NATIONAL JUDICIAL ACADEMY

ORIENTATION COURSE FOR NEWLY ELEVATED HIGH COURT JUSTICES

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PROGRAMME REPORT

PREPARED BY

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The National Judicial Academy organised a two day Orientation Course for Newly elevated High Court Justices on 10th and 11th September 2022 at the NJA, Bhopal. The Course was attended by 31 justices from different jurisdictions across country. The core theme of the session was Writ Jurisdiction of High Courts. Courts have played a significant role in developing the jurisprudence of constitutional principles and have ensured judicial governance in accordance with constitutional norms. High courts have a greater responsibility of exercising writ jurisdiction with judicial considerations and well-established principles. With this background, the Orientation Course for Newly Elevated High Court Justices provided a forum for participant justices to deliberate upon contemporary issues and developments in the writ jurisdiction of the High Court under Art. 226 of the Constitution and its application in the dynamic and constantly changing social paradigms. Some core areas that were focused upon during the course included the scope of judicial review of legislative and administrative actions, principles of judicial review & proportionality and the extent of judicial review viz. judicial restraint and activism. The concept of Judicial over reach and judicial under reach were also deliberated upon. The themes included in the course are of seminal importance owing to the large number of PILs being filed in courts and the widening scope of writ jurisdiction of High Courts. The sessions also focused on constitutional remedies and contours of judicial power vis-à-vis the executive and the legislative power. The doctrine of Locus Standi, the principle of Moulding of Relief, De Jure and De Facto doctrines formed part of the discussion. The course offered participating justices a platform to share experiences, insights and suggestions with a panel of distinguished resource persons from the judicial branch and other relevant domains.

Session 1: Writ Jurisdiction: Scope and Extent under Art. 226 of the Constitution

Panel: Mr. N. Venkataraman & Mr. C.S. Vaidyanathan

The session commenced with a reference to Justice K. Subba Rao's judgment in *Dwarka Nath v. Income Tax Officer,* AIR 1966 SC 81 wherein it was held that Article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found, that the Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. The scope and powers of the High Court under Art. 226 of the Indian Constitution was dealt with at length. It was pointed out that High Courts can issue writs in the nature of prerogative writs and can also issue directions, orders or writs other than the prerogative writs. It was emphasized that under Article 226 writs can be issued to "any person or authority" and it can be issued "for the enforcement of any of the fundamental rights and for any other purpose.

Various writs including habeas *corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* were deliberated upon. With regard to writ of *mandamus* a mention was made to the judgment in the case *CAG v. K.S. Jagannathan* (1986) 2 SCC 679 wherein court held when writ of *mandamus* can be issued; and *Anandi Mukta Sadguru Shree Mukta v. V.R. Rudani* 1989 AIR 1607 wherein it was held that mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. It was pointed out that courts have a responsibility to distinguish between the right and the wrong cause and judges must ensure to put their discretionary powers in place. Public duty and a corresponding right was discussed during the session. It was stated that writ jurisdiction is something which the High Court Judges exercise in ensuring public duty is performed as a threshold expectation of law. Further the issue whether public duty is only confined to a statute was dealt with at length wherein it was emphasized that public duty can be enforced even through government contracts. That the government contracts are tested on Wednesbury principle, fairness and Art. 14 and they are subject to writ jurisdiction. It was underscored that the scope of writ jurisdiction is undergoing a metamorphic change. The emerging patterns in writ jurisdiction were also discussed at length. It was stated that issuance of writ by one High Court against another or by High court against Supreme Court or vice-versa is completely out of writ jurisdiction under Art. 226. It was highlighted that in the present times High Courts are dealing with sensitive writ petitions matters. Principle of reasonableness and Wednesbury principle were also deliberated upon during the discussion. It was pointed out that the High Court's power under Art. 226 is far wider than the power of Supreme Court under Art. 32. On interim orders judgment in *Asian Resurfacing of Road Agency Private Limited and Another v. Central Bureau of Investigation* (2018) 16 SCC 299 was also referred during the course of discussion.

It was stressed that courts are custodians of constitutional morals, ethics and code of conduct and that the scope of judicial review is the highest power following the United Kingdom's evolution of judicial review. It was further emphasized that the Constitution is the ultimate *dharma* to which

all are bound. The changing social paradigm with regard to writ jurisdiction was reflected upon. It was accentuated that judges are trustees in whom the power of review is vested and that judiciary has high credibility to the society. In this regard the oath of a judge was referred to, that to perform duties without fear or favor. It was accentuated that judicial review is the constitutional power vested in judges to issue prerogative writs. A comparison was drawn as to how habeas corpus petitions were expeditiously listed on the same day in earlier times whereas, in the present times such petitions are listed after 6 months or more.

