National Judicial Academy, Bhopal

PROGRAMME REPORT

Workshop for Newly Elevated High Court Justices

[P-1240]

06th & 07th February, 2021

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A two day "National Workshop for Newly Elevated High Court Justices" was organised at the Academy on a virtual platform. The online workshop sought to sensitize the newly elevated High Court Justices on the core domain of "Judicial Review". The essence of the core area was schematically subsumed in four sessions accreting to a deeper understanding of the contours of "Judicial Review". The pedagogy and the discourse stimulated intense discussions and dissemination of evolution of the indispensably important area by tracing its historic and theoretical genesis to its contemporaneous adolescence by capturing the philosophical fabric to the common-law jurisprudence of "Judicial Review". The four strategically designated sessions, each fencing a key area of judicial import were: "Theories of Judicial Review: Are there Boundaries for the Sentinel on the *Qui Vive*"; "Judicial Review of Legislation: Genesis, Evolution & Boundaries"; "The Evolving Landscape of Judicial Review of Administrative Action"; and "Judicial Review of Policy: The Contours and Boundaries of '*Substantive Due Process/ Manifest Arbitrariness'*".

The discourse was kindly guided and navigated by Mr. Arvind Datar (Sr. Advocate); Mr. C. Aryama Sundaram (Sr. Advocate); Hon'ble Justice A. P. Sahi (former CJ Madras High Court & Patna High Court); Hon'ble Justice S.C. Dharmadhikari (former senior judge Bombay High Court); Mr. Sujit Ghosh (Advocate Supreme Court of India); Hon'ble Justice Badar Durrez Ahamed (former CJ J&K High Court) and Hon'ble Justice G. Raghuram (Director, NJA).

Session-wise Programme Schedule

Day-1

Special Session - Presentation by e-Committee, Supreme Court of India on e-Court Services

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

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'*.

Session-1

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

Proposed areas for discussion

- ✓ *Scope of Judicial Review.*
- ✓ *Doctrine of "Separation of Powers" vis-à-vis "Judicial Review".*
- ✓ *Restraint to Judicial Review.*
- ✓ *Sketching the boundaries pertaining to Legislative Spear.*
- ✓ *Sketching the boundaries pertaining to Constitutional Law Spear.*
- ✓ *Sketching the boundaries pertaining to Administrative Law Spear.*
- ✓ *Sketching the boundaries pertaining to Judicial Spear.*

Speaker: Mr. Arvind Datar & Mr. C. Aryama Sundaram

The session commenced by enquiring about the existence of fences (if any) to be guarded by the legal fiction, *sentinel* on the *qui veve.* The etymology and the origins of the constituent words of the phrase *Sentinel on the Qui Vive* was briefly discussed to literarily mean a guard on the alert or lookout. Only to substantially imply, as to whether theories of judicial review are diligently and observantly (to be) sentry guarded to maintain its impermeable natural contours. To what extent (if permeable) the theories of judicial review pervade other governmental organs (*viz.* legislature and executive) under the garb of judicial review, judicial activism, and the likes. Is the concept of judicial review sacrosanct in nature? Or does it militates against other democratically established doctrines *viz.* "Doctrine of separation of powers"? The operations of judicial review to trim constitutional irregularities inflicted upon, by legislative provisions and/or executive actions and the exothermic resistance to the same were argued, defended and examined.

For an effective analysis of the scope of "judicial review" and for ease of contemplation the topic was schematically analysed through four key lenses: a) Constitutional; b) Legislative; c) Administrative; and d) Judicial.

On boundaries pertaining to Constitution of India, delimiting the focus exclusively to the express constitutional provisions (discounting ingression into the silences and implied interstices), it was asserted that, at its infancy the Supreme Court of India along with the High Courts were being assigned the role of a "*Sentinel on the Qui Vive* by non-other than the Constitution of India. The Indian position of the sentinel *qua* constitutional boundaries was elucidated with the help of certain provisions including, Art(s). 31B (Ninth Schedule). It was introduced by the 1st Amendment to the Constitution of India in 1951.

