


The COURT & The CONSTITUTION

2018 in Review

26 - 27 January 2019

NALSAR University of Law

The COURT & The CONSTITUTION 2018 in Review

NALSAR University of Law, Hyderabad
in collaboration with
School of Policy & Governance,
Azim Premji University
and
'Law and Other Things' Blog

Date : January 26-27, 2019

Venue : M.K. Nambyar SAARCLAW Centre, NALSAR
University of Law, Medchal District Telangana (500078)



NALSAR
UNIVERSITY OF LAW
HYDERABAD

**Law and
Other Things**



**Azim Premji
University**

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INTRODUCTION

2018 has been an eventful year for the Supreme Court and the Constitution of India. The year opened with an unprecedented press conference by four senior judges of the Supreme Court followed by a controversy over the Chief Justice of India's prerogative to allocate cases and the initiation of an impeachment motion against the then CJI in the Rajya Sabha.

The year witnessed controversies arising from the dilution of the protective provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the exclusion of more than 20 Lakh individuals from the National Register of Citizens in Assam, increased cases of mob-lynching and the relentless tussle between the Executive and Judiciary on the issue of appointments to the higher judiciary. The Apex Court, at the same time also had opportune moments to adjudicate on crucial questions of rights and policy. Alongside the Court, the legislative sphere witnessed the enactment of several legislations and ordinances which are bound to have a considerable impact.

Through 'The Courts and the Constitution' conference, we envisage an annual exercise of examining the major constitutional law developments of the preceding calendar year. The Conference is an attempt to bring together diverse voices from the bench, bar, academia and journalism to deliberate on the landmark legal developments of 2018 which are bound to have a long-term impact on governance and rights of the citizenry.



SCHEDULE

26 January, 2019

9:30 AM : FLAG HOISTING FOR REPUBLIC DAY

10:00 AM - 11:30 AM : SETTING THE STAGE - WHY DO WE NEED A REVIEW EXERCISE?

- Moderator : Dr Faizan Mustafa | Vice Chancellor, NALSAR
- Ms Indira Jaising | Senior Advocate, Supreme Court
- Dr N. R. Madhava Menon | Founder VC, NLSIU and WBNUJS
- Justice G.R. Swaminathan | High Court of Madras
- Dr Sitharamam Kakarala | Professor, Azim Premji University
- Dr N. Vasanthi | Professor, NALSAR

11:45 AM - 1:15 PM : PANEL I - INSTITUTIONAL DEVELOPMENTS AT THE SUPREME COURT

- Moderator : Dr Arun Kumar Thiruvengadam | Professor, Azim Premji University
- Ms Indira Jaising | Senior Advocate, Supreme Court
- Dr Aparna Chandra | Assistant Professor, NLU Delhi
- Mr Alok Prasanna Kumar | Vidhi Centre for Legal Policy, Bangalore
- Mr Suhrith Parthasarathy | Advocate, High Court of Madras
- Ms Apurva Vishwanath | Journalist, New Delhi

2:15 PM - 3:45 PM : PANEL II - DEVELOPMENTS IN EQUALITY JURISPRUDENCE (EMPHASIS ON GENDER AND SEXUAL ORIENTATION)

- Moderator : Ms Prerna Dhoop | Assistant Professor, NALSAR
- Mr Arvind Narrain | Founder, Alternative Law Forum
- Dr Sudhir Krishnawamy | Professor, Azim Premji University
- Ms Poongkhulali Balasubramanian | Advocate, High Court of Madras
- Mr Nizam Pasha | Advocate, Supreme Court

4:00 PM – 5:30 PM : PUBLIC LECTURE BY DR ANUP SURENDRANATH ON 'RETHINKING CAPITAL PUNISHMENT: THE COURT'S ROLE AND RECORD'

- Moderator : Mr Neeraj Grover | Assistant Professor, Azim Premji University
- Discussant : Dr Murali Karanam | Assistant Professor, NALSAR
- Discussant : Mr Venkat Venkatesan | Senior Associate Editor, Frontline Magazine

8:00 PM : CONFERENCE DINNER - HOSTED BY THE VICE- CHANCELLOR, NALSAR

27 January, 2019

10:00 AM - 11:30 AM : PANEL III - LAW AND RELIGION

- Moderator : Mr K. Vivek Reddy | Advocate, High Court of Telangana
- Dr Faizan Mustafa | Vice-Chancellor, NALSAR
- Mr Harish Narasappa | Co-Founder, DAKSH
- Dr Aparna Chandra | Assistant Professor, NLU Delhi
- Mr Nizam Pasha | Advocate, Supreme Court
- Mr Goutham Shivshanker | Advocate, Supreme Court

