

Dr. Venugopal B. S.

Judicial Process

(With Legislative Process and
Legislative Drafting)

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Judicial Process

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Judicial Process

[With Legislative Process and Legislative Drafting]

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Foreword

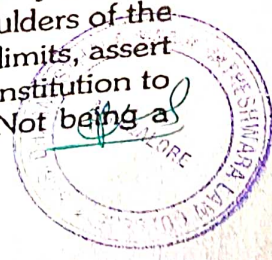
Being fascinated by Benjamin N. Cardozo's The Nature of Judicial Process and having imparted the knowledge of the subject over a decade to the students, Dr. Venugopal, as it manifests in this book titled Judicial Process [With Legislative Process and Legislative Drafting] has emerged as an authoritative writer in this field. A student of public law should have a thorough understanding of not only judicial process but also of the legislative process and legislative drafting. By authoring this book, Dr. Venugopal has done total justice to the students of public law.

Every person is a child of his his times; judges are no exceptions. The contemporary situations and upheavals will not leave them untouched. Myriad factors will enter the process of decision making and challenge the judges to retain objectivity and objectify law, liberating themselves. They have to interpret laws to respond to the social needs, especially the Constitution. They have to retain their independence and play their role as guardians of the Constitution, maintaining a delicate balance between asserting their power of judicial review and at the same time showing due deference to the popular mandate in a democracy. Right minded judges make law organic, living and dynamic to respond to the needs of society. The author introduces the reader to the abstract concept of judicial process in a concrete manner using illustration from the field of constitutional law, commonwealth and continental approaches. Having done that, he takes the readers to greater levels of analysis touching upon the directive forces of law, role of both the judges and judicial process in society. Authoritatively, using case law, he proves that the judicial process is on the right track having catered to social order in various fields. Dealing with judicial process in common law tradition, the demand of Julius Stone that judges have to articulate the real reasons than relying upon various categories of illusory references, the author has given a lucid description of illusory references. One finds an elegant summary of inquisitorial and adversarial systems also.

The discourse on common law traditions takes the reader after introduction to inductive method, through the doctrine of precedent illustrating how generalisations are arrived at through the process of abstraction in determining the principles of law. The technique of judicial reasoning is well explained using ancient Indian concepts. The factors that affect the weight of a decision are discussed in detail to weigh the value of precedents. Deductive method is also described.

The part of constitutional adjudication is copiously dealt with. Emphasising that the constitutional courts have a greater responsibility to uphold constitutionalism, constitutional morality, constitutional order and values, the author has given a quality description of these concepts. There is a vivid description of the role of constitutional courts in preserving the constitutional values and see that the constitution de jure and constitution de facto coincide. The role played by the constitutional courts in ensuring that constitution remains a living document through judicial review, judicial activism and judicial restraint wherever necessary is brought out well. All that goes to ensure that constitution remains a living document. The part on interpretation of Constitution is a value addition.

In a democracy, there should be respect for the popular will as reflected in the legislature. However, in a constitutional democracy, the constitutional injunctions designed to protect liberty against the state power are to be respected. It should be ensured that power will flow only through the channels permitted by the Constitution. This onerous responsibility is on the shoulders of the judiciary. It has to keep the legislative and executive wings of governance within their limits, assert itself wherever necessary, play a creative role in reaching the benefits of a welfare constitution to the masses, and use appropriate restraint showing deference to the popular will. Not being a



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representative body, judiciary has to exhibit unwavering independence and accountability of highest order to retain the trust of the people. This delicate balancing is well presented by critical analysis and evaluation of the relevant provisions and case law. This is necessary to drive home to the readers the basic principles.

The study of judicial process is appropriately supplemented with legislative process. The techniques of lacing public opinion or popular opinion into law making process is of primordial importance in a democracy. The dynamics of delicate interplay between law and public opinion deserves attention. If India has adopted a transformative Constitution, statutes are the vehicles of transformation in specific fields; they translate the constitutional mandate into reality. The legislative process should be in a position to respond to the contemporary needs of the society by involving in appropriate consultation process. The statutes may be made to respond and yield desired results by pressing appropriate rules of interpretation into service. All this is brought out in a lucid manner by Dr.Venugopal. Usually the books on interpretation of statutes rely upon foreign case law to illustrate various rules of interpretation. However, Dr.Venugopal has used Indian case law for the purpose which makes students understand the principles better.

