

NATIONAL JUDICIAL ACADEMY



WORKSHOP FOR NEWLY ELEVATED HIGH COURT JUSTICES [P-1234]

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PROGRAMME REPORT

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OVERVIEW OF THE PROGRAMME

The National Judicial Academy organized a two day ‘Workshop for Newly Elevated High Court’ on 12th & 13th December, 2020 on a virtual mode. The participants were newly elevated High Court Justices from across the country. The workshop provided a forum to participant judges to deliberate upon contemporary themes like judicial review, its importance, genesis, limits and boundaries. The workshop included sessions on judicial review of administrative action legislation and policy with special reference to recent developments in contemporary jurisprudence of judicial review. The workshop was conceived to apprise the participating High Court judges of the nuances and intricacies of public law adjudication at an early phase of their judicial career.

DAY 1

Session 1 - Theories of Judicial Review: Are there Boundaries for the *Sentinel on the Qui Vive*

Session 2 - Judicial Review of Legislation: Genesis, Evolution & Boundaries

DAY 2

Special Session: Presentation by E-Committee of the Supreme Court on eCourt Services

Session 3 - The Evolving Landscape of Judicial Review of Administrative Action

Session 4 - Judicial Review of Policy: The Contours and Boundaries of “Substantive Due Process/Manifest Arbitrariness”

DAY 1

Session 1 - Theories of Judicial Review: Are there Boundaries for the *Sentinel on the Qui Vive*

Speakers - Justice S.A. Bobde, Justice B.S. Chauhan & Adv. Sujit Ghosh

In the session, the judges were reminded of their role as guardians of fundamental rights, irrespective of their faith as per the Constitution of India, which is basic charter of our vast and vivid democracy. Various fundamental rights and principles of liberty, equality and fraternity as enshrined in Preamble to the Constitution of India were discussed. Judges were reminded that our Constitution and our ancient principles state that Law is the king of kings and that no one is superior to law. It was stated that judges will be asked to judge the veracity and limits of legislative and administrative/executive actions often as a part of judicial review. Moreover, to ascertain whether the subordinate courts have exercised jurisdiction vested in them judiciously, or had exceeded such jurisdiction, as a role of a *Sentinel on the Qui Vive*. It was further suggested that the provisions of other substantive laws of our country along with constitutional provisions are required to be well administered. The concept of separation of Powers was referred to remind judges of their powers and restraints. It is only the judiciary which has been entrusted to apply to check the constitutionality and validity of a law. The judicial power exercised by Supreme Court of India and High Courts in India are probably the widest and the most extensive known to the world. On judging, it was opened that knowledge of law as well as of human behaviour is important for judging. Socrates was quoted to highlight the essential qualities of a good judge - "to hear courteously, to answer wisely, to consider soberly, and to decide impartially." The importance of consistency in judicial decisions was stressed on. While addressing the issue of the influence of public perception on judgment, it was stated that the greatest guarantee of justice

is the personality of a judge; and judges with strong character are not influenced by public perception.

The provisions of Constitution of India relating to 'separation of powers' and Kelsen's theory of 'Grund Norm', which is a basis of Judicial Review were discussed. Cases including *Kesavananda Bharti v. State of Kerala* (1973) 4 SCC; *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299; and *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha* (2007) 3 SCC 184 were discussed in detail. The US Supreme Court judgment in case of *Marbury v. Madison* (1803) which laid the foundation of Judicial Review was referred to. The relevance of 'Basic Structure Theory' as propounded by Indian Supreme Court in case of *Kesavananda Bharati* and strengthened in later cases like *Minerva Mills* was discussed. While explaining the scope of 'Judicial Review', judges were cautioned that judicial review lies against decision making process and not against the decision itself. Courts should act as an Appellate for a and re-appreciate the evidence. This power is limited to correct the error of law or procedure. Important facets of judicial review viz. judicial review of legislative action; judicial review of administrative actions; judicial review of policy decisions; judicial review of economic policy; judicial review of price fixation; judicial review of decisions based on expert opinions; judicial review of sub-ordinate/delegated legislations; judicial review in contractual cases; judicial review in labour and service law related matters; judicial review of the quantum of punishment awarded by trial courts; and judicial review of clemency Power of President & Governors etc. were discussed in great detail with the help of relevant judicial pronouncements.