11:45 AM - 1:15 PM : PANEL IV - DEMOCRATIC INSTITUTIONS AND FEDERALISM

- Moderator : Dr N. Vasanthi | Professor, NALSAR
- Dr M.P. Singh | Professor Emeritus, NLU Delhi
- Mr K.V. Vishvanathan | Senior Advocate, Supreme Court
- Dr Anuj Bhunia | Associate Professor, Ambedkar University Delhi
- Ms Malavika Prasad | Advocate & Ph.D. Candidate, NALSAR
- Mr Suchindran Baskar Narayan | Advocate, Supreme Court

2:00 PM – 3:30 PM : PANEL V - PRIVACY, AADHAR AND DATA PROTECTION

- Moderator: Dr Sitharamam Kakarala | Professor, Azim Premji University
- Ms Ujwala Uppaluri | Advocate, Supreme Court
- Mr Apar Gupta | Advocate and Executive Director, Internet Freedom Foundation
- Mr Suhrith Parthasarathy | Advocate, High Court of Madras

3:30 PM – 4:30 PM: PUBLIC LECTURE BY MR KAPIL SIBAL ON 'THE SUPREME COURT IN TRANSITION' FOLLOWED BY Q&A WITH AUDIENCE

4:30 PM - 5:00 PM : KEY TAKEAWAYS AND PLANS FOR FUTURE EDITIONS

- Moderator : Mr Sidharth Chauhan | Assistant Professor, NALSAR
- Dr Arun Kumar Thiruvengadam | Professor, Azim Premji University
- Mr Vikram Raghavan | Law and Other Things

Vote of Thanks : Ms Parika Kamra and Mr Lovish Garg



SETTING THE STAGE - WHY DO WE NEED A REVIEW EXERCISE?



Dr Faizan Mustafa
(Vice- Chancellor, NALSAR)



Ms Indira Jaising
(Senior Advocate, Supreme
Court)



Dr Madhava Menon
(Founder VC, NLSIU &
WBNUJS)



**Justice G.R.
Swaminathan**
(Madras High Court)



**Mr Sitharamam
Kakarala**
(Professor, Azim Premji
University)



Dr N. Vasanthi
(Professor, NALSAR)



INSTITUTIONAL DEVELOPMENTS OF THE SUPREME COURT

2018 opened with the unprecedented press conference by four puisne judges of the Supreme Court alleging that the then Chief Justice, Deepak Mishra had been acting in complete disregard of the established institutional norms and conventions. In the aftermath, a motion to impeach the Chief Justice was raised in the Rajya Sabha but was instantly rejected by the Chairman.

The press conference was closely related to the controversy around the selective allocation of cases on the basis of the whimsical roaster-system. Later, the roaster-allocation policy was judicially challenged ([Shanti Bhushan v. Supreme Court of India](#)) on the ground that the Chief Justice, regardless of his discretionary powers as the ‘master of the roaster’, could not act in an unguided and unbridled manner. However, the Attorney General argued that conferring roaster-allocation function to the collegium instead of the Chief Justice alone would result in a chaotic situation. This issue has raised multiple questions about the need to ensure allocation of roaster in a fair and efficient manner.

On other fronts, the apex court took several crucial decisions to bring greater transparency into the functioning of the institution. Notably, the collegium adopted a resolution to publish tailored minutes of their meetings on the Supreme Court website. However, these updates provide only a keyhole view of what happens in the hallowed collegium chamber. The specific example of the protracted process of elevating Justice KM Joseph to the Supreme Court paints a poignant account of the tussle that continues between the executive and the judiciary even after the NJAC verdict. The debate on judicial appointments is therefore, far from being settled.

In August, 2018 the Court released guidelines for regulating the process of designating senior advocates by a five-member committee. To what extent this committee brings in an element of objectivity in the process is a subject of debate. In the eventful marathon month of September of 2018, the Court also delivered a judgement allowing for live-streaming of its proceedings ([Swapnil Tripathi v. Supreme Court of India](#)) so as to promote greater transparency in judicial functioning. The modus operandi to implement this judgment is yet to be ascertained.



Dr Arun K. Thiruvengadam
(Professor, Azim Premji University)



Ms Indira Jaising
(Senior Advocate, Supreme Court)



Dr Aparna Chandra
(Assistant Professor, NLUJ)



Mr Alok Prasanna
(Vidhi Centre for Legal Policy, Bangalore)

The policy suggestion of creating an All India Service for Judiciary (AIJS) also resurfaced in 2018. Many states and High Courts have opposed this reformatory suggestion on the ground of potential interference with their role in selecting judges at the lower level. While the Bill promises to provide potential benefits of reaping young talent to join judiciary, issues like coordination and smooth functioning of executive and judiciary need close consideration before going forward with the Bill.

