NATIONAL JUDICIAL ACADEMY

Orientation Course for Newly Elevated High Court Justices [P-1319]

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Programme Report

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The National Judicial Academy organized an "Orientation Course for Newly Elevated High Court Justices" on 3rd & 4th December, 2022. The participants were newly elevated High Court Justices nominated by the respective High Courts. The course facilitated deliberations among participant judges on themes including Scope of Writ Jurisdiction under Articles 226; Supervisory Power under Article 227; Suo Motu Jurisdiction of the High Court; Doctrine of Separation of Powers; and Law of Contempt. The idea was to provide a unique platform to participants to share experiences and assimilate best practices. The emphasis was on enabling deliberations through clinical analysis of statutory provisions, case studies and critical consideration of the relevant judgments and minimizing the lecture format.

Session 1: Scope of Writ Jurisdiction under Article 226

Speakers: Mr. C.S. Vaidyanathan & Mr. Sujit Ghosh

The session was commenced by Hon'ble Mr. Justice A.P. Sahi, Director, National Judicial Academy and the words of Hon'ble Mr. Justice Subba Rao that Article 226 is suppose to reach wherever injustice is found were referred. It was opined that justice is the ultimate goal whatever jurisdiction is exercised by the court including the jurisdiction of prerogative writs. Article 226 is wider than Article 32 of the Constitution of India and law in this jurisdiction most of the time is developed by the High Court. The precedents should be established at the level of the High Courts. The contribution of the district courts and High Courts in the development of law was highlighted. The judgment *Ratlam Municipal Council, Ratlam vs. Vardhichand & Ors* (1980) 4 SCC 162 was referred where the Supreme Court put a seal on what was done by the district judiciary. The fundamentals about the rights guaranteed under Part III were set out by the Patna High Court, Allahabad High Court, Jabalpur High Court and various other high courts of the country during the emergency. They laid down the foundation of liberty cherished under the Constitution. Article 226 is the weapon that gives opportunity to expand the horizons of law to the ultimate constitutional limits. The High Courts should contribute towards the understanding of life and liberty in the context of its own state. The dynamism of Article 226 is immense and it is one of the most powerfully recognised jurisdictions in the world.

The discussion then focussed on the judicial review of the action of public authorities. The speakers opined that judicial review of the public authority is a fundamental and inalienable constitutional protection under Articles 226 and 32. Article 226 is rule of law in action. Exercising the power of judicial review is a constitutional responsibility and it promotes larger public interest. It guides the public authorities on how they should discharge their function and that is the fundamental object of judicial review.

The speakers then explained the concept of hard power and soft power while applying the power of judicial review. The hard power of judge is exercised when the public authority is transgressing jurisdiction and not acting in conformity with law and in conflict with principles of natural justice. The soft power of a judge is exercised when the public authority is acting in conformity with law and principles of natural justice but there were possibility of different views. There is always a tussle between judicial vigilance and judicial restraint and ultimate justice is the product of dynamic interrelation between these two elements. So the court has to see that the rule of law is upheld and at the same time the public authorities should be allowed to function within limits and should be held accountable for their actions. The interpretation of law is the domain of courts and while applying the law the courts can adopt the soft approach. The issue of not imposing cost in appropriate cases such as in

situation of non-disclosure, abuse of process, wrongful invocation of jurisdiction of the court, failure to be transparent or non compliance was highlighted.

The speakers then focussed on the separation of power and limits of power of judicial review. The decision making process of the lower courts and forums is the subject of judicial review and not their opinions. The difference between test for the judicial review of legislative action, the judicial review of administrative action and the judicial review of quasi judicial actions were discussed.

Then focus was laid on the judicial review of legislative action. For judicial review of legislative action, some questions should be asked by the constitutional courts i.e. about the competency of the legislature to pass legislation, whether the legislation is in agreement with Part III of the Constitution or does it violate fundamental rights, does the legislation go contrary to the other parts of the Constitution and whether the legislation is meeting the test of proportionality. Then the judicial review of economic legislation, doctrine of judicial restraint and the judgement Lockner vs. United States was discussed. In Lockner vs. United States the dissenting judgement of Justice Holmes held that un-enumerated constitutional rights like contractual liberties or economic justice cannot be protected by the court. The use of restraint in deciding matters involving economic policy was emphasised.

The judicial deference in economic and fiscal matters by the Indian judiciary was discussed and Article 38 dealing with economic justice was referred. The judgments *R.K. Garg and Ors. vs Union Of India And Ors.* (1981) 4 SCC 675 and *Government of Andhra Pradesh & Ors vs Smt. P. Laxmi Devi* Appeal (civil) 8270 of 2001 were referred in this regard.

