the bench, bar, academia, and journalism to deliberate on the landmark legal developments which are bound to have a long-term impact on governance and the rights of the citizenry.

This Conference is being organised by the Editorial Team of the 'Law and Other Things' Blog in collaboration with its institutional sponsors, the Centre for Constitutional Law, Policy & Good Governance, NALSAR University of Law and the School for Policy and Governance, Azim Premji University. The event will take place at the campus of NALSAR University of Law, Hyderabad. SCC Online and SCC Times will be the Knowledge and Media Partners of the Conference.

THE COURTS AND THE CONSTITUTION CONFERENCE, 2024

SCHEDULE

March 30, 2024 (Saturday)

10 am-11.30 am: Inaugural Session (Including Address by Justice B.V. Nagarathna, Judge, Supreme Court of India)

12 pm-1.30 pm: Electoral Laws and Democratic Legitimacy

2.30 pm-4 pm: Developments in Indian Federalism

4.30 pm-6 pm: Adjudication of Socio-Economic Rights in the SAARC Countries

March 31, 2024 (Sunday)

10 am-11.30 am: Taking Stock of the Judiciary

12 pm-1.30 pm: Developments in Equality Jurisprudence

2.30 pm-4 pm: Shamnad Basheer Memorial Roundtable – Disability and Law

4 pm: Closing Session

ELECTORAL LAWS AND DEMOCRATIC LEGITIMACY

SESSION - 1

The past year witnessed the Supreme Court of India (SC) being actively involved in litigation relating to free and fair elections. Several concerns have arisen with respect to a heightened executive control in the election process, and in turn the long-standing constitutional scheme related to the separation of powers. The panel stems from the developments detailed below and aims to address the contours of the issue from various aspects.

First, in *Anoop Baranwal v. Union of India* (2023), the SC devised a selection committee composed of the Prime Minister, the Leader of the Opposition in the Lok Sabha, and the Chief Justice of India to recommend names for appointment of Chief Election Commissioner (CEC) and other Election Commissioners (ECs). This was done with an intention to ensure independent institutional and procedural mechanisms for such appointments. Subsequently, the Parliament enacted a new law, i.e., The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023 (EC Act 2023), to replace the earlier Act on the subject. The EC Act 2023 deviates from the position developed by the Court in Anoop Baranwal, and changes the appointment process and service conditions of the CEC and ECs. The new Act presents the constitutional challenge of curtailment of the autonomy of independent constitutional bodies and increased control of the executive, which in turn could affect the integrity of elections.

Second, the Electoral Bond Scheme, initiated in 2018, has emerged as the main medium for monetary contribution to political parties for elections. The scheme was the subject of litigation in *Association for Democratic Reforms v. Union of India*. With the hearing of the case beginning in the year under review, the Supreme Court's ruling in February, 2024 establishes a significant precedent regarding transparency in political financing. The introduction of this scheme generated concerns regarding the relaxation of upper limits for funding, allowing foreign contributions to election funds among other concerns, along with the anonymity of the contributors.

To further enable the Electoral Bonds Scheme, the Parliament introduced a proviso to Section 29C of the Representation of People's Act 1951, through the Finance Act, 2017, which exempts political parties from disclosing any funding received through electoral bonds. This raises questions about transparency in the election process. The petitioners of the case have argued that the right to know about the antecedents of electoral candidates is a subset of the larger sphere of the right to freedom of speech that flows from Article 19(1)(a) of the Constitution. This problem posits interesting questions surrounding the private or public nature of political parties, and the level of accountability that they can be held to as participants in a democratic process.

Third, the revolt within the Shiv Sena precipitated a constitutional crisis in Maharashtra regarding the scope of powers of the Governor, the Speaker of the Legislative Assembly, and the higher judiciary. The SC's intervention in May 2023 deemed the Governor's directive for a floor test (despite a no-confidence motion in the Assembly) improper, but it could not restore status quo ante after the Uddhav Thackeray-led government's resignation. The issues of rebel legislator disqualifications and strategic delays in decision-making by the Speaker remain sub-judice. This demonstrates the limitations of constitutional remedies when political machinations can circumvent textual provisions. It underscores the need to rework redesign constitutional safeguards to address such possibilities. Accordingly, the panel will deal with a) issues of party identity as opposed to individual member autonomy, b) the legal questions raised by the Governor's aforementioned conduct, and c) the role of the Election Commission of India in recognising a party faction and the justiciability of the role by the constitutional court.

DEVELOPMENTS IN INDIAN FEDERALISM

SESSION - 2

The recently-delivered judgment in *NCT of Delhi v. Union of India* concluded eight long years of litigation over the contentious implications of Article 239AA of the Indian Constitution. This Article grants to the Delhi Legislative Assembly the power to make laws with respect to legislative fields under Lists II and III of Schedule VII "in so far as any such matter is applicable to Union territories". Textually, the excerpt may be understood in two ways: first, that applicability of the entries in Lists II and III is to be decided on an ad-hoc basis; and second, that the excerpt makes all entries in the Lists available to Union Territories to legislate on, other than those expressly excluded in Article 239AA(3)(a).