This session aims to assess the institutional performance of the Supreme Court in terms of its own processes and procedures. Discussions on actual independence and the tenability of judicial norms shall form the broad contours of debate. In particular, this panel will discuss the feasibility of institutional conventions like bench formation, listing of hearings and CJI's role as the master of the rooster. The future of democratising the judiciary by making judicial appointments more transparent, live-streaming the proceedings, and introducing All India Judicial Services will also be an integral part of the discussion.



**Mr Suhrith
Parthasarthy**

(Advocate, High Court of
Madras)



**Ms Apurva
Vishwanath**

(Journalist, New Delhi)



DEVELOPMENTS IN EQUALITY JURISPRUDENCE

With its decision of September 7, 2018, the judiciary undertook the task of doing away with gender-based discrimination by reading down Section 377 of the Indian Penal Code (IPC) and recognising the rights of sexual minorities. In the judgment of [Navtej Singh Johar v. Union of India](#), the Supreme Court as an institution atoned for centuries of atrocities against sexual minorities by overturning the 2013 verdict of [Suresh Kumar Koushal and another v NAZ Foundation](#). The Court recognized the impact that criminal sanctions on non-penile-vaginal sexual activity had on the everyday lives of non-heterosexual individuals. Although in essence the judgment only narrowly moved beyond the Delhi High Court's decision of [Naz Foundation v. Govt. of NCT of Delhi](#), the observations made in the concurring opinions are of great significance for the future of the rights discourse in India. The judgment provides a stepping stone towards building an inclusive republic for sexual minorities. The majority opinion of Deepak Mishra C.J. observed that the purpose of the Constitution is not to limit the meaning of equality to individual dignity but to provide equal opportunity in all aspects of life. Similarly, Chandrachud J. in his concurring opinion vouched for greater public recognition of sexual minorities when he stated that the members of the LGBT Community are entitled to "full range of constitutional rights".

The Supreme Court recognising the autonomy of women to marry a partner of their choice in the Hadiya case ([Shafin Jahan v. Ashokan K.M.](#)), has further opened doors for advocating for similar legal rights for sexual minorities. It has initiated a discussion about the steps that can be taken to legalise the right of marriage, adoption and non-discrimination at workplace, in order to secure substantive equality for the non-heterosexual population of India.

In the same month, the Supreme Court handed down another noteworthy judgment with the [Joseph Shine v Union of India](#). The Court rendered the impliedly discriminatory provision under Section 497 of the IPC to be ultra vires of the Constitution. With this judgment, the Court also ventured into the violation of Article 15 of the Constitution. It was observed that criminal sanctions on adultery committed by a husband caused expressive harm to women by stereotyping them into gender roles and denying them active agency for the choices involving their sex life.



Ms Prerna Dhoop
(Assistant Professor,
NALSAR)



Mr Arvind Narrain
(Founder, Alternative Law
Forum)



**Mr Sudhir
Krishnaswamy**
(Professor, Azim Premji
University)



**Ms Poongkhulali
Balasubramanian**
(Advocate, High Court of
Madras)

The judgment emphasised how the provision of adultery permitted State interference into private space of individuals. The opinion of Chandrachud J. emphatically puts, “...the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned”. In decriminalizing adultery, the judgment recognized the agency of women in most private of the affairs, celebrated her autonomy in juxtaposition with forced fidelity, and broke away with the stereotype of women being the property of men.

This session will explore the idea of constitutional morality and its relevance in guiding matters that are otherwise vulnerable to majoritarian backlash. With respect to the case of Navtej Johar, the session will throw a light the possible steps that can be taken to ensure equality in true sense. Since the decision has paved way for purposive interpretation of Article 15, the litigation surrounding non-discrimination movement in India will become an integral issue for discussion. Apart from that, the session will also discuss the spatial idea of ‘public’ and ‘private’ that is likely to affect litigations surrounding marital rape, among other issues.



Mr Nizam Pasha
(Advocate, Supreme Court)



PRIVACY, AADHAAR AND DATA PROTECTION

The decision of the Supreme Court in [Puttaswamy v. Union of India](#) which upheld privacy to be a fundamental right opened door for deliberation on state surveillance, informational privacy and data protection in India. In 2018, the apex court gave momentum to this discussion by upholding the validity of the Aadhaar based biometric scheme of the Indian Government. The decision of [Puttaswamy \(II\) v. Union of India](#) is significant because Aadhaar is touted as the world's largest biometric programme that has an inevitable bearing on the lives of 1.16 billion Indians.