Then the judicial review of administrative action was focussed upon. It was stated that the Wednesbury Principle is used in order to test that whether the action was illegal, arbitrary, irrational or unreasonable. The lack of source of power of administrative action, arbitrariness and procedural illegality are other grounds to invalidate the administrative action under judicial review. The judgments *Marathwada Agricultural University v. Marathwada Krishi Vidyapeeth*, (2007) 8 SCC 497 and *Madhya Pradesh vs. Burhanpur Tapti Mills and Ors.* AIR 1964 SC 1687 were referred. The issue related to the judicial review of quasi judicial action and the test of manifest arbitrariness was discussed and the judgment A.K. Kraipak v. Union of India (1969) 2 SCC 262 was referred.

It was stated that the administrative action is driven by policy and expediency and quasi judicial action is dictated by stated rules. When an administrative action is done in judicial manner then it is a quasi judicial action. The test of natural justice is commonly applied to test administrative action and quasi judicial action. The first ground to review the action of quasi judicial authority is violation of the principle of natural justice. Failure to supply incriminating document, lack of opportunity of cross-examination of witnesses, absence of reasons in orders, infirmity in the decision making process and non-application of mind are other violations of the natural justice.
Then speakers focussed on issue of availability of alternative remedy. The first challenge relating to alternative remedy comes when there are disputed questions of facts and in such situation the court must ask litigant to access the forum where the facts can be better appreciated. The four known exceptions to alternative remedy are violations of natural justice, jurisdictional error, violation of fundamental rights and *ultra vires* legislative action. The disputed question of facts does not warrant interference by the High Court. However the High Court cannot refrain from intervention in all situation of disputed question of facts. The

judgments *Gunwant Kaur v. Municipal Committee, Bhatinda*, (1969) 3 SCC 769, *Century Spinning Mill 1971* SCC 582, *ABL International Ltd. vs. Export Credit Guarantee Corporation Ltd*., (2005) 10 SCC 495 and *Popat Rao Patel* 2020 19 SCC 241 were referred.

Session 2: Supervisory Power under Article 227

Speakers: Justice Abhay Shreeniwas Oka & Mr. Ramakrishnan Viraraghavan

The session was commenced by Hon'ble Mr. Justice A.P. Sahi, Director, National Judicial Academy and the objective of sessions was explained to participants. It was opined that there is a need to deliberate on the question that how supervisory power under Article 227 be navigated by judges in cases where alternative remedies are available. The power should not be exercised at the drop of a hat.

The discussion then focussed on the exercise of discretionary powers under Article 227 by the High Court. The petitions filed under Article 227 against the interim orders or interlocutory orders of the district courts such as cases arising out of orders passed on application for amendment of pleadings or written statements were discussed. The speaker suggested that the power under Article 227 is not an appellate power and it is purely discretionary and the High Courts should be careful in interfering with orders of amendment of pleadings under Article 227 because the order allowing amendment of pleadings can be challenged under Section 105 of Code of Civil Procedure by invoking appellate jurisdiction. It should be left for appellate court to decide under Section 105 of Code of Civil Procedure. If the high court thinks that application for amendment should have been allowed in lower forum then it should remand the matter to the appellate court.

It was opined that when the High Court entertain a petition under Article 227 challenging order of rejecting plaint or written statements, the High Court may has to stay the suit and such situation increases the pendency of cases. It was opined that unless there is some drastic consequence of order allowing amendment, the High Court should refrain from interference. It was opined that the High Court should only entertain such petitions if there is some major reason which requires intervention by the High Court.

It was further stated that petitions challenging order under Order 26 Rule 9 for the appointment of commissioner should not be routinely entertained under Article 227. The strategies to deal with maintenance matter and settlement of the matrimonial disputes under Article 227 were discussed. Concerning challenges to interim or interlocutory orders it was suggested that High Court should ensure that trial is not delayed and rights of parties are protected. It was suggested that if the operative part of the order under challenge is correct then High Court should not interfere under Article 227. The speakers referred to a study done in the Bombay High Court where the data showed that about 70% of the litigants whose cases are decided against them by the trial court approach the district court and those who lose their case there then hardly 40-50 percent of those litigants approach the High Court for second appeal under Section 100 of the Code of Civil Procedure.

It was suggested that in cases concerning interim orders under bail jurisdiction where the advocates request for completion of trial in time bound manner, the High Court should not issue such direction in a routine manner. It was suggested that only in matters concerning maintenance matter or custody of minor child such directions for completion of trial in time

bound manner can be issued in rare circumstances. In situation of complaints against trial court judges, High Court should show some restraint in passing strictures against trial court judges and the opportunity for hearing should be given. The speakers suggested that matrimonial cases, cases of senior citizens and cases pending for a very long time should get priority in hearing.