On *locus standi* following landmark judgments were highlighted including *Sebastian M. Hongray vs Union Of India & Ors*, 1984 AIR 1026*; Naz Foundation v. Govt. of NCT of Delhi* 2009 SCC OnLine Del 1762; and *Bandhua Mukti Morcha vs Union Of India & Others* 1984 AIR 802. By referring to these cases it was pointed out that these are some areas where courts must reach out. The discussion included that right based enforcement is undisputed and clear whereas interest based dispute can be marked. Enforcement *versus* implementation and dilution *versus* rigour were some areas covered during the session. It was mentioned that challenging legislation or executive act has widened with the interpretation of Wednesbury principle. Various aspects of *locus standi* including aspect of interest and right to be looked into were discussed during the session. One of the issues highlighted in *locus standi* was whether the complainant will be an important party.

On the aspect of alternative remedy it was suggested that if judges can resolve repetitive matters expeditiously then it will help in reducing multiplicity of litigation. It was emphasized that demolition matters, medical emergencies or examination matters must be disposed of expeditiously. It was also suggested that judges must exercise their innovative powers. Lastly, it was pointed out that Art. 226 is an extraordinary remedy and not an alternate remedy. The case of *Rustom Cavasjee Cooper v. Union of India*, 1970 AIR 564 mentioned where in court gave a wide interpretation to the term "expression". Judges were suggested that while listing matters they must design their time in compartments and put similar cause matters together.

Lastly, following cases were cited for reference *T.N. Godavarman Thirumulpad v. Union of India* [WP (Civil) No. 202 of 1995] and *Deoraj v. State of Maharashtra & Ors*, AIR 2004 SC 1975.

Session 2: Judicial Review of Legislative Action

Panel: Mr. C. Aryama Sundaram & Mr. C.S. Vaidyanathan

The session briefly outlined the growth of Judicial Review (JR) in recent times. Powers and Duties of courts while exercising JR also formed part of discussion. Discussing on the concept of separation of power, it was stated that the hallmark of a democracy is the people and therefore, democratically elected representative interfered by non-elected body is uncalled for. Referring to *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 44, it was pointed out that the constitution gives the unelected judges power of JR by which they can nullify unconstitutional act of legislature, however, it was cautioned that judiciary is not superior to legislature. It was stressed that the power of the people embodied in the constitution is superior to both judiciary & legislature. It was highlighted that the constitution is the will of the people and statutes are the creation of legislators, JR would be to bring the legislators creation in tune with will of the people which ultimately is the constitution.

Two pertinent areas of JR viz. JR of legislative process & JR of constitutional competence were discussed in detail. In light of *Shayara Bano v. Union of India* (2017) 9 SCC 1, the scope of exercise of JR was elaborated. It was stressed that the scope of JR has been tremendously expanded in recent times and we have moved from procedure laid down by law to the due process of law.

Reflecting over landmark case laws viz. *A.K. Gopalan v. State of Madras,* AIR 1950 SC 27; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.* 1993 SCC (1) 645, the scope of fundamental rights (FR) and how they have widened over a period of time was discussed. Referring to the case of *Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors.* (2019) 1 SCC 1, It was stated that privacy was not only recognised as a FR but also as basic Human Right. It was stated that the nature of rights which are recognised as FR to the human being or as fundamental to the citizens have now widened and for this reason the scope of JR has greatly increased. The areas which are now considered basic FR or human rights was presented. Grounds on which judicial review of legislative action can be made was discussed. Pondering over the concept of essence of democracy and the question whether judiciary trading into the area of legislators, it was pointed out that if the legislators are more keen in defending the statute as will of the parliament, the court can see whether the will of the parliament reflects the will of the people which is the constitution and this way supremacy of the constitution over statute can be justified. It was suggested that before deciding which school of JR to be followed in a particular case, look at the nature of different statutes, keep in tune with constitution policy not just the letter of the constitution, focus on purposive interpretation of the constitution and lastly to refer into directive principles for guidance & help.

Session 3: Judicial Review of Administrative Action

Panel: Mr. N. Venkataraman & Mr. Sujit Ghosh

The session commenced with highlighting two major areas of concern under JR of Administrative Actions; firstly, the right proportion to read natural justice in a particular case and, secondly, stalling of investigations under any law through malafide writ petitions before the courts. Discussing on executive orders, it was suggested to highlight underlying problems before quashing any executive orders. Hans Kelsen's 'Pure Theory of Law' was discussed briefly to underline that higher law prevail over lower law. An act can create or modify the law if it is created in accordance with another, "higher" legal norm that authorizes its creation in that way. And the "higher" legal norm, in turn, is legally valid if and only if it has been created in accord with yet another, "higher" norm that authorizes its enactment in that way. Referring to Patanjali Shashtri opinion in - *State of Madras v. V.G. Row*, AIR 1952 SC 196, the scope of judicial review was further elaborated & discussed.