In the judgment, CJI Chandrachud adopted the principle of asymmetric federalism and representative democracy to interpret the abovementioned text. In a situation of constitutional ambiguity, his opinion states, the reading that advances the principles of federalism and representative democracy is the preferred one. This judgment is an example of a relatively thin stream of precedents in a sea of cases which explicitly favour the Union. The SC takes the approach which restricts the 'centralising drift' from gaining further entrenchment, and, instead, views the explicit provision as a ground to prevent further unwritten centralisation. This judgment reaffirmed the 2018 judgment on the subject, which stated that the Delhi government, and not the Union, would exercise control over 'services'.

The 2023 judgment becomes noteworthy as close to its heels the Union promptly responded with an ordinance and a Bill connected to the matter, resurfacing the debate about the power tussle between Delhi and the Union.

Another major development last year was the Supreme Court's judgment in *In Re: Article 370*. It upheld the abrogation of Article 370 of the Indian Constitution. The petitioners had invoked the historical commitments made to the erstwhile Princely State of Jammu and Kashmir at the time of signing the Instrument of Accession in 1948. The Central Government defended its measures taken in August 2019 on the premise that the safeguards provided under Article 370 should be characterised as temporary provisions. While the SC has affirmed the stance of the Central Government, the reasoning adopted by the two concurring judgments has attracted considerable criticism, as it potentially compromises the edifice of other temporary provisions in the Constitution of India.

In essence, the year 2023 has been quite prominent for Indian federalism. Besides these two high-stakes judgments, the year saw cases involving the original suit filed by the State of West Bengal against the Central Bureau of Investigation (CBI), which has been continuing to register and investigate cases even after the withdrawal of general consent to do so by the State Government.

Inevitably, the question that arises is whether the unique nature of asymmetric federalism crystallised in the Indian Constitution is being properly invoked in the recent disputes, or is there now an evident of lapsing back to the ‘centralising drift’ witnessed in earlier decades.

ADJUDICATION OF SOCIO-ECONOMIC RIGHTS IN SAARC COUNTRIES

SESSION - 3

This panel is envisioned as a learning exercise in the recognition and enforcement of specific socio-economic rights across the SAARC nations. In these jurisdictions, contemporary human rights law bends towards parity between civil-political and socio-economic rights. The law in these territories refers to these rights collectively as 'universal, indivisible, interdependent and related'. However, profound disagreement persists regarding the precise legal position of socio-economic rights and what duties are held by the administrative state to realise them. While progress has been made in integrating the older conceptualisation of rights, deep differences of approach persist over enforcing socio-economic protections, both in the ideological and institutional sense.

The enumeration of socio-economic rights, such as healthcare, education and housing, remains an outlier phenomenon if we survey constitutional texts globally. However, the entrenched inequalities in our societies have compelled constitutional courts in Bangladesh, India, Nepal, Pakistan, and Sri Lanka to either read in or expand the meaning of socio-economic rights through their adjudication.

Despite socio-economic rights being non-justiciable in these countries, the courts have carved an important role for themselves by integrating the right to education, housing, and other Directive Principles into Fundamental Rights.

Further, an active judiciary has enabled relatively disempowered groups to approach the courts through Social Action Litigation. Socio-economic rights litigation in South Asia has sought to make welfare guarantees effective, not just symbolic, with mixed results, for instance: cases in India on education, Nepal on housing equality, and Bangladesh on healthcare access do highlight the courts' potential and limitations in realising constitutional directives on development.

This, however, raises pertinent concerns regarding the lack of explicit constitutional safeguards for many of these rights. This has also raised questions about judicial overreach and the competence of courts in when it comes to the granular details of making entitlements available. Additionally, despite widespread constitutional recognition of directive principles on equitable access to welfare, resources, and development, the practical realisation of these positive rights remains uneven across the region. By sharing experiences and insights on best practices and the likely pitfalls, this panel is aimed at finding common ground for ensuring that constitutional socio-economic protections actually translate into enhanced living standards.

TAKING STOCK OF THE JUDICIARY

SESSION-4

This panel will examine issues related to judicial administration, especially as they have been raised through successive attempts at empirical research in recent years. We routinely try to assess the judiciary's role in achieving constitutional objectives through its decisions. However, there is an inherent limitation of doctrinal scholarship that largely concentrates on decisions made by specific benches, while not considering the working of the institution as a whole. The higher judiciary's internal processes, particularly those related to the listing of cases before the respective benches, have faced criticism for their lack of transparency. Statistical analysis of the Supreme Court's workflow has raised multiple questions, such as those related to the predominance of Special Leave Petitions (SLPs) as the route of entry, the lack of subject-matter expertise in bench-allocation, immense variations in judicial productivity, disparities in the regional origin of litigation and the considerably wide discretion exercised in scheduling Constitution Bench matters.

The presumptive equality of opportunity to be heard is often compromised by the presence of hierarchies, both among the practitioners and Judges, as well as between them. The practice of having multiple benches, as opposed to an en banc structure (as was the case with the Federal Court that functioned between 1937 and 1950), was seen as necessary to tackle a continuously increasing appellate docket.

