



RAPPORTEUR FOR SPECIAL EVENT: TRAINING PROGRAMME FOR JUDGES FROM SRI LANKA

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SUBMITTED TO-

DR. GEETA OBEROI

DIRECTOR IN-CHARGE

NATIONAL JUDICIAL ACADEMY INDIA

BHOPAL (M.P.)

SUBMITTED BY-

SHIKHAR STHAPAK

BBA.LLB. (H.)

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SESSION 1- DISPARITY AND DISCRIMINATION IN SENTENCING

SPEAKER 1 - <DR. MINAL SATISH>

Dr. Satish started his session by asking a question to all the delegates from Sri Lanka, which was, “Define Sentencing? And, How Discrimination and Disparity occurs in Sentencing?”

He continued by quoting a paragraph from one of the most landmark judgments by *Justice Chinnappa Reddy*. For sentencing, there is no straight jacket formula which could be followed by a judge while sentencing. He further quoted *Santosh Kumar Bariyar vs. State of Maharashtra* by saying that, sentencing has become totally judge-centric, as it was given in the said judgment and also that, it depends on the facts, circumstances and situation of each case. He also discussed about the 47th Report of Law Commission of India, which was published by the Law Commission of India in 1972.

By quoting *Modi Ram case*, he pointed out certain parameters which are to be considered while sentencing, they are- due consideration to both the accused and the victim, circumstances under which the incident happened, the motive behind the act, the age of the accused, his social status and the character which he possesses, and also that, the sentence should neither be harsh nor less. He further discussed the seven factors laid down as mitigating factors in *Jagmohan case*, they were “(1) the minority of the offender; (2) the old age of the offender; (3) the condition of the offender e.g., wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when offence was committed under a combination of circumstances and influence of motives which are not likely to recur either with respect to the offender or to any other; (7) the state of health and the sex of the delinquent.”

Earlier, in India, the courts believed in reformation and the sentence was passed in accordance with this principle only; but, later on in 1990’s, it changed to retributive principle of punishment, with reference to *Dhananjay Chatterjee case* (1994) when there was society’s cry for justice. Although, this principle was again reformed in 2000’s with proportionality along with society’s cry for justice.

The issue involved was, whether the disparity was warranted disparity or an unwarranted disparity? Does unwarranted disparity exist in sentencing? He answered by saying, “Complete uniformity is not correct in sentencing and further added the difference between warranted and unwarranted disparity. Warranted disparity is present because every case

comes with a different set of facts and circumstances and unwarranted disparity occurs due to reliance on irrelevant & extraneous factors, deviation from established/identified set of norms/values.

So, if these disparities exist, is sentencing guidelines the solution to curb it? And what are Sentencing guidelines? For this, Dr. Satish quoted two great thinkers, namely, Duff and Wasik and said, it should be there to only inform, advise & guide the decision-making process. But, the question which arose was, what is the rationale behind this? It is to maintain the Principle of Equality, example: religion, social status, race, caste, employment should not be the factors to sentence someone differently. Consistent factors, so as to balance the impact of sentencing are required.

The discussion further went on to discuss the Guideline Models of sentencing- basically, four models were discussed, namely- Legislative Model, Judicial Model, Sentencing Commission Model and Israeli Model of proportionality.

Now, the question that came up was how to deal with Aggravating & Mitigating factors? He said that, listing out the factors is impractical as no-one could ever imagine what might come up in a new case, and further quoted *Julian Roberts*, as to “list the factors that should not be considered for particular crimes and use the theories of punishment during the making of the list. And also, to deal with collateral consequences for the offender, offender’s family and to others.”

In *Union of India vs. Kuldeep Singh* and *BHEL vs. Chandrasekhar Reddy*, the court upheld its judicial discretion but said that, reasoning is necessary for every sentence passed. Further, in *E.P. Royappa vs. State of Tamil Nadu*, doctrine of arbitrariness was established and held that when an executive action is arbitrary, Article 14 and 16 of the Indian Constitution gets violated. And, he also quoted *Mohammed Farroz Abdul Gafoor case*, which held that judicial discretion shouldn’t violate Article 14. He also referred to *Lord Bingham* where the Lord compared arbitrary judicial discretion with a dragon.