Difference between JR of Legislative Actions, Administrative Actions and Quasi-Judicial actions was also explained during the session. It was explained that an administrative action done judiciously is a quasi-judicial action. Whereas an administrative action is all about the subjective satisfaction of minister or officer concerned. Referring to the decisions of Supreme Court in *Rai Sahib Ram Jawaya Kapur And Ors. vs The State of Punjab* AIR 1955 SC 549 and *Jayantilal Amrit Lal Shodhan vs F.N. Rana And Others* 1964 AIR 648, the difference between legislative action and administrative action was explained. It was stated that the executive power is the balance & residue of legislative and judicial power. The executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. Legislation lays down the code of conduct and if there is violation of code of conduct, there should be penal consequence and only then it is a legislative action but if there is none then it is only executive action. It was further added that distinction depends upon the facts & circumstances of each case. JR of pardoning power was also discussed briefly during the session.

Referring to *Competition Commission of India v. Steel Authority of India Limited* 2010 (10) SCC 744, the concept of post-decisional and pre-hearing in context of administrative fairness was discussed briefly. Citing, *Siemens Engineering & Manufacturing Co of India Ltd. V. UOI and Ors* (1976) 2 SCC 981, the concept of natural justice in administrative actions was discussed. It was stated that rule requiring reasons to be given in support of an order is a basic principle of natural justice and if the representation has not been considered in true spirit then there is a violation of natural justice, it was stressed that the principle must be exercised in proper spirit and not as a pretence of compliance. Referring to Judgement of Allahabad High Court in *Nanha and another v. Deputy Director of Consolidation, Kanpur & others* 1975 AWC 1, irrationality and perversity in administrative action was examined & discussed.

Session 4: Judicial Restraint, Activism and Overreach: Evolving Jurisprudence

Panel: Hon'ble Justice S. Ravindra Bhat, Mr. Shekhar Naphade & Mr. Sujit Ghosh

It was highlighted that the limits of exercising power of judicial review need to be reemphasized in various other aspects. The session focussed on powers of *Suo Moto* cognizance which exists in CrPC and other statues for taking *Suo Moto* actions by different authorities and by High Court. It was pointed out that in coming times judges will face challenges relating to consumer law matters, challenges by a regulatory regime and challenges relating to right to privacy. It was stated that the Constitution is a charter for an ongoing debate about how to best approximate the national ideals. The term 'Judicial Activism' was defined stating that it refers to many things such as it describes the broad or new interpretation of the law or the constitution, it also refers to and covers action of the court in excess of and beyond the powers of judicial review. The Constitution does not confer any authority or jurisdiction for activism as such upon the court. It refers to interference of the judiciary in legislative and executive fields which mainly occurs due to inactivity of various organs of the government. It was underscored that activism in the judiciary can be seen in a way through which relief is provided to the disadvantaged or aggrieved citizens. A comparative overview was given with regard to constitution of various nations like the US & UK which does not have a written constitution. Judges were apprised of how the constitution makers thought while drafting various provisions of the Constitution their vision. The 2 ends of judicial review were mentioned as the limits of review including what court ought to and what ought not to do and in between is the judicial activism.

The case of *State of Madras vs. V.G. Ros* AIR 1952 SC 196 was cited wherein Justice Patanjali Sastri emphasized upon the test of reasonableness stating that "…the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorising the imposition of the restrictions, considered them to be reasonable."

It was highlighted that there is a huge deluge of PILs in courts and reasons for the same were stressed viz. Constitutional overlap wherein there is no clear-cut demarcation of executive, legislative and judicial functions; History of democratic constitutions across globe is history of

turf war between the executive and legislate on one hand and the judiciary which is inevitable; and Judiciary playing a dominant role due to dysfunctional legislative and executive wings. The concept of judicial restraint, judicial activism, judicial overreach, judicial under reach and judicial abdication were deliberated upon at length in light of case law jurisprudence. The test of judicial restraint was mentioned, the conservative approach wherein the court goes by the letter of the law and not the deeper meaning of the text of the statute and the spirit underneath the text of the statue as reflected in *A.K. Gopalan v. The State of Madras* 1950 AIR 27.

It was underlined that Judicial Activism is when the court examines the real purpose of constitutional or legal rights and attempts to make them meaningful and create possibilities of implementing them, done without doing any violence to the language of law. Following cases were referred *Rustom Cavasjee Cooper v. Union of India,* 1970 AIR 564; *Maneka Gandhi v. Union of India,* 1978 AIR 597; and *E. P. Royappa v. State of Tamil Nadu & Anr*, 1974 AIR 555. It was highlighted that judiciary is the protector, defender & preserver of the basic principles of rule of law.