Session 2 - Judicial Review of Legislation: Genesis, Evolution & Boundaries

Speakers – Justice Aniruddha Bose, Justice Kurian Joseph & Adv. Sujit Ghosh

The session was commenced with a remark that as judges of higher judiciary in India, we have been conferred with power to upset what has been done by two houses of legislature and the

head of the executive. In continental and in most of the common law systems, judicial review of legislative actions is not welcomed by many. 'Judicial Review' of legislative action was possibly first started by Chief Justice Marshall in case of *Marbury vs. Madison*. Reference was made to the common law jurist Lord Coke saying that common law can control acts of Parliament/legislature. Art. 13(2) of Constitution conferring power of judicial review on judiciary was discussed. It was stated that for judicial review Art. 13, 246, 372 and Part III of the Constitution are very important to be understood. *Kesavananda Bharati case* and various areas of judicial review of legislation as minority related laws, fundamental rights related laws, privacy laws etc. were discussed. The importance of sanitization of mind of a judge hearing cases judicial review was emphasized upon.

The concept 'Rule of Law' and its implementation was discussed. It was stated that peoples our representatives pass the law and they have their own politics. It was suggested that judges one should considered as to whether policy in any law is in consonance with the Constitution and nothing else. The case of 'Triple Talaq' and its relevance as a case for judicial review of the Legislation and the issues of arbitrariness and unreasonableness while deciding cases under judicial review were discussed. The oath taken by a 'Judge' and its importance while dealing with cases on judicial review was emphasized. True faith to the constitution of India in oath taken by a judge was stressed upon. Constitutionality of a legislation or its provision should be the only concern for a judge while undertaking a judicial review. A judge should have only 'Constitutional Conscious' and no other conscious like religious, political, personal etc. while deciding.

The importance of Art. 37 and other Directive Principles of State Policy was emphasized upon. The importance of Parliamentary Democracy and the relations of three organs of State in Indian context was discussed. It was stated that a fight or tension between three organs of democracy are vital for being a vibrant democracy had been referred in earlier paragraph of this report. The

importance of Kelsen's Grundnorm theory and its relevance in Indian Context was deliberated upon. Various approaches to interpretation of statutes/Constitution with reference to relevant judicial pronouncements was discussed. It was stressed that legislation should not be invalidated unless the error is apparent. The presumption should always be in favour of constitutionality of any law passed by legislature and those who claim it to be unconstitutional should prove it. Judges shared their experiences with the panel.

DAY 2

Special Session: Presentation by E-Committee of the Supreme Court on eCourt Services

Speaker – Ms. R. Arulmozhiselvi

In the presentation by e-Committee of the Supreme court on eCourt Services major projects of e-committee and its relevance, various litigant centric services offered by e-committee viz. push messages, case status, mobile applications, NJDG, e-seva Kendra etc. were discussed.

Session 3 - The Evolving Landscape of Judicial Review of Administrative Action

Speakers – Justice J. Chelameswar & Mr. Khagesh Gautam

The session commenced with the assertion that judicial review over administrative action has evolved in lines of common law doctrines such as proportionality, legitimate expectation, reasonableness and principles of natural justice. The scope of judicial review before Indian courts has emerged in three dimensions (i) to establish fairness in administrative action (ii) to protect the guaranteed fundamental constitutional rights and (iii) to rule on questions of legislative competence between the Centre and State. Further, the speaker shared some experiences in relation to judicial review of administrative action and what appropriate inferences could be drawn, given that human mind can perceive different facets of inferences from the same set of facts. Some of the landmark judgments cited and discussed were *Ramana Dayaram Shetty v. International Airport Authority of India and Ors* (AIR 1979 SC 1628), *Shamsher Singh & Anr. v. State of Punjab* AIR 1974 SC 2192, *Mahendra Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.* AIR 1978 SC 851. These decisions gave a new dimension to the concept of judicial review and the functioning of judiciary in the country. The speaker remarked that for the initial one and a half decade the Indian judiciary maintained a distinction between quasi-judicial functions and administrative functions but by

the late 60's the distinction got blurred. It was pointed out that relaxation of the traditional rule of standing and the perception that Art. 14 strikes at every arbitrary action by the State, in theory makes absolute sense but poses rather practical difficulties.

The participant judges were cautioned to refrain from falling into the trap or illusions that judges exercise any sort of "divine powers" under Art. 226 while granting relief to the people. They must function under the discipline and jurisprudential principles of law. The session further explored on the need to observe the doctrine of *stare decisis* and *ratio decidendi* more strictly. The weight of the authorities laid down in the *Council for Civil Service Unions v. Minister for the Civil Service* or the *GCHQ case* [1984] UKHL 9, *Ridge v Baldwin* [1964] UKHL 2, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223, *Tata Cellular v. Union of India* 1994 SCALE (3) 477 and host of other judgments makes it clear that when it comes to judicial review of administrative action, it is the process which must be reviewed and not the merits of the decision. It was stated that three grounds of judicial review of administrative action has been accepted and read into the Indian law as per the *Tata Cellular case*, which are (i) illegality i.e. pure questions of law; (ii) irrationality i.e. if a decision is so perverse that no reasonable person with the same facts will ever come to that conclusion; and (iii) procedural impropriety.