Legislative drafting is a very important professional ability to be imparted to students of law. The principles of drafting will lead the draft to be methodical and systematic. Earlier, it was a part of the curriculum both in undergraduate and post graduate levels. Incorporating this part in the book makes the book wholesome and relevant to the contemporary requirements. This fills the void in Indian legal literature. The highlight of this part is the use of Indian statutes to elucidate the principles.

The essence of authoritative books in the field of judicial and legislative process is distilled in this work. It will help those who may not have access to those original books. At the same time, the work reflects the originality of thinking and ability to conceptualise on the part of the author. He heavily relies on important cases of constitutional law which exhibits his scholarly ability of orienting the subject to the Indian context which will benefit the students to a great extent. Because of this orientation, it can be gainsaid that the book fills the gap in this field of knowledge. The book also will help the students while studying other subjects like Constitutional Law, Jurisprudence, Interpretation of Statutes, etc. Being a result of assiduous work over a period of more than a decade, the book is of high quality and will be of immense use for academicians, professionals and students alike. Law libraries will do a good job by adding this book to their collection as it covers the syllabus prescribed for post graduate and under graduate law studies.

Having the benefit of reading the other two text books Legal Methods and Legal Research and Jurisprudence with a Outline of Native Indian Jurisprudence authored by Dr.Venugopal, I can vouch that readability is the hall mark of his writings. He has kept the economy of time of the reader (student) in mind while writing this book. I am confident that it will serve the noble cause of knowledge creation and dissemination as conceived by the author. I wish him well and the readers a useful professional study through this book.

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1-08-2023

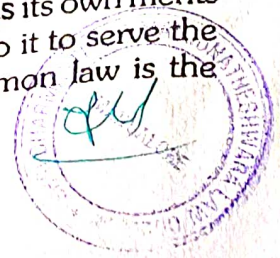


Preface

Judicial Process which was one of the subjects for me in the LL.M. curriculum, is a very interesting subject. The syllabus of the subject is partly based on the book "The Nature of Judicial Process," a must-read book for every LL.M. student, authored by Benjamin N. Cardozo who was a judge of American Supreme Court for a long tenure. The contents of the book were drawn by him from his experience as a judge of the higher judiciary. The elegant style in which he has articulated his ideas has made the subject all the more fascinating. It is a matter of great delight to say that I got an opportunity to teach the subject which I am very passionate to teach and which I do continue to teach. The contents of the subject and lack of a comprehensive book on the same inspired me to pen this Book. I have no scruple to say that the LL.M. students will certainly be benefitted by this Book. The subject encompasses contents like nature of judicial process, directive forces of law, ingredients of judicial decision-making process, judicial reasoning in common law and codified systems, precedents, constitutional adjudication with a focus on judicial review, judicial activism of the Supreme Court of India and limitations on the same, judicial accountability and independent judiciary, interpretation of statute, legislative process and legislative drafting. The contents of the book are divided into six parts as discussed below.

Like law and jurisprudence, the expression judicial process does not admit any precise definition. It cannot be defined aptly, but can be explained roughly to grasp the underlying idea. The question what is law is not a question of law but a question about law. It depicts the multidimensional facets of law culminating in a spate of conflicting ideas, which has naturally its impact on judicial process also. Various ingredients enter into law. In the same way various ingredients into the judicial decision-making process. The proportion of the ingredients varies from judge to judge and depends upon certain other factors. The judges being human beings are swept by certain subconscious forces which also influence the judicial decisions rendered by them. In this regard Justice Cardozo reminds that the most important function of a judge is to objectify law by emancipating himself from all subconscious forces. It is said about American realism that it could bring such exuberance and vigilance to the study of law that in the hands of rightminded persons law came to be recognized as a living organism rather than a bloodless abstraction. Similarly, only in the hands of rightminded judges judicial process can become a dynamic process. The importance of the judicial process lies in the fact that a legal principle is constantly tested and retested in the laboratory of the courts to purify it by throwing out the fowl content. Such fermentation is very much needed sans which the liquor of law becomes sour and stale. It is the responsibility of judges to establish a system of living law by exerting the path of a legal principle along the line of logic, history, tradition or social needs which are known as the directive forces of law. Judicial process is an instrument of social order. The opinion as to whether judicial process can alter the public policy is divided. Judges act as legislators under certain circumstances. But their movements are confined from molar to molecular motions. Judicial process can be based on either adversarial or inquisitorial system of justice delivery system. Both systems are not free from hurdles. All these aspects are discussed in Part I.

