

State of U.P. and anr. Vs. Johri Mal

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Court : Supreme Court of India

Decided On : Apr-21-2004

Reported in : AIR2004SC3800; JT2004(Suppl1)SC443; 2004(5)SCALE1; (2004)4SCC714; 2004(3)SLJ175(SC)

Judge : V.N. Khare, C.J.,; Brijesh Kumar and; S.B. Sinha, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 24, 24(1), 24(2) to 24(6) and 320; [Constitution of India](#) - Articles 13, 14, 124, 142, 166 and 226; Bar Council of India Rules - Rule 36

Appeal No. : Civil Appeal Nos. 6549 of 1999 and 963-64, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975 and

Appellant : State of U.P. and anr.

Respondent : Johri Mal

Advocate for Pet/Ap. : Ranjit Kumar and; R.C. Srivastava, Sr. Advs.,; Ashok K. Srivas

Disposition : Appeal allowed

Prior history : From the Judgment and Order dated 11.12.98 of the Allahabad High Court in C.M.W.P. No. 34064 of 1998

Judgement :

INTRODUCTION:

1. A short but interesting question as regard interpretation of Section 24 of the Code of Criminal Procedure and the relevant provisions of Legal Remembrancer's Manual relating to appointment and renewal of term of the District Government Counsel is in question in this batch of appeals which arise out of various judgments and orders passed by the Allahabad High Court in C.M.W.P. Nos. 34064, 19513, 34074, 26613, 40945, 41178, 5665, 41180, 5667 of 1998, 9809 of 1992, 9203 of 1998, 3100, 3102 of 1999 and 6754 of 1998.

FACTUAL BACKDROP:

2. The State of Uttar Pradesh appoints District Government Counsel (DGC) for civil, criminal and revenue courts in terms of the Legal Remembrancer Manual.

3. Appointment of Public Prosecutor is governed by the Code of Criminal Procedure, 1973. The State of Uttar Pradesh, however, amended Section 24 of the Code of Criminal Procedure in terms whereof the requirements to consult the High Court for appointment of Public Prosecutions for the High Court as contained in Sub-section (1) of Section 24 as also Sub-sections (4), (5) and (6) thereof were deleted. Renewal of terms of the District Government Counsel, are however, governed by Legal Remembrancer Manual.

4. The first respondent herein was appointed as District Government Counsel (DGC) (Criminal) at Meerut on or about 7.01.1983. The said post is deemed to be that of Public Prosecutor within the meaning of Section 24 of the Code of Criminal Procedure. His term was renewed by an order dated 12.03.1996. He was again appointed in the same capacity by an order dated 17.09.1997 for a period of one year. Before expiry of the said period, the respondent applied for renewal of his tenure. Allegedly, the District Judge and the District Magistrate did not recommend therefore. The State Government decided not to renew the term of the respondent as DGC (Criminal) and by an order dated 18.9.1998 he was relieved from the charge of the said post. By a notification dated 17.09.1998, the vacancy was

advertised whereafter the respondent filed a writ petition before the Allahabad High Court inter alia praying for quashing the said order dated 18.09.1998. In the said writ petition, the contention of the respondent was that as the District Magistrate as also the District Judge had recommended for renewal of his tenure as DGC (Criminal) having found his conduct and work satisfactory, the renewal ought to have been granted as a matter of course.

5. Despite opportunities granted in that behalf, the appellants, however, did not file any return.

6. By reason of judgment dated 11.12.1998, a Division Bench of the Allahabad High Court allowed, the said writ application holding:

'In the present case the District Judge has recommended in favour of the petitioner and no good or cogent reason has been assigned or rejecting the recommendation of the District Judge. Hence we direct the petitioner's term as DSC (Criminal) to be renewed forthwith by the State Government.'