The scope of jurisdiction of High Court under Article 227 was discussed. It was opined that High Court can exercise jurisdiction on tribunals when the tribunal decided without jurisdiction or exercised excessive jurisdiction or when there is perversity in decision making or when it exercised its jurisdiction in violation of the natural justice principle. Regarding jurisdiction of High Court on tribunals, the judgement *Commissioner of Income Tax v. ABC Papers Ltd.,* (2022) 9 SCC 1 was discussed. The judgment *Anisminic Ltd. v. Foreign Compensation Commissioner* [1969] (1) All ER 208 was referred while discussing issue of errors in excess of jurisdiction. The judgment *Union of India v. Tarachand Gupta and Bros*., (1971) 1 SCC 486 was also referred. The issues relating to exercise of supervisory jurisdiction in issues of merits of an order were discussed.

Session 3: Suo Moto Jurisdiction of the High Court

Speakers: Justice Akil Kureshi & Mr. Ramakrishnan Viraraghavan

The session was commenced by Hon'ble Mr. Justice A.P. Sahi, Director, National Judicial Academy and the objective of session was explained to participants. The speakers suggested that success of a judge is substantially dependent upon their conduct with bar, staff and litigants. Their conduct should be dignified and approach should be impartial. The speakers opined that the conduct of judges should be composed of fairness, politeness, grace and compassion and judgements should be precise, clear and free from unnecessary details. The contentions of parties should be in summary form and should not be reproduced in elaborate manner.

It was stated that the Suo Moto power is the pivot of justice dispensation system of the constitutional courts. The scope of Article 226 is not confined to the issuing of known prerogative writs and it can be used to correct any injustice done to a litigant. The state is provided with many powers for the development and welfare of people but sometime these powers are misused. The role of courts is to keep the executive and legislature within its legal and constitutional bounds. Today private entities are engaged in development activities and management of airports and railways. The long arm of the writ court under Article 226 can reach out to any entity or body exercising public duty or public function. The judgement *S.R. Bommai vs Union of India* 1994 SCC (3) 1 which provides that even the President's subjective satisfaction is open to review was referred.

The judicial review is available almost in every field except for policy issue unless it is arbitrary. The judgment *L. Chandra Kumar vs. Union of India* Appeal (Civil) 481 of 1980 was referred while discussing the scope of judicial review under Article 226 and 227 and issues relating to challenges to the orders of Central Administrative Tribunal.

The duty of the court is to reach out to injustice wherever it is noticed and it should be cured. The power of moulding of relief is one of the manifestations of the Suo-Moto power of the court and it should be exercised according to the need of the situation. The judgements *D.S.*

Nakara v. Union of India, (1983) 1 SCC 305 and *Vishaka and others v. State of Rajasthan* and Others (1997) 6 SCC 241 were discussed in this regard. It was opined that the powers of the court are unlimited and restrictions are self imposed. The issue that whether a judge is rule maker or rule applier and the conventional and pragmatic approaches in decision making were discussed. It was opined that the law of tort is a judge made law and the judgement Rylands v Fletcher (1868) LR 3 HL 330 was discussed.

The jurisprudence on the public interest litigation and relaxation of the rule of locus standi to file the petition for the enforcement of fundamental rights on behalf of poor litigants were discussed. The judgments *State of Uttaranchal vs Balwant Singh Chaufal & Others* [Civil Appeal Nos.1134-1135 of 2002], *Bandhua Mukti Morcha vs Union of India & Others* 1984 AIR 802 and *Hussainara Khatoon & Ors vs Home Secretary, State of Bihar* 1979 AIR 1369 were discussed in this regard. The initiatives taken by the Supreme Court during COVID period including suspending the period of limitation, legalizing virtual hearings, releasing prisoners on parole to decongest prisons and distribution of vaccines were discussed.

It was stated that there should be healthy regard to other democratic institutions and executive and legislature have their own role to play. There is clear demarcation between an illegal action or an action without jurisdiction and an action which falls within the policy matter of the government and courts should act accordingly. The judgement R.K. Garg and Ors. vs. Union Of India and Ors. (1981) 4 SCC 675 was referred and it was stated that government has the power to make trial and errors in economic and administrative policies. However if administrative action is arbitrary, illegal or malafide then it is the duty of the court to strike it down.