The end products of judicial process are judicial decisions which serve as precedents to be followed in the potential like cases. A peculiar feature of common law is that judges are bound by precedents as contemplated under the doctrine of stare decisis which signifies keep to the past decisions and do not unsettle the things which are well-established. This doctrine has its own merits and demerits. It is not a rigid doctrine. Courts have carved out many exceptions to it to serve the ends of justice and keep pace with the march of time. The peculiarity of common law is the



application of inductive method to arrive at generalizations based on specific instances to mark a movement from particular to general. Justice Cardozo has opined that common law has the flexibility to be vibrant and sensitive to the needs of society at a given point of time. Julius Stone analysing the common law has demonstrated various categories of illusory references underlying a spate of doctrines and principles what judges have applied to arrive at their decisions. Judicial decisions in codified system are based on deductive reasoning under which decisions are deduced from pre-determined rules marking a movement from general to particular. This topic is explained in detail with reference to French codification. Much before that the process of codification began in ancient India with the compilation of all the available Smritis, which compelled the need for rules of interpretation. The Mimansa which was propounded by Jaimini to interpret Shruthi was applied to interpret Smritis also. It contains many rules of interpretation which are relevant even now. It should be noted that there is nothing new in the western system of interpretation of statutes which owes its genesis to Mimansa. The matters highlighted here form part of Part II

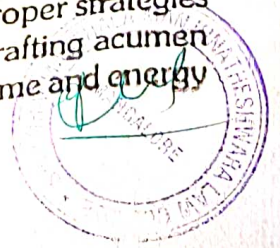
Constitutional adjudication is the most important function of higher judiciary which encompasses many important constitutional concepts. Basically, it revolves around judicial review. Judicial review has its limitations. In India like USA, judicial review encompasses review of legislative, executive and administrative actions. Judicial activism and judicial restraint are concepts in England by reason of parliamentary supremacy. Judicial activism and judicial restraint are concepts which are allied to judicial review. It should be kept in mind that it is neither exclusively restraint nor activism, but a golden mean between the two. At times judiciary is constrained to take recourse to excessivism or overreach or may take recourse to populism. Part III throws light on all these aspects.

Judiciary is enjoined with the obligation of protecting the rights and liberties of people. It is conferred with immense power to discharge its role of custodian of rights and liberties of people. Wherever there is power, there is always a scare of its power as the saying goes power corrupts and absolute power corrupts absolutely. Judiciary misusing its power cannot be ruled out. It must be made accountable in the public interest to guard the people at large against misuse of power by the judiciary. Judges must be made accountable for their professional misconduct and moral depravity in spite of many challenges, which at times may mar the reputation of the judiciary. But only an ethically sound and responsible judiciary can protect the people from legislative and administrative excesses. Constitution provides a mechanism for disciplining the erring judges as a part of judicial accountability by way of impeachment in the parliament. An independent judiciary is as important as an accountable judiciary which can discharge its constitutional responsibilities free from any political interference without any fear or bias. Constitution provides provisions ensuring the independence of judiciary. An independent judiciary is not only one of the pillars of a vibrant democracy, but also is a basic structure of the Constitution. Many components enter into the concept of independent judiciary. Judiciary is a non-representative wing of the state. It is not a political body. Yet, under certain circumstances judiciary is constrained to wear political garb to arrive at political decisions to serve the ends of justice by upholding the substance of law rather than the form of law. The decision of the US Supreme Court in *People v. Garcia*, elaborately discussed in this book, aptly proves this point. The Critical Legal Studies Movement claims that law and politics are inseparable. Thinkers like Karl Marx has strongly condemned law as a political weapon of oppression used to grind the poor. However by and large judicial process is not a political process. Political overtone can be seen in judicial process sporadically. Judicial process assumes political character rarely. It must be creative. The Supreme Court of India in the initial years of independence adopted a very cautious approach. But even then, the creative feats of Supreme

Courts were not totally missing. It activated itself especially after the post-emergency era, which witnessed a spate of monumental judgements to make the legal system vibrant and sensitive to cater to the needs of march of time. But judicial activism has its own limitations and is beset with many structural challenges. Part IV elaborately deals with all these matters.

