

NATIONAL JUDICIAL ACADEMY



SEMINAR FOR FOREIGN JUDGES [BANGLADESH] (SE-3)

**(For District Judges/Sessions Judges, Additional & Joint Sessions
Judges and Additional District Judges [Level-1])**

December 7th to 13th, 2018

PROGRAMME REPORT

Submitted by

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OBJECTIVE OF THE SEMINAR

A Memorandum of Understanding (MoU) has been entered between the National Judicial Academy, India (NJA) and the Supreme Court of Bangladesh for organising training and capacity building programmes for Bangladesh Judicial Officers. For the year 2018-19, four batches comprising of 40 judicial officers will visit India and participate in a 15 day training programme.

The training programmes will be held in two Phases. First Phase will be held at the National Judicial Academy and Second Phase will be organized by identified and designated State Judicial Academies, within the framework of a training module and curricula designed by the National Judicial Academy.

In pursuance of the said MoU, a 7 day programme for District Judges/Sessions Judges, Additional & Joint Sessions Judges and Additional District Judges [Level-1] nominated by Bangladesh was organized by NJA with the objective of training and capacity building of the participant judges. The Programme included sessions on constitutional, civil, criminal and human rights law and correlative jurisprudence. The conference also aimed to acquaint participants with elements of judicial behaviour- ethics, neutrality and professionalism, skills of judging and judgment writing. The programme facilitated discussions on court and case management and use of ICT in administration of justice.

RESOURCE PERSONS

1. Hon'ble Mr. Justice U. U. Lalit, Judge, Supreme Court of India
2. Hon'ble Mr. Justice M. S. Sonak, Judge, Bombay High Court
3. Hon'ble Dr. Justice K. J. Thaker, Judge, Allahabad High Court
4. Hon'ble Mr. Justice Sanjiv Khanna Judge, Delhi High Court
5. Hon'ble Mr. Justice Ravi R. Tripathi, Former Judge, Gujarat High Court
6. Hon'ble Mr. Justice Ved Prakash Sharma, Chairperson, M.P. State Law Commission,
Bhopal
7. Hon'ble Ms. Justice Roshan S. Dalvi, Former Judge, Bombay High Court
8. Hon'ble Mr. Justice K. C. Bhanu, Former Judge, Andhra Pradesh High Court
9. Hon'ble Mr. Justice U.C. Dhyani, Former Judge, Uttarakhand High Court
10. Hon'ble Mr. Justice Dharnidhar Jha, Former Judge, Patna High Court
11. Mr. R. Venkataramani, Senior Advocate, Supreme Court of India
12. Mr. Atul Kaushik, Former Additional Secretary
13. Prof. (Dr.) Faizan Mustafa, Vice Chancellor, NALSAR University of Law
14. Prof. Dr. A. Lakshminath, Former Vice Chancellor, Chankya National Law University
15. Prof. V. K. Dixit, Professor, National Law Institute University, Bhopal
16. Dr. Jagadeesh N. Reddy, Professor & HOD, Forensic Medicine & Toxicology, Vydehi
Institute of Medical Sciences & Research Centre
17. Mr. Nikunj Brahmhatt, Assistant Director, Gujarat Forensic Sciences University,
Gandhinagar

SESSION 1

Overview and architecture of the Indian Constitutional Arrangement

Speakers : Dr. Justice K.J. Thaker, Justice Mahesh S. Sonak & Mr. R. Venkatramani

The speaker discussed the framing of Constitutions as Constitutional experiments and referred to the early experiments in establishing a code by which nations were governed. The speaker referred to efforts like Hammurabi Code of Law, French system of governance under Napoleon Bonaparte and the American federation of states as examples of constitutional experiments and traced the evolution of state creation from Hammurabi till the present day. The speaker highlighted that the movement in constitutional experiments have been towards creation of a state of order wherein equality prevails. It was discussed that varied experiments in constitution making have resulted in divergent features of Constitutions. The speaker discussed various historical attempts at Constitution making across the globe from the first wave of Constitution-making i.e. drafting of the American constitution to the Asian experiments at Constitution making which is part of the seventh wave. The speaker discussed the relevance of the composition of the Constituent Assembly (representative or composed of a group of elite) and its impact on the Constitution; its social acceptance, ratification and the longevity of the Constitution. The speaker also discussed the divergences in constitutions on account of the cultural, historical, social background and influences. The speaker stressed on the importance of the endurance of the Constitution for social stability and also for adjudicators. The speaker stated that the criticism of the Indian Constitution as lengthy and bulky is unfair. India was under a period of transition from colonial regime to self –governance and in structure of state and functions of the wings of the state in structure was the need of the hour to ensure stability. The speaker discussed the important players in a constitutional structure and highlighted electoral representation as a significant feature common to most Constitutions. The speaker stressed that constitutional structures and codes need to grow organically from our roots and our experiences rather than be transplanted from other countries. The Indian Constitution was built on histories, past traditions and also borrowed from its experiences. The speaker stated that the Election Commission, Legislative Assembly and the Institutions of the President and the Governor are the most important institutions in Constitutional governance. The speaker discussed the *AK Gopalan* case and *Maneka Gandhi* case; and stressed that the existence of statutory law is not enough to permit an action, the law has to be just, fair and reasonable as mandated by the Constitution of India. The speaker also drew comparisons between the Indian Constitution and the Constitution of Bangladesh to highlight the similarities. The speaker also