Further, the rule of law in sentencing was discussed with the delegates, and a question whether sentencing is a science or an art was raised by Dr. Satish? Answer to it was given in terms of equality of approach in sentencing and proper reasoning for the same.

SPEAKER 2 - <HON'BLE JUSTICE PRIYASATH DEP JUDGE OF SUPREME COURT OF SRI LANKA>

The Hon'ble Judge from Sri Lanka cited a few Sri Lankan cases and discussed the concept of restorative justice with the delegates and asked them to consider the victims also during sentencing for proper compensation and also the accused for his rehabilitation. Further, he discussed the difference between the balance of probability and beyond reasonable doubt during sentencing.

SESSION 2- USEFULNESS OF DEATH PENALTY

SPEAKER 1- <DR. ANUP SRINATH>

The session began with a question to the delegates, how many sections in Sri Lankan Penal Code have punishment of death penalty for a crime. As they answered, there are four sections, namely, Section 296 (murder, which has mandatory death penalty), 114 (when anyone goes against the State), 191 (when an innocent is convicted due to false evidence) and 299 (abatement to commit suicide and if he/she commits suicide).

He went ahead with the discussion of Article 6 of International Covenant on Civil and Political Rights (ICCPR), where it is a mandate for the signatory countries to meet the required conditions, if they want to impose a sentence of death penalty. Further, the question of death penalty vs. deterrence was raised by Dr. Anup. The issue of convicts on death penalty not being executed for a long time was also raised in the discussion.

Dr. Anup quoted *Bachan Singh vs. Union of India*, where it was held that, death penalty could be given only in the rarest of rare case, only when there is no alternative for any other punishment and the accused is beyond reformation. Further, the balance sheet of all the mitigating and aggravating factors have to be considered before the passing of death penalty.

The Law Commission report on Death Penalty was also discussed by the delegates, where it recommended to abolish the death penalty for the all the crimes except for the terrorism.

SPEAKER 2- <JUSTICE BASANT>

He asked a question to the delegates that whether they (judges in Sri Lanka) have a right to choose from the sentence of life imprisonment and death penalty? The response/ answer that

came from the delegates was positive in nature, as they said that they have a choice between the above said punishments in the cases of certain matters like drugs, etc.

He also added and reiterated that, according to the case of *Bachan Singh vs. Union of India*, death penalty could be given only when there is no other alternative left and the case is one of rarest of rare nature.

SESSION 3- CRIME AGAINST STATE (ECONOMIC OFFENCE)

SPEAKER 1- <JUSTICE NAVEEN SINHA>

The session started by a numerous questions being imposed to the delegates, which are enlisted here- “What is an economic crime? How to avoid from being caught? Does amount (stolen/embezzled/defrauded) matter in an economic crime? Is there any minimum mandatory sentence? What are the factors in an economic crime? What is the motive to commit an economic crime as vengeance is one of the motive in crime against human body?”

There were several answers to the above question which were followed by examples from both, the delegates as well as the speaker for that session. And, one of the motives for the commission of economic crime was found out to be the personal profits made by the people indulged in economic crime. The people involved in economic crimes are motivated by the hedonistic calculus of pain and pleasure, that is, the pain that they have to suffer in lieu of the pleasure that they will gain, here personal gains/profit.

SESSION 4- CRIME IN GENERAL OFFENCES (AGAINST HUMAN BODY)

SPEAKER 1- <JUSTICE BASANT>

This session also started by a question which is, what is the macro-challenge faced by the State? He said, it is the citizens two basic expectation from the State, that are- first, protection against external attack (for which army is formed) and second, protection against internal aggression (for which police force is formed to fight crime). He further pointed out that, right to life is not just mere animal existence; it is existence with honor, pride, dignity, without any fear, etc. which a state has to provide to its citizens.

