



NATIONAL JUDICIAL ACADEMY

**JUDGING AND JUDICIAL METHODS FOR NEWLY ELEVATED HIGH COURT
JUDGES**

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Introduction :-

National Judicial Academy organized A Workshop For Newly Elevated High Court Judges On 19th To 22nd November 2015. Eighteen judges from the different states like, West Bengal, Andhra Pradesh, Kerala, have participated in this conference. The conference was split into six sessions for each day, out of which four sessions were dedicated to the lectures by the distinguished speaker in the respective fields and few of the session were dedicated to the group discussion or simulation exercise. Two sessions were kept daily for the library reading and computer skills training. Dr. Parul Rishi, Mr. Mohan Parasaran, Justice V. Gopalagowda Justice S.A.Bobde, Justice Kurian Joseph Justice N.Santosh Hegde, Justice R. Basant, Justice A.K. Sikri, Prof.(Dr) N.R. Madhava Menon, Justice P.V. Reddi and Dr. Aruna Broota, guided the sessions.

Day 1

Session 1 & 2, Topic: - Art, science, craft of judging

Speaker: - Dr. Aruna Broota

Prof(Dr) Geeta Oberoi, director in charge of the National Judicial Academy gave a warm welcome and brief introduction on all the sessions and deliberated on the objective of the conference. Prof(Dr)Geeta Oberoi, deliberated on the constituents factors of the process of the judgment making. She told that this workshop is inspired by the book “The Nature of The Judicial Process” by justice Benjamin .N. Cardozo as each and every person even to whom the notions of the philosophy are unknown is being guided by something which gives coherence and direction to the thought and action. And it is really essential for the judge to extract out such pre-notions from the mind. She deliberated on the four points that are philosophy, history, tradition, social context which must be get reflected in the judgement of the judge. A brief introduction was given by the

participants as well. After a warm welcome they were requested to open the first session of the conference.

The speaker initiated the discussion by stating that giving a decision is very easy process but giving reason for the decision is a tough job which the judges are required to do and to do so one must learn the habit of learning as well as unlearning. There are many theories in the jurisprudence but now a days one can't find the expression of the same in the judgement following are the points which are being discussed in the discussion:-

- 1.) Difference between judging in the trial court and the high court:- according to the speaker there is a very big difference between the adjudication in the lower court and the high courts as the high court are the constitutional courts and the law made by them will become the law of the land, thus a greater responsibility is placed on the shoulder of the judges as well as people are expecting a much from them they have to have a broader view of the society, they have to take different dimension of the society while giving the decision.
- 2.) Judgment are piece of the art: - judging of the decision is not only based on the evidences adduced, witness called rather they are more dependent of the judge how he interpret the law and the argument advanced by the advocates and hence judgement is referred as a piece of craft art and science. The art and craft is the reasoning given by the judge in the judgement how well it is placed, how well it is connected and the likewise.
- 3.) Who is the judge :- according to the speaker the layman understand the judge as a decision maker deciding the dispute but if we see the whole picture everybody is judge in itself in each and every action one is making, even when one is making a step in a direction he is judging the step while taking and hence we are decision makers in every sense but when people refer judges they interpret them as decision makers, but one must understand that judges are also human being and they do have a lot of baggage in the form of biases but it is the duty of the judge to keep outside its biases to fulfill the expectation of the public .
- 4.) “G” factor and “S” factor according to the speaker there are two kind of factors which are known as the general factors and the special factors, the judge must have the “S” factor

which is generally known as the special factor and the special factor can be developed by the judges in twofold practice firstly by giving a satisfying reason behind his judgement and to try that his own personal bias are not coming in the decision making.

5.) Exercises:-the participants were required to do the exercise and they were made to write on three different topic they were told that they must write the things under the following topics which are coming to their minds at the first instance and the topics were

- a.) Who am I?
- b.) What am I?
- c.) What I want to be?

The judges were required to read in their mind what they have written and introspect themselves. The speaker is of the view that the judge must always do this exercise in the gap of 20-25 days and this may help them to remind them to not have biases.

6.) How to become unbiased:- even the most experienced person and who claims that they are not biased are sometimes or the other showing that they are having stereotypes to substantiate it she gave an example off the judge who was considered to be the most unbiased judge told in the case that people from the madras are good people “ madarasi to ache hote hai” according to her this shows the stereotype of the judge and if such stereotype are known to the advocate then it would become easier in the case to mold the judge on their side thus a judge must see that his attitude his stereotype do not get reflected in his judgement or even his conduct. The speaker is of the view that in the quest of the truth our biases do come but it is the duty of the judge to come over the bias through a conscious and consistent practice, she again told an example that if a senior advocate is coming to the court then it is the common practice that they will greet them but such practices must be discarded as they are showing one or the other type of stereotype and the judges must understand that if there stereotype is reflected in the conduct or the judgement then the faith of the people which they have posed in the judiciary will wither away.

- 7.) Meta-cognition:- the judge must understand that he can also make mistake as he is a human being: he is a human being first and then a judge and it is there duty to learn from the instinct and if they will allow the learning from their instincts then they will realize that there is larger compound or the component which must be recognized and that component is the perception which a human being possess and it is there duty to see before giving the judgement that to check that is the judgment based only on the evidence and the witness or there is something else which is guiding it, through this exercise he will able to put out his bias from the decision making. Thus every judge must learn from his instincts and which will help to take the Meta cognition in the respect.
- 8.) Attitudes are verifiable but beliefs are not :- every person is having a personality, belief, superstition and so on as they are not robot they are also human being, but they must understand that attitude are verifiable whereas the beliefs are not as one who is having an particular type of attitude say for example that Punjabis are fun loving it is verifiable and can be checked when a person is meeting a Punjabi but when such attitude has turned itself into the belief the person can't check them and it is the duty of the judge to see that his attitude must not get turned into the belief as then it will clearly affect his judgment making which must not take place.
- 9.) Idealized self:- in the line of the above point the speaker told that we develop stereotype from our attitude although they are verifiable but when they got cemented in our mind they become the part of our cognitive structure like the things such as we are told not to purchase the iron on Saturday, not to wash hair on Wednesday and son these are the practice which have molded our attitude in the idealized self-form and these are the practices which are developing into the stereotype and they get reflected in our decision making which must not be the attitude of the judge as if he will allow his stereotype in the judgement making then he will not be doing justice per se and not even with his job
10. BAV (believe, attitudes, values):- these are things which pre-disposes the person to act in a particular way so it is the duty of the judge to see that whether his judgement are based on perception which are already governed by the beliefs, value, etc., he must try not make

them part of his decision making only then his judgment will be made on the based on the interpretation of the law. She made an example in which she told that a coach said to his students that if they will lose then they will be sodomized on this point the every participant was shocked and then the speaker told that the human body is reactive it has a tendency to react on each and every situation but by every act the person on the other side of the conversation is able to make out the viewpoint of the other thus a judge must not allow his beliefs attitude, to be get reflected through his bod

Session 3 : Appellate Judging

Speaker:- Justice P.V. Reddi

The discussion took upon the following points :-

- 1.) Way from the advocate to the judge :- the speaker while referring to the judges who are being directly elevated from the bar told that there is a big difference as when they were advocate they can prepare the case within an hour but when you are judge a higher degree of responsibility is expected from you and one must read the case fully and must have microscopic view.
- 2.) Difference between judges and jury:- “A bench trial takes place in front of a judge only; there is no jury involved. The judge is both the finder of fact and ruler on matters of law and procedure. This means that the judge decides the credibility of the evidence presented at trial and also decides what happens at the trial according to laws and rules of procedure. Whereas In a jury trial, a jury composed of members of the community is present at the trial to act as the finder of fact. The jury listens to the evidence that each side presents during the trial and renders a verdict based on how persuasive each side's evidence is. The judge handles questions of law and procedure during a jury trial, such as addressing attorneys' objections to questions or evidence or ruling on motions that the attorneys make.”¹ Thus the need of the bench trial is that the judges are not considered as finder of the truth rather they are only considered to be as the interpreter and the decision maker, it

¹ <http://www.rms-law.com/Articles/What-is-the-Difference-Between-a-Bench-Trial-and-a-Jury-Trial.shtml>

is believed in the adversarial system that if the judge is made the finder of the truth then it will effect the decision making process which must not take place.