threw light on the development of the Constitutional jurisprudence on Fundamental Rights, its scope and permissible restrictions on such rights. The participants raised a question as to the concept of 'free market constitution' to which the speakers replied that this concept was not mentioned in the Constitutional text but can be inferred from the object, vision and the economic philosophy of the Constitution.

SESSION 2

Indian Judiciary: Organizational Structure and Jurisdiction

Speakers: Dr. Justice K.J. Thaker, Justice Mahesh S. Sonak & Mr. R. Venkatramani

The speaker discussed the important features of the framework of the Constitution of India and stated that the Constitution protects itself through the Constitutional agencies and the law makers. The speaker dwelt on the issue of whether inclusion of fundamental rights in the Constitution gives these rights an enhanced status as compared to rights provided in a Charter (e.g, in Canada) or in a Bill of rights (e.g, USA). The speaker discussed the unique right to directly petition the Supreme Court of India in cases of violation of Fundamental Rights. The speaker further elaborated on the development of jurisprudence on the 'Right to Life' under Article 21 of the Constitution of India through the judgments of the Supreme Court of India.

The speaker also discussed the jurisdiction and powers of the Supreme Court and High Courts and elaborated upon on the rationale for giving so much power to the High Courts and the Supreme Court. The speaker discussed the power of judicial review and stated that the Supreme Court and High Court can declare any law as invalid. The case of Marbury v. Madison was also discussed in detail during the course of the session. The speakers dwelt on the social contract theory and highlighted that the term 'We the People' signifies that the Constitution of India and the authorities under the Constitution have been constituted by the people as a social contract with the objective of regulating society for productive enjoyment of rights.

SESSION 3

Goals, Role and Mission of Courts: Constitutional Vision of Justice

Speakers: Justice Mahesh S. Sonak & Mr. R. Venkatramani

The basic structure of the Constitution of India was discussed to highlight the vision enshrined in the Constitution and the values and goals that should be upheld by the courts. The Constitution of India was compared to a social justice idea guaranteeing a certain way of life and freedom for achieving justice. The dimensions of constitutional justice – equality, liberty, freedom of speech and expression, freedom of religion etc. were also highlighted during the session. It was stated that the role of judges encompasses the preservation of fundamental rights and removal of inequality. The speaker also discussed the landmark judgments relating to constitutional amendments i.e *Sajjan Singh, Shankari Prasad, Golaknath v State of Punjab* and *Kesavnanda Bharti v. Union of India*.

SESSION 4

Group Discussion

Speakers: Justice Mahesh S. Sonak & Mr. R. Venkatramani

In the group discussion session, the participants were divided into groups and were engaged in discussion on the topics – ‘Social Context Judging in Bangladesh’ and ‘Tackling Pendency in Judicial System of Bangladesh’. The major points highlighted in the discussions are –

Topic- ‘Social Context Judging in Bangladesh’

- Public Interest Litigation has been used in Bangladesh for enforcing environment rights and protecting liberty of the people.
- Non-governmental organization including Bangladesh Legal Aid and Services Trust (BLAST) and Bangladesh Environmental Lawyers Association have played a significant role in public interest litigation.
- Industrial Pollution has been reduced significantly due to interventions by the Bangladesh Judiciary through its orders in Public Interest Litigations.

Topic - ‘Tackling Pendency in Judicial System of Bangladesh’

- ADR has proved to be very effective in reducing pendency as 80% of the cases are compromised by the litigants in Bangladesh.