To meet this, that is to achieve crime-free state, he said there is a criminal justice system in any State. It is the responsibility of this criminal justice system to prevent crime from occurring and for that, punishment theories were evolved. So he asked a simple question, how is crime prevented by any State? The answer from the delegates varied, which could be summed-up as- severity is not the only factor that prevents the crime, it is the immediate action which is taken along with the certainty of the punishment to the offender.

There is an additional duty on the State to ensure that an innocent is not punished & a guilty is not left without any punishment. So, before giving any benefit of doubt to the accused, there must be a real doubt.

The session continued with new set of questions with their answers from the delegates as well as the speakers. The question that came up was how to do justice in a case? Where to start from? How do you see it in a case? Justice Basant said that, there is an implicit trust on the judges to do justice and to meet the expectation. It also has to shed the prejudices and look at the law & justice as perceived by everyone. It has to consider all the facts, circumstances and situations of the case, and then a sentence is imposed.

Further, discussion on the method of finding the appropriate punishment took its toll. As per Justice Basant, the sentencing should start from the mid-way, that is, if for a given crime the punishment is three years, then it should start from one and half years and then on the basis of the circumstances brought before the court, it should go up or down depending upon the situation. According to him, the sentencing than will be just, equal, reasonable and not a vague statement. Further, proper reasoning has to be followed for the punishment.

SPEAKER 2- <JUSTICE NAVEEN SINHA>

He began by putting a question for discussion, which is, do you think the nature of assault affects the severity of the sentencing? According to him, sentencing is difficult, and there is no straight jacket formula for the same. He further enlightened our views by giving two example- one, where someone slaps a person and he falls and breaks his rib, which further erupts that persons lungs and second, when one big man hits a weak person with his fist in weak man's stomach, which breaks his ribs and collapses his lungs.

He further, gave a car example, where the person having voluntarily intoxicated himself, drove his car from the party having clear mind about the road directions, etc hits a person.

SPEAKER 3- <HON'BLE JUSTICE PRIYASATH DEP JUDGE OF SUPREME COURT OF SRI LANKA>

We further continued the discussion and said that, Sri Lankan court is planning to introduce a sentencing policy and went on to discuss different types of cases which involved injury against human body, example- robbery, simple hurt, grievous hurt using dangerous weapons.

SESSION 5- CYBERCRIMES AND LAWS RELATED TO CYBERCRIME

SPEAKER 1- <MR. ANAND DESAI>

The session started by a question, how many of you have come across a cybercrime? For which he got numerous responses from the Sri Lankan delegates. Then the session started with a presentation by Mr. Desai.

He explained what is cybercrime as- any criminal activity in which a computer or computer network is a source, tool, target, or place of crime. According to him, almost all crime involves communication. Most communication is now through a computer device including smartphones. He conclude as, there is a “cyber” element in most of the crime. Further, he added that, the traditional method of detecting & solving crimes have changed.

He then discussed some forms of cybercrimes with the delegates, they are- hacking, spamming, phishing, identity theft & impersonation, cyber stalking- harassment on the internet, corporate espionage- theft of business secrets through illegal means, spoofing, software piracy, copyright piracy- use of the internet for illegally copying or distribution of pirated content, morphing of images & sharing them with mal-intent, cyber pornography, privacy violation by disseminating information subject to right to privacy, online defamation and cyber terrorism.

The discussion went a step further to the issues involved with the enforcement against cybercrimes. Mr. Desai pointed out the issues involved, as- difficulty in detection in crime- role of victim/complainant, masking of identity- anonymity, volumes of data on the internet, admissibility of digital evidence, awareness of rights, data protection, jurisdiction-

territorial/pecuniary which involves different levels of legal protection in different countries, extra-territorial jurisdiction, tax evasion, bank frauds and misuse of ‘secure communication devices’. He further added the recent developments in cybercrimes, that are- Indian government is now empowered to intercept wireless messages in the internet for the national security; also that, the persons not below the rank of an Inspector may investigate any offence and they can enter any public place & search & arrest without a warrant.