On boundaries pertaining to "Legislative Spear", the arguments forwarded focused on what lies without the scope of judicial review with reference to legislative domain. It was explained that judicial restraint must be followed to check pervasion of judicial interventions beyond its ambit.

On boundaries pertaining to Administrative Law, it was asserted that a judicial review is limited only to constitutional and statutory aspects. The contours were discussed with the help of a few landmark cases like- *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517, *S.R Bommai v. Union of India*, (1994) 3 SCC 1, *State of Kerala v. Naveena Prabhu*, (2009) 3 SCC 649 and *Bajaj Hindusthan Limited v. Sir Shadi Lal Enterprises Limited*, (2011) 1 SCC 640

On boundaries pertaining to "Judicial Spear", the discourse navigated through the rich evolutionary history of case law jurisprudence. Cases *viz. Sankari Prasad v. UoI,* AIR 1951 SC 458; *Sajjan Singh v. State of Rajasthan,* AIR 1965 SC 845; *I.C. Golak Nath v. State of Punjab, 1967* SCR (2) 762; *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *State of Uttar Pradesh v. Raj Narain*, 1975 SCR (3) 333; *M. Nagaraj v. UoI*, (2006) 8 SCC 212, wherein the transition from literal and narrow interpretation to purposive and wide interpretation of the Constitution was reiterated; *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1; and many more were briefly referred.

Session-2

Theme - Judicial Review of Legislation: Genesis, Evolution & Boundaries

Proposed areas for discussion

- ✓ *Tracing the genesis of Judicial Review of Legislation(s)*
- ✓ *Evolution of Judicial Review of Legislation in India*
- ✓ *Metes and bounds of the process of Judicial Review*

Speaker: Mr. Arvind Datar & Mr. C. Aryama Sundaram

The second session was initiated by tracing the genesis of the "doctrine of judicial review", in his anthology the "Closing Chapter", Lord Denning indicates the genesis of the doctrine to the British Courts of 17th and early 18th century. Prerogative writs of *certiorari*, *mandamus* and *prohibition* along with remedies of declaration and injunction were popular and in vogue.

Thereafter the evolution in *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 1803, was discussed. It was argued the courts boundaries should not transgress to the domain of policy matters, but rationale or reason behind a policy could be amenable to "judicial review".

The concepts of "*doctrine of proportionality*" and "*reasonable restrictions*" were discussed through case law jurisprudence. The two prominent approaches laying down tests included (1) the German Federal Court's approach as advocated in the landmark case *Modern Dental College v. State of M.P.*, (2016) 7 SCC 353, 414-415; (2) the approach laid down by the Canadian Supreme Court in *R v. Oakes*, [1986] 1 SCR 103 were discussed with reference to the clarification sought in *K.S. Puttaswamy v. UoI,* (2019) 1 SCC 1 (Aadhaar Case), wherein the Supreme Court of India expressed its inclination to adopt the third hybrid model suggested by David Bilchitz in his book *Necessity and Proportionality: Towards a Balance Approach?* With more nuanced approach as suggested by.

The relationship and extent of restriction posed by a legislation in context of the object of the statute was highlighted citing *P.P. Enterprises* v. *Union of India*, (1982) 2 SCC 33. The objectivity and standpoint of determination of a restriction to be reasonable was emphasized.

It was underscored that general public interest must trump as against ramifications on individual quoting *Mohd. Hanif Quareshi* v. *State of Bihar*, AIR 1958 SC 731.

Aspects of "legislative estoppel" and scope of judicial review was discussed. Retrospective changes inflicted on a legislation through the tool of notification or executive orders and the ramifications therein formed part of the discourse. The ingress of "manifest arbitrariness" (originally a subject-matter of policy and administrative domain) into the recent judicial pronouncements *viz. Shayara Bano v. UoI*, (2017) 9 SCC 1, 99 and was carefully considered.

