NATIONAL JUDICIAL ACADEMY

PROGRAM REPORT

[P-1414]

ORIENTATION COURSE FOR NEWLY ELEVATED HIGH COURT JUSTICES

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Sumit Bhattacharya

NATIONAL JUDICIAL ACADEMY

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Orientation Course for Newly Elevated High Court Justices [P-1414]

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Sumit Bhattacharya, Research Fellow, National Judicial Academy

The National Judicial Academy (NJA) organized a two day Orientation Course for Newly Elevated High Court Justices on 28th & 29th September, 2024. The program aimed to enhance core judicial skills of newly elevated High Court Justices. The discussion in the orientation course was divided into five sessions, each covering a core judicial area including Writ jurisdiction and its scope & limits, ICT in High Courts enabling transformation in the age of digital democracy, Fundamental Rights and Free speech, and Role of a judge in Supervisory Jurisdiction.

Session 1 – Writ Jurisdiction: Scope

Speaker(s): *Justice Hrishikesh Roy; Justice Rajesh Bindal; & Justice Ashwani Kumar Mishra*

The session traced the origin of the writ jurisdiction and its evolution. It was underscored that constitutional law predates Constitution of India. It is a subject area which deals with basic inquiries *viz.* the interaction(s) between a subject and a State, and amongst themselves *interse* takes place. The session proceeded to discuss the metes and bounds of Article 32 and 226 of the Constitution of India. It was iterated that the allegiance of a judge should be only towards the Constitution of India and none other. After a brief overview of the aspects *viz.* reading down of a statute *vis-à-vis* declaring a statute unconstitutional, PIL, Judicial Review, Writ of Continuous Mandamus, etc. was discussed in context of dealing with judge's discretion. It was underscored that writ jurisdiction covers both equity and law. What becomes important for a judge is to understand how to mold a relief, so that justice is served best between the adversaries. It was discussed as the subject of writs is known to every lawyer dealing with constitutional law, then why it attains importance to be covered as a topic in this conference? It was answered asserting that, perspective of a judge of a constitutional court is different to a lawyer from the Bar. It was clarified that courts are established to decide cases or legally settle disputes as per the procedure established and the legislated statutes. But the writ jurisdiction is an extraordinary power enshrined in the constitutional courts over and above the normal adjudicatory powers of the rest of the courts of the country. These powers are generally to be put into force where ordinary remedy under a statute is not available, or is not able to settle a dispute to do justice. Writs therefore are extraordinary powers reposed on the Constitutional courts to drive in the higher values projected by the Preamble to the Constitution. Writs are given to the constitutional courts to ensure that the vision of establishing an egalitarian society can be achieved by molding appropriate reliefs while delivering justice. Thus, the scope of the writ jurisdiction is to establish and uphold constitutional trust amongst the citizens and to some extent others in the democratic system. Explaining the concept many landmark judgments were cited including the travel of changing society and a responsive constitutional judicial system of India from *A.K. Gopalan* to *Maneka Gandhi* to *R.C. Cooper.* Social responsiveness and the role and scope of writ jurisdiction was exemplified by citing *Olga Tellis, Romesh Thaper, Vishakha case* and many such other evolving cases. While explaining

the concept of "Constitutional Morality" it was explained that the doctrine has evolved over a long period of seven decades in the functioning of the Constitution of India. It was underscored that constitutional morality should not be confused with social morality or personal morality of an individual. A caution was sounded echoing that, like "public policy" constitutional morality should not become a unruly horse. Elucidating "Public Morality v. Constitutional Morality" *State of Bombay v. R.M.D. Chamarabaugwala,* AIR 1957 SC 199 was discussed wherein whether gambling as a right would fall under the scope of Art 19(1)(g) was the issue. Several case law including *Indian Young Lawyers Association v. The State of Kerala*, (2019) 11 SCC 1 (*Sabrimala Case)* were discussed. Resounding *Navtej Singh Johar v. Union of India*, the discourse highlighted that constitutional morality is a "mental attitude" which citizens must imbibe, first through society, and when society fails, then through the court as an "external facilitator". In *Central Board of Dawoody Bohra Community v. The State of Maharashtra,* [2023] 1 SCR 293 at para 25(b) the apex court held that, "'Morality' for the purposes of Articles 25 and 26 must mean that which is governed by fundamental Constitutional principles". Contesting ideologies and approaches to the doctrine was discussed with reference to scholarship of Dr. Abhinav Chandrachud contrasting with Senior Advocate Mr. K.K. Venugopal. Lastly, whether the scope of writ jurisdiction is limited to the constitutional courts exclusively? What would happen if a writ petitions lies with the Apex Court under Article 32 as well as in the High Court under 226? To explain the answer Article 32(3) and Article 226(4) were referred to.