While determining the validity of Aadhaar, the Supreme Court opined that the collection of biometric data in order to create a unique identity based on biometrics did not violate privacy of those enrolled in the program. This is because only minimal and authentic data that was necessary for identifying beneficiaries of welfare programs was to be collected for one's enrollment to Aadhaar. The Court thereby justified the Aadhaar scheme for the purpose of larger public good even if it came at the cost of violating privacy to a certain extent.

The dissenting opinion of D.Y. Chandrachud J. pointed out the inconsistencies with the Aadhaar program and its effect on right to privacy. He reasoned that biometric based unique ID violated essential norms of informational privacy and created a path for mass state surveillance. He also apprehended that the inadequate technology to preserve and secure the collected biometric data would make it vulnerable to leakage and misuse. His dissent raises integral questions about the use of biometric data and autonomy of individuals over their own data.

In the aftermath of the judgment, Justice Srikrishna Committee on Data Protection provided recommendations to facilitate ushering an era of digital economy in the country and indicated the need for a fresh take on right of privacy. The recommendations stressed on the importance of consent as a pre-condition for digital services, the need to store information responsibly, and the obligation of data fiduciaries towards data subjects. The Committee also drew comparisons to data protection laws in other regimes including the European Union and the United States.



**Mr Sitharamam
Kakarala**
(Professor, Ajim Premji
UNiversity)



Ms Ujjwala Uppaluri
(Advocate, Supreme Court)



Mr Apar Gupta
(Advocate and Executive
Director, Internet Freedom
Foundation)



**Mr Suhrith
Parthasarthy**
(Advocate, High Court of
Madras)

The session will explore the right of informational privacy in India in context of constitutional validity of Aadhaar. In this regard, it will further the issues flagged by the Data Protection Committee and assess the validity of the Aadhaar scheme, discuss the possibility of state surveillance through Aadhaar, determine the credibility of Aadhaar Act as a money bill, the need for a full-proof technology to ensure the success of the scheme, the limits to usage of Aadhaar details by corporate entities and the the feasibility of Data Protection Committee's recommendations to further informational privacy and personal autonomy.



LAW AND RELIGION

The Indian Constitution permits interference with religion in case a religious practice hurts public order, health and morality, or in case it runs contrary to other provisions of Part III. In 2018, the Supreme Court attempted to abolish a discriminatory religious practice by permitting the entry of women of all ages into the Sabarimala temple ([Indian Young Lawyers' Association v. State of Kerala](#)), thereby defying hundreds of years of religious custom.

In the present matter, the task before the Court was to first decide whether the devotees of Sabarimala temple formed a separate religious denomination and were thereby distinct from Hinduism. Next, the Court considered whether the restriction on entry of menstruating women was essential to the practice of Hinduism. In coming to its decision, the majority relied on the 'Essential Religious Practice' test to finally allow the entry of women to the temple.

However, the essential religious practice test is met with a great deal of criticism. The term 'essential' is considered to be overbroad and remains undefined. This in turn leads to judicial rationalization of certain religious practices while dismissing others. The dissenting opinion given by Indu Malhotra J. points to this anomaly and states that interference of judiciary in religious practices cannot be justified. The Court also deliberated upon how the ban on entry affects the right to worship under Article 25 of those female devotees who were within the menstrual age, the rights of celibacy under Article 21 of the Constitution and the patriarchal nature of the ban on women entry masked behind a religious custom.

Apart from the Sabarimala temple entry case, 2018 witnessed the Lok Sabha deliberating on the Triple Talaq Bill that imposed criminal sanctions on instantaneous divorce. The validity and utility of this bill becomes an interesting matter for Constitutional scholars in India. Another controversy in matters of religious affairs arose with the Supreme Court branding the Ram Janabhoome-Babri Masjid dispute as a case of land dispute ([M. Siddiq v. Mahant Suresh Das](#)) instead of a religious conflict. With this, the apex court refused to refer the issue to a larger Constitutional bench and stated that the case will be decided like a civil dispute. While the case is yet to be decided in 2019, the issues of Triple Talaq Bill and the Ayodhya verdict will play an integral role in determining the upcoming Lok Sabha elections.