- Creation of special courts and tribunals for important areas of litigation have helped manage the judicial workload.
- Case management timelines are not strictly followed which adds to the delay.
- Diversion of cases to ADR in pre-trial stage should be considered to reduce the burden of the courts.
- Digitalization of courts was suggested as a tool to expedite justice delivery.
- The need for strong judicial governance systems was emphasized as a measure to incorporate court management and case management skills in judicial administration.
- The challenges in tackling pendency highlighted are-
 - Lengthy procedures prescribed under the procedural law result in delay in disposal of cases.
 - 80% of criminal cases are due to land disputes so there is a need to minimize land disputes to reduce the influx of cases before the court.
 - Delay caused by Advocates and non-cooperation by Advocates were highlighted as a challenge in reducing pendency.
 - Non-induction of modern technology in judicial system was is also as a cause of delay.
 - Lack of a separate and independent agency for investigation was highlighted as a problem in expeditious disposal of cases on account of the delay caused by the investigating agency
 - Infrastructural issues
 - Large number of vacant positions in the judicial system of Bangladesh

SESSION 5

Principles of Evidence: Appreciation in Civil and Criminal Cases

Speakers: Justice U.U. Lalit, Justice K.C. Bhanu & Justice Dharnidhar Jha

The speakers emphasized that appreciation of evidence was a question of fact to be decided by the judge. The varied evidence –documentary, oral and circumstantial and the principles for appreciation of such evidence was also discussed.

.It was stated that the following factors must be considered while appreciating evidence –

- Whether the evidence is direct,

- Trustworthiness of the evidence,
- Whether the evidence passes the test of cross-examination,

With regard to the appreciation of medical evidence, it was stated that a doctor's report or a ballistics report requires corroboration. The qualification of the experts must be examined to ensure that the expert has requisite qualification to give evidence. It must also be verified whether the finding and reasons given for the finding are supported by the evidence.

The speakers distinguished between admissible and inadmissible evidence and explained how admissible and inadmissible parts of a report can be segregated. In such cases, only the objective findings are admissible such as injuries, blood stain, presence of certain materials etc. while subjective findings are not admissible.

The speakers discussed the admissibility of evidence received from the accused and chance witnesses. The admissibility of statements made under Section 32, Indian Evidence Act, 1872 and the factors to consider while appreciating such statements were also discussed in the session. The speaker also dealt with concept of chance witness and it was stated that the judge should critically examine the circumstances surrounding his presence.

The speakers highlighted the similarities in the evidence law in India and Bangladesh and stated that the approach in cases while appreciating evidence should be to arrive at a just and proper conclusion. The speakers discussed the relevance of circumstantial evidence and stressed on the principles for admissibility of circumstantial evidence emphasized in *Sharad v. State of Maharashtra (1984)*. The speakers concluded by discussing the relevance and principles for considering relevance of dying declarations.

SESSION 6

Evidentiary Presumptions; Onus and Burden of Proof

Speakers: Justice U.U. Lalit, Justice K.C. Bhanu & Justice Dharnidhar Jha

The speakers discussed that in every criminal justice system it is upon the prosecution to prove the accused guilty. It was further stated that the basic presumption in every criminal justice system is that the accused is innocent until proven guilty. Thereafter the speaker discussed the concept and rationale of burden of proof under the Indian Evidence Act, 1972. The speakers emphasized that in case of any plea of defence made before the court, the court has to start

from the fact that these defences are not ordinarily available and the onus is on the person making such plea to prove that the defence applies in the case at hand. Presumptions under the Indian Evidence Act, 1872 were discussed and concept of reverse burden of proof was explained. The speaker also discussed the presumptions under Section 113A and 113B. The participants raised the issue of whether the presumption of legitimacy would continue to be applicable in light of newer scientific methods to prove legitimacy. In response, the speakers stressed on the social morality reasons for continuing to adhere to such presumption under law.

SESSION 7

Electronic Evidence: New Horizons, Collection, Preservation and Appreciation

Speakers: Justice Sanjiv Khanna & Justice K.C. Bhanu

The speaker discussed the relevance of electronics in crime detection and investigation. The speaker dwelt on the concept of digital footprint and the increasing relevance of electronic evidence in cases, whether matrimonial matters, criminal cases or corporate matters. The speaker stressed on the important factors in appreciating electronic evidence i.e. relevancy, admissibility, mode and manner of proof and authenticity. The speaker also stressed on the need for uniform judicial practice in appreciating electronic evidence. The speaker dwelt on the evidentiary value of electronic evidence and admissibility of evidence procured from electronic devices. The speaker also discussed the challenges in procuring electronic evidence such as call records, e-records from servers based outside India and checking the authenticity of the electronic evidence placed before the court. Lastly the speakers highlighted the judgment passed by the Supreme Court in *Anvar v. Basheer*.