The learned Judges further opined:

'The Supreme Court has observed in Special Reference No. 1 of 1998 that, the Chief Justice of India means not the Chief Justice of India alone but in consultation with his four senior most colleagues. No doubt this judgment was given in the context of appointments of Judges in the Supreme Court and High Courts, but in our opinion the spirit of the judgment is applicable to the present case also since the intention was to keep the administration of justice away from political considerations. Hence in our opinion the District Judge should not make the recommendation alone but in consultation with the two senior most Judicial Officers in the District Court and also the CJM in the case of recommendations for appointments in the Criminal side, and the senior most Civil Judge for appointments on the Civil side, and also the District Magistrate. In other words the recommendation shall be by a collegium headed by the District Judge and consisting of the above mentioned five members (consisting of four judicial officers and the District Magistrate). If two members disapprove the name no recommendation will be made. No name will be recommended if the District Judge

disapproves. This, in our opinion, will be in accordance with the norms laid down in the L.R. Manual. Such a recommendation will ordinarily be treated as binding on the Government unless for some strong, cogent reasons to be recorded in writing if the Government disagrees. We again make it clear that the recommendation must be made purely on merit and competence ignoring caste, creed, religion or political affiliation.'

7. Contending that the said judgment contains an error of record as the case of the first respondent had not been recommended by the District judge or the District Magistrate concerned, an application for recalling of the judgment was filed by the appellant herein but the same was disposed of directing that the question regarding renewal of the respondent's term as DGC (Criminal) shall be considered afresh by the collegium headed by the District Judge constituted in the said judgment and the State Government shall act on the recommendations thereof.

SUBMISSIONS:

8. Mr. Ashok Kumar Srivastava, learned counsel appearing on behalf of the appellant would urge that the High Court proceeded on a wrong premise that the recommendations for renewal of terms of D.G.C. (Crl.) had been made by the District Magistrate in favour of the first respondent. Our attention in this behalf has been drawn to the opinion of the District Judge dated 11th September, 1998 as also the letter of the District Magistrate, Meerut addressed to the Principal Secretary, Justice and Legal Remembrancer, Government of Uttar Pradesh, Lucknow dated 12.9.1998.

9. The learned counsel would submit that as the appointment of public prosecutor is governed by the provisions of the Code of Criminal Procedure and renewal thereof by the Uttar Pradesh Legal Remembrancer, the High Court committed a manifest error in directing constitution of a collegium headed by a member of Judiciary.

10. Mr. Srivastava would argue that having regard to the fact that professional engagement of a lawyer cannot be equated with appointment on a civil post as there exists a relationship of client and the lawyer between the State and the

Public prosecutor, the High Court was not correct in issuing the impugned directions. Reliance in this behalf has been placed on Harpal Singh Chauhan and Ors. v. State of U.P. : 1993 CriLJ3140 , State of U.P. and Ors. v. U.P. State Law Officers Association and Ors. : [1994]1SCR348 and State of U.P. v. Ramesh Chandra Sharma and Ors. : AIR 1996 SC864 .

11. Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit that the High Court felt the need to constitute a collegium keeping in view of the fact that the action on the part of the State in appointment and/or renewal of the DGCs was found to be arbitrary.

12. The learned counsel would submit that the public prosecutors look after the prosecution works and, thus, the nature of office would be a public in nature having regard to the fact that they discharge public functions.

Statutory Provisions:

13. Sub-sections (2) to (6) of Section 24 of the Code of Criminal Procedure read thus:

'(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Govt. shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district.

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutor or Additional public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under Sub-section (4).

(6) Notwithstanding anything contained in Sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under Sub-section (4).'

14. However, the State of U.P. by Act No. 18 of 1991 with effect from 16.2.1991 amended Sub-section (1) of Section 24 of the Code of Criminal Procedure in the following terms:

'in Sub-section (1), the words 'after consultation with the High Courts' shall be omitted;'

15. By reason of the said Act, Sub-sections (4), (5) and (6) of Section 24 have also been omitted.

16. Para 7.01 of Legal Remembrancer's Manual defines the District Government Counsel to mean legal practitioners appointed by the State Government to conduct in any court such Civil, Criminal or revenue cases, as may be assigned to them either generally, or specially by the Government. The legal practitioner appointed to conduct civil, criminal or revenue cases shall be known as District Government Counsel (Civil), (Criminal) or (Revenue), as the case may be.