The exclusive claim of advancing civilization is to acknowledge the superiority of legislation as a source of law and discard all other sources as relics of the infancy of law. In the modern welfare state legislation has a formidable role to play in effectuating social progress and social transformation. The parliament and state legislatures are empowered to make laws observing the constitutional procedure and norms. Law making process passes through 3 readings in both the houses of parliament and state legislatures as the case may be before obtaining the assent of the President of India or Governor of the respective states as the case may be. In some foreign jurisdictions pre-legislative consultations are mandatory. Such consultations and deliberations provide necessary insights and caution that any legislation which is promulgated after eliciting the opinion of the people at large for whom it is meant can clear all bottlenecks for the effective implementation of the same. In India, pre-legislative consultation is not mandatory. Even then instances of such consultation are not wanting. The passing of Right to Information Act is classic example of such pre-consultation that it could be implemented very effectively. It should be noted that public opinion and law influence each other. The controversial area is whether public opinion is to precede or follow law. It depends upon the very nature of the society. Legislations may be supreme or subordinate. The latter is further classified as of a few types, which are known as delegated legislations. There are certain parliamentary and judicial controls to check abuse of power by the subordinate law making bodies which legislate under the power delegated to them by the supreme law making bodies. A peculiar feature of legislation or statute is that the letter of law stands between its judicial interpretation and spirit. Courts adhere to many rules of statutory interpretation depending upon the subject matter and circumstances of the individual cases, when they are called upon to interpret a particular statute. Part V unfolds all matters mentioned above.

Legislative drafting is very much a part of legislative process, which begins with the drafting of a legislation. A good draftsman can do away with many problems when a legislation drafted by him comes before the judges for interpretation. He has to intellectually equip himself with many qualities to become a good draftsman. But the truth is that a perfect draftsman is not born. Drafting is both an art as well as a science. But it is more an art than a science. It is a difficult art because he has to render verbal expression to the ideas conceived by a third person, i.e. the legislator. He has to keep his ears open to receive criticisms from the legislators and judges. If a legislation does not serve the purpose, blame is shifted to the draftsman. Otherwise, the legislators take all the credit of the good work done by a draftsman. There were instances, where judges came heavily on the draftsmen for flaws in their drafting. A draftsman needs to check and recheck the draft, before he places it before the legislators for their consideration. The biggest problem with drafting legislation or any document for that matter is the problems that arise from the use of language especially the open texture of language for which he has to find out effective solutions at the threshold itself. Further, a draftsman must have knowledge of important constitutional provisions touching his work, constitutional values, various types of statutes, various parts of a statute (Mechanism of an Act), principles of interpretation and the General Clauses Act. He must have good command over the language in which he is going to draft the required legislation. Above all he must have a fair amount of the knowledge of the challenges before him so that he can come with proper strategies to meet them. It should be kept in mind that a good draftsman can always with drafting acumen strengthen the judicial process by reducing the burden of the judges by saving their time and energy.



51
which otherwise will have to be used for things which could have been averted at the stage of drafting itself. All the matters highlighted above form part of Part VI.

Every branch of knowledge itself is a great ocean for which law is not an exception. It is not humanly possibly to navigate in the nook and corner of this ocean. The known is only a molecule. The unknown is cosmic. Yet, there are legal luminaries and masters of their own right who have exuberantly ploughed a few fields to hand down the knowledge to the progeny to enable them to continue the onward march of law and legal education meaningfully. I have drawn the ideas to a very extent from such luminaries like Justice Benjamin Cardozo, Justice Holmes, Julius Stone, Glanville Williams, John Salmond, Dias, M.D.A. Freeman, Dean Roscoe Pound, Hans Kelsen, Lon L.Fuller, H.L.A.Hart, Savigny, Montesquieu, C.K. Allen, Ehrlich, Duguit, A.V. Dicey, Dr. P Ishwara Bhat, Dr. S.P. Sathe, Dr. N.K Jayakumar, Dr. V.D. Mahajan, Dr. M.P. Tandon, Dr. N.V. Paranjape and Dr. G.P. Tripathi. I sincerely express my gratitude to all these luminaries with a deep sense of indebtedness.

I place on record my sincere thanks and gratitude to Dr. C.S. Patil, a legal luminary and Professor of Law of par excellence with an academic experience of more than three decades, for penning a meaningful Foreword to this book with highly inspiring and motivating words which will certainly go a long way in making me to continue my academic endeavours with added and renewed zeal as additions to this current academic work and two more ventures viz. Legal Methods and Legal Research & Jurisprudence with an Outline of Native Indian Jurisprudence.

I profusely thank the Library Staff of Vaikunta Baliga College of Law for their co-operation in providing all the required materials which enabled me to complete the work successfully within time. I am very much grateful to Sri Ganesh Pai, Proprietor, Bharath Press, Udupi for printing this book also elegantly with an attractive cover design.