Session 4: Social Context Adjudication

Speaker:- Prof.(Dr) N.R. Madhava Menon

The speaker told that judging in the constitutional courts is done in the social context as the law made by them will be followed in the lower judiciary and in that line of progression he has divided his presentation into the four parts :-

- 1.) Historical context of the judgment making in the social context:- the judicial decision making is being taken place from the very inception but the it has undergone different changes the major change has taken place in the India is the introduction of the constitution and this introduction has made a whole set of changes in the thinking of the social context as according to the speaker the constitution is biased , it is always taking side of the social justice, it perpetuate equality, it is always taking a definitive position thus the constitution is working for the bias which are being laid out in the constitution thus the constitution is always taking sides thus in the same line of the progression as a judge of the higher court an interpreter of the constitution the judges must also take sides but the question arises on which they must take sides the answer is simple it is the values which are being laid out in the constitution and i.e. societal context he substantiated his argument with an example:-

At the point when the British settled at Sydney Cove in 1788 the colonial government in Australia guaranteed all terrains for the Crown from the formal statement The thought that Australia was terra nullius was utilized as defense for it being settled and not being attacked and that the native population had no regional rights over it as they were not represented in the way which were known to the Britishers. The first case of terra nullius in Australia was R v Tommy demonstrating that the local occupants were just subject to English law where the occurrence concerned both locals and other laws and not where the case concerned just locals. The justification was that Aboriginal tribal groups as of now worked under their own particular legitimate frameworks Justice Forbes stated that

I believe it has been the practice of the Courts of this country, since the Colony was settled, never to interfere with or enter into the quarrels that have taken place between or amongst the natives themselves. This I look to as matter of history, for I believe no instance is to be found on record in which the acts of conduct of the aborigines amongst themselves have been submitted to the consideration of our Courts of Justice. It has been the policy of the Judges, & I assume of the Government, in like manner with other Colonies, not to enter into or interfere with any cause of dispute or quarrel between the aboriginal natives. In all transactions between the British Settlers & the natives, the laws of the mother country have been carried into execution. Aggressions by British subjects, upon the natives, as well as those committed by the latter upon the former, have been punished by the laws of England where the execution of those laws have been found practicable. This has been found expedient for the mutual protection of both sorts of people; but I am not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort, or crime

The speaker wanted to emphasize the social context which has been taken up by Justice Forbes as till then the terra nullius was never interpreted in that way, through this judgment they have constructed that even though the terra nullius would apply but only to the extent till where the native laws are not in consonance with the English laws the same process is being applied by the Indian courts as at the time of the independence they were given the responsibility of promoting the equality in a society which was unequal at the inception according to the speaker the meaning of the legal reasoning must be given in the form that it balances the interpretation from the existing social reality to the new social reality which is being anticipated by the people. He told that the role of the supreme court from *The State Of Madras vs Srimathi Champakam*² to the *Indra Sawhney Etc. vs Union Of India And Others*³ is nothing but the change which is being incorporated to assimilate the changing social context in the society. The concept of the generational debt has also been developed on the same line of thinking. He cited the judgement of Justice Krishna Iyer where he said that bail is the rule and the jail is the exception as at that point of time many people were not able to furnish the bail bond and they were put up to jail, thus to mold the rules in the social context he had done so. According to the speaker in today's scenario the social context

² 1951 AIR 226, 1951 SCR 525

³ AIR 1993 SC 477, 1992 Supp 2 SCR 454

is changing day by day and there is a recent need of new jurisprudence which will help to assimilate the same.

- 2.) Adversarial system:- he told that there are certain fundamental problems in the adversarial system as it is the system which is lawyer dominated system as it is the system in which both sides of the parties must be have equally placed otherwise the party claiming will not be able to get claims and will forgo it. The quality of the justice in the adversarial system is dependent on the equality of the advocating lawyer and at the last in the other countries the arrest is made after the investigation where as in India the arrest is being made before the investigation which is making the lawyers day by day and the judges must always take into the account and then accordingly decide the case so that it will help the people in the general context. According to the speaker these anomalies of the adversarial legal system are another factor due to which there is the judges must take the decision in the social context so that justice seems to be done.
- 3.) Understanding from the past lesson :- according to the speaker there is a need to understand it the concept of the equality in the present context although it has been interpreted in the various ways such as reasonable classifications to give the formal equality and then the substantive equality so that there is equality in outcome and in the result through the Thomas case, there is a need that the judiciary must interpret the laws in the social context i.e. according to the going on social change as the Indian judiciary has an experience in the context of the right of property as it was being abrogated by the legislature in the same context the judiciary must understand the need of the contemporary change and the must mold the laws accordingly as one must not exceed in time for interpretation otherwise the law will become ineffective and there would be anomaly created. Since the Indian legal system is having that experience they must always try to interpret laws in the going social context.
- 4.) What is all about social context and how to bring it about? The speaker is of the view that one has to become partial to become impartial, and it is the duty of the judge to appreciate the evidences which are in always in accordance with the social context theory: the judges must undergo a sensitive training on diversity issue they must inculcate the habit of appreciating the diversity : they must explore their own assumption and he stated that in the US the judges has to undergo social context training otherwise they will not be able to write down the judgements in the social context.

Day 2

Session 5 : Importance of Reasoning

Speaker:- Justice Aftab Alam

The speaker is of the view that reasoning is a very important component of the judgement which can be contemplated as legal reasoning or in the language of the law as ratio of the case such reasoning if used in another cases or by the lower courts then it must be made judiciously i.e. precedents must be used judiciously.

To start with the speaker is of the view that there is difference between logical reasoning and legal reasoning

A judge always has to decide from the paradox which according to the dictionary is A seemingly absurd or contradictory statement or proposition which when investigated may prove to be well founded or true or A statement or proposition which, despite sound (or apparently sound) reasoning from acceptable premises, leads to a conclusion that seems logically unacceptable or self-contradictory

There judge gave the illustration of Protagoras and the Socrates while introducing it, he said that in logical reasoning as well as in the science to meet the paradox there is always a fertile ground to debate on which can help to generate knowledge at the last. But this kind of fertile ground cannot be used upon or enjoyed upon the court. The reason being that if the court invests such exorbitant amount of time in deciding the paradox, there it will lead to inordinate delay and therefore denial of justice and we all know that justice delayed is justice denied. He was of the opinion that law does not operate in vacuum. Law is always operating in a society which is dynamic in nature and always changing day by day. Law is not static but dynamic. There is no single approach which can be used to view law. But there are a number of approaches to view law. Legal reasoning is a process by which a dispute can be decided. The life of law is not logic but it is experience. But the legal reason must not be plain rather it would only be accepted, it would only preserve its integrity until and unless given by a proper reasoning. For example.critical and critique diff google.

