

## **SESSION 6 - STRENGTHENING THE ROLE OF CONSTITUTIONAL COURTS**

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### **PANELISTS:**

1. Shri V. Sudhish Pai, Advocate and Author
2. Shri Alok Prassana Kumar, Co-Founder, Vidhi Legal Policy, Karnataka
3. Ms. Cathy Catterson, Former Clerk of Court of Appeals, Ninth Circuit, USA

**CHAIR:** Shri Justice Madan B. Lokur, Former Judge, Supreme Court of India

### **ABSTRACT**

*This session was the sixth leg of the “tripod” of Police, Prosecution and Procedure. There was an agreement among the panelists that the Constitutional Courts needed to be strengthened and all of them recommended diverse ways to move forward in that direction. The problem of an overwhelming caseload was noted, and the panelists recommended solutions to expedite and effectively dispose-of cases. These courts form the core of the Indian Judicial System, and therefore, in order to strengthen the Indian Judiciary, the Constitutional Courts need to be strengthened first.*

## **PRESENTATIONS BY THE PANELISTS**

### **Shri Justice Madan B. Lokur, Former Judge, Supreme Court of India**

Justice Lokur began his address by mentioning two aspects of justice delivery, one pertaining to the judicial element and the other being the administrative aspect i.e. the registry. In respect of the former, Justice Lokur made two recommendations - first, the Supreme Court should be in the nature of a federal court, dealing solely with cases that have an all India impact. It therefore follows that the apex court does not adjudicate on matters relating to the interpretation or application of laws enacted under List II of the Seventh Schedule of the Constitution which must be left to the High Courts of the respective states. Such a restriction in the jurisdiction is a matter of self-restraint on the part of the court itself. Second, referring to the filtering process of cases, Justice Lokur called for increased use of the constitutional provisions that provide for grant of a certificate for the purpose of an appeal to the Supreme Court in lieu of Article 136. These provisions have fallen into disuse in recent times with such a certificate being granted in only 4 or 5 cases in the past 25-30 years. The joint operation of the two recommendations will lead to a drastic reduction in the caseload of the Supreme Court.

Moving on to the administrative aspect, Justice Lokur highlighted the need to strengthen the Supreme Court registry. He shared that the Registrar of the Canadian Supreme Court, appointed by the Canadian Parliament, is not answerable to the Chief Justice of Canada but solely to the Canadian Parliament which strengthens the administration of the courts ensuring independence and professionalism. He recommended that India too must adopt a hybrid system wherein the registry is not answerable to the Chief Justice for the day-to-day functioning of the court.

With regard to the High Courts, Justice Lokur emphasised on the need to fill in the vacancies but at the same time opined that the Indian judicial system is stuck in a vicious cycle of excessive caseload, increased judicial strength, and rising vacancies. Therefore, a mission-mode approach wherein the vacancies are filled within a year or two, is the need of the hour, accompanied with stability in appointment. Second, the High Courts of the states should be the equivalent to the

Supreme Court of the State and should have the final word on the interpretation of the law for the states. Thirdly, Justice Lokur stated that administration of High Courts must be strengthened. Finally, he called for a clean-up exercise to clear the enormous backlog of cases in the High Court dockets.

### **Shri V. Sudhish Pai, Advocate and Author**

Shri Sudish Pai began by stating that the *“role of the constitutional courts is not so much dispute resolution as developing law and jurisprudence.”* As judicial exegesis becomes inevitable in expounding the Constitution, judges must perform a balancing act between not being influenced by their own prejudices and principles on one hand, and ensuring that the Constitution remains responsive to changing times. He expressed concern that the preeminent position of the Supreme Court has been diluted over the years due to various reasons. He concurred with Justice Lokur’s suggestion regarding strengthening the High Courts. Expansive exercise of jurisdiction under Article 136 by the Supreme Court has undermined the position of the High Courts in the states. He commented that the Supreme Court has transformed into a general court of appeal by self-enlargement of its jurisdiction, which is further exacerbated by it being designated the first appellate court under several laws. Left with hardly any scope for constitutional matters, even two-judge benches end up deciding constitutional matters. He also raised a question regarding the ideal number of judges that the Indian Supreme Court ought to have as a smaller strength would result in a more coherent institution and mentioned that Justice Subbarao had considered the ideal strength to be eleven judges.