17. Para 7.02 of the Manual lays down the power of the Government to appoint Government Counsel for each district in the State. Para 7.03 provides that whenever a post of any Government Counsel is likely to fall vacant within the next three months or when a new post is created, the District Magistrate shall notify the vacancies to the member of the Bar, the qualification where for would be practice of 10 years in case of District Government Counsel, 7 years in case of Assistant District Government Counsel and 5 years in case of Sub-District Government

Counsel. Clause (3) of Para 7.03 reads thus:

'(3) The names so received shall be considered by the District Officer in consultation with the District Judge. The District Officer shall give due weight to the claim of the existing incumbents [Additional/Assistant District Government Counsel], if any, and shall submit confidentially in order of preference the names of the legal practitioners for each post to the legal Remembrancer giving his own opinion particularly about his character, professional conduct and integrity and the opinion of the District Judge on the suitability and merits, of each candidate. While forwarding his recommendations to the Legal Remembrancer the District officer shall also send to him the bio data submitted by other incumbents with such comments as he and the District Judge may like to make. In making the recommendations, the proficiency of the candidate in civil or criminal or revenue law, as the case may be, as well as in Hindi shall particularly be taken into consideration:

Provided that it will also be open to the District Officer to recommend the name of any person, who may be considered fit, even though he may not have formally supplied his bio data for being considered for appointment. The willingness of such a person to accept the appointment if made shall, however, be obtained before his name is recommended.'

18. Para 7.04 of the said Manual provides that on receipt of the recommendations of the District Officer, the Legal Remembrancer may make further enquiry and submit the recommendations as also for orders of the State Government. The decision of the State Government would be final. Para 7.05 prohibits canvassing by or on the part of a candidate which would entail disqualification.

19. Paras 7.06, 7.07 and 7.08 read thus:

'7.06. Appointment and renewal- (1) The legal practitioner finally selected by the Government by be appointed District Government counsel for one year from the date of his taking over charge.

(2) At the end of the aforesaid period, the District Officer after consulting the District Judge shall submit a report on his work and conduct to the Legal Remembrancer together with the Statement of work done in Form No. 9. Should his work or conduct be found to be unsatisfactory the matter shall be reported to the Government for orders. If the report in respect of his work and conduct is satisfactory, he may be furnished with a deed of engagement in Form No. 1 for a term not exceeding three years. On his first engagement a copy of Form No. 2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record.

(3) The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause.'

7.07 Political Activity - The District Government Counsel shall to participate in political activities so long they work as such; otherwise they shall incur a disqualification to hold the post.

Note: The term political activity includes members of any political party or local body as also press reporting work.

7.08. Renewal of term: (1) At least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering his past record of work, conduct and age, report to the Legal Remembrancer, together with the statement of work done by him in Form No. 9 whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the term of a District Government Counsel is made for a specified period only, the reasons therefore shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel -

(i) the District Judge shall give an estimate of the quality of the Counsel's work from the Judicial stand point, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specifically his professional conduct;

(ii) the District Officer shall give his report about the suitability of the District Government Counsel from the administrative point of view, his public reputation in general, his character, integrity and professional conduct.

(4) If the Government agrees with the recommendations of the District Officer for the renewal of the term of the Government Counsel, it may pass orders for re-appointing him for a period not exceeding three years.

(5) If the Government decides not to re-appoint a Government Counsel] the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in para 7.08.

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel.'

20. A supplementary provision has been made in Chapter XXI of the said Manual for appointment and renewal of the post of public prosecutors. It inter alia contains the guidelines and clarifies that the appointment of DGC (Criminal), the change of designation of the public prosecutors could not effect the basic nature of their professional engagement. It further provides that such professional engagement is terminated on either side without notice and without assigning any reason. It is stated that the appointment of public prosecutor and Addl. Prosecutor both for the High Court and District shall be made in accordance with Section 24 of the new Code. Para 21.04 provides for constitution of a panel of five years against each vacancy. It mandates that the State Government shall appoint an Additional Public Prosecutor out of the names appeared in the panel. Paras 21.07 and 21.08 of the said Manual read as under:

'21.07. The appointment of Public Prosecutor or Additional Public Prosecutor shall be made for the period of three years, but the State Government can terminate such appointment at any time without notice and without assigning any reason. The State Government may extend the period of such appointment from time to time and such extension of such term shall not be treated as new appointment.