The 3 different rules of reasoning which are used to frame a judgement are as follows:-

1) Reason by analogy i.e. precedent

The law laid down by the higher court is binding on all lower courts in the country. However this principle will apply only in a case of similar facts and circumstances.

2) Linguistic analysis

The judge is required to give the judgment on the basis of statutory principles and that would become the concrete reason behind the judgement.

3) Judicial discretion

Wherever there is no law, or any enactment made in a particular area, a court has the full discretion to decide on the issue and to provide with the law. For example. As it was done in *Vishaka v. State of Rajasthan*

At the time when the judgement was pronounced, there was no law enacted in the country on the issue of Sexual Harassment of Women at Workplace. Owing the condition of working women and the absence of any law in this issue, the Supreme Court issued guidelines on Sexual Harassment of Women at Workplace. The law on this issue known as Sexual Harassment of Women at Workplace 2013 was framed on these guidelines.

The speaker is of the opinion that every precedent is bound in certain context and is only applicable to that context. Thus before citing it in any case, the judge must be cautious about the facts on which it applies. He very beautifully gave the example of how a precedent given for the benefit of the oppressed wife was used against women in subsequent similar cases, thereby defeating the very reason for which the precedent was held.

The speaker relied on two cases which are as follows:-

1) *Amiruddin vs Musammat Khatun Bibi*⁴ on 10 February, 1917 “The dispute between the parties to this appeal, who are husband and wife, is as to whether the conjugal relations between them still subsist. The suit out of which this appeal has arisen was brought by the wife, the plaintiff-respondent, for the recovery of her dower, her moveable’s in the possession of her husband, the

⁴ 39 Ind Cas 513

defendant-appellant, or their value, and her maintenance during iddat, The claim was brought on the allegation that she had been lawfully married to the defendant some years ago and had lived with him as his wife up to the 8th of September 1913, when he divorced her at the railway station at Allahabad as she was going with her parents to Mahoba against his wishes. The defendant admitted the marriage, but denied the alleged divorce. ” the practicality of the judgement must be seen and the law applied by the judges (i.e. by saying three times talak it would be considered to be talak) here are according to the facts wand they have done so to give the benefit to the weaker section

2) Fazlur Rahman vs Musammat Ayasha And Ors⁵. on 18 January, 1929 : Equivalent citations: 115 Ind Cas 546 :- “The case of the appellant who was the plaintiff in the suit was, that Musammat Ayasha one of the defendants, was his lawfully wedded wife, that on 27th June, 1923, she left the house of the appellant in his absence and went away to her parents, and that on 28th June, 1923, the appellant went to the house of defendants Nos. 2 and 3 to bring defendant No. 1 back but the latter was not allowed to return to the plaintiff. Thereupon the appellant filed a petition under Section 552, Criminal Procedure Code, on 29th June, 1923, in the Court of the District Magistrate at Monghyr against defendant No. 2 and a notice was issued to him; but ultimately the District Magistrate rejected the application, holding that there being a matrimonial dispute between the parties no action could be taken under Section 552, Criminal Procedure Code. ”

In both these cases the husband had applied for restitution of conjugal rights. This was opposed by the wife on the ground that she was no more the wife of the said man because the man had pronounced the words “talak” thrice, and so the marriage had dissolved.

The court upheld the contention of the wife by agreeing to the contention that marriage was dissolved by pronouncing the word talak thrice, in order to protect the oppressed party in this case which was the wife.

The speaker also made a remark that the practice of triple talak is present only in India and not in any other countries.

⁵ 115 Ind Cas 546

The speaker then discussed another case, *Ramesh bhai Dabhai v state of Gujrat* in which the question was “ The question that once again arises before this Court is what would be the status of a person, one of whose parents belongs to the scheduled castes/scheduled tribes and the other comes from the upper castes, or more precisely does not come from scheduled castes/scheduled tribes and what would be the entitlement of a person from such parents to the benefits of affirmative action sanctioned by the Constitution.” in which the speaker felt that the judgement of the past cases were used totally against the theme which they intended to achieve.

Another case which was cited by the speaker was of Nandini Sarpathi “Smt. Nandini Satpathy, a former Chief Minister of Orissa and one time minister at the national level, was directed to appear at the Vigilance Police Station for being examined in connection with a case registered against her under the Prevention of Corruption Act. On the strength of the first information report, in which the petitioner, her sons and others were shown as accused, investigation was commenced. During the course of investigation she was interrogated with reference to a long string of questions, given to her in writing. The major accusation against her was the acquisition of assets disproportionate to the known sources of income.

V.R Krishna Iyer. J, delivering the Judgment of the court held that the prohibitive sweep of Art 20 (3) goes back to the stage of police interrogation- not commencing in court only. The ban on self-accusation and the right to silence, while on investigation or trial under way, goes beyond that case and extends to the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of incriminatory matter. The phrase 'compelled testimony' has to be read as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidator methods and the like. However, the legal penalties that follow for refusal to answer or answer truthfully cannot be 'compulsion' under Art 20(3).

Followed the position of law in the US after the decision in Miranda case (1966) 384 US 436, which extends the right against self-incrimination to police examination and custodial interrogation and takes in suspects as much as regular accused persons. Held further that fanciful claims, unreasonable apprehensions, vague possibilities cannot be the hiding ground for an accused. He is bound to answer where there is no clear tendency to criminate.

The right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice which is Guaranteed by Art 22(1). The lawyer's presence is an assurance of awareness and observance of the right to self-incrimination.”⁶

He criticized the judgement by stating that the judgement had relied on a judgement of the American Court Miranda. the speaker enlightened us on the point that in American Criminal Law, confession made by the accused to the police is admissible in evidence and is a valid confession. However the scenario in India is much different as the statement given by accused to police is not admissible in evidence. Hence the speaker said that the court ought to have taken the difference in the criminal law of both the countries and should not have relied on Miranda Case.

He said that judges must always be unbiased and they must not have any preconceived notions. he then went ahead to cite Justice Cardozo “something is always guiding which gives coherence and direction to the thought and action of the person.” Justice Cardozo in his book “the nature of judicial process “has quoted Mr. William James that everyone of us has pragmatism in truth as an understanding philosophy of our life. Even those of us to whom the names and notion of the philosophy are unknown. Thus he told the judgement pronounced by the judge must be balanced in the following 4 principles, as justice is nothing but the formula through which conscience of equity finds expression.

- 1) Rule of analogy which is also known as method of philosophy, along the line of progression or logic
- 2) Method of evolution along the line of historical development
- 3) Method of tradition along the line of custom
- 4) Method of sociology

He conclude his speech by citing a positive case. The famous case known as the Asiard Case.

A PIL was filed under 32 of the constitution before the Supreme Court praying for relief for workers who were paid much below the minimum wages. The workers were employed by the contractors hired by the Govt of India. The contention of the other party was that the proper

⁶ http://www.hrcr.org/safrica/arrested_rights/sathpathy_dani.htm

redressal should be found in the Minimum Wages Act and not by filing a PIL in the Supreme Court.

The issue was also whether there was a relationship of master and servant between Union of Indian and the workers.