Lastly, it was remarked that no uniform rule has been or can be evolved to test the validity of an administrative action or decision because the extent and scope of judicial scrutiny depends upon a host of factors such as nature of the subject matter, nature of the rights affected, executive functions of the decision maker, circumstances in which the decision was made, character of the legal and constitutional provisions applicable etc. That is to say, the quest to find an objective standard in this regard is futile.

Session 4 - Judicial Review of Policy: The Contours and Boundaries of “Substantive Due Process/Manifest Arbitrariness”

Speakers – Justice Indira Banerjee & Justice B.D. Ahmed

The session commenced with the assertion that the essence of judicial review is 'rule of law'. The judiciary exercises the power of judicial review to ensure the different organs of the State act within the limits of the power conferred on them by the Constitution. 'Judicial review' is therefore, the cornerstone of constitutionalism. The courts may strike down as unconstitutional any Act that violates the principles of the Constitution. It also includes the power of the court to redress executive or legislative inaction in giving effect to constitutional rights. That is to say when there is clear violation of a constitutional right, the courts cannot shut its eyes, simply because a defence of policy decision is taken. However, it was pointed out that courts must take utmost caution while reviewing policy decisions and considerations, *viz.* policy be better or expedient than the other must be left to the wisdom of the concerned organ of the State. It was further clarified that under the scheme of the Constitution, the legislature, executive and judiciary are restricted to their respective fields. Therefore, keeping in mind the principle of 'separation of powers' and without encroaching upon the legitimate arena of a different organ of the state the judiciary has to uphold the constitutional and statutory rights. The concentration of power in any one organ may upset the fine balance between them and destroy the fundamental premises of democratic governance. In this regard, the decision in *A.K. Gopalan v. State of Madras* AIR 1950 SC 27, *Maneka Gandhi v. Union of India* AIR 1978 SC 597, *S.P. Sampath Kumar v. Union of India & Ors.* AIR 1987 SC 386, *L. Chandra Kumar v. Union of India and Others* 1997 (2) SCR 1186, *Delhi Development Authority & Anr. v. Joint Action Committee & Ors* JT 2007 (13) SC 548, *Ajay Hasia & Ors v. Khalid Mujib Sehravardi & Ors* AIR 1981 SC 487 were briefly discussed.

It was remarked that it is the legality of a policy and not the wisdom or soundness of the policy which is the subject of judicial review. The courts cannot act as appellate authority examining the correctness, suitability and appropriateness of a policy. Also, the courts cannot advise on matters of policy which the executive is entitled to formulate. It was asserted that the scope of judicial review while examining a policy is to check whether it violates the fundamental rights or is opposed to the provisions of the Constitution/statute or is 'manifestly arbitrary'.

The session further dealt with the scope and implications of “due process” and “arbitrariness”. In this regard, it was stated that the origin of the term ‘due process’ can be traced to the *Magna Carta*. The doctrine has been incorporated in legal systems around the world in order to check unrestricted exercise of governmental power and to balance the same in accordance with the interest of the masses. Due process is either procedural or substantive. 'Procedural due process' implies that no one shall be deprived of his life, liberty or property except in accordance with procedure laid down in the statutory law. 'Substantive due process' connotes that a procedure must be fair, just and reasonable. The decision in *Selvi & Ors v. State of Karnataka & Anr.* AIR 2010 SC 1974, *Mohd Arif @ Ashfaq v. The Registrar, Supreme Court of India & Ors* (2014) 9 SCC 737 and *Justice K.S. Puttaswamy (Retd) v. Union of India* 2017 SCC OnLine SC 996 were discussed. The session also dealt with the contours of ‘arbitrariness’. It was asserted that arbitrariness strikes at the root of Art. 14. It is important to remember that an Act founded on prejudice or preference rather than on reason which ignores relevant factors is arbitrary. Such an Act is liable to be struck down. However, it was advised that the quest to curb arbitrariness should not result in judicial arbitrariness. The function of the court is to see that lawful authority is not abused and not to appropriate to itself the task entrusted to that authority.