He further agreed with Justice Lokur’s opinion that the Supreme Court should be a federal court, with pronouncements mostly being limited to the laws affecting the entire country. The Court must exercise self-restraint in dealing with matters under Article 136. He further cautioned that the distinctive constitutional role envisaged for the Supreme Court and the High Courts must not be sidelined in the effort to clear the backlog. He recommended that there should at least be 1-2 permanent constitutional benches in the Supreme Court to deal with serious constitutional cases

and such benches may be constituted on a rotational basis. He also mentioned specialization of judges and how knowledge in a particular subject could help in the speedy disposal of cases.

He expressed that the appointment of ad-hoc judges in the High Courts is a good suggestion. Such judges can solely concentrate on the judicial work, unburdened with administrative matters. He however, expressed reservations on the efficacy of restricting revisional jurisdiction. In conclusion, he pointed out that strengthening of the High Courts would lead to reduced burden on the Supreme Courts. At the same time, we must ensure that the best people man the positions in the superior courts which in itself is a great challenge.

### **Shri Alok Prassana Kumar, Co-Founder, Vidhi Legal Policy, Karnataka**

Shri Alok Kumar started off by stating that constitutional courts are not merely a synonym for the Supreme court and High courts, but they also include other courts such as the magistrate courts and district courts. Emphasising the importance of magistrates, he stated that a magistrate is given few of the most important powers under the purview of our constitution. He took the example of the Disha Ravi case and stated that when a magistrate does not perform his duties properly, then it becomes a matter of concern and even an incident of injustice.

The speaker opined that the following are the major problems existing in the functioning of High courts:

- 1) Bureaucratic intransigence towards court orders, prompting the repeated filing of contempt petitions.
- 2) High courts are too concentrated in the major cities of a state rather than a state as a whole. Giving the example of the state of Karnataka, he said that 50% of the writ petition cases come from the city of Bangalore, pointing towards some imbalance in the system. The speaker added that parts of Karnataka that need such a bench do not get one, hence

furthering the status of imbalance. The plight in Madhya Pradesh, Uttar Pradesh, Rajasthan and West Bengal are similar to Karnataka.

- 3) Criminal appeals are slowing down the High Court system because criminal cases are not disposed of as quickly as they should be.
- 4) Unnecessary filing of bail cases in high courts because sessions judges refuse to deal with it. He quoted Justice Atul Shridharan's (Judge, Madhya Pradesh High Court) words as follows: *"There is an immediate reaction of judges to deny bail as they don't want to take responsibility or the consequences of granting a bail and hence the easiest option is to deny bail"*.
- 5) The High Court appoints judges from the bar rather than from the subordinate courts. The reason for this prejudice is because of the common stereotype that the judges from the subordinate courts are not competent enough to perform their duties.

Pointing out flaws in the Supreme Court, he opined that on an average, a judge spends three and a half years in the Supreme Court, which is too little time. Out of that, two years are spent as a puisne judge. Due to this, the potential of highly experienced judicial officials is wasted and they are unable to leave behind a legacy in their expertise.

Shri Alok Prassana suggested short term, medium term and long term suggestions which are as follows -

**1. Short term suggestions:**

- Prioritise about 3 lakh+ cases which are pending for more than 10 years. This can be done through setting up dedicated benches, clearing out the processes, getting lawyers to cooperate, getting registry to cooperate etc.

## **2. Medium term suggestions:**

- The ratio of members of the Bar appointed as High Court judges relative to the subordinate court judges who are so appointed must be at least 50:50. It gives signal to judges in subordinate judiciary that if they perform well, they can be elevated to higher judiciary.
- Many of the judges who get elevated to the higher judiciary are writ practitioners and civil side practitioners. Since a lot of subordinate judges have in-depth knowledge of criminal cases, they should be given priority or be given promotions to practice as judges in the High Court.

## **3. Long term suggestions:**

- To use artificial intelligence to deal with the volume of the cases that are in front of the court, which will in turn reduce the amount of manual labor and save valuable time of the judiciary.

Finally, the speaker concluded by suggesting that Supreme Court carries out 3 major functions which are as follows:

- 1) It's the apex criminal court.
- 2) It's the apex civil court.
- 3) It's the apex constitutional court.

He opined that one body does not need to do all these three functions. According to him, it is time that a separate institution is set up for all three functions, therefore lifting the burden off the supreme court. This disaggregation into three different entities will help in each developing their own jurisprudence and procedures. He emphasised that doing this would lead to each institution doing justice to the functions given to them under the constitution.