The case was decided by bringing this issue within the ambit of Article 23 and 24 which prohibit forced labor and child labor. The court explained that since in this case the workers were working below the minimum wages, it would be deduced that they are forced to do the work as they were working for wages which were inadequate for human subsistence. The workers were working for wages below the minimum wages in spite of this knowledge, but only for bare minimum subsistence owing to their poverty. Hence the court said that this is forced labor and since it is provided in the fundamental rights that forced labor should be abolished, it is the obligation of the state to abolish the same.

The session was concluded by the director by stating the example professor Mohan Gopal . she said that law is not equal to justice. But law along with the elements of Freedom, Equality, Dignity and Fraternity (collectively known as fedf) amounts to Justice.

Session 6 : Components of Judicial Reason

Speaker:- Justice P.V.Reddi Justice Sunil Ambwani

He made a distinction between reason and reasoning. To explain the difference, he gave an example by making two statements.

First, "I saw a bird on the window and so I didn't have breakfast this morning."

Second, "I saw a bird and realized that it was so healthy and light that it can fly and so I didn't have breakfast this morning"

The first statement only gives a reason. But the second statement gives the reasoning. The difference underlying the two is that in the first statement, there is no connection with the reason and the result. He said that it is "reasoning" that connects the reason and the result.

According to him reason is the process by which the judge reaches the conclusion and which becomes the basis to put the judgment in words according to the speaker it is the reasoning is the determining factor of the quality of the judgment and he is of the view that opinion without reasons raises the question accountability and ultimately it will directly effect the trust which people in the judiciary. He said that there are three basic principle guidelines to write the judgment and they are three C's Consistency, Coherence and Clarity. The speaker cited an article written by him that is "The ethical process in the judicial reasoning. According to him there is a difference between giving a reason and a legal reasoning as in the above stated example in the first statement the reason given by the person in not accurately determining the cause of his not eating the breakfast where as in the second statement it is sufficiently determining the cause and there is a relation and a nexus between his act and reason accorded by him, this nexus according to the speaker is what is known as rationality: he says that the reason are not always guided by the rationality but sometimes they are guided by also from our biases, even the cognitive illusion affect them and at the last our reason are always sometimes guided by our feelings unconsciously. It is our duty to not to give judgment guided by the above stated problems. Thus he concluded that there is art of writing of judgment and it is their job which require ethics in the judgment writing. He said that there are the fact, there are laws, there is conclusion and the conclusion drawn by the judge must having the three C's, rationality, free from biases and it is their duty to have a connection between the facts, laws, conclusion and that is that connection that will determine that a judgment is a complete judgement.it is wholesome and is full of reasoning. Certain types of reasoning as discussed by the speaker are as follows:-

- 1.) Analysis :- he said that this is the type of reasoning that a judge must restrain himself from doing, as it is a kind of process by which you try to understand the object behind an act by breaking it into smaller parts and the judge must look at the things as a whole analytical task is for the mathematician, scientist and it is better for the judge to leave these things for them
- 2.) Synthesis:- it is the duty of the judge to possess the synthesis as a part of reasoning practice but it is not important for him to apply it in all cases as while doing so one is trying to understand the objective of an act by clubbing similar acts as a whole and during class decision it might help a judge as a legal tool of reasoning.

- 3.) Deductive reasoning:- he said that the judge must use this type of reasoning as it is used to deduce the desired result and it is not the duty of the judge to have a desired result in mind and it gives a very wrong picture for that he gave an example that Ganguly, Dravid, Tendulkar, Lakshman, Shewhag, scored averagely 300 runs together in every match, but that does mean that in every match they score 300 runs and thus a judge must not deduce as well as he must not also take up the averages hence this type of thing whether it is syllogistic in nature or so is bad for a judge.
- 4.) Inductive reasoning :- this is the reasoning that a judge must possess as it will induce him to come to conclusion but it is the duty of the judge that he must understand that truth of promise does not suffice rather it is the truth of conclusion which must suffice him.
- 5.) Red herring practices :- there used to be a practice that whenever the colonial master used to go for hunting in the lands of the tribal they used to misguide their dogs by carrying a fish which was having a very bad odor in the process of saving the animals in the same way a judge is always misguided by advocates, litigants, public opinion and so on and it is our duty to understand such kind of practices.
- 6.) No freedom in judging:- he says that judges do not possess power they are not free they can't exercise their discretion in adjudication in the way of their whims and fancies, rather their thinking is always guided by the statutes where as they are completely sovereign and free to give their reason while deciding the judgment. They always have to give reason while adjudicating between law and equity and while doing so they possess full discretion.
- 7.) Biases may effect positively :- the speaker is of the view that it is not necessary that ones biases will always work negatively if your ideology your biases are in the line of the constitutional ideals then they are perfectly alright. For the same he cited the example of J.Krishna Iyer whose own ideology is considered to be guided by the socialist thinking.
- 8.) Radical views:- he told that there is need of having a critical legal studies as the judge must also understand that what will be the effect of his judgment. He explained it with an example that if there is a case in regarding the license of the fair price shop then the judge must understand that if he will delay the matter then it is the poor villager which are suffering and it is they who have to go to different village to earn bread and butter.
- 9.) The writer stated that there is a book "Supreme Court In Quest Of Its Identity" by the writer Govind Das which tells us that in many ways our supreme court is venerated institution, it

has often to negotiate with the changing public opinion and political scenario by which the tentative equilibrium was disturbed and as a judge it is our duty to understand it and said this book must be read by all judges elevated to the constitutional courts.

- 10.) Can faith healing be practiced in public. And the speaker while citing J. Reddy said that there must be faith healing until and unless it is not against the constitutional them.

Session 7: Stages of Moral Development

Speaker:- Dr. Parul Rishi

The third distinguished speaker of the day was Dr.Parul Rishi. She has given her presentation on the agenda of “stages of moral development” and following are the main issues in her presentation:-

- Deontological framework of the ethics
- Myth vs reality of the ethics
- Unethical behavior
- Threats to the morality

Her presentation started with the difference between the values, morals and ethics. The values are the beliefs of oneself regarding his way of conduct, life etc. whereas morals are certain rules of conduct which are transmitted to the individual through a gradual process by the society in the same way ethics are those conduct of the life which are taught to the person by a specific subgroup of the society it like ethics of the judges are made practiced and perpetuated by the judges only. We always believe in the written and stated rules but there are certain operational values that always gives coherence to our thought and action. Dr Rishi posed a question to the house that after all what is it that disconnects us with the ethics and values how many times we break them is it a conscious or an unconscious exercise of the mind. Who is the person who would tell a judge that you are doing something unethical?

To answer her question she stated that there are different kind of threats to the morality of one they are:-

- 1.) External pressure:- these are due the threats made to the one or the allurements made to the person
- 2.) Humanitarian concerns :- these are always personal in nature and responsive to the biases which one possesses.
- 3.) Running over:- that's the easy way of escapism i.e. we generally sit over the problem
- 4.) Practical considerations:- sometimes they take a form that they crush the walls of the conscious as the meaning of the context changes.

She said that these are the certain problems which can be dealt by the introspection i.e. asking yourself, your conscious, facing your minutest fears, believing in the god almighty and so on. She stated that there is always myth in the mind of the person that one is ethical or not and to clear that myth one has to go through the smell test, which says that if there is smell or fishy in the thing about which you are going to act, then that must be considered as not to be ethical. She very beautifully described two kinds of frameworks which we have to pursue in our life to be ethical that are consequential framework which is based on the end point that what would be the effect of the judgment in the society. Second one is the de-ontological framework which always perpetuates that we have to be on the path of virtues, justice and integrity no matter what is the consequence of our decision. These are the problems which are faced by the judges while deciding the case related to the question on the child labor, prostitution? That whether it is the values or the living of the person which must be taken in consideration.