21.08. The District Magistrate shall after consultation with the Sessions Judge submit a confidential report in respect of the Public Prosecutor and Additional Public Prosecutor giving details about the percentage of success of cases conducted by them and the general reputation which they enjoy. Where the percentage of success is low the reasons given by the Public Prosecutor or Additional Public Prosecutor for the same should also be commented on. After every three years he shall make a special assessment of each such Public Prosecutor and recommend whether the person concerned should be granted extension for a further term of three years or for a shorter term only.'

21. The provisions of the Code of Criminal Procedure which are statutory in nature govern the field. The State of Uttar Pradesh, however, for reasons best known to it amended Sub-section (1) of Section 24 of the Code of Criminal Procedure as a result whereof, the State is not required to consult the High Court before appointing a Public Prosecutor for the High Court. Similarly, Sub-sections (4), (5) and (6) of Section 24 have also been deleted purported to be on the ground that similar provisions exist in the Legal Remembrancer Manual. The Legal Remembrancer Manual is merely a compilation of executive orders and is not a 'law' within the meaning of Article 13 of the [Constitution of India](#).

JUDICIAL REVIEW:

22. The power of Judicial review is now well-defined in a series of decisions of this Court. It is trite that the court will have no jurisdiction to entertain a writ application in a matter governed by contract qua contract (assuming such professional engagement to be one), as therein public law element would not be involved. (See Life Insurance Corporation v. Escorts Ltd. and Ors. : 1986(8)ECC189 , F.C.I. and Ors. v. Jagannath Dutta and Ors., : [1993]2SCR497 , State of Gujarat and Ors. v. Meghji Pethraj Shah Charitable Trust and Ors., : [1994]3SCR163 , Assistant

Excise Commissioner and Ors. v. Issac Peter and Ors., : [1994]2SCR67 , National Highway Authority of India v. Ganga Enterprises and Anr., : AIR 2003 SC3823 .

23. In any event, the modern trend also points to judicial restraint in administration action as has been held in *Tata Cellular v. Union of India* : AIR 1996 SC11 . (See also *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Ors.* : AIR 2000 SC2272 and *W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Ors.* (2001) 2 SCC 451 and *L.I.C. and Anr. v. Consumer Education and Research center and Ors.*, : AIR 1995 SC1811 .

24. The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law be it a legislative act or the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having regard to the nature of and extent of authority vested in the State. However, it may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions.

25. In *Council of Civil Services Unions v. Minister for the Civil Service* (1985) AC 374 while extending the scope of judicial review the House of Lords decided that judicial review should not be available if the particular decision under challenge was not justiciable. However, in granting relief the Court shall take into consideration the factors like national security issue. In *Constitution Reform in the UK* by Daw Oliver, it is stated at page 210:

'In the *CCSU* case the House of Lords decided that judicial review should not be available if the particular decision under challenge was not justiciable. In effect they respected the political Constitution and deferred to government in some sensitive areas. In this case the Government was alleging that for them to have consulted the unions before the decision was taken would have provoked industrial action at *SCHQ*, which would in turn have been damaging to national security. In the view of the House of Lords this made an otherwise reviewable decision not suitable for judicial review - not justiciable. Other decisions taken

under the royal prerogative, which the court indicated would be non-justiciable, included treaty making and foreign affairs. Despite the outcome of the CCSU that the prerogative is in principle reviewable and that were it not for the national security issue the government should have consulted the unions before imposing these changes was a major step forward in the judicialization of government action, including the actual conduct of government, and a step away from the political Constitution.'

26. However, we may notice that judicial review was held to be available when justiciability of foreign relations came to be considered in *R. (Abbasi) v. Secretary of State for the Foreign and Commonwealth Office and Secretary of State for Home Department* [2002] EWCA 6 November 2002 stating:

'Although the statutory context in which *Adan* was decided was highly material, the passage from Lord Cross speech in *Cattermole* supports the view that, albeit that caution must be exercised by this Court when faced with an allegation that a foreign state is in breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of International law, particularly in the context of human rights.'