However, practitioners and commentators have repeatedly raised the problems that arise when comparable propositions and situations are dealt with in disparate ways across different benches. It is argued that these disparities incentivise litigants to re-open the same questions before larger benches, thereby acting as a drain on judicial time and attention. In recent months, the present CJI has invoked the virtues of a"polyvoca" court as a response to some of these criticisms.

In popular discourse, decisions about the creation of benches and the assignment of cases to them, traditionally vested in the "Master of the Roster", are often criticised as examples of "favouritism" within the Bench or at worst "fixing" in favour of privileged litigants. Scheduling practices followed by the Courts at different levels have also encouraged the production of a new literature on case-management in the Indian context. This panel will try to survey the significant questions that have been asked in the recently published scholarship that is focussed on judicial statistics.

DEVELOPMENTS IN EQUALITY JURISPRUDENCE

SESSION-5

The objective of this panel is to critically analyse the evolution of equality jurisprudence in the private sphere by examining the stance of the Supreme Court of India on the issues of gender, sexuality and religion. The discussion will seek to evaluate the Court's developing position in cases involving overlapping identities and intersecting harms.

First, the Supreme Court's reluctance to make a decisive shift towards marriage equality in Supriyo v. Union of India, was largely presented as an institutional limitation in the majority opinion. The judgment invites examination from several perspectives, including issues such as a) whether social rights need to be seen as contingent on the extent of the reliefs that are sought; b) whether a constitution bench should revert back to formalist reasoning; and c) whether the piece-meal classification of issues in this case could lead to a regression from earlier precedents that have recognised a "right to marry" in other contexts. Situating Supriyo in the genealogy of LGBTQ jurisprudence since the landmark NALSA judgment, there is a need to assess if the Court is actually crafting a transformative vision of equality, or if its reticence to catalyse social reform is posing hurdles for the recognition of intersectional dignitary rights. This critical inquiry will illuminate the judicial balancing of arguments based on "constitutional morality" with deference to the elected branches on socially contentious issues.

Specifically, in addressing these themes, a bigger question to be evaluated is whether the Court has been able to craft a transformative vision of substantive equality that can be applied across the diverse contexts of discrimination or are there evident gaps and inconsistencies in its reasoning. The aim is to understand the current judicial thinking on the theoretical foundations and practical applications of equality doctrine in India's unique socio-legal landscape.

SHAMNAD BASHEER MEMORIAL ROUNDTABLE-DISABILITY AND LAW

SESSION-6

Apart from being a globally acclaimed IPR expert, professor Shamnad Basheer was a social justice warrior who devoted his life to making the legal profession more accessible. He founded 'Increasing Diversity by Increasing Access' (IDIA) in 2010 which aimed towards making legal education more accessible for the underprivileged and marginalised groups of society. With the organisation approaching its 15th anniversary, this panel is an ode to Professor Shamnad Basheer and the impact that his work has made on the lives of countless people.

IDIA runs with the help of volunteers which includes 600-plus members from various National Law Universities. Not only has IDIA assisted more than 200 plus scholars to succeed in the entrance exams, but has also guided them in pursuing their legal education through scholarships. IDIA through the years has also worked towards sensitising people regarding careers in law and has been able to sensitise more than 71,000 students.

Given the fact that multiple IDIA scholars are located in remote areas, where most chapters are unable to reach them, there is now a growing need for more institutions to further the cause. A key reason for this is that there can be a much more efficient dissemination of services, leading to a larger number of scholars who can be assisted, thus contributing towards fulfilling the goal of truly increasing diversity within the legal sector.

This panel aims to blend the experience of IDIA scholars with the judicial and academic perspectives of increasing accessibility within legal education and the judicial system in India. The panellists will consist of IDIA scholars who have achieved eminence as practitioners and scholars of law, sharing their insights about their journey and how they overcame personal and professional challenges.

The Panel is organized in collaboration with the Hyderabad Chapter of IDIA, based in NALSAR University of Law.

CONTACT INFORMATION

CONFERENCE EMAIL ID

courtsandconstitution@gmail.com
laotnalsar@gmail.com

STUDENT COORDINATORS

Eeshan Sonak - sonak.eeshan@nalsar.ac.in (+91 8380074901)
Utkarsh Mani Tripathi - utkarsh.tripathi@nalsar.ac.in (+91 9838746722)

ADVISORS

Aymen Mohammed - aymen@nalsar.ac.in
Sidharth Chauhan - sidharth.chauhan1983@gmail.com
Sitharamam Kakarala - sitharamam.kakarala@apu.edu.in
Srijan Mandal - srijan.sandip.mandal@nalsar.ac.in
Vikram Raghavan - vikram1974@gmail.com

Knowledge Partner

Media Partner

ORGANIZING COMMITTEE

PUBLICITY & DESIGN

Bharati Challa
Devi Nandana Baiju
Escandita Tewari
Snigdha Khandelwal
Sukrut Khandekar

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