Session 2 – Limits of Writ Jurisdiction

Speaker(s): *Justice Hrishikesh Roy; Justice Girish S. Kulkarni*

At the outset it was asserted that the Writ jurisdiction being a very important jurisdiction of the High Courts - especially which are the federal constitutional courts responsible for judicial dispensation in the great operational democracy of India – has got a very wide spectrum of the types of litigation sources. May it be, fundamental rights, public services, health and hygiene, enforcement of contracts, tortious liability of a State, safety and security, and such myriad other grounds. Hence, it becomes extremely important for the High Courts to understand its operating scope and conscious of the prescribed limits. While discussing the limits the concept and jurisprudence of "maintainability" *vis-à-vis* "entertainability". Every petition that might be maintainable may not be entertainable by bypassing the alternative remedies prescribed under the respective applicable statute. Citing *M/s. Godrej Sara Lee Ltd. v. The Excise And Taxation Officer*, 2023 INSC 92, wherein the apex court relied upon its holding in *Wirlpool Corporation v. Registrar of Trade Marks Mumbai,* (1998) 8 SCC 1, at para 15, held that, "The objection to "maintainability" goes to the heart of the matter, and if it were upheld, the High Courts would be unable to adjudicate. The determination of "entertainability" is solely within the discretion of the High Courts." The four exceptions (to having an alternative remedy) carved out in *Wirlpool Case* are – a) where the writ petition seeks enforcement of any of the fundamental rights; b) where there is violation of principles of natural justice; c) where the order or the proceedings are wholly without jurisdiction; or d) where the validity of an act is challenged. It was further underscored that there is a mandate in case of application of *writ of mandamus* (that it will lie only where there is no other equally effective remedy. Therefore, to exhaust all the available statutory remedies prior to issuance of

mandamus), however there is no such rule in cases of *writ of certiorari*. In *State of Uttar Pradesh v. Mohd. Nooh*, 1958 AIR 56, the apex court held that, "[R]ule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies." More basically, while "maintainability" concerning the exercise of a court's jurisdiction to receive a case, while "entertainability" is about the court's discretion to exercise its power to decide on the *lis*.

It was reemphasized that prerogative writs are issued by the High Courts under Article 226 and the Supreme Court under Article 32 to do "substantive justice". Therefore, they should never be confused with routine reliefs. The jurisdiction is limited to the Constitutional Courts as extraordinary, equitable and discretionary in nature. A prerogatory remedy is not to be treated as a matter of course. A useful list of reference could be drawn from *M/s Shiva Construction Works v. The State of Madhya Pradesh,* 2023 SCC OnLine MP 2065, at para 18 wherein the High Court succinctly summarized seven points, drawn from the jurisprudence drawn out by the Supreme Court of India, on what should be (not)considered by the Court while dealing with a Writ petition.

The session highlighted the the novel concept of "audit of a statute" by the judiciary. Supreme Court in *Yash Developers v. Harihar Krupa Co-operative Housing Society Ltd,* (2024) 9 SCC 606 had explained the justification and source and power of a constitutional court in operating the doctrine.

Session 3 – ICT & High Courts: Enabling & Transforming Digital Democracy

Speaker(s): *Justice Rajesh Bindal; & Justice A. M. Mustaque*

The session started by registering a perennial working impediment of High Courts, generally relating to the spending of the allocated financial budget in a planned and phased out manner. Moreover, yet another issue relates to the lack of natural affinity of the judges and the staff to use ICT fearlessly and seamlessly, without depending upon the archaic hard practices. It was told that in the modern times we have travelled to a point wherein using ICT is not a luxury or a choice, but has become imperative. It has now taken the center-stage in all forms of transactions, and therefore can hardly be ignored or avoided in the Court transactions and integrating judicial processes. It was underscored that the silver lining with the deep pervasion of the ICT renders transparency, ease of access, deep research capability, speedy disposal, ease of retrieval of records, enabling justice to doorsteps, increasing efficiency, and ease of having multi-stakeholder transactions on extremely quick turn-around-time (ToT). It was acknowledged that reluctance to change or adopting a surgical/medical procedure is often the case, and adopting a revolutionary change in the adoption of ICT and ITeS (Information and Communication enabled Services) was obviously one such mega resistance. However, the Covid 19 pushed the judicial system (like almost all such essential (inter)national infrastructure) to an involuntary paradigm change in the functioning of the justice delivery. It not only pushed the system on the burner with ICT as the only feasible and most effective option, it created the much needed confidence in the otherwise not-so-sure judicial system

to run the show of justice delivery that otherwise almost came to a crashing halt. And soon the entire judicial machinery came to realize its immense potentials.

With the background involuntary, unplanned and significantly successful experiences during Covid 19 period, High Courts and the entire judicial system plunged into real-time "digital transformation" with enough confidence under the belt. It was explained that the entire process of digital transformation can be seen through the lenses of three major concepts: 1) Justice as an Idea of Emancipation; 2) Certainty & Less Human Intervention; and 3) Prudent Use of Human Resources. The first concept would drive uniformity across the nation with predictability and less human intervention. Example of challans of violation of the provisions of Motor Vehicle Act were explained which constitutes a significant chunk of pendency in the courts. If the same is automated using ICT and AI tools a sizable quantum of low level judicial time would be emancipated for engaging in a more value added dispensation. Therefore, as per the second concept certainty, predictability and scalability of disposal can be attained. The same would also lead to the validation of the third concept, wherein lesser dependence and use of human intervention would allow establishment of new courts, assignment of new and more valuable roles for the human resources. It was asserted that transformation in digital democracy would be catalyzed by transition from a typical centralized model of operation to a more automated decentralized organizational and operational structure.

Session 4 – Role of a Judge in Supervisory Jurisdiction

Speaker(s): *Justice Joymalya Bagchi & Justice Akil Kureshi*

The session initiated with the describing the unique role and responsibilities of being a judge. It was asserted that very rarely one would find a role that touches so intimately the social fabric in such decisive manner, as that of a judge. Therefore, the responsibilities of being a judge starts with his/her first day after the oath and terminates only with him. It becomes therefore, extremely important for a judge to conduct himself/herself appropriately in his public and personal life, and therefore, the supervisory role of a judge of a High Court reposes upon himself/herself a responsibility of being a mentor and an administrator of the institution under his/her jurisdiction. It was delineated that for a judge often there would be an expectation on two equally important options a) Perfection; and b) Finality. It was suggested that as a supervisor (s)he should attempt to drive in finality over perfection as a virtue. One of the virtues which a supervisory judge must have while in his/her role as a supervisor is that (s)he should be mindful of the virtue of equality and collegiality. While discussing the scope of Article 226 and 227 it was underscored that while 226 has exclusive applicability for "judicial reviews", whereas 227 has got a wider spectrum, it would be pressed into action for not only "judicial review" but for "administrative reviews" of the Courts and Tribunals which are within the jurisdictions of a particular High Court. Although is law is well settled that 227 is applicable to supervise hierarchically inferior courts or tribunals, however, the sub-clause 1 of 227 does not expressly mentions the word "inferior" or "subordinate" as such, therefore, does this mean or can be considered to argue that, particularly in Delhi, will Delhi High Court therein have technically a supervisory jurisdiction over Supreme Court? In other words can the judgments or orders of the Supreme Court of India be assailed in the Delhi High Court under

Article 227? *Ibrat Faizan v. Omaxe Buildhome (P) Ltd.,* 2022 SCC OnLine SC 620 was discussed. The principles of supervisory powers under Article(s) 226 & 227 was explained as laid down in *L. Chandra Kumar v. UoI,* (1997) 3 SCC 261, also *Madras Bar Association v. UoI,* (2014) 10 SCC 1 which revolves around the issue of whether the jurisdiction of High Courts under Article 226 and Article 227 can be barred. The Supreme Court held that while tribunals can supplement the role of High Courts, they cannot completely replace them as they are courts of constitutional interpretation. It was held in the above decisions that, Article 227 is a part of the basic structure. The High Courts have the discretionary power to choose to allow a writ under 227. Further, it was considered that can the Supreme Court of India, injunct the High Court to exercise its power under Article 227? In Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1 (popular as the 2G Spectrum Case); and the *Manohar Lal Sharma v. Principal Secretary*, (2014) 9 SCC 614 (popular as the Coal Block allocation scandal case).

Regarding composite writ petitions wherein both 226 and 227 or 226/227 are filed in a single petition, what should be the test to determine, which of the two alternatives, or whether both of the Articles would qualify? It was clarified citing *Shalini Shyam Shetty v. Rajendra Shankar Patil,* (2010) 8 SCC 329, that while 226 gives Original jurisdiction to High Courts, the same under 227 is neither Original nor is it Appellate. This jurisdiction under Article 227 is judicial superintendence as well as administrative. Therefore, a petition under 227 cannot be governed by Original Side Rules of a High Court. It was clarified that the test is that, a judicial order by a court cannot be challenged under Article 226 or 32. Such judicial orders can be challenged either under statutory appeal, or under Article 227. The clarification was explained w.r.t. *Radhey Shyam v. Chhabi Nath,* (2015) 5 SCC 423 wherein, "Judicial orders of the civil court are not amenable to writ jurisdiction [*writ of certiorari*] under Article 226 of the Constitution". The case also clarified "judicial acts" from "judicial orders" of civil courts.

Discussing the power of superintendence over the District Judiciary by the High Court was discussed. The distinction between the meaning and scope of the words "vested" and "control" under Articles 233 and 235 of the Constitution of India was elucidated with the help of case law jurisprudence including, *The State of West Bengal v. Nripendra Nath Bagchi,* AIR1966SC447. It was explained that these are "absolute" powers, and any special statute creating any adjudicatory or administrative functions are only supplementary to the power of the High Courts under Article(s) 233 & 235. It was underscored that whenever the powers are plenary, they are absolute, and the responsibility to exercise such powers by the Courts becomes equally onerous. Therefore, such powers needs to be exercised with caution and reasonableness by a court. It was mentioned that the expression "subordinate courts" in the Constitution of India projects the colonial flavors. The nomenclatures have changed as it has been directed by the apex court in *Sakhawat v. State of Uttar Pradesh,* (2024) SCC OnLine SC 141, that "It will be appropriate if the Registry of this Court stops referring to the *Trial Courts* as '*Lower Courts*'. Even the record of the *Trial Court* should not be referred to as Lower Court Record (LCR). Instead, it should be referred as the Trial Court Record (TCR)." In *All India Judges Association v. Union of India*, (2024) 1 SCC 546 the apex court held that District Judiciary should not be referred as "subordinate judiciary" as it is only a misnomer.