SESSION 6 & 7- APPRECIATION OF CIRCUMSTANTIAL EVIDENCES

In this session, the delegates were divided into six different groups have five members each with an exception to one group having only four members and number A-F, respectively. After the division was over, they were given a case problem to perform a mock trial before a magistrate (who was amongst them), who was further supervised by an observer. They were allotted forty minutes of time and after that twenty minutes were given to the observer judge to give a presentation on the trial.

During the presentation, the observer of group A gave his views regarding the trial by the magistrate in the criminal matter, he discussed about the perspective taken by the magistrate in the trial related to the expert opinion and also about his fault and raised several questions. He concluded by saying that, the case was proved against the accused.

Further the observer judge of group B discussed about the circumstantial evidence and the default committed during the trial and said that the magistrate came to the right conclusion but the reasoning was wrong and concluded by saying that the case was proved against the accused. When the observer judge of group F was given a chance to speak, he elaborated the facts & circumstances of the case and said that the case was discharged as the prosecution was not able to prove his case.

The point of this exercise was not to judge the capacity of an individual but to see the importance of the human factor in the exercise of judicial discretion by the difference in the results of these groups. As the problem given to all the six groups was same and the results varied as they were different, this shows that the human element plays an important role in deciding cases.

It was further discussed that, for the admission of circumstantial evidence, it is necessary to have a chain of evidence to be proved, pointing out at the accused and no one else.

The delegates were then shown a movie, 12 Angry Men, after which they were asked to criticize the movie. Some criticism that came up were-

- his search for the knife & present in the juror room was not correct, as he should have shown that in court-room;
- knife was rare even if not unique, and what is the probability that he bought a knife & lost it on the same day?;
- further, how did the person got that same knife and went to the boy's house and killed his father?;
- did he created an alibi for himself?;
- he might have gone to the movie and had asked his friend's to kill his father;
- the father was stabbed in an upward manner, but this was not considered at length;
- no fingerprint was found in the knife, etc.

SESSION 8- ELECTRONIC EVIDENCE

For this session, they were given different sets of articles to read, on which the discussion was held among the delegates.

Further, every delegate was given a sheet containing an exercise which had a hypothetical case problem and then they were asked to answer it in terms of their (Sri Lankan) law. After the exercise was over, Hon'ble Justice Priyasath Dep Judge of Supreme Court of Sri Lanka, gave the answer to the exercise as per the law of their land.

SESSION 9 & 10- THE ART, CRAFT AND SCIENCE OF JUDGING

SPEAKER 1- <DR. ARUNA BROOTA>

The session began with the introduction of all the Hon'ble Judges from Sri Lanka. After the introduction session, Dr. Aruna Broota started the session with a question, who is a judge?- and defined as, "a person with law as his background & has qualified the examination for

judiciary”. She added that, the science of judging is solely based on the evidence and went on to discuss the Art & Craft. The delegates also gave their response to who is a judge as- judge is a priest; he has knowledge of society, and its values; he is ethical; an administrator; he has decision making ability along with good listening skills; he is neutral and impartial”

Dr. Broota then gave three exercise to the delegates which included answering three question, which they did not have to disclose to anyone- Who am I/ What am I?, What I am not?, What I want to be?

The discussion continued and the Session 9 was concluded on the note that, “A Judge is a Human first. He looks at the evidence first as a normal human being and then as a Judge”.

The Session 10 began with the discussion of different types of depression, like- cyclic-depression, uni-polar depression, bi-polar depression, dysthymia depression. She says that, “no person is a bad person; their behavior is subjected to bio-chemical disorder, due to which they act in a certain manner which is general unacceptable in society”. She further added and requested the delegates to recommend in their judgments for psychological therapy, evaluation because the offender is sick and not bad by nature. It is a genetic dis-order. According to her, though everyone is not rehabilitated but certainly no one deserves a death sentence.