27. In *Counsel of Civil Services Unions v. Minister of Civil Service* the power of judicial review was restricted ordinarily to illegality, irrationality and impropriety stating:

'If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated.'

28. The Scope and extent of power of the judicial review of the High Court contained in Article 226 of the [Constitution of India](#) would vary from case to case,

the nature of the order the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review succinctly put are:

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies:

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn v. State of Ellinois* 1876 (94) US (SR) 113)

29. In Wade's Administrative Law, 8th edition at pages 33-35, it is stated :

'Review, Legality and discretion

The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision; is it

correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality; is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'

Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the Court quashes an order made by a minister under some Act, it typically uses its common law power to declare that the Act did not entitle the minister to do what he did and that he was in some way exceeding or abusing his powers.

Judicial review thus is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. If the Home Secretary revokes a television licence unlawfully, the court may simply declare that the revocation is null and void. Should the case be one involving breach of duty rather than excess of power, the question will be whether the public authority should be ordered to make good a default. Refusal to issue a television licence to someone entitled to have one would be remedied by an order of the court, requiring the issue of the licence. If administrative action is in excess of power (*ultra vires*), the court has only to quash it or declare it unlawful (these are in effect the same thing) and then no one need pay any attention to it. The minister or tribunal or other authority has in law done nothing, and must make a fresh decision.'

30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed

questions of fact; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

31. In *Chief Constable of the North Wales Police v. Evans* 1982 (3) All ER 141 the law is stated in the following terms:

'...The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.'

32. Prof. Bernard Schwartz in his celebrated book (*Administrative Law*, III Edn. Little Brown Company 1991) dealing with the present status of judicial review in American context, summarized as under;

'If the scope of review is too broad agencies are turned into little more than media for the transmission of cases to the Courts. That would destroy the values of agencies, created to secure the benefit of special knowledge acquired through continuous administration in the complicated fields. At the same time, Court should not rubber-stamp agencies, the scope of judicial enquiry must not be so restricted that it prevents full enquiry into the action of legality. If that question cannot be properly explored by the Judge, the right to review becomes meaningless...in the

final analysis, the scope of review depends on the individual judges estimates of the justice of the case.'

33. Prof. Clive Lewis in his book (Judicial Remedies in Public Law 1992 Edn. At p. 294-295)

'The Courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction...Earlier cases took a robust line that the law has to be observed and the decision invalidated what ever the administrative inconvenience caused. The courts now-a-days recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the Court's remedial discretion may prove decisive...They may also be influenced to the extent to which the illegality arises from the conduct of the administrative body itself, and their view of that conduct.'

34. Grahame Aldous and John Alder in 'Applications for Judicial Review, Law and Practice' stated thus:

'There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the royal prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service this is doubtful, Lords Diplock, Scamah and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.'

35. In Wade's Administrative Law, 8th Edition at pages 551-552, the author states:

'Rights and Remedies: Rights depend upon remedies> legal history is rich in examples of rules of law which have been distilled from the system of remedies, as the remedies have been extended and adapted from one class of case to another. There is no better example than habeas corpus. This remedy, since the sixteenth century the chief cornerstone of personal liberty, grew out of a medieval writ which at first played an inconspicuous part in the law of procedure; it was used to secure the appearing of a party, in particular where he was in detention by some inferior court. It was later invoked to challenge detention by the king and by the Council; and finally it became the standard procedure by which the legality of any imprisonment could be tested. The right to personal freedom was almost a by-product of the procedural rules.

This tendency has both good and bad effects. It is good in that the emphasis falls on the practical methods of enforcing any right. Efficient remedies are of the utmost importance, and the remedies provided by English administrative law are notably efficient. But sometimes the remedy comes to be looked upon as a thing in itself divorced from the legal policy to which it ought to give expression. In the past this has led to gaps and anomalies, and to a confusion of doctrine to which the courts have sometimes seemed strangely indifferent.'

36. A writ of or in the nature of mandamus, it is trite, is ordinarily issued where the petitioner establishes a legal right in himself and a corresponding legal duty in the public authorities.