On judicial overreach the case of *A.R. Antulay v. R.S. Nayak & Anr,* 1988 AIR 1531 was highlighted. With regard to judicial under reach the Bombay blast case (1993) and the Coimbatore bombings case (1998) were pointed stating that these cases are still pending. On judicial abdication case of *ADM Jabalpur v. Shivkant Shukla,* 1976 AIR 1207 and *State of Rajasthan & Ors. Etc. v. Union of India Etc*., 1977 AIR 1361 were cited. Judiciary's contribution in protection of human rights was highlighted by citing following cases *Bandhua Mukti Morcha v. Union of India & Others,* 1984 AIR 802; *Unni Krishnan v. State of Andhra Pradesh,* 1993 AIR 217; *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647; *Vishaka & Ors v. State of Rajasthan & Ors,* (1997) 6 SCC 241; *Union Carbide Corporation v. Union of India*, 1990 AIR 273; *Jolly George Verghese & Anr v. The Bank of Cochin,* 1980 AIR 470; and *Zahira Habibullah Sheikh & Anr v. State of Gujarat & Ors,* (2004) 4 SCC 158. It was pointed out that every case of judicial activism is backed by Art. 21 or Art. 14 of the Constitution, and that, it is the test to decide whether judicial activism fits into the scheme of Constitution or not. It was emphasized that courts by its very nature have limitations including that of resources, manpower etc.

On judicial overreach two cases were highlighted viz. *State of Tamil Nadu Rep. by… v. K. Balu* (2017) 6 SCC 715 relating to ban on liquor along National & State highways and *Supreme Court Advocate-on-Record Assn. v. Union of India* (1998) 7 SCC 739 relating to appointment of judges. Further, Art. 121 and Art. 124 (2) of the Indian Constitution were deliberated upon. The distinction between judicial activism and judicial overreach was highlighted by referring to the case *of Union of India and Others v. Ashish Agarwal,* (2022 SCC Online 543). The session also threw light upon judicial activism in matters of formulating executive policies wherein the case of *MC Mehta v. Union of India,* (1997) 8 SCC 70 was highlighted. It was emphasized that where the executive has failed to take any action or the executive action is tardy then judiciary is required and forced to act through activism. The area of judicial under reach were also put forth such as matters relating to education, medical aid and cost of medical treatment and pendency in courts.

Lastly, the session focussed on *Suo moto* powers of High Court. A comparison was drawn between powers of High Court under Article 226. With that of Art. 142 wherein the Supreme Court has the power to do complete justice. The theory of International law pertaining to Monism & Dualism were also pointed out. The doctrine of separation of power and limits of each branch was also deliberated upon.

Session 5: Moulding of Relief under Writ Jurisdiction

Panel: Mr. Ramakrishnan Viraraghavan & Mr. Sujit Ghosh

The session outlined the width, scope and the ambit of article 226 of the constitution in context of moulding of relief. Phrases under article 226 (1) viz. “directions, orders or writs" and "including writs in the nature of” were discussed and explained. The scope of power to mould the relief under writ jurisdiction was further elaborated, citing provisions under Code of Civil Procedure (CPC). It was stated that section 151 CPC dealing with inherent power of courts, does not give the court any power, however, it recognises that courts already have inherent powers to achieve the ends of justice and to prevent abuse of the process of the court. It was explained as to how the power of High Courts to mould the relief is larger than the power of civil courts under the civil procedure code but less than the power of the Supreme Court under article 142 of the constitution. It was further stressed that power to mould the relief is not subject to the procedural limitations and relief can be moulded even when there is no entitlement on the facts pleaded. It was emphasized that to exercise power to mould the relief, three different and distinct steps or protocols may be followed; first, go through the pleadings, hear arguments and decide whether there is an entitlement to a relief, secondly, decide whether the relief pleaded can be granted, wholly or in part and thirdly, decide whether you need to exercise your power to mould the relief or not. Referring to latin maxim *“fiat Justitia ruat caelum (Let justice be done though the heavens fall)”*, the power of High Courts to do ‘complete justice’ was elaborated.

Deliberating on moulding the relief based on subsequent events, it was suggested to consider following protocols;

- the subsequent events must be on record. The party must be required to file an affidavit with supporting documents.
- the opposing party must be given an opportunity to respond
- at the time of moulding the relief in a particular manner, parties must get an opportunity to react and make submissions

Referring to *Golak Nath vs. State of Punjab* 1967 (2) SCR 762, it was stated that reliefs can be moulded even without subsequent events in a form of prospective over-ruling, giving prospective effect to a judgment. Commenting on Principles on which the relief is moulded, it was pointed out that moulding the relief will shorten the litigation or enable complete justice; avoiding an abuse of process of the Court.