### **Ms. Cathy Catterson, Former Clerk of Court of Appeals, Ninth Circuit, USA**

Ms. Cathy Catterson started off by suggesting a few efficient case management methods that are followed in the United States of America. She stated that the time of the judge is of utmost importance and hence all the necessary things needed by the judge to pronounce a judgment must be in front of them so the judge is able to dispose of cases in a speedy but not hasty manner. She further added that it is the duty of various establishments such as the registry, the clerk's office, supporting staff, etc. to make this possible.

The speaker mentioned that once the cases are filed in the court, it must be in the court's control, not in the control of lawyers or the parties. The court must be responsible for setting the rules, the timelines and deadlines to make sure that the case follows the rules and regulations of the court in a timely manner. Although this is not well received by the Bar, it helps the court function better and expedite the decision.

Ms. Cathy Catterson elaborated on the practices followed by the 9th circuit, which deals with 10,000-12,000 cases a year, to eliminate cases before they move to trial. When the appeal is filed, the Staff Attorneys go through the case immediately and their role is to figure out whether the court has the jurisdiction or not. Many of the cases are not under the jurisdiction of the 9th circuit and hence are dismissed at a very preliminary level without wasting the time of the court. Further, she stated that the role of mediators or mediation as a process is very necessary to dispose of cases, hence minimising the burden on the court. The 9th circuit has 10 mediators who work with the court directly. Parties fill out a brief questionnaire to see if the case is appropriate for mediation or settlement. Mediators resolve about 1000 cases a year.

The speaker moved on to explain the methods used to improve efficiency during the court process. Cases that are not resolved through the lack of jurisdiction or settlement move forward and the parties have fairly strict deadlines to file their briefs. There is also a limit on the number of words or pages for the written briefs. The office of Staff Attorneys then picks up the case and their role is to figure out the issues that are being raised in the appeal, and group cases by issues as far as possible. Cases belonging to a particular group, for example prisoner civil rights cases,

are assigned to a panel. A couple of lead cases are first sent to the panel and the rest are held, until the panel decides the legal issue at hand. All the cases are loaded in a case management computer so they can be tracked and followed whenever necessary.

Staff Attorneys also weigh cases in terms of difficulty and how much time of the judge a particular case might take. The speaker further briefed about the weighting system that has been followed in the United States of America in which the cases are categorised a 1, 3, 5, 7 or 10 weight, wherein 1 being a case that takes the minimum amount of time and 10 taking a longer time of the judge to resolve the case. The 1 weight cases are shuttled off quickly without the entire appellate process, and are decided on the briefs by a standing panel of judges who are assigned on a monthly basis to deal with the simple matters. The other cases go through the traditional route of the oral argument panel.

Ms. Catterson emphasized the role of the staff as one of being professional with adequate experience and proper training. She suggested that paralegals should be appointed on a contractual basis instead of attorneys because they are efficient with administrative duties and the system is more economical.

## **PANEL DISCUSSION**

The first question was posed by Justice Madan Lokur to Shri Sudhish Pai regarding tribunals, such as the Central Administrative Tribunal, which have made the Supreme Court the first appellate court, adding to their workload. Shri Sudhish Pai suggested that the High Courts must be made the court of first appeal in order to reduce the number of cases that go to the Supreme Court. Justice Madan Lokur commented that this would require the number of judges in the High Court to be increased. He added that when the appointment of ad hoc judges was considered by the Delhi High Court, there was tremendous resistance from the Bar.

Justice Lokur went on to comment on Shri Pai's suggestion of setting up permanent constitutional benches in the Supreme Court. He illustrated that the Chief Justice of India is wary



of setting up a bench of 5 judges to decide on a single matter due to the enormous caseload handled by the court. Shri Pai responded that the pendency is because of a large number of leaves being granted and petitions converting into appeals. He prescribed that filtration must occur at jurisdiction stage for admission under Article 136. Although restrictions cannot be imposed through legislation, the court can exercise better self-restraint. The mechanism of certificate of fitness being granted by the High Courts has fallen out of use and must be brought back into practice to curtail some of the caseload of the Supreme Court. Furthermore, he added that the process of arriving at a decision on constitutional matters could be better, with judges having adequate time to ruminate and discuss serious issues. Constitutional benches may be a solution to this.