37. The Legal Remembrancer Manual clearly states that appointment of a public prosecutor or a district counsel would be professional in nature. It is beyond any cavil and rightly conceded at the Bar that the holder of an office of the public prosecutor does not hold a civil post. By holding a post of district counsel or the public prosecutor, neither a status is conferred on the incumbent.

38. A distinction is to be borne in mind between appointment of a Public Prosecutor or Additional Public Prosecutor on the one hand, and Assistant Public Prosecutor, on the other. So far as Assistant Public Prosecutors are concerned,

they are employees of the State. They hold Civil posts. They are answerable for their conduct to higher statutory authority. Their appointment is governed by the service rules framed by the respective State Government. (See *Samarendra Das, Advocate v. The State of West Bengal and Ors.* : (2004)2SCC274).

39. The appointment of Public Prosecutor, on the other hand, are governed by the Code of Criminal Procedure and/or the executive instructions framed by the State governing the terms of their appointment. Proviso appended to Article 309 of the [Constitution of India](#) is not applicable in their case. Their appointment is a tenure appointment. Public Prosecutors, furthermore retain the character of legal practitioners for all intent and purport. They of course; discharge public functions and certain statutory powers are also conferred upon them. Their duties and functions are onerous but the same would not mean that their conditions of appointment are governed by any statute or statutory rule.

40. So long as in appointing a counsel the procedures laid down under the Code of Criminal Procedure are followed and a reasonable or fair procedure is adopted, the Court will normally not interfere with the decision. The nature of the office held by a lawyer vis-a-vis the State being in the nature of professional engagement, the courts are normally carry to over-turn any decision unless an exceptional case is made out. The question as to whether the State is satisfied with the performance of its counsel or not is primarily a matter between it and the counsel. The Code of Criminal Procedure does not speak of renewal or extension of tenure. The extension of tenure of public prosecutor or the district counsel should not be compared with the right of renewal under a licence or permit granted under a statute. The incumbent has no legal enforceable right as such. The action of the State in not renewing the tenure can be subjected to judicial scrutiny inter alia on the ground that the same is arbitrary. The courts normally would not delve into the records with a view to ascertain as to what impelled the State not to renew the tenure of a public prosecutor or a district counsel. The jurisdiction of the courts in a case of this nature would be to invoke the doctrine of 'Wednesbury Unreasonableness' as developed in *Associated Picture House v. Wednesbury Corporation* (1947) 2 All ER 640).

41. In *Om Kumar and Ors. v. Union of India* [(2001) 2 SCC 386], it was held that where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the constitutional courts as primary reviewing courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. For judging the arbitrariness of the order, the test of unreasonableness may be applied. The action of the State, thus, must be judged with extreme care and circumspection. It must be borne in mind that the right of the public prosecutor or the district counsel do not flow under a statute. Although, discretionary powers are not beyond pale of judicial review, the courts, it is trite, allow the public authorities sufficient elbow space/play in the joints for a proper exercise of discretion.

42. It may be true that the Legal Remembrancer Manual provides for renewal but it contains executive instructions which even do not meet the requirements of Clause (3) of Article 166 of the Constitution. Legal Remembrancer Manual is not a law within the meaning of Article 13 of the [Constitution of India](#). [See *Union of India v. Naveen Jindal and Anr . - : AIR 2004 SC1559*].

43. The State, however, while appointing a counsel must take into account the following fundamental principles which are required to be observed that good and competent lawyers are required to be appointed for (i) good administration of justice; (ii) to fulfill its duty to uphold the rule of law; (iii) its accountability to the public; and (iv) expenditure from the tax payers' money.

44. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the public prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy. No appointment of public prosecutors or district counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is a position to appoint a more

competent lawyer. In such an event, even a good performance by a lawyer may not be of much importance.

45. However, malice in law can also be a ground for judicial review.

46. The Code of Criminal Procedure does not provide for renewal or extension of a term. Evidently, the Legislature thought it fit to leave such matters at the discretion of the State. It is no doubt true that even in the matter of extension or renewal of the term of Public Prosecutors, the State is required to act fairly and reasonably. The State normally would be bound to follow the principles laid down in the Legal Remembrancer Manual.

CORRECTNESS OF THE HIGH COURT

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