NATIONAL JUDICIAL ACADEMY

Orientation Course for Newly Elevated High Court Justices

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(Virtual through Google Meet)

PROGRAMME REPORT PREPARED BY

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The National Judicial Academy organized an online "Orientation Course for Newly Elevated High Court Justices" on 27 – 28 November, 2021. The participants were the newly elevated High Court Justices. The course aimed to discuss core areas concerning writ jurisdiction and judicial review. The course provided a platform for participating justices to share experience, insights and suggestions with a panel of distinguished resource persons from the judicial branch and other relevant domains. The course involved deliberations on the topics including Writ Jurisdiction: Varieties and Scope; Judicial Review of Legislative Action; Judicial Review of Administrative Action; and Constitutional Remedies under Criminal Justice System.

Major Issues and Suggestions from the Discussion

Session 1: Writ Jurisdiction: Varieties and Scope

The session was introduced by the Hon'ble Director, NJA and the objective of the session was explained. The judgment *Dwarkanath v. Income Tax Officer,* AIR 1966 SC 81 was referred and the interpretation of Article 226 of the Constitution of India by Justice K. Subba Rao was discussed. Article 226 confers wide powers on the High Courts to reach injustice wherever it is found. The judges have to exercise self restraint because of the constitutional limitations of the doctrine of separation of power and at the same time reach out to protect the fundamental rights guaranteed in the Constitution. The *Vishakha case* AIR 1997 SC 3011 was referred where the Supreme Court entered upon judicial legislation for the betterment of the society.

The historical background behind the framing of Article 32 of the Indian Constitution was discussed. Its jurisdiction is limited for enforcement of fundamental rights under Part III of the Constitution. The jurisdiction of the High Court is wider than the jurisdiction of the Supreme Court as High Courts can issue writs either for enforcement of the fundamental right or for any other purpose under Article 226. The features of various writs i.e. habeas corpus, mandamus, prohibition, certiorari and quo warranto were discussed. The importance of the writ of habeas corpus was explained. The issue of compensation to the detenue under public law in India was discussed. This remedy is unique to India and has been developed by the Supreme Court of India. The writ of mandamus is applied when the

authority is bound to do something but it is not exercising its powers. The interpretation of Article 21 was discussed and a case relating to the right to have proper road in hilly areas was referred and it was interpreted as part of Article 21 but the direction to provide budget was termed as an encroachment on the functioning of government. Under the writ of mandamus instead of closing the case the Supreme Court issued directions to authority time to time in the larger interest of the society. The writ of certiorarified mandamus was discussed and the nature of directions to be issued under it by the High Courts were highlighted. The writ of prohibition is applied when judicial or quasi judicial authority has no inherent jurisdiction to entertain the matter.

The Doctrine of Promissory Estoppel, the Doctrine of Unjust Enrichment, the Doctrine of Legitimate Expectation were discussed. The writ of quo warranto was discussed and it was emphasized that even a third party can approach the court against unlawful appointment of a person. The De Facto Doctrine was discussed. The De facto doctrine is applied in the situation where a person is appointed without necessary qualifications. The inaugural address of the first Chief Justice of India delivered on 28 January, 1950 when the Supreme Court started functioning was referred. The address highlighted the role of the courts in the administration of justice and playing a key role in the society as the sentinel on *qui vive*.

Various aspects of judicial review were discussed. Judicial review is an inherent characteristic of a constitutional State. It was underscored that judicial review is exercise of power by the superior courts to test the legality of State action, to determine whether an action is lawful or not, and to grant appropriate relief. Judicial review has roots in common law but in India it is enshrined in Articles 13, 32 and 226. This power is exercised through prerogative writs. The Blackstone's Commentary was referred where the purpose of various writs was explained which is to keep jurisdiction within the bound of their authority and to ensure the performance of duties by various authorities and to protect the liberties of people. The discussion then focused on the high prerogative writs. According to the eminent jurist Dicey these writs are the bulwark of english liberties where individual rights are safeguarded even without there being a declaration that they are fundamental. It was emphasised that fundamental rights are not a gift of the Constitution and that was the mistake that the Supreme Court did in the *ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521*. The right to life and liberty are

inalienable human rights which inhere in a person as a human being. They are not the gift of any law or the Constitution and the Constitution will be considered incomplete if it does not recognize those rights. The Constitution does not confer these rights, rather it only recognizes and gives effect to those rights.