She has illustrated that the saying rotten apple spoils the barrel does not hold good in this judicial arena i.e. they cannot shift the burden that since one person is doing something wrong so do I have the authority to do the wrong does not hold good meaning thereby that unethical behavior is simply result of your own action and not the replica or the result of the others. Thus although there are codes in the judiciary through which ethics are maintained but the codes only are not sufficient they must be practiced conventionally. She substantiated her point of view by giving an example that ethical behavior is always linked to the ethical leadership which we can infer from the instances of the whistleblowing, she stated a very peculiar Indian habit which consists of making of the escaping statements in the form that in the earlier days people used to be

ethical but they are not now a days. But such statements are of escaping nature and shows the lack of concern which you are giving to the ethics.

She gave a logical problem consisting nine dots which have to be join using the four lines without putting up a pen through this problem she was able to state that life is not so simple in order to connect the dots, we are being constantly being challenged to use our mental capacity, which we have resolve only through out of box thinking. We always have to go beyond the reality which is perceivable to find out the truth.

She stated that there is a principle which is given by Sigmund Freud about the components of the personality and it can be used as a check over our personality to see when one is ethical and not.

- 1.) ID: - it is the pleasure principle that always is seeks by the people that what suits to one is the work which he wanted to do. We have to look up to ourselves that are we in that situations
- 2.) EGO:- it is our inner ego which tells us that what we have to do in a response to a certain work, whether our mind is pre-occupied by the notions
- 3.) SUPER EGO:-here we have to see the personal biases that are always coming to our mind whether it is of pecuniary nature of personal nature or any other nature.

She illustrated that ethical as well as unethical decision making always has to fall upon the characteristics of culture variable, context, issue intensity and issue of moral development. During which we have to see the personality measures of the ego strength of oneself and also has to seek that where the locus of control of our personality is resting. There are certain determinants which we have taken account of in order to check our intensity and they are :-

- Consensus of wrong
- Consensus of harm
- Consensus of effect of the judgement
- Proximity with the problem

She has illustrated the Kohlberg Lawrence theory to keep up a check over what is right and wrong in our working of ethics he stated in his theory that moral development is a gradual process an there are the categories of the morality i.e moral, immoral, amoral where as there are three stages of the moral development:-

- 1.) Principal:- this consists choosing the self-chosen ethical principle and secondly to judge on the basis of the values and the rights upholder as absolute by the society
- 2.) Conventional:- this consists of maintaining conventional order values and doing what other are doing and supposing it to be right.
- 3.) Pre-conventional:-these are those stages that our actions are guided by the end results of the act

She stated that generally people till the second stage and there are only few which can grow up to the pre-conventional stage and it is the duty of judge to guide their actions upon the third stage.

At the end she illustrated a picture showing pebbles put upon each other, at the bottom there was a big pebble upon it was small, then a smaller pebble over it too and asked the participants to give their inferences over the same which were balance, stability, strong base, bigger base, skills and so on she clearly depicted that the larger stone is the judiciary on which the whole trust of the people in the state democracy stands they are being put up with the power to balance the interest of the society in a better possible way and it is their duty to see the least-well off that is the smallest stone must not fall from its place.

Session 8 : How to comprehend Precedents?

Speaker:- Mr.Mohan Prasanra

The last session of the day was initiated by the speaker by stating that precedent are only ratio decidendi applicable to the facts of the case: The term Judicial Precedent has at least two meanings. One of which is the process where the judge follows the decision of the previously decided cases and the other is called the original precedent that is a case, which creates and applies new rule. The four different cases cited by him are as follows:-

- 1.) Article 141 of the Constitution lays down that the “law declared” by the Supreme Court is binding upon all the courts within the territory of India. The “law declared” has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law

or judgment by the Supreme Court, upon which, the case is decided. (See Fida Hussain v. Moradabad Development Authority [(2011) 12 SCC 615 : (2012) 2 SCC (Civ) 762] .)

- 2.) Hence, it flows from the above that the “law declared” is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided. [Also see *Ambica Quarry Works v.State of Gujarat* [(1987) 1 SCC 213] and *CIT v. Sun Engg. Works (P) Ltd.* [(1992) 4 SCC 363]]
- 3.) In other words, the “law declared” in a judgment, which is binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which the case is decided which has to be ascertained in relation to the subject-matter of the decision. It is this principle which becomes part of the precedent binding on subsequent benches of co-equal strength and all subordinate courts throughout the territory of India. [*Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1*]
- 4.) Further Article 227 of the Constitution of India vests the power of superintendence in every High Court over all Courts and Tribunals throughout the territory in relation to which it exercises jurisdiction. It is in this constitutional provision, it is implied that all the courts and tribunals throughout the territory of the State will be bound by the decisions or to be precise the ratio of the decisions of the respective State High Courts, subject to the decision of the Supreme Court on the issue. [*East India Commercial Company 5 Ltd. V. Commissioner of Customs, AIR 1962 SC 1893*]

He further cited his views on the topic of the rational behind the precedents :-

- The United States Supreme Court, in one of its most sustained discussions of stare decisis, cited the rule of law as a reason for not overturning precedents too often. In *Planned Parenthood v. Casey*, three of the Justices in a plurality opinion addressed the prospect of overturning the abortion decision in *Roe v. Wade*. They devoted a 6 long section of their argument to the issue of stare decisis, insisting at the outset that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." The US Supreme Court in *Planned Parenthood* further said: “There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith.... The legitimacy of the Court would fade with the

frequency of its vacillation....” Stare decisis is, in the words of Justice Cardozo, "the everyday working rule of our law". he stated that every judgment of superior courts has three segments, namely, (i) the facts and the point at issue; (ii) the reasons for the decision; and (iii) the final order containing the decision. The reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a judgment of the Court, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment. This may happen either on account of any subsequent event or the need to would the relief to do complete justice in the matter. It is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent.

- Further he stated the basic points on which the precedent are made down are as follows :-
 - Stability of the interpretation
 - Respect of the law laid down by the highest court
 - Decisional efficiency
 - Treating like one's alike
 - Formal and comparative justice
- Where as according to him he task of finding the principle is fraught with difficulty because without an investigation into the facts, it could not be assumed whether a similar direction must or ought to be made as a measure of social justice. And different terms on which the judge must have a clear baring mind and application of the law are as . **Obiter Dicta:-** Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. **Per Incuriam:-** A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. Sub-Silentio:- A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind following are the points according to him are destroying or weakening the binding force of precedent
 - a. Abrogated decisions
 - b. Affirmation or reversal on a different ground.
 - c. Ignorance of Statute

- d. Inconsistency with earlier decision of higher court.
 - e. Inconsistency with earlier decision of same rank.
 - f. Precedents sub silent or not fully argued.
 - g. Decisions of equally divided courts h. Erroneous decisions
- At the end he concluded It would not be inappropriate to part with a gentle reminder of what Senior Advocate and Jurist Fali S. Nariman in his book India's Legal System: Can it be saved? has said, that unwittingly Article 141 has become a thief of judicial time since there are so many reported judgments, which are cited and have to be looked into and takes up vast amount of judicial time and the Judges are deterred from considering the overall justice of the case. Therefore, while precedents have wisdom and a source of great guidance, it should be used to do justice and not become a deviation from being able to do justice in a given facts of the case at hand.