Further, the discussion on the personality of judges was followed. Certain points were raised as follows- every judge have beliefs and superstitions, they have attributes towards life, marriage, regions, etc. (a cognitive structure towards life, world, towards things from the past experiences & learning). Beliefs which a person have cannot be verified, example- belief in god, soul, life after death, but attitudes are verifiable. Therefore, beliefs are not alterable but attitude could be changed. As per her beliefs, every teacher and judge is supposed to mandatorily go to for a psychological evaluation. This is because beliefs, attitudes & values pre-dispose an individual to act in a particular way. Similarly, the judgments are based on perceptions which are already governed by beliefs, values. And, only then your interpretation of law begins to operate. Moreover, biases are a hug phenomenon in a judge.

SESSION 11- JUDICIAL ETHICS: STAGES OF MORAL DEVELOPMENT

SPEAKER 1- <DR. PARUL RISHI>

This session was mainly based on the ethics of an individual. The session started with a exercise named as- *An Experiential Exercise for Judges*. It was a situation based exercised, and was given to see the different responses from the delegates in different situation faced by them. Then after the exercise, Dr. Parul started with her presentation.

Where are Ethics? She said, it could be seen in three forms- in our mind, enforced by law and written in judiciary's code of conduct (like Nolan principles/ Bangalore Values). And then this question followed, who makes us Ethical or Otherwise- she answered by saying that, our values, our culture and our mind set makes us ethical or otherwise. Individual characteristics like values (defined by one-self), morals (by society) and ethics (organizations/sub-groups of society) affects a person's ethical behavior. She further added that, the philosophy to behind all the three is to distinguish between the right & wrong.

Further, the different types of values, such as stated values & operational values, were discussed. And, most of the time there is disconnect between the two while deciding, that is, these values are in conflict. The reason for disconnect is many-a-times due to not being aware of the fact that, we are doing something unethical. There is always threat to morality; and even if you are on the right track, you'll get run over, if you just sit there. This treat is due to external pressures, attitudes, biases, humanitarian concerns, etc.

The difference in the myth and reality of ethics was also discussed with the delegates. The question which arose was why it is difficult to be ethical? It is a myth that, to be ethical is quite easy, but it is always other-way round; for this, two frameworks, namely consequential framework and deontological framework were also discussed at length. Further, Dr. Rishi added that, unethical behavior is simply the result of bad apples. Ethics in judiciary can be managed through ethical codes. It was also pointed out that, ethical behavior is linked to ethical leadership.

Dr. Parul also discussed the three components of personality by Sigmund Freud, which are Id, Ego and Super Ego. She also discussed the Stages of Development given by Lawrence Kohlberg.

SESSION 12- TRANSACTIONAL ANALYSIS

SPEAKER 1- <DR. PARUL RISHI>

She started the session by giving a brief background of the transactional analysis. Transactional analysis is a system of analyzing & understanding human relationships. It was first developed by an American psychiatrist Eric Berne, drawing on the theories of psychoanalyst Sigmund Freud. Transactional Analysis is practical and useful. It gives positive communication tool and also provides for better insight into personalities & transaction. It also helps in solving personal as well as family problems and it is also easy to learn.

Transactional bias was also discussed with the delegates, where Id (pleasure principle), Ego (reality principle) and Super Ego (ethical principle) were explained in detail. According to the discussion, the human mind is like an iceberg, where we have 10% of conscious mind control regarding the will power, decision making and other 90% is our sub-conscious mind regarding the beliefs, values, identity, habits, emotions, self-confidence, resistance to change.

People generally have three states of ego, which are parent state (taught concept of life), adult state (thought concept of life) and child state (felt concept of life). Each ego state has a positive as well as negative aspect. These states were further explained using different analytical tools. The analytical tools used were- Structural analysis (Introvert/extrovert; type A/B personality), Transactional analysis (how people communicate), Stroke analysis (how people recognize each other), Game Analysis (ulterior transaction) and Script Analysis (life position).

Factors hampering and building inter-personal relations were also discussed with the delegates. Negative factors are poor listening, lack of time, emotional arousal whereas, positive factors are empathy, listening carefully, use of 'I', more focus on problem solving and no deceptive practice.