The issue that whether the the court can refuse to exercise their constitutional power of judicial review in respect of illegal or unlawful action on such grounds as delay, res judicata or existence of alternative remedies was discussed. It was opined that there is no strait jacket formula by which the courts can refuse to exercise the judicial review. The purpose of public law is to discipline the exercise of power and judicial review is the means of achieving that objective. The protection and enforcement of the fundamental rights is both a power and the duty of the court. Concern was expressed on the reducing number of cases under Article 32 in the Supreme Court. It is imperative that this pristine preeminent position of the Supreme Court and of the High Court as envisaged by the Constitution is exercised unimpaired. The discussion then focussed on the situation when the writ is for any other purpose and the exercise of discretionary power of the court. The *Ratlam Municipality case, 1980 AIR 1622* was referred wherein Justice VR Krishna Iyer held that the discretion becomes the duty when the beneficiary brings out the circumstances for its benign exercise. Then the scope of application of power to issue writ in situation when an alternative remedy exist was discussed. It was emphaised that existence of an alternative remedy is not a bar to the writ jurisdiction and it is only one factor that court would consider. When the writ is for the enforcement of the fundamental rights then alternative remedy is not a bar at all. The existence of the alternative remedy is no bar in other situation as well including where the vires of the Act is challenged, or when there is non compliance with the principles of natural justice, or where there is inherent lack of jurisdiction, or when the mandatory provisions of the law is not complied with. Various factors which require the exercise of writ jurisdiction even when the alternative remedy exists were highlighted.

Session 2: Judicial Review of Legislative Action

The session focused on instiutional limitations of judiciary in reviewing legislative action, procedural fairness and due process, legislative competence and repugnance. The limitations concerning striking down a law under judicial review were discussed. The judicial review of any legislative action classically concerns Article 32 where a legislative action can be struck down if it is violative of fundamental rights. The issue that if the Supreme Court or the High Court strike down a legislation as being unconstitutional and if this striking down takes place after few years when the Act has come to force then what happens to the transactions which have taken place in between was explained. The issue of what happen if the striking down has retrospective effect was also discussed. One view is that if a law is struck down today then every transaction is void ab initio. There are conflicting judgments where the Court has used the word void *ab initio*, nullity and dead. It was opined that when the law is struck down as void it should normally operate till the date when it is struck down and the in between transactions should not be affected.

In this regard the amendment to the Delhi Special Police Establishment Act was referred where the legislative direction that if the officer is above the rank of joint secretary then no action can be taken against him unless special sanction for prosecution has been given by the central government was struck down in the *Vineet Narain v. Union of India, (1996) 2 SCC 199.* The discussion then focussed on Article 226 and the grounds on which a legislative action is challenged. It was opined that arbitrariness has been elevated to set aside the primary legislation and this approach has been followed in *Shayara Bano v. Union of India, (2017) 9 SCC 1* and *Joseph Shine v. Union of India, (2019) 3 SCC 39.* The 1975 Indira Nehru Gandhi judgment of the Supreme Court was referred and the issue that when the basic structure is a ground to strike down a constitutional amendment why it can't be a ground to strike down an ordinary legislation was discussed. It was opined that the *Madras Bar Association vs Union of India and Another 2021 SCC OnLine SC 463* judgment which struck down the National Tax Tribunal Act made it clear that an ordinary legislation too can violate the basic structure. So now the violation of the basic structure can also be a ground to strike down an ordinary legislation.

The discussion then focused on the scope of judicial interference in policy matters. It was emphasised that courts can scrutinise the reasons behind the policy and if the reasons do not satisfy the mandate of the Constitution then the policy can be struck down. If the reasons behind the policy are sustainable and plausible and represent one view the policy will be upheld.

Then the discussion focussed on the issue that if a High Court struck down a central legislation then is it invalid only in that state or in the entire country. The Bombay High Court said that once a central legislation has been struck down by one High Court and if there is no conflicting judgment by any other High Court then that judgment will have pan India ramifications. The complication comes when it is struck down by one High Court and upheld by another High Court then what happens to other states. This question has still not come up. It was opined that if a law is struck down by one High Court then that judgment will have application throughout the country. There is no similar provision regarding the applicability of High Court judgment for the State as it is for the Supreme Court according to Article 141 of the Constitution. The discussion then focussed on the High Court's power to strike down a law and prospective application. The purpose of Validation Act to save the law was also explained to participants.

The discussion then focussed on the procedural fairness and due process. The dissenting judgment of Justice S. Fazl Ali in *A.K. Gopalan v. State of Madras, 1950 SCR 88* was referred and it was opined that according to Justice S. Fazl Ali due process is not just the 14th Amendment of the US Constitution and it goes back to the Magna Carta and to a year 1311 Statute of King Edward. The *Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India, (1970) 1 SCC 248* was discussed where it was held that all the fundamental rights must be considered together and it also introduced the object and effect test. The court must test object and effect of the law. Then the *E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3* was referred where for the first time arbitrariness was read in Article 14 and it expanded the scope of Article 14 and put a limit on the arbitrary executive action. Then the *Maneka Gandhi v. Union of India, (1978) 1 SCC 248* was referred where the law was substantially liberalised and procedural and substantive due process were brought in. The *Ramana Dayaram Shetty vs The International Airport 1979 SCR (3)1014* was referred where procedural fairness was discussed and it was held that the fair play must permeate in the entire operation of the

State action. These judgments substantially expanded procedural fairness and made fairness a part of the administrative law and the constitutional law.