Session-3

Theme - The Evolving Landscape of Judicial Review of Administrative Action

Proposed areas for discussion

- ✓ Tracing the genesis of "Judicial Review" of Administrative Action
- ✓ Evolution of "Judicial Review" of Administrative Action
- ✓ "metes and bounds" of the process of Administrative Action
- ✓ "Judicial Review" of the decision making process – tests therein
- ✓ "Case law" jurisprudence

Speakers: Justice A.P. Sahi; Justice S.C. Dharmadhikari; & Mr. Sujit Ghosh

The session rolled out with a brief overview of "judicial review" of administrative action, its history and extant application especially with reference to Indian judiciary. "Judicial review" of administrative action has its genesis from the common law doctrines such as "reasonableness", "proportionality", principles of "natural justice", and "legitimate expectation". The history of Judicial Review in Indian context may be traced back to *Emperor v. Burah*, ILR, Calcutta, 63 (1877), where the Calcutta High Court, as well as the Privy Council, accorded to the view of Indian courts having power of "judicial review" subject to certain limitations.

It was emphasized that a competent court can undertake a "judicial review" only to the extent of looking into the process of decision making of a public authority and not the decision or

action *per se.* To establish the point foreign and Indian jurisprudence were cited including *R. v. Panel of Take Over*, 1987 (1) ALL ER 564; *Tata Cellular v. UOI*, (1994) 6 SCC 651. While dealing with policy matters and interference by the court with expert body's opinion, it was insisted upon that the court generally should abide by the opinion of the expert body owing to the simple fact that it lacks expertise especially in disputes relating to policies and hence should refrain from indulging into unnecessary judicial interventions and especially eschew "judicial review".

Session-4

Theme - Judicial Review of Policy: The Contours and Boundaries of 'Substantive Due Process/ Manifest Arbitrariness'

Proposed areas for discussion

- ✓ *Policy review by courts: extent & limits*
- ✓ *Concept of "substantive due process": evolution and adoption by judiciary in India*
- ✓ *Evolution and contours of doctrine of "manifest*

Speakers: Justice A.P. Sahi; Justice B.D. Ahmed; & Mr. Sujit Ghosh

The last session commenced by examining the Latin maxim *boni judicis est ampliare jurisdictionem* (a good judge's duty is to amplify the remedies of the law) in the context of amplitude of judicial review pertaining to the extant policies. It was underscored that, although judicial review of a policy matter is generally to be eschewed, the exception lies when a majoritarian Government fails to appreciate the difference between "*democracy simplicitor*" as against "*Constitutional democracy*", wherein the Constitution of India is impregnated with the concept of judicial review flowing from the oath of judge. In this context the celebrated case of *S.R. Bommai v. UoI*, 1994 (3) SCC 2734 was discussed.

The evolution and journey of judicial review on policy decisions from conservatism to being more liberal was discussed by citing a chronology of case law jurisprudence. The adoption of "substantive due process" into the constitutional corpus through a gradual series of evolving case law was discussed. Citing *Selvi v. State of Karnataka*, (2010) 7 SCC 263, 359 the standard

of "substantive due process" was explained "[as] the threshold for examining the validity of all categories of governmental action that tend to infringe upon the idea of "personal liberty"." It was elucidated that "due process" which originally carefully found an express avoidance in Constitution of India accreted through judicial interpretations since *Maneka Gandhi v. UoI,* 1978 SCR (2) 621.

The doctrine of "manifest arbitration" formed part of the discourse. The literal interpretation of the word "manifestation" was overviewed to be generally construed as a resultant or consequence. The test of "manifest arbitrariness" of a legislation, disqualifying it and suspecting it to judicial review as laid down by the apex court in *Shayara Bano v. Union of India*, (2017) 9 SCC 1 was discussed. The apex court held that "arbitrariness" when applied to legislation cannot be used loosely, the locus has to be found in "constitutional infirmity" of a provision or the legislation. Only in such cases a constitutional court shall have the power to interdict such infirmity under Article 14. A constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary".