

National Conference for High Court Justices on Constitutional Remedies and Administrative Law

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Programme Report

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The National Judicial Academy (NJA) organized a two-day **National Conference for High Court Justices on Constitutional Remedies and Administrative Law** on **05 – 06 October, 2024** at **NJA, Bhopal**. The participants were High Court Justices nominated by the respective High Courts. The Conference focussed on contemporary issues in constitutional and administrative law and involved discussion on themes including Scope of Writ Jurisdiction; Judicial Reviews of Administrative Action; Judicial Reviews of Legislative Action; Constitutional Morality: Evolving Jurisprudence; and Judicial Activism and Judicial Restraint in Contemporary Times.

Session 1: Judicial Review of Legislative Action and Administrative Action

The session was commenced with discussion on the Montesquieu's theory of separation of power and it was stated that each organ of the State has their respective functional domain and they should operate within that domain. The task of the judiciary is to ensure that other two organs have performed their function within the framework of law and to keep the other two organs of the State within the bounds of law. The court should assess that whether the legislative or administrative action is arbitrary or contrary to law or not. The court should restrain itself from quashing the legislative or administrative action merely because another view is possible.

The judgment of the US Supreme Court *Marbury v. Madison*, 5 U.S. 137 (1803) and judgments of the Indian Supreme Court including *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, *I.C. Golaknath v. State of Punjab* (1967) 2 SCR 762 and *Mafatlal Industries v. Union of India* (1997) 5 SCC 536 were referred while highlighting the evolution of the principles of judicial review in India. It was emphasised that the jurisdiction of the High Courts under Article 226 is very vast and should be invoked to protect rights of people. Then the doctrine of Manifest Arbitrariness was discussed and various parameters to test the legislations were deliberated upon. The judgment *Shayara Bano v. Union of India* AIR 2017 SC 4609 was discussed and it was stated that this doctrine aims to address actions which shocks judicial conscience.

The discussion then focussed on the judicial review of subordinate legislation and it was opined that principles of statutory interpretation should be invoked in this regard. The issues related to reconciliation of subordinate legislation with the principal legislation were highlighted and it was opined that courts should enquire into the root of the decision making powers and the wisdom of the legislature should be tested on the standard of constitutional norms. It was further added that the court should rarely declare a legislation ultra vires and generally there should be presumption of constitutionality. The issue of excessive delegation of power was discussed and it was stated that when delegated power exceeds its scope then court can intervene. The application of the doctrine of proportionality in the judicial review of legislative action was highlighted and the judgment *Ashoka Kumar Thakur vs Union of India* (2008)6 SCC 1 was discussed. It was stated that court should enquire into various factors including the legislative competence of the legislature, violation of the fundamental right or violation of any other provision of the Constitution and arbitrariness. The application of the doctrine of proportionality in sentencing in criminal matters was also discussed.

The discussion then focussed on the role of courts in deciding crucial socio-legal issues and it was stated the judges should refrain from imposing personal views in the matters concerning

society at large. It was further added that courts should not function as legislature and judgements of the US Supreme Court were referred in this regard. It was opined that judges should exercise utmost care on what un-enumerated rights should be declared as the fundamental rights. The scope of the role of judiciary in deciding about culture and belief of the people was deliberated upon. The judgment of Justice Roberts on reducing overcrowding in US prisons was referred. It was stated that judiciary can fill gaps in legislation to address a critical problem and the judgment *Vishaka & Ors vs State of Rajasthan* AIR 1997 SC 3011 was referred where the court responded to fill the gap in legislation with regard to prevention of sexual harassment at workplace. The issue of restriction on females in religious places was also discussed.

Then the use of foreign jurisprudence was highlighted and it was opined that the Indian jurisprudence is rich and sufficient to deal with all kinds of issues. It was stated that Kautilya concept of dharma of king to not to impose excessive punishment is equivalent to the doctrine of proportionality. Then the panel invited the views of participants about the concept of arbitrariness. It was stated that arbitrariness implies irrationality, unreasonableness, capricious, action without adequate principles and exercise of power beyond rules. The judgments *E. P. Royappa vs State of Tamil Nadu* 1974 SCR (2) 348, *Indira Nehru Gandhi vs Shri Raj Narain* 1976 2 SCR 347 and *Ajay Hasia v Khalid Mujib*, (1981) 1 SCC 722 were referred. Then the doctrine of pith and substance and triple test to assess the legislative action were discussed and it was stated that the court should see that what is the field occupied by legislation and what is the scope and effect of its provisions and the judgment *M/S. Girnar Traders v. State of Maharashtra* 2007 (7) SCC 555 was referred. The conflict between the Central Act and State Act was deliberated upon while discussing the doctrine of pith and substance. The doctrine of severability was referred and it was stated that the court can strike down provisions of a legislation which are overlapping with the central legislation.

The issue of disturbance of level playing field by the administrative action was discussed and it was stated that court can restore level playing field in such matters. It was added that court can correct any injustice if it function within the framework of the Constitution. Various grounds for setting aside arbitrary action were discussed including illegality, irrationality, jurisdictional defects, prima facie errors of law and facts, discrimination and procedural impropriety. The Wednesbury principle was compared with principle of proportionality and the judgment *Tata Cellular v. Union of India* 1994 SCC (6) 651 was referred. The judgment on non-proportionate harsh disciplinary action on playing cards in military duty was discussed. It was stated that when court finds no reasonable grounds for administrative action and the authority has misinterpreted or misapplied its power then the court can always review the action on the basis of settled legal principles.

The judgment *Sant Singh v. State of Haryana* [CWP No.19096 of 2011] was referred while discussing power of eminent domain and it was stated that illicit or improper purpose behind application of power should always be strike down by the court. The judgment *Ameena Begum v. The State of Telangana* [SLP (Criminal) No. 8510 of 2023] was referred. The issue that whether the public private partnership project should come within the purview of judicial review was discussed and it was opined that any private body which is discharging public function is amenable to the judicial review. The judgments *Lotus Refineries Private Ltd v. State of Maharashtra* [Writ Petition No. 403 of 2023], *Bareilly Development Authority v. Ajai Pal*

Singh 1989 (2) SCC 116 and *Zee Telefilms v. Union of India* (2005) 4 SCC 649 were referred in this regard.

It was emphasised that the court must assess the administrative action on the standard of procedural fairness and natural justice principles. The issue that how and where the principles of natural justice should apply and where they can be dispensed with was deliberated upon. The judgment *S. L. Kapoor v. Jagmohan* 1980 (4) SCC 379, *Olga Tellis v. Bombay Municipal Corporation* 1985 SCC (3) 545, *Union of India v. Mohd. Ramzan Khan* 1991 (1) SCC 588 and *Municipal Corporation of Greater Mumbai v. Ankita Sinha* 2021 SCC OnLine SC 897 were referred in this regard.

Then discussion focussed on grounds for refusing to exercise judicial review including suppression of facts, existence of alternative remedy, disputed question of facts which can only be resolved by appreciation of evidence, extraordinary delay and laches and public interest litigation filed for ulterior motives rather than public interest. It was added that when the question of law and question of fact are intermingled then court should decide the matter accordingly. The judgment *Ashok Kumar Sharma v. Union of India* Writ Petition (Civil) No. 551 of 2024 which involved issues related to foreign policy was referred to highlight the matters where remedy under writ jurisdiction cannot be granted. The issue related to judicial intervention in compassionate appointment was discussed and it was stated that if the authority deviated from rules of compassionate appointment then court is bound to intervene. Such matters often involves negative equality and court cannot allowed an illegal action to continue as a standard. The session was concluded by emphasizing that courts should exercise judicial review with great caution in policy matters, matters requiring specialized technical knowledge and expertise and issues related to social change.

Session 2: Emerging Trends in Judicial Review

The session was commenced with discussion on the separation of power according to the Constitution and it was stated that each wing has independence. The freedom of each wing should be respected otherwise democratic setup would collapse. It was further added that if the legislature has crossed structural legal parameters then court can intervene in such matters. There are mechanism of checks and balances within the constitutional scheme.

The issue that whether under the Indian Constitution the separation of power is explicitly recognised or not was discussed. It was stated that in US Constitution the separation of power is clearly provided under Article 1, 2 & 3. The legislative framework under the Indian Constitution with regard to Article 245 & 246 was highlighted. The judgments *In re: Delhi Laws Act case* (AIR 1951 SC 332), *S. P. Gupta v. Union of India*; AIR 1982 SC 149, *Rai Saheb Ram Jawaya v. State of Punjab*, AIR 1955 SC 549, *State of M.P. v. Nerbudda Valley Refrigerated Products Company Private Limited*, (2010) 7 SCC 751, *Indra Sawhney v. Union of India* AIR 2000 SC 498, *Supreme Court Advocates-on-record Association v. Union of India* (1993)4 SCC 441, *In Re: Appointment and Transfer of Judges* (1998)7 SCC 739 and *Kesavananda Bharuti Sripadagavara v. State of Kerala* AIR: 1973 SC 1461 were discussed.

The recent trends in judicial review of administrative action were discussed and scope of judicial intervention in policy matters was highlighted and judgments *Association for Democratic Reforms v. Union of India*, 2024 SCC OnLine SC 150 and *Rajiv Suri v. Delhi*

Development Authority, 2021 SCC OnLine SC 7 were referred. The issue that when once a law made by a legislature is struck down as unconstitutional then whether the State can come with fresh legislation and in what manner it can be done was deliberated upon. It was stated that the legislature is empowered to enact the law again but it should remove the thread of unconstitutionality. The judgment *Shri Prithvi Cotton Mills Ltd. & Anr v. Broach Borough Municipality* 1970 SCR (1) 358 was discussed in this regard. The judgments *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1 and *Indian Young Lawyers Association v. The State of Kerala* (2019) 11 SCC 1 were also referred.

The discussion then focussed on the expansion of constitutional rights and the expansion of the right to personal liberty was discussed. Section 50 of the Cr.P.C. and Article 22(1) dealing with detention were referred and the requirement of reasons of detentions was deliberated upon. The expansion of fundamental rights against statutory bodies was highlighted and the creative interpretation of the definition of State was discussed. The judgments *Life Insurance Corporation v. Manubhai D. Shah*, AIR 1993 SC 171, *M.K. Agarwal v. Gurgaon Gramin Bank*, AIR 1988 SC 286, *Air India International v. Nergesh Meerza*, AIR 1981 SC 1829, *Rajasthan State Electricity Board v. Mohan Lal*, AIR 1967 SC 1857, *Ajay Hasia v. Khalid Mujib Sehravardi & Ors.*, 1981 (1) SCC 722 and *B.S. Minhas v. Indian Statistical Institute*, 1983 (4) SCC 582 were referred in this regard.

The discussion then focussed on the expansion of fundamental rights under Articles 14 and 19 and judgments *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299, *Romesh Thappar v. State of Madras*, 1950 SCC 436, *Bennett Koleyman & Co. vs. Union of India* (1972) 2 SCC 788, *Bijoe Emmanuel v State of Kerala*, AIR 1987 SC 748 were discussed. The interpretation of Article 21 by the Supreme Court and enumeration of various fundamental rights under it was highlighted. The judgments *Bandhua Mukti Morcha vs. Union of India* (1984) 3 SCC 161, *Olga Tellis vs. Bombay Municipal Corporation* AIR 1986 SC 1980, *Dalmia Cement (Bharat) Ltd. & Anr. vs. Union of India & Ors.* (1996) 10 SCC 104, *State of Himachal Pradesh vs. Umed Ram Sharma* AIR 86 SC 847, *M.C. Mehta vs. Union of India & Ors.* (2004) 12 SCC 118, *Shantistar Builders vs. Narayan Khimalal Totame & Ors.* AIR 1990 SC 630, *Chameli Singh vs. State of Uttar Pradesh* AIR 1996 SC 1051 and *Narmada Bachao Andolan vs. Union of India & Ors.* (2000) 10 SCC 664 were referred in this regard.

Session 3: Constitutional Morality: Evolving Jurisprudence

The session was commenced with enquiring into the basis and origin of the concept of morality and the definition of morality from dictionary sources was discussed. The issue related to relationship between morality and ethics was highlighted and comparison between public and private morality was drawn. It was stated that public morality implies ideals or general moral beliefs of a society and it refers to ideals or actions of an individual to the extent that they affect others. The private morality implies a person's ideals, character, and private conduct, which are not valid governmental concerns if the individual is to be considered sovereign over body and mind. The meaning of dharma was explained to participants. Various judgements were referred in this regard including *Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*, AIR 1996 SC 1113 and *Brij Gopal Denga v. State of Madhya Pradesh*, AIR 1979 MP 173.

The discussion then focussed on the origin of the concept of constitutional morality and various ancient sources including Mahabharata, Dharmakosha, Naradasmriti, Katyayana Smiriti, and Shukraniti were referred. The meaning of *Raga, Lobha, Bhaya, Dwesha and Vadoscharashruthi* were explained. Then the definition of constitutional morality according to Dr. B.R. Ambedkar was referred and the fundamental duties and oath to be made by judges of a High Court were discussed.

The meaning of constitutional morality according to various judgments of the Supreme Court was discussed and judgments *Manoj Narula v. Union of India* (2014) 9 SCC 1, *Indian Young Lawyers Association & Ors. v. The State of Kerala*, (2019) 11 SCC 1, *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501 and *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 were referred extensively in this regard. It was stated that the mind of an individual is conditioned by his/her prejudices and biases and thinking of an individual may differ significantly from the requirements of constitutional morality. It was emphasised that it is very important for a judge to unlearn one's biases and prejudices and one has to be eternally vigilant in this regard. The methods and principles for eradication of personal biases and prejudices were discussed and it was stated that judges' mind should be in conformity with constitutional morality.

Then interactive discussion took place on the issue that whether constitutional morality has any intellectual or jurisprudential base in the Indian culture. It was stated that the Indian Constitution's text does not use the word constitutional morality and the reference points towards this concept could be traced to Articles 19, 25 and 26. Then the judgment *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 was discussed and basic structure doctrine as one of the important source of constitutional morality was highlighted. The effect of constitutional morality on interpreting silences in the Indian Constitution was discussed. Then the issues related to challenges to a legislation or seeking a relief on the basis of constitutional morality were discussed. The judgments delivering empathetic relief to litigants were discussed and participants shared their experience in writing such kinds of judgments. The situation where the statute fall short of providing remedy in a particular case was discussed and the judgment *Walaiti Ram Charan Dass v. State of Punjab*, (2019) 9 SCC 779 was referred in this regard.

Session 4: Judicial Activism and Judicial Restraint in Contemporary Times

The session was commenced with discussion on the judgment *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225. It was stated that the phrase basic structure has not been used anywhere in the Constitution and it is through the creative interpretation of the Supreme Court of India that the doctrine of basic structure has become an integral part of the constitutional law. The issue was raised that whether the doctrine of basic structure is the result of judicial activism on the part of the Supreme Court and participants shared their views in this regard. The session then focussed on the interpretation of Article 368 and various amendments of the Constitution were discussed. It was stated that judicial innovations keeps the Constitution a relevant documents over the course of time and the Constitution needs to be interpreted according to the requirements of changing time.

The issue that how the interpretation of the Constitution has changed over time and what impact it has made on the development of the constitutional law was discussed. The judgments *Additional District Magistrate v. S. S. Shukla* 1976 AIR 1207, *I.C. Golaknath v. State of Punjab* (1967) 2 SCR 762 and *Maneka Gandhi v. Union of India* 1978 SCR (2) 621 were referred in this regard. The issue that what tools were used by the judges to change the prevailing view and why such major changes happened in the approach of the Supreme Court were discussed and participants shared their views in this regard. The impact of natural justice principles on the interpretation of laws was discussed and it was opined that procedure to deprive someone from life or liberty should be fair and reasonable. The contribution of the Indian Supreme Court towards the expansion of right to life and personal liberty was discussed and various judgments of the Supreme Court were referred in this regard. The difference between judicial activism and judicial adventurism was explained and it was stated that the discipline of the Constitution must be followed while interpreting the laws to address any gap in the legislature. It was opined that judges are equally accountable to the Constitution and judicial innovations should not go beyond the limits prescribed by the Constitution. The judgment *Vishaka & Ors vs State of Rajasthan* AIR 1997 SC 3011 and *Donoghue v Stevenson* [1932] AC 562 were referred in this regard. The discussion then focussed on factors affecting interpretation of the Constitution and it was emphasised that there should not be any impact of personal beliefs on decision making process. The use of *Suo Motu* power was discussed and it was emphasised that this power should be used sparingly and the proper course of action is to bring such issue to the notice of the Chief Justice of the concerned High Court. The judgment *L. Chandra Kumar vs Union of India* 1997 (3) SCC 261 was referred and the issues related to regulation of tribunals were discussed.