The discussion then focussed on the legislative competence and repugnance under Article 254. Article 245 and 246 of the Constitution were read and the principle of federal supremacy was discussed. Conflict about law making power of parliament framed in terms of the entries in List I as compared to the law making power of the States framed in terms of the entries in List II and the List III was discussed. It was opined that as far as the entries in the concurrent list are concerned they will take precedence over the List II. Power of the Parliament with respect to entries in List I as well as the powers of the Parliament and States with respect to matters in List III was discussed. Any time when the legislativce competence is challenged then one has to make determination as to whether or not the law in question is traceable to a particular entry in one of the lists and for that the test is found in the Doctrine of Pith and Substance and one has to see the true nature and character of the legislation. While discussing the test to determine the actual legislative competence of the relevant legislatures, the judgment in *State of Rajasthan v. Shree Jeet Chagla*, 1959 Suppl SCR 904 on the application of Doctrine of Pith and Substance was referred. The judgment laid down the principles for dealing with issues of legislative competence. The first principle is the presumption of constitutionality of any legislation made by the legislature which means courts always look to try to uphold legislation. The second principle is that plenary power of any legislature must be confined to the topics mentioned in the respective list.

Then the analysis of Article 246 of the Constitution was done and it was opined that entries are not always mutually exclusive. The issue how to reconcile the conflict between two entries when the legislation is found to be impinging on legislation of other legislature found in other list was discussed. It was opined that the test of pith and substance should be applied in such situation with respect to the impugned legislation and it must be seen that whether in pith and substance the legislation is related to the entry in the list of relevant legislature. The court must see the actual frame of legislation and should analyse it section by section in light of the preamble and object and purpose of legislation and then relate it to a particular entry in List I, List II or List III.

The discussion then focussed on the conflict between the entries and how it is to be resolved under Article 246. The judgment *Herbs Pharmacetical v. State of Bihar,* [(1983) 4 SCC 45] was referred and it was opined that the test of pith and substance will apply here. It was opined that if there is a irreconcilable conflict in entry in List I and entry in List II then alone the power of Parliament to supercede legislation with respect to matters in List II would arise. It was opined that the non obstante clauses and the subject to clauses in Article 246 lays down the principle of federal supermacy therefore in the event of overlap between List I and List II then List I will prevail.

Then the discussion focussed on the broad principles for reconciling conflict between entries. The first principle applies in a situation when there are two legislations, one by a State legislature and one by the Parliament and both of them are found to be traceable to the relevant entries in their respective list and in such a context the judges must read the entries together and should attempt to reconcile them without giving the narrow interpretation to either of them to avoid the conflict of jurisdiction. The second principle is that judges can restrict the scope and give less wide interpretation if possible so that the conflict between two entries can be reconciled and the entries can be interpretated accordingly. The third principle is that no question of conflict can arise if on examination of the impugned legislation it is found in pith and substance that it falls exclusively in the list relatable to that legislature and the encroachment on the legislation by other legislature is purely incidental. If the encroachment is only incidental then no question arises.

Then the discussion focussed on Article 254 and the issue of repugnance dealing with conflict of legislations on matters in the concurrent list. The issue whether it should be in the same entry in the concurrent list or it can also relate to different entry in the concurrent list was discussed. It was opined that only conflicts of laws made by the Parliament with laws made by States on matters enumerated in the concurrent list are covered by Article 254. The judgment in *Vijay Kumar Sharma v. State of Karnataka* 1990 SCR (1) 614 was referred and the issue that whether the conflicts relate to the same entry in the concurrent list or they relate to the same subject matter was discussed. The judgment *Innovative Industry v. ICICI Bank,* [2018 (1) SCC 407] was also discussed.

Session 3: Judicial Review of Administrative Action

Two slightly differing views on judicial review were deliberated upon i.e. first, greater vigil & circumspection on judicial review of administrative action and, second, expanding the reach, scope and powers of judicial review. It was stressed that the role of constitutional courts of India is to keep the executive and legislative within the constitutional bounds. The *Triple Talaq Case* [(2017) 9 SCC 1] was referred on 'manifest arbitrariness' as a new ground for judicial review. The grounds for the permissibility of judicial review were elucidated upon including irrationality, illegality, and proportionality. It was emphasized that after the judgment in *L. Chandra Kumar v. Union of India and Others* [AIR 1997 SC 1125] judicial review is a basic structure of the Constitution and post the judgement in *S.R. Bommai v. Union of India* [1994 AIR 1918] there is virtually nothing beyond judicial review. It was mentioned that the reach, scope & powers of judicial review are extremely wide. However, participant justices were suggested to be cautious and aware of the limitations on the power of judicial review. It was stressed that judges must show respect for executive discretion but in case the discretionary powers are exceeded then the judiciary can exercise review based on the permissible grounds for judicial review. The session involved deliberation on the contours of judicial review itself and the following aspects were highlighted that right of judicial review is itself a fundamental right which is the fulcrum of democracy because it is basic to the principle of separation of powers, it is a bulwark and a defense against absolute rule & autocracy.