Session 5 – Fundamental Rights & Free Speech

Speaker(s): *Justice Joymalya Bagchi & Justice Akil Kureshi*

The session covered major jurisprudential areas such as: the burgeoning issues relating to jurisdiction in the digital age; the evolving concept of what constitutes defamation in the digital age, its contours, ingredients and law. The scope of defamation as it varies internationally with various countries having different forms of legislations, social contexts, pervasion of internet, compliance to the international laws, etc. An analysis of the characteristics of the digital platforms in terms of their control as to whether they are akin to the public high ways or akin to private dominions? Particularly when two Constitutional Rights are in conflict *viz.* "Right to Information" and "Privacy Rights", etc. A discussion on the issues relating to "live streaming" saw intriguing aspects impacting various verticals including, the judge(s), the victim, and the accused, judiciary as an institution, the interested parties, and the society in general. The conundrum of the legislative and judicial mandate of holding "open court" *versus* militating privacy rights and right to anonymity pose serious novel areas for judicial and policy considerations. On the other hand, the projection of "video clips" on online platforms by public, generally for commercial exploitation (often uploaded completely out of context), not only inflicts a deleterious impact on the judges' personality and demeanor while (s)he is presiding over a court of law, but potentially puts the institutional credibility and public trust at stake. Therefore, the ever-changing and deep pervasive digitization, digitalization, & digital transformation has been posing novel and evolutionary conflicting positions in law, sometimes those relating to Constitutional and/or Fundamental Rights. It was underscored the merits and cautions of the digital world is a double edged sword which cuts both the ways, on one hand increasing systemic-transparency, while on the other hand, ease of access to information, when gets to the hands of irresponsible, unregulated persons may adversely, disproportionately and irreversibly jeopardize rule of law. It was cautioned to the participants that since digital media by its virtue has the advantage of casting popularity. Popularity being a general antithesis to judicial behavior at times, when not careful has the potential to leave indelible scar on the institution. Examples, like public disposition of vested power on the Court (in the persona of a judge) *viz.* "call the District Collector, or The Superintendent of Police", or running down a junior lawyer in a court proceeding, etc. gives unnecessary fodder for the commercial online platforms & channels to make quick money out of the popularity urge of a judge, who might be ignorant of the far reaching implications. A question posed was whether, a limited livestreaming can be allowed by the Court to a lawyer? It was proposed that one cannot be selective in allowing a particular class the access. Such a phenomenon would violate the uniform right to access to the "open courts". However, recording of livestreaming can be a policy option to avoid misuse. Secondly, it was suggested that, a delayed broadcasting of the livestreaming can also be a prophylactic option to reduce the potential harm. It was explained that the concept of "open court" is to ensure and allow access to anyone interested, wherein permission to enter a court cannot be generally prohibited. It is a Constitutional Right under Article 145(4). Also, it is a statutory right under Section 153 B, Order 18 Rule 4 of the CPC, and Section 327, 274 to 276 of the CrPC. Therefore, in the digital-age with online broadcasting as an option, the spatial dimensions of a Court is no longer the physical "court room", but a virtual space, accessible anywhere in the world. It is accessible to anyone, who has not been denied access. Hence, it was asserted that one can

options of “regulate the recording” though, but it might not be a feasible option to “regulate the mischief” of copying from the accessible broadcast in the public domain; or misappropriating a portion of the copy of the online broadcasted proceedings, and then circulating it or making it available for vested (economic) purposes.

Commenting on the dark side of openness and ease of access owing to online operations of the virtual courts, a hypothetical incidence was underscored wherein a south-indian judge presiding over a north-indian court was ridiculed by a local advocate over his capabilities to understand the local-language. Therefore, openness so long as it promotes free and valuable participation is appreciable, but when it operates to work counter productively to stifle the justice delivery system, could pose serious problems. It was opined that the concept of “open courts” it to have a direct public engagement of the judicial operation and dispensation. It in turn is an important aspect to keep public trust over the judicial system. Therefore, to operate in a balanced manner in the unfettered and unregulated internet access, and control misinformation, it was aired as an idea to have dedicated posts in the form of media-managers, who can narrate the Courts’ position in a sensitive matter demanding engagement with the society, rather than leave it open for any and every person interpret, publish, broadcast his/her own suitable narrative.

The sessions culminated with exchange of thoughts, sharing of best practices and orientation of novel ideas on the seminal topics.