Day 3

Session 9 : Importance of Rationality in a Judgment

Speaker:- Justice V. Gopalagowda Justice S.A.Bobde

Few of the points discussed by the speaker are clubbed as follows:-

- 1.) Can thought, emotion and reason be separated? :- thoughts of the person are response which are quick in the nature and had nothing to do with the act of the person, but since they take place spontaneously they reflect the personality of the judge secondly the emotions of the person can be get reflected in the way he react to the situation this also according to the speaker will reflect the personality of the judge and last the reason of the judge given in his judgement must always be in accordance with the law the judgment should be such that one can't access

the personality of the judge from the judgment. These three points according to the speaker must always be kept in mind by the judge.

- 2.) Trust in the judges in the information age: - according to the speaker in the earlier times the judges were not asked for the reason which was behind their judgment, even now according to the arbitration act no reason for the dismissal is given at the same time there are also not any reason to be given while rejecting the writ petitions but now the time have changed and the people in the judiciary are only responsible for it as it. The growing information age everybody wants reason and taking into the considerations of the events when the judges were being caught up in the corruption matters the people are demanding more reason behind the judgment and now the responsibility of the judiciary that they must safeguard their position they must always try to keep up the trust which the people has posed in them.
- 3.) Precedent:- according to the speaker once there was father who told a son to do a particular act in a certain way and the son asked him whether he is sure that he is right the father replied that he is not always right but he is having the more experience of being right in the same way the person who is basing his decision on the previous judgment then he getting the experience of the earlier judges but now a time has come when the judge must only cite one or two judgment there is no need citing the precedents that are of very lessor of no value as in regard of the judgement and at the same time there is a need that the judge must always ask the council to state the facts and laws and not of more insignificant judgment as the need of the time is fast dispensation of the cases and the clearance of the backlog but when it is necessary to give the long judgment then he must do so but not in every case rather in every case he must try to find out a central issue to which all other issue are incidental and must try to deliberate over it.
- 4.) Art of judging:- according to the speaker the art of the judgment writing comes when it has to be made short there is no art which can get reflected or rather used in writing down the long judgments as the people are believing in the solutions and not the judgments
- 5.) Practices to be adopted: - the two practices according to the speaker which must be inculcated by the judges in the present scenario are trained mind in the sense that the judge is able to get at the first instance what is that is demanded by the case and this practice can only be achieved

by the consistent reading as well as by living in the present. And second is the formulation of the issues but the speaker was asked the question what has to be done of the notifications which render the judgment lengthy then he replied the judges must take help of the paraphrasing and the footnotes and must develop a habit of identifying the obiter dicta as it is very important to unlearn also the things which are unnecessary.

- 6.) Comprehensive judgement:- he started this point by stating that whoever take the procedural sore must always face the sword buy that he means that there is a procedural guard to the litigants and the judges must take into account that the rights are also wasted in the procedures and they must identify such procedure which are containing the rights as well as the substantive rights, thus at the same time they must try to give effect to the section 80 of the CPC by this the speaker wanted to say that the judges must try to take commands of the procedure.
- 7.) Writs:- the speaker told that majority of the cases in the constitutional courts are regarding the govt. authorities and they must understand that yet they are not exclusive but they are aloof from the government
- 8.) Our ideals and goals:- the session was ended up by the4 speaker by telling that it is the preamble which have sets out goals and ideals for us and in the present context there is a need of developing a jurisprudence which is fulfilling the present need such as consumer jurisprudence, PIL and so on and it is the duty of the judge to think of different kind of the jurisprudence which are apt according the coming needs.

Day 3

Session 10: Importance of objectivity in decision making process

Speaker:- Justice A.K. Sikri

The speaker initiated the discussion with the example of the beef eating issue, according to the speaker such are the issues that put the moral and subjective pressure on the judges, it is this very kind of the judgements in which the judges must try their full to restrict their personal belief and

they must go according to the constitution. The speaker told that the reason and the rationality must be developed in such a way that a person is able to distinguish between the relevant and the irrelevant part of the questions posed, evidences adduced and so on the judges must always find and try to look out the reason on the basis of the laws provided and secondly the judge must always in the view that upholding the rule of the law, constitutionalism, at the same time he must be having a objectivity to find out the truth. For the above said thing following are the points which according to the speaker must be taken into the account by the judge:-

- 1.) Conscious falsification :- this is the act which is not expected from the judges it happens sometimes that due to match the case with the particular precedent, or when the judge is having pre-occupied motions or ideas about an issue in the given case or by any conscious or unconscious approach the judge twist the facts of the case, as sometimes it is seen that when a judge needs a particular result then he is twisting the facts of the case this is the practice which be discarded by the judges and there is a simple formula for it and which is always asking oneself that whether have I pre-decided the case? Have I preoccupied the mind about the issue?

- 2.) Priors:-the speaker told that we are having different types of the priors before deciding the case and they can be in the form of the temperament which once possess as sometimes it is seen that if he temperament of the judge is always in the favor of the acquittal then he will be misguided by the lawyer or rather used by them, ideology of the judge plays a deep role in deciding the priors the judges must not do any act which reflects there ideologies, even the moral and the religious values of the judge are sometimes making a base of the prior before writing a judgment and it is the duty of the judge that he is always keeping a check that he is not having such priors, there are certain other factors which also must be avoided buy the speaker and they can be cytological, geographical factors at this juncture the speaker told the story of the queen of the France that when she went to see the people, they were starving and they told her that they are not havi9ng breads to eat, then she replied that if you are not having bread the you must take cakes, she was not able to understand the parity of the position in the same way the judges must not try to have such a view of the situation.

- 3.) Cognitive illusion :- sometimes it is done so that the judges go into the imagination of the facts to get a desired result or otherwise, the judges must not imagine the facts of the case , while saying so the speaker is not telling that the judge must not have a urge or do a thing or to have quest for the things but he must never imagine the facts which are not pleaded or proved because it will hinder the decision making process
- 4.) Priors framed by the irrelevant reactions:- the judges sometimes make an image of the lawyer that he is bad or he is good which must not take place as it is not necessary that the advocate who proposed wrong in the earlier case will always be doing so, it is not necessary that advocate who spoke lie in the previous case must be speaking lies forever if the judge must never make certain apprehension about the lawyer if he is doing so then he will not be able to do justice
- 5.) He told that the judges must have the following judicial virtues and these judicial values needs to be enriched from time to time otherwise they will not be of any use and the virtues are as the following:-
- a.) Incorruptibility
 - b.) Courage
 - c.) Judicial temperament and judicial impartibility
 - d.) Diligence
 - e.) Drafting skill
 - f.) Practical wisdom
- 6.) Example:- he told that in the certain court the image of the judge is made that he is either pro-landlord or he is pro-tenant and son and it is up to the judge that he is making his such kind of images and there is no problem when your image is in accordance with the principles laid down by the constitution but when they are constructed otherwise they are a just mirror to the judge and he must always try to abide from doing any acts which will render his image inclined in the views of the general public.