Dr. Venugopal B.S.
Mangalore, Karnataka
01-08-2023



Contents

Foreword	v
Preface	vii
Table of Cases	xv
Part I [1-48]	
Meaning of Judicial Process	1
Nature of Judicial Process	3
Sub-conscious Forces	8
Directive Forces of Law	9
* Logic or Philosophy or Analogy:	10
* History	14
* Custom	16
* Social Welfare	18
Judges as Legislators	21
Judicial Process as an Instrument of Social Order	29
Judicial Process and Public Policy	38
Judicial Process: Adversarial and Inquisitorial System	42
Judicial Process in India: Hurdles	45
Part II [49-109]	
Common Law Tradition	49
*Inductive Method	49
*Adherence to Precedents	50
Precedent	52
*Ratio Decidendi	52
*Process of Abstraction	54
*Distinguishing	55
*Ascertaining Ratio decidendi: Tests	57
* Obiter Dictum	59
* Ratio Decidendi and Obiter Dictum Distinction	60
* Kinds of Precedents	60
* Doctrine of Stare Decisis	63
*Exceptions to the Doctrine of Stare Decisis	69
*Factors Affecting the Weight of a Decision	76
*Judicial Law Making	76
*De facto Doctrine	76



Judicial Process and Common Law

- *Social Change and the Common Law Tradition 77
- *Categories of Illusory References in Common Law 77
- *The Ratio Decidendi of a Case: Legal Category of Indeterminate or Multiple Concealed Reference 80

Judicial Reasoning in Codified Systems

- *Codification 94
- *Mimansa (Interpretation) 98
- *French Codification and Judicial Reasoning 99
- *Deductive Method 104

Part III [110-176]

Constitutional Adjudication

- *Constitutional Law 110
- *Constitutional Law v. Statute (Ordinary law) 110
- *Constitutionalism 113
- *Constitutional Theory 114
- *Constitutional Values 120
- *Constitutional Morality 122
- *Judicial Review 126
- Judicial Review in India 135
- Judicial Activism 137
- Judicial Restraint 155

Interpretation of Constitution

- Application of Various Doctrines 165
- Various Approaches 168

Part IV [177-223]

Judicial Accountability

- *Challenges 177
- *Need 179
- *Constitutional Provisions 179
- *Judicial Standards and Accountability Bill, 2010 180
- *Judicial Accountability and Judicial Law Making 181
- *Independent Judiciary 183
- Basic Components 183
- *Independent Judiciary and the Indian Scenario 185



- *Appointment of Judges 188
- *Political Nature of Judicial Process 191
- *Judicial Activism and Creativity of the Supreme Court 196
- Tools and Techniques of Creativity 207
- *Judicial Activism: Institutional Viability, Limitations of the Courts and Structural Challenges 217
- Part V [224-288]**
- Legislation 224
 - *Legislation as a Source of Law 224
 - *Supreme Legislations 228
 - *Law-making by Indian Parliament and State Legislatures 229
- Interaction between Law and Public Opinion 233
- Pre-legislative Consultation and Deliberation 247
- Subordinate Legislations 255
- Interpretation of Statutes 257
 - *Interpretation: Types 258
 - *Rules of Interpretation 263
 - Context Rule 264
 - *Noscitur -a- sociis 264
 - *Ejusdem Generis 268
 - *Reading the Words in their Context: Statutory Aspect 270
 - *Reading the Words in their Context: External aspect 271
 - Interpretation in the Light of Policy: Fringe Meaning 275
 - The Mischief Rule 275
 - *Purposive Construction 278
 - *Compromise Approach 279
 - *The Golden Rule 281
 - Rule of Expressio Unius Est Exclusio Alterius 285
 - Rule of Casus Omissus 286
- Equity of a Statute 286
- Strict and Equitable Interpretation 287
- Sociological Interpretation 287
- Presumptions 288



Part VI [289-359]

Legislative Drafting	289
*Introduction, Meaning and Scope of Legislative Drafting	289
*Legislative Drafting: Philosophy	293
*Evolution of Legislation vis -a- vis Legislative Drafting	293
*Responsibilities and Constraints of a Draftsman	296
*Legislative Drafting – A Difficult Art	299
*Qualities, Skills, Traits and Abilities of a Good Draftsman	301
*Problems of Language: Solutions	307
*Intellectual Equipment of a Draftsman	310
-Pre-draft Preparation	310
- Parts of a Statutes	313
*Mechanism of An Act	325
*Types of Statutes (Legislations)	326
*Role of Legislation	332
*Delegated Legislation	338
*Legislative Drafting and General Clauses Act, 1897	351

Subject Index	360-364
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