It was opined that Article 215 dealing with power of contempt should also be kept in mind while exercising Suo Moto power. According to the principle of parens patrie jurisdiction under the Constitution, the High Court has power to act on its own motion. The power is almost unlimited but it is limited by the Constitution, laws and precedents. The difficulty arise when the Suo Moto power is exercised not for upholding the rule of law but rather for the exercise of jurisdiction in the name of authority simpliciter. The Suo Moto power should not be exercised unless there is a higher purpose of achieving the goals of justice and there should be public purpose behind the exercise of this power. The Suo Moto power should be exercised to fill the gaps and not to make laws. The court does not legislate and it is the legislature which legislates. The court interprets the law but the court do enter into the arena of making laws because extraordinary situations requires extraordinary remedies and that is the width of the power of Suo Moto jurisdiction. The speakers then focussed on the differences between ordinary jurisdiction and Suo Moto jurisdiction of the High Court. The trends in the public interest litigation and difficulties in exercising Suo Moto jurisdiction were also discussed.

Session 4 - Doctrine of Separation of Powers

Speakers: Justice S.C. Dharmadhikari & Prof. (Dr.) V.K. Dixit

The concept of “separation of power” propounded by Montesquieu was emphasized alongwith the importance of rational discussion between the different organs of the state for smooth functioning. The practice followed in France and United States of America was elaborated upon highlighting that the U.S. Constitution clearly demarcates the area of

operation of the executive, judiciary and the legislature. The idea of separation as expounded by James Madison, Dr. B. R. Ambedkar and Justice L. Brandeis were also focused upon. Two models of separation of powers i.e. watertight compartment and overlapping model were discussed and it was stated that the idea of separation of powers is tempered with the concept of checks and balances. It was highlighted that independence of the judiciary has been enumerated as one of the basic features of the constitution. Further, it was opined that an undercurrent of cooperation of power among the different organs of the state is important. Thereafter, various provisions of the Constitution and the judgments of *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; *In re Delhi Laws Act,* AIR 1951 SC 332*; Rai Sahib Ram Jawaya Kapur v. State of Punjab***,** AIR 1955 SC 549 and *Ram Krishna Dalmia v. Justice Tendolkar,* AIR 1958 SC 538 were discussed to elaborate upon the separation of power with respect to the Constitution of India. The Commonwealth (Latimer House) Principles on the Three Branches of Government were discussed during the session and it was opined that the judiciary is an organ of the state and not a department of the government. Furthermore, Article 356 of the Constitution was highlighted to showcase that even if emergency is declared the power of the judiciary cannot be assumed by any other organ. The limits to the power of judicial review was discussed with reference to the judgment of *A.K. Kaul v. Union of India*, (1995) 4 SCC 73 and it was opined that the rule making power should be exercised by the courts only in situations wherein there is a legislative vacuum. The participants were also cautioned against judicial overreach by usurping the power of the legislature, and reference was made to the judgment of the Supreme Court in *State of H.P. v. Parent of a Student of Medical College*, (1985) 3 SCC 169. It was advised that the judges should exercise judicial restraint and not neglect their core functions and duties.

Session 5 - Law of Contempt

Speakers: Justice S. Talapatra & Justice S.C. Dharmadhikari

The session was initiated by elaborating upon Article 215 of the Constitution of India and the purpose of contempt action by the court. Thereafter, the development of the contempt jurisprudence in United Kingdom was traced and the Lord Justice H. Phillimore Committee Report on Contempt of Court was discussed. The various acts which have been considered by the apex court in a catena of decisions as an act of contempt were also discussed and it was stated that for contempt of court, the essential ingredient is "wilful disobedience" i.e. intention to disobey the court. Accentuating on the contours of freedom of speech vis-à-vis contempt of court it was stated that criticism of judgments does not constitute contempt and reference was made to the judgment of *Andre Paul Terence Ambard* v. *Attorney General of Trinidad and Tobago* [(1936) All ER 704]. The observations by Lord Denning in *Regina v. Commissioner of Police of the Metropolis,* [(1968) 2 QB 150] and the judgment of U.S. Supreme Court in *Bridges v. California,* 314 U.S. 252 (1941) were also discussed in brief. Legitimate criticism of the judgments is permissible but there should not be personal attacks or attribution of malafide to the judge. However, such speech should not scandalize or lower the authority of the court. It was opined that contempt jurisdiction should be exercised sparingly by the court, and that the contemnor should not be sentenced to prison unless it is required in the interest of justice. However, leniency should not be shown in cases of deliberate contempt of court. Furthermore, the ambit of defenses allowed under the act were also highlighted. The scope of Section 16 was elaborated upon and the issue of High Court judge committing contempt of his own court was discussed with reference to the judgment of the Patna High Court in *Harish Chandra Mishra and others v The Hon'ble Mr. Justice S. Ali*

Ahmed (AIR 1986 Patna 65). It was highlighted that with the advent of social media there has been increase in remarks against the judges who were cautioned against being over sensitive to such comments.