Justice Lokur sought clarification from Shri Kumar on having four or five High Court benches in a state, if that would create confusion and more conflicting interpretations of the same statutes. Shri Kumar responded that while he cannot dispute that there may be some contrary rulings, since there would be a common pool of judges with an experience of 10 years on average rotating between the different circuit benches, this would ensure a certain level of uniformity in judgements. Moreover, in exceptional cases the Chief Justice of the High Court may use his/her discretion to bring such cases to a single bench. This is a worthwhile experiment as it would address both access and improve the court's own functioning. Justice Lokur noted that while the High Court of Guwahati served the people of seven states, people from states like Mizoram and Arunachal Pradesh prefer to attend court in Guwahati in Assam rather than a division bench within their own state, despite senior judges being on rotation. He postulated that this may have been due to better quality of lawyers in Guwahati and cautioned that the preference of the litigants must be studied further.

Justice Lokur pointed out the dangers of specialization in response to Shri Sudhish Pai's proposal - there have been cases of Supreme Court judges with inherent biases towards one party, say for example, towards the government in matters of tax evasion, which upsets the system. He added that "specialization" is the basis for the creation of various tribunals such as the tax tribunals, the

experience with this hasn't been very successful. The speakers agreed that the idea must be thought through further. They noted that five tribunals have now been abolished and cases reverted to the High Court.

Justice Lokur inquired about the system of filtration of cases at the registry and the role of law clerks in the 9th circuit. Ms Cathy Catterson explained that the Clerk's Office consists of law clerks as well as 80-90 attorneys who work for the court, rather than a judge, and prepare the cases for the judges including classification, motions practice before the case is submitted to a panel of judges for decision. Attorneys generally have a tenure of 5-7 years and report to supervisory attorneys and the chief judge of the circuit. Some attorneys specialize in certain areas of law, such as immigration, sentencing law, and so on. The speaker added that there is no specialization of judges due to the same reasons discussed by the panel. However, there is a 'issue identification' system wherein a panel (that gets the issue first) decides on the issue on a consistent basis. Justice Lokur sought clarification that this is a part of the case management system to which Ms Catterson replied in the affirmative. Justice Lokur also added that with the help of a case management system, Judge Fogel of the 9th circuit managed to bring his docket caseload of 3000 cases to 300 cases in a span of 3 years. Further, he noted that the preparation of cases in India is handled by the registry, which is not composed of many lawyers, and adopting such a system of attorney's to assist the court might improve professionalism and efficiency.

Justice Lokur also commented on Shri Kumar's idea of multiple Supreme Courts, that Germany has a similar model. However, he pointed out the same challenges discussed in respect of specialization of judges make him apprehensive of this proposal as well. He also noted that utilization of Artificial Intelligence will prove dangerous if any bias is injected in the algorithm. Shri Alok Kumar elaborated that the decision at the end of the day is with the judge and the role of AI is to merely assist the judge in putting together the facts of the case, evidence presented, and identify correlations and errors before hearing the arguments. This would save time for the judge as well as the lawyers. One way to prevent bias in the algorithm is to use a wide range of training data, without any bias in that data, such as all criminal judgments passed in the country.

## QUESTIONS AND COMMENTS

A question from the participants was then taken up which inquired about the reasons behind heavy caseload on High Courts and why there's still no solution to it even after 70 years. Justice Madan Lokur replied that no effort had been made but it could be tackled if we made an effort, perhaps on a mission mode. A follow-up question asked whether this heavy caseload was due to structural problems rather than resources, to which Justice Lokur replied that outdated rules were a matter of concern and a solid effort should be made to streamline processes using case management.

The next question was directed to Shri Alok Prasanna asking the reason why criminal appeals take a long time to be disposed of. To this, the speaker replied that there are 3 major reasons as to why this situation prevails. One, these cases require specialised criminal lawyers who have the ability to read through indefinite case files, coalesce them into a coherent argument. Second, transmission of records from the trial courts to the High court takes up a lot of time and sometimes are sent incorrectly, further delaying the disposal of the case. Records are still sent manually while there is scope for digitization and efficiency. Third, competency of the judges to in depth deal with criminal appeals also matters; if a judge is incapable of reading evidence, pouring through documents, then it hampers the course of judgement. Judges experienced in criminal matters would work more efficiently. He added that although Allahabad High Court has a reputation for long standing criminal appeals, every High Court grapples with this challenge.

Third question asked Ms. Cathy Catterson how the circuit courts limit their jurisdiction, if there are any rules or conventions employed. Ms Catterson replied that appeals to the 9th circuit court are by right, and the court does not select which cases to be taken up unlike the US Supreme Court. However, there are a lot of statutory provisions that set forth the jurisdiction. They must be final appealable orders that can be heard by the District Circuit. Further, case laws also help in determining whether an order is appealable or not, and what cases can be heard by the circuit

court. The role of staff attorney is to look into these laws and determine if the court has jurisdiction.