Session 11 : Free and Equal Decision Making

Speaker:- Mr.Mohan Prasanra

According to the speaker the point for this session "Free and Equal Decision Making" is an basic component in the equity regulation framework, which basically shapes and obliges the center origination of protected equity. In concise, free and equivalent choice making is focal in maintaining the Rule of law. This requires the judge to persistently police the limit between what is and what is most certainly not inside of his/her energy to choose and to choose all cases in a way that never dismisses the subjective assessments of both sides. Few of the schools of the jurisprudential decision making as discussed by the speaker are

- a.) Legal Formalism Legal Formalism is an old school of thoughts, which at its most extreme views judges as meticulous, by-the book adjudication machine. Testimony, evidence, and impartiality are fed in one direction, laws and precedent in another, and rulings are produced from this combination without any personal preferences from the judge.
- b.) Legal Realism Opposed to Legal Formalism, Legal Realism views judges as human beings who are captive to their personal beliefs and opinions. Thus, their decisions are impacted by and contain elements of those beliefs, and are susceptible to personal whims, rather than devoid of them, to such an extent that only personal preferences and individual philosophies matter in legal decision-making.
- c.) Legal Pragmatism A newer school of thought in legal academia which sought to more accurately describe how judges make decisions. A core tenet of Legal Pragmatism is that judges have a "heightened judicial concern for consequences [of their rulings] and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities.

He told that there are two kind of decision making done in the judicial process which are legalistic and non-legalistic decision making and it is the need of the time that judges must understand the non-legalistic decision making and must try that such practices are not coming in their mind while giving the decision and he defined the non-legalistic decision making as Non-legalistic decision-making postulates on judicial discretion, which is a vital component of

decision-making process. The non-doctrinal factors that make up discretion are an invisible part of judicial decision-making that cannot be explained with any precision given our primitive understanding of how the human mind works. He told that before giving the decision the judge must think of a curtain that divides our understanding of the judicial process. We know what is visible in front of the curtain: written doctrine, accepted methodology, etc. But they only know a little bit about what lies behind the curtain, although they know something is there. The judicial world is not like the Land of Oz, where we can pull back the curtain to see the real source of decisions. No matter how hard we try today, we cannot understand all the hidden factors that influence judicial outcomes.

He told about the hidden aspect of the judging in which he told that there is a “balancing” test, common in constitutional law, frequently requires judges to balance incomparable considerations. For example, in regulatory cases, a judge must determine the outcome by balancing the harm to the aggrieved party against the benefit to society, usually where the harm and benefit cannot be quantified. Another common approach requires judges to look at a number of factors and make a decision based on the totality of the circumstances. Some judges will view one factor as important; other judges will disregard that factor and concentrate on another. Sentencing domain of the judges is best-suited example for this. For illustration, the factors that influences the judges minds while balancing the aggravating and mitigating circumstances in deciding the whether to impose of death penalty or life imprisonment is one such predicament.

He deliberated on the issue that judges must overcome their predilections in the process of decision making and in the line of the progression he quoted the following authors and the crux of the discussion is as follows :-

- 1.) In the Nature of the Judicial Process, Justice Benjamin Cardozo tried to explain how appellate judges overcome their individual predilections in decision-making. His thesis was that the different perspectives of the members of an appellate bench balance one another. He argued that "out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements." But another Judge namely, Judge Edwards, who served as Chief Judge of the D.C. Circuit from October 1994 until July 2001, differed with the Cardozo, though not in principle, but in the phrase used. He used “collegiality” instead of “attrition”.

2.) According to Judge Edward “Collegiality” has an important judicial function. When he speaks of a collegial court, he does not mean that all judges are friends and do not mean that the members of the court never disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what he means is that judges have a common interest, as members of the judiciary, in getting the law right, and as a result, all judges are willing to listen, persuade, and be persuaded, in an atmosphere of civility and respect. Thus collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered. Collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways. What is at issue in the ongoing collegiality-ideology debate is not whether judges have well defined political beliefs or other strongly held views about particular legal subjects; surely they do, and this, in and of itself, is not a bad thing. Instead, the real issue is the degree to which those views ordain the outcomes of the cases that come before the appellate courts. Collegiality helps ensure that results are not preordained. The more collegial the court, the more likely it is that the cases that come before it will be determined solely on their legal merits.

Day 3

Session 12 : Challenges in Judging by Justice R. Basant

Speaker:-Justice R. Basant

Some of the points on which the speaker deliberated are as follows:-

- 1.) Act of reckoning:- the judge must be such that he must always take side, he must always have an opinion and at the last he must be calculative, according to the speaker if the a person is not having these qualities then the person is not fit to be judge. The speaker told the participants that they must inculcate such habits that they must take position but such position must not be arbitrary rather it should be in accordance with the laws.

- 2.) Function is divine:- the speaker told that giving the judgement is the divine function and the participants must understand their jobs they must enjoy the thrill they must inculcate the feeling that the people presume that they are having the STD facility with the god and they must not do any act which affect the image of the judiciary and in the second line of progression they must see that whatever the judgment they are giving is practical as they must understand that the people believe in the solution and not the judgment and secondly justice must not only be done rather its must apparat to be done.
- 3.) Sublime nature:- it is believed that the judge must be atheist then only he will be able to become impartial but it is not so according to the speaker it does not matter that a judge is atheist or a theist but the thing which matter is that he must inculcate the sublime nature, according to the speaker if the judge is not having the sublime nature then he will prone to the bias which he has got in his life, whenever the judge is wearing that robe he must always try to possess a nature which is firm at the same time it is also flexible as in accordance with the societal values thus the requirement of the judge is to have sublime nature
- 4.) One must enjoy the thrill in giving judgement :- according to the speaker the judges must always be alert, he gave an example of the judge who has taken a vow that whenever he will sleep in the court then he will straight away leave the job, that kind of the determination must be there in the judges as they are required to possess the eye of an vulture, they must always take a keen interest in the matters advanced by the advocates they must resolve they would try to look all the important matters in the case as each and every point is of great consideration.
- 5.) 1:0 syndrome must be changed to 1:1 syndrome:- the speaker is of the opinion that a common syndrome known in the high court where the bench is consisting of the senior judge and a junior judge is known as 1:0 syndrome as it is well known that the junior judge will never be asking question it is the only senior judge who will take the case in the particular direction and will give the decision but this syndrome must be changed as

according to the speaker both the senior judge and the lower judge are drawing the same salary and that implies that when the law demand that the two judges must hear the issue then it can be inferred that law is taking both the senior judge as well as the junior judge at the same pedestal non of them is junior is senior while listening the issue it is the time that we must compromise the tradition and work with the modern practice. The speaker is of the opinion that while interpreting the laws the judge is doing the sovereign function and even the president cannot guide him to go in the particular direction thus if a junior judge is not thinking in the line of progression as the senior judge then he must ask the senior judge in a polite way and he must always respect the senior judge.

- 6.) Faltitude:- the speaker told that a judge is not a pedestrian walking alone in the garden and can do whatever he pleases, the speaker told that when a person becomes a judge then he lose one thing and that is mirror either there will be advocates who will try to flatter him or there would be person who would be criticizing him but it is up to him to understand that he has lost the mirror he must not get carried away by the situations or the persons. He must always introspect himself as there will be no one to tell him truth about him.
- 7.) Intellectual humility:- the judge must believe that he knows all the thing and the advocates are not that intelligent rather he must always have approach that advocates are there teachers they are both the two sides of the same coin and it is they together who are given the job of disseminating the justice and both the limbs of the organization are essential in there respective areas, according to the speaker the judge must always possess that kind of intellectual humility.
- 8.) Attitude :- the speaker told the story in which three person were thrashing the stones from the mountain another person came and he asked the first person that what is he doing the first person replied that that can't he see that he is cutting the stones, he went to the second person and asked the same question he replied that he is cutting the stones and when he went to the third person and asked the same question he replied that he is building a cathedral and thus it is the attitude which makes a person and the judge while

administering the matter in front of him must always try to have the attitude that he is dispensing the justice.