**SESSION 13- ALTERNATE DISPUTE RESOLUTION- MAPPING OF SUCCESS OF ADR
INITIATIVES IN INDIA**

SPEAKER 1- <JUSTICE ROSHAN DALVI>

Session started with the introduction of Justice Dalvi and her credentials. She continued with the presentation which she had prepared for the programme. She started her presentation by posing a question, which she usually asks the parties when they come for resolution, is there anyone in this room who would rather not have disputes settled? The session went ahead with discussion on different types of Alternate Dispute Resolutions. They are- negotiation, mediation, arbitration, neutral-evaluation, settlement conference, summary jury trial, mediation-arbitration and police action.

The session continued with discussion on different types of suits that come up settlement before the court. They are Possession Suits, Specific Performance Suits, Commercial Disputes, Corporate Litigation, Family Disputes, Partition Suits, Administrative Suits and Partner-ship Disputes. There are certain types of cases which could not be resolved through these above alternate resolutions, such as matter involving question of law, matter involving interpretation and criminal matters.

Further, the question which arose was what is the time for reference to alternate resolution? According to Justice Dalvi in pending matters any time is a good time that can be even after part trial or at the time of hearing of interim application or after the issues are framed & before evidence is recorded. Moreover, in new matters, it could be at the time of the filing itself (in case of all referable matter) or after the first hearing (as deemed fit by the judge).

The mediation is basically of two types- ICM (Information Centered Mediation, where mediator is a neutral facilitator) and PCM (Process Centered Mediation, where mediator maintains power balance). Further, the four arms of mediation were also discussed, which are the judges, coordinator, mediator and parties. After this, an exercise was given to the delegates, where five situations for resolutions were discussed.

SESSION 14- CASE MANAGEMENT AND COURT MANAGEMENT

SPEAKER 1- <JUSTICE ROSHAN DALVI>

This session started with a very famous example, where in a class a teacher shows his student a jar in which he puts few large stone and asks them, whether it is full or empty, to which the students' response was full. He then goes on to add some small stones and repeats his question, to which the answer remains same. Further, he takes some sand and put it into the jar and repeats his question which gets the same response as full. Now, he takes up a jar of water and pours the water in the jar till its brim, and repeats his question. He then asks the students the moral of the story. The moral is a person must always put his big rocks into his day first which should be followed by other small things.

“The best way to predict the future is to create it”- Peter Drucker

Management is everywhere, even in animals & birds. She discussed the elements of management which are- planning, organizing, directing, coordinating and controlling as was propounded by the management Guru Peter Drucker. Thereafter, the relevant aspects of management in judiciary were discussed. They are- non-value added items, core competence, time management, procedural simplification and paradigms shift.

A question was posed to the delegates which was what is case management? It is the management and disposition of a case in a better manner to achieve the same thing in less time, so as to improve the efficiency and to reduce the delays and to cut the cost. It also helps the practitioners & judges in becoming better in the work which they do. The ambit of case management is divided into procedural and substantive part to realize the infrastructure sensitivity. Further, the stages of Case management were discussed with the delegates, they are- plaint, service of summons, interim application, ad-interim relief, returnable date, rejection of plaint, court commissioner, oral application, disposal of suits, written statement, original document, preliminary decree, issues, admissions, evidence, compilation, arguments, judgment, judgment on arguments (summary trial), cost, ADR, and summary suits.

Justice Dalvi also discussed the aspects of court management which are as follows- scrutiny, technicalities, directions, certified copies, group matters, new suits, case tracking, expedition orders, discharge of suits on board, classification of suits, registrar's powers, facilitation counter, etc. She also discussed the requirements for effective management, they are-

precedents, judicial training (JT), court administration (CA) and High Court Practice Direction (HCPD).

SESSION 15- FEEDBACK FORMS & SUGGESTIONS

In this session, the delegates were given a feedback form to express their opinion and to review their training program. The reviews received were- the reading material given during the programme should be given in soft copy format as it will be easy to carry; there should be only one tea break in between; delegates should be taken to the higher court to experience the actual court proceedings.

The programme was concluded by vote of thanks from the delegates from Sri Lanka.