Next question was directed towards Shri V. Sudhish Pai which inquired the reason why the Supreme Court repeatedly rejected the recommendations for setting up permanent constitutional benches. Shri Pai replied that there are certain inhibitions that Chief Justices hold and they must be quashed in order to set up constitutional benches. He stated that the primary job of the superior court is to be a constitutional court not an SLP court, and the court must exercise self restraint in restricting their SLP jurisdiction to devote more time to constitutional matters. Shri Alok Prasanna Kumar added that the time taken up by the Supreme Court judges can be limited by enforcing strict timelines to the counsels for presenting their arguments. These timelines must be strictly adhered to so as to save the time of the court, as sensible time management is important. Shri Pai added that at the end of the hearing, the judges must have a meaningful conference before proceeding to judgement.

A question sought the opinion of the panel on the wide range of recommendations for restructuring the Supreme Court, from establishing permanent benches, disaggregating functions into different courts, or creating an intermediary court of appeals. Justice Madan Lokur opined that before looking for alternatives, we must strengthen the existing systems and utilize existing resources to their full capacity. In order to strengthen the judiciary, we must improve the system from within. This was agreed upon by Shri V. Sudhish Pai, that within the existing framework a lot of things could be achieved. A focused and dedicated effort is necessary to improve the system. Shri Alok Prasanna Kumar held a different point of view. He held that large scale institutional reform in our judiciary is needed, even above the structural level. Although strengthening our judiciary is needed, we must acknowledge that they (judicial system) will also hit a limit of their efficiency. There is only so much they will be able to do even if we make them function as best as they possibly can. If we start the conversation for such institutional reform now, we will be in a position to implement those reforms in, say 20 years down the line, when they are needed. Ms Catterson concurred with Justice Lokur and Shri Pai.

Dr. Jayaprakash Narayan enquired the panel about ways of improving quality of judges. Justice Madan Prasad Lokur replied that it is difficult to comment on the merits or demerits of the Indian Judicial Service without the details of the proposal by the government. He pointed out that there are two problems in the appointment of judges –

- 1) Salary of judges is too low. Many lawyers earn more in a day than what a judge earns in a month, hence good lawyers are not interested in becoming judges.
- 2) Prestige of the office must be restored. The number of judges is too high, they are transferred easily and not trusted, diminishing the prestige of the office.

Only when the prestige is restored and the judges are paid well, people of competence, character and integrity will come forth. Shri V. Sudhish Pai stated that as judges come from the same society, and no office in a republic is as important as that of being a citizen; if citizens are good then subsequently the judges and lawyers will be good. Therefore, there must be sustained efforts for general rise in standards of society as a whole. Shri Alok Prasanna Kumar stated that quality travels downwards up and the only way to ensure that every judge is of quality is to ensure quality within the pool of eligible candidates. It is necessary to retain talented young professionals in the field long enough and constantly upskill them after entering the judiciary, and conduct assessments on quality, with prospects of a steady career.

The final question by Dr. Jayaprakash Narayan to Ms. Cathy Cartterson, pondered whether the predictability of various judgements of superior courts in the United States of America on grand matters of policy and constitutionality is a matter of concern. Ms Catterson replied that the system works fairly well for the most part. Owing to the fact that the federal judges are appointed for life, it gives them the independence to not be worried about their next job. She added that the federal bench being smaller than the state court bench is very competitive and federal judges achieved a pay raise in the past few years, which originated from the same issue of lawyers being paid much more than the judges. The prestige of the federal judiciary is still remarkably high.

## CONCLUSION

The Supreme Court and the High Courts have been overburdened with appellate cases, limiting the time and resources available to address the more pressing issues of constitutional interpretation. As a result, constitutional issues account for only a small portion of their annual caseload. Furthermore, constitutional benches are created on an ad-hoc basis. As a result, there are inconsistencies in the decisions of different benches.

The panelists suggested that the criteria for admitting cases to the Supreme Court and High Courts must be tightened, and the number of appeals must be reduced. To reach the sanctioned strength of judges, the vacant positions in these courts must be filled as soon as possible. To clear the backlog, Article 224A of the Constitution, which allows for the recruitment of retired High Court judges, should be used. Permanent constitutional benches must be established in the High Courts and the Supreme Court in order to cement their roles as the final authority on constitutional issues in India.