Mr K Vivek Reddy
(Advocate, High Court of
Telangana)



Dr Faizan Mustafa
(VC, NALSAR)



Mr Harish Narasappa
(Co-Founder, DAKSH)



Dr Aparna Chandra
(Assistant Professor,
NLUD)

The moot point for this session is whether the Supreme Court should continue placing reliance on the Essential Religious Practice test, or if it should instead expand the definition of ‘morality’ under Article 25 to Constitutional morality while deciding on religious issues. This session will also deliberate on the limits of judicial interference in deciding the religious faith of citizens, the role of judiciary in ironing the creases of discriminatory practices within religion, the interference of Central government in religious affairs and its link to vote-bank politics.



Mr Nizam Pasha
(Advocate, Supreme Court)



**Mr Goutham
Shivshanker**
(Advocate, Supreme
Court)



DEMOCRATIC INSTITUTIONS AND FEDERALISM

The elections to the sixteenth Lok Sabha in 2014 was a watershed moment in India's tryst with federalism. With a union government as number-heavy as the incumbent, the delicate "quasi-federal" balance that the Constitution envisages underwent some crucial changes.

In May 2018, the Supreme Court opened its gates at midnight to put to rest the controversy on Governor's discretion in inviting a party or alliance to form the government after the elections to legislative assembly in a state ([Dr. G. Parmeshwara v. Union of India](#)). This time it was in Karnataka that the Governor invited the party with highest number of votes to form the government even when the two parties next to it claimed to have the requisite majority stake to form the government. The Governor's use of discretionary power in the appointment of the Chief Minister has historically been an arena of political manipulation and the ambiguity attached with it has often enabled the Central Government to get into state politics through the Governor's office. This time when the Court had an opportune moment to settle the vexed question for once-and-for-all, it simply skirted the question by ordering a floor test.

Another case where the relevance of the office of governor was under scanner was [Government \(NCT of Delhi\) v. Union of India](#) where the Supreme Court examined the sui generis character of the National Capital Territory of Delhi which functions with a Lieutenant Governor (L.G.) as its constitutional head but with its own Legislative Assembly and a Council of Ministers. The question there pertained to the interpretation of Article 239AA of the Constitution as to whether or not the L.G. was bound to act as per the aid and advice of the Council of Ministers. The respondent argued that notwithstanding that NCT had a popularly elected legislative assembly, it was the President of India acting through the L.G. who remained its executive head. The Court however, agreed with the appellants to hold that it was the Council of Ministers (which is constituted of the elected representatives of the people) which have the ultimate say in governing the national capital with the exception of select issues over which the Centre has exclusive powers.



Dr N. Vasanthi
(Professor, NALSAR)



Dr M.P. Singh
(Professor Emeritus,
NLU Delhi)



**Mr K.V.
Vishvanathan**
(Senior Advocate, Supreme
Court)



Dr Anuj Bhuwania
(Associate Professor,
Ambedkar University Delhi)

In the light of the above instances, this session shall seek to explore certain perennially relevant issues in India's Constitutional polity concerning the role of governors, their discretionary power to invite a party to form a government, the nominal nature of their authority alongside contemporary circumstances that have brought about centripetal domination in India's quasi federal scheme of affairs. Given the momentous nature of the Court's decision in the case of NCT of Delhi, the session shall also investigate the sui generis situation of Delhi and look at whether the judgment that looks so far good on paper is actually capable of implementation at the level of realpolitik.

2018 has been a rocky year for the Supreme Court and the Constitution of India. The threat of majoritarian backlash, decay of institutional integrity and disregard for the rule of law loomed large for the Courts and the Constitution. Along with it, the Year also witnessed many far-reaching decisions that will deeply affect the nature of Fundamental Rights in the years to come. This Conference aims to create an annual platform for a thorough examination of the activities of our Apex Court.



Ms Malavika Prasad
(Advocate & Ph.D.
Candidate, NALSAR)



**Mr Suchindran
Baskar Narayan**
(Advocate, Supreme Court)



PUBLIC LECTURES

RETHINKING CAPITAL PUNISHMENT: THE COURT'S ROLE AND RECORD



Dr Anup
Surendranath
(Assistant Professor,
NLU Delhi)



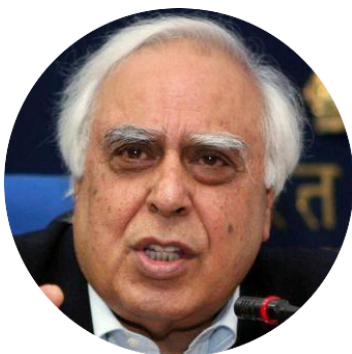
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Azim Premji University)



Dr Murali Karanam
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(Senior Advocate,
Supreme Court)

THE SUPREME COURT IN TRANSITION



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