It was pointed out that the constitutional power of judicial review has been restricted over the years in the form of limitations through judicial pronouncements. The Wednesbury principle was also highlighted and discussed in detail. Some judgments on judicial review over quasi-judicial actions highlighted during the session included *Supreme Court Advocates-on-Record Association v. Union of India* [AIR 1994 SC 268]; *Manak Lal v. Dr. Prem Chand* [1957 AIR 425], *Om Kumar v. Union of India* [(2001) 2 SCC 386]; *Municipal Corporation Ujjain v. Bvg India Ltd*. [(2018) 5 SCC 462]; *Mansingh v. State of Haryana* [(2008) 12 SCC 331]; *Sterling Computers v. M/s M & N Publication* [(1993) 1 SCC 445]. The grounds on which administrative matters can be interfered with under Article 226 were broadly laid down during the discussion. Certain limitations on judicial review in the form of checks and balances on the judiciary itself to avoid judicial overreach were highlighted. It

was mentioned that it must be checked whether the authority/ institution brought before judicial review is amenable. It was underlined that it is not the merits of the decision but the decision-making process which must be examined and courts cannot substitute the wisdom of the executive. Lastly, the constitutional underpinning to administrative decision-making under Article 77 with regard to the Union of India and Article 166 as far as States are concerned was also discussed upon.

Session 4: Constitutional Remedies under the Criminal Justice System

A kaleidoscopic presentation on the development of Constitutional Law in the arena of Criminal Justice System was given during the session. The session involved an in-depth discussion on the laws laid down through judicial pronouncements, the philosophical aspect, and a pragmatic approach on constitutional remedies *viz.* criminal justice system. The constitutional remedies for reversal of wrongful conviction, illegal arrest & detention, unnatural death in prison and, custodial death were some areas deliberated upon. The parameters for grant of compensation as public law remedy and private law remedy were mentioned. It was highlighted that the law of compensation has extended even when the Courts have not recorded an order of conviction to do complete justice as in the case *Shakila Addul Gafar Kahn v. Vasant Raghunath Dhoble* [(2003) 7 SCC 749]. It was also stressed that compensation may be granted only in cases of malicious prosecution and not otherwise as held in the cases *viz. State of West Bengal v. Babu Chakraborthy* [(2004) 12 SCC 201] wherein compensation awarded was set aside by the Supreme Court. It was pointed out that Articles 20, 21 and 22 are the bedrock of constitutional principles which govern the criminal field. Protection against *Ex post-Facto Laws*, double jeopardy, and self-incrimination as provided under Article 20 were some areas that were discussed at length in light of judicial pronouncements. It was highlighted that the purpose of these provisions are to seek truth and take the constitutional provisions forward. Some other areas that were discussed included the right to remain silent, Art. 21 on the expansion of the right to life, due process and fair procedure established by law, death sentence and its promulgation, aggravating circumstances & mitigating circumstances and, jail jurisprudence relating to contemporary prison reforms. The session involved discussion on legal aid under the Constitution wherein Article 39A of the Constitution and Section 304 of the CrPC along with the Legal Services Authorities Act, 1987 was

referred. Through various judgments *viz. Suk Das v. Union Territory of Arunachal Pradesh* [(1986) 2 SCC 401], *Sheela Barse v. State of Maharashtra* [(1983) 2 SCC 96], *Hussainara Khatoon and Ors v. Home Secretary* [(1980) 1 SCC 98], etc. it was elucidated that legal aid is interpreted as a fundamental right. It was pointed out that in case of breach of duty to provide legal aid various consequences have been laid down by the Supreme Court through judgements.

On the subject of expanding horizon of compromise in criminal cases with reference to Section 320 CrPC, it was highlighted that for quashing cases on settlement the guiding principles are to achieve the ends of justice and, to prevent abuse of process of the court. It was also emphasized that a settlement between parties makes the chance of conviction extremely bleak and the continuation of proceedings is rendered prejudicial to the accused. The parameters for compounding an offence were also highlighted during the course of the discussion *viz.* the nature & gravity of an offence and the stage of proceeding. Lastly, the deliberations highlighted some precautions that judges must take while dealing with such matters as they come up before them over time. It was suggested that a judgment must include findings that an arrest is malicious, the prosecution is malicious, and that judges were suggested to go into facts & findings of the case while giving compensation to the victim.