Day 4

Session 13 : Judicial Persuasion of emerging trends (National& International)

Speaker:-) Justice Kurian Joseph Justice N.Santosh Hegde

The discussion started with the difference between the reasonableness and the rationales and the participant were of the opinion that that reason can be given of anything or in any way whereas the rationales are the reason which are always in relation or nexus to the act on which they have been given. The speaker initiated the discussion that since the decision is out now on sec 377 by both the high court as well as supreme court they can now discuss that which part of the judgement is rational or which part of it is reasonable.

Then the baton of the discussion was given in the hand of Justice N.Santosh Hedge and he told that the only thing which he worried about is time taken by the judiciary in deciding the matter, according to him this is the matter which is directly hitting the roots of the trust which is posed in the judiciary by the public. He told that the case of Lalu Yadav has taken around 16 years in the trial court and the participants were surprised to know that there are 9 lakhs cases pending in the Allahabad high court and they were astonished to say know that there are even the cases of the 1980,s which are pending in the that high court and the participants cited that since the large number of senior judges have retired the pendency of the cases in increased day by day. On consensus they agreed that lack of infrastructure is the key problem in the appointment of the judges and the pending vacancies of the judges.

The speaker told the participants that the in the case of Anil Rai vs State Of Bihar⁷ it was cited that “Adverse effect of the problem of not pronouncing the reserved judgments within a reasonable time was considered by the Arrears Committee constituted by the Government of India on the

⁷ Appeal (crl.) 389 of 1998

recommendation of the Chief Justices' Conference. In its report of 1989-90 Chapter VIII, the Committee recommended that reserved judgments should ordinarily be pronounced within a period of six weeks from the date of conclusion of the arguments. If, however, a reserved judgment is not pronounced for a period of three months from the date of the conclusion of the arguments, the Chief Justice was recommended to be authorized to either post the case for delivering judgment in open court or withdraw the case and post it for disposal before an appropriate Bench.” And it is the duty of the high court judge to not to reserve order some of the ideal situation told by the participants on the reserve of the case are as follows:-

- 1.) Not getting the required amount of resistance of the lawyers :- they wanted to say that sometimes they know that the case is not properly presented or the case has been not put up properly
- 2.) Length of the evidence adduced :- the participants were of the opinion that the oliminus nature of the facts and the evidence adduced is the major factor behind the reserving of the case
- 3.) No assistance from the matter which are coming up from the legal aid committee:- the matter which are being handled out by the committee (legal aid) they are not givi9ng their proper assistance and they are not functioning accordingly.
- 4.) Sometimes the participants confessed that they reserve the order only because they feel that if any matter will be taking a lot of time then why not to solve the other matter first and then come to it.
- 5.) As a advocate it would only take them 2-3 hour to complete the matter for appeal but as a judge it is taking too much time and all is in the account of the number of cases.

The speaker told that the advocate can hold that or can just throw away the case at the judge but the judge must not throw away the case as it is his duty to uphold the constitution and the rule of law. The speaker told that the judge of the high court can reserve the judgment to think upon the issue which is not dealt by the Supreme Court and is also concerning the central law. Secondly some of the judges develop the habit to write the big judgements in the form of the thesis, they are always in the mood to deliver the classic masterpiece judgment but the judge must understand the duty of the judge is to decide the case and not to create masterpiece for this they must put themselves in the shoe of the litigant who is coming from a long distance to fight the case and he

is of the opinion that unless there is a need of creating a masterpiece on the given question of facts and the given question of law the judges must refrain from giving judgements which they consider as masterpiece as the ordinary people wants only solution. And not more than that.

He also told that judges while listening the senior advocates must understand that they are not there to sub serve the lawyer they are there to give justice, and in the same way they must not treat the litigant differently. The speaker discarded and told that it is the black day in the judiciary when you treat Salman khan differently than others and it is again giving hindrances in the trust which the people of this country posed in the judiciary. The judges must abide from doing such a practice. The speaker is of the opinion that is time now that they must take the train judges in spite of training the judges as they must create some special courts like one which is good in the criminal matters and so on. At the same time he also said that while sitting on the bench each and every act of there is showing any of their emotion must not be made and at the same time they must not give comments on the person rendering the judgment as it is not the judge which is appealed against rather it is the judgment which is appealed against and thus it is the duty of the judge to not to comment on the fellow judges and they must understand that they at the same time also safeguarding the integrity of the institution.

Day 4

Session 13 : How to reconcile conflicting opinions

Speaker:- Justice K.S.P. Radhakrishnan

The second session for the day started with stating of different conflicts which can be said as of the conflict within the bench, between benches and so on. But it is the duty of the judge to bring uniformity in the line of the judgment and if there is no rule laid down by the Supreme Court then it is his duty to lay down the rule. The discussion was initiated with the help of the law commission 136th report according to which that there is urgency to have the uniform laws and it is elementary to the law it is his basic requirement. Our system is such that anxiety of the it is to maintain and to secure and wherever necessary to restore uniformity or important points of law.

He started with the reading of the art 141 :- . Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India

He stated that no such provision is made for the high courts in the constitution thus whether the law made by the high court would be followed by the lower judiciary and the tribunal is a valid question which was being raised in the case of East India Commercial Co., Ltd. vs The Collector Of Customs⁸ in which it was held that “Under Art. 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercise jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the sub-ordinate courts can equally do so, for there is no specific, provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding.”

Thus the high court are also constitutional courts whose decision will be followed but according to him the question arises on the issue that when they are facing two conflicting opinions of the court and in the given situation you can follow the three following rules :-

- 1.) In case of conflicting opinion of the two benches of equal strength then it must be the view of the later which can be chose.
- 2.) In case of conflicting opinion of the two benches of equal strength then it must be the view of the earlier which can be chose.

⁸ 1962 AIR 1893, 1963 SCR (3) 338

3.) In case of conflicting opinion of the two benches of equal strength then a more upright way is to do substantial justice when it is coming from the facts of the case

The above said points were illustrated by the speaker with the help of the following cases :-

- In the case where the later has to be chosen
 - a.) Niranjana Singh & Anr vs Prabhakar Rajaram Kharote & Ors⁹
 - b.) Directorate Of Enforcement vs Deepak Mahajan¹⁰

In both the cases the high court have faced the question which were decided by the supreme court in two different cases which were inconsistent and the high court has taken up the view which was accepted by the bench which was later

- In the case where the earlier view taken by the court can be adopted:- the speaker has made following submission in this line of progression:-
 - a.) Peter v Sara¹¹
 - b.) Jabalpur bus association v. state of MP¹²
- In the case where to do the substantial justice the court can determine the case on the basis of the facts and the law pleaded the submission made by the speaker in this line of progression are as follows:-
 - a.) Govindanaik G. Kalaghatigi vs West Patent Press Co. Ltd¹³
 - b.) N v. Bristol Aeroplane company¹⁴

Thus now the high courts are having the three ways to go and it is up to them to opt for one.

⁹ 1980 AIR 785, 1980 SCR (3) 15

¹⁰ 1994 AIR 1775, 1994 SCR (1) 445

¹¹ 2006(4)KLT219

¹² 2003(4)JCR325MP

¹³ AIR 1980 Kant 92, ILR 1979 KAR 1401

¹⁴ 1944(1)Kings Bench