SESSION 8

Forensic Evidence in Civil and Criminal Trials; DNA profiling

Speakers: Dr. J.N. Reddy & Mr. Nikunj Brahmhatt

The speaker highlighted the significance of DNA Profiling as evidence in criminal cases especially in identification of victims, identifying and linking accused to the crime and determination of paternity and maternity of an individual. The speaker discussed the science of DNA profiling and the biological sources required to conduct the test for DNA Profiling. It was stated that the biological evidence also helps in proving or disproving an alibi. The

speakers discussed the importance and limitations of forensic evidence. The speakers also highlighted the concerns in collection and preservation of DNA and forensic evidence which results in contamination or destruction of the evidence. The speakers also discussed the landmark judgements on appreciation of forensic evidence.

SESSION 9

Judge the Master of the Court: Court Management & Case Management

Speakers: Justice U.C. Dhyani, Justice Ravi R. Tripathi & Justice Roshan S. Dalvi

The speaker discussed the principles of management propounded by Peter Drucker – planning, organization, directing, co-ordinating and control, were highlighted and the significance of management, leadership and team work in judicial administration were emphasized. It was stated that it is considered that the judge is performing a divine duty and therefore, the judge should perform his official duties with sincerity and dedication. The speakers emphasized that the judge is the leader and has a significant role in ensuring smooth functioning of the court. It was stated that the judge must ensure that the background processes of the court are streamlined so as to ensure efficient and smooth conduct of the court. The judge as the administrative leader must ensure that the court functions effectively and encourage the court staff to ensure positive outcomes. Thereafter the speakers discussed the various administrative challenges in the judicial system *viz.* access to justice, backlog of cases, increasing cost of litigation and delay in disposal. It was discussed that bench and bar relations are also an important facet of court management and it was stated that the judges should not unnecessarily enter in confrontation with the advocates. The issue of corruption in the judicial system as a challenge in judicial administration was also discussed during the course of the session.

SESSION 10

Elements of Judicial Behaviour- Ethics, Neutrality and Professionalism

Speakers: Justice U.C. Dhyani, Justice Ravi R. Tripathi & Justice Roshan S. Dalvi

The speakers stated that the judge as the master of the court should be driven by passion for his work. The speaker stressed that the judge must be innovative in his work and must have job satisfaction for the work done each day. The speaker attributed the waning faith in the justice

system to the mechanical approach of the judiciary. The speaker discussed the concepts of docket explosion and docket inclusion and opined that it is better to have docket explosion rather than docket inclusions as docket inclusion results in preventing some people from accessing the judicial system. The judges were advised to study their district and the court when taking charge in a new posting to understand the problem of the district and court. On ethics, it was emphasized that the persona of a judge should include traits of humility, helpfulness and compassion. The judges were advised to be aware of their personal bias and prejudices and to ensure that their bias does not influence their work. The speakers elaborated on the standards of judicial ethics prescribed by the Bangalore Principles of Judicial Conduct and emphasized on the development of judicial temperament and professionalism. The speakers stressed on adherence to precedents as a form of judicial discipline, wherein similar cases are decided in the same manner resulting in stability and certainty in judicial outcomes. The judges were advised to refrain from passing strictures on lower courts as these orders are demoralizing and would impact the public perception of the judiciary.

SESSION 11

ICT and E-Judiciary: Indian Perspective

Speakers: Justice Ravi R. Tripathi & Mr. Atul Kaushik

The benefits of ICT and the innovations and achievements of the Indian judiciary in integrating ICT into the judicial system were discussed to provide a comparable standard of best practices which can be adopted by the judiciary in Bangladesh. It was stated that ICT empowers the court to meet their responsibilities with lesser staff and in reduction of hours of operation. The E-courts project, CIS and the E-filing system were explained and its achievement in inter-linking agencies in the criminal justice system, providing decision support systems, transparency and public convenience were highlighted in the session. The speaker also elaborated upon the development of NJDG (National Judicial Data Grid) and highlighted some recent developments like eFiling, ePay, and NSTEP (National Service and Tracking of Electronic Processes). It was stated that these steps have been taken to improve the quality of justice, access to justice, and public trust and confidence in the court as an institution. The major causes of delay in disposal of cases in India and Bangladesh were discussed and the solutions adopted were highlighted. The security concerns in protection of judicial data on the NJDG and the mechanisms to protect the data on NJDG were discussed.

SESSION 12

Criminal Justice Administration and Human Rights

Speakers: Justice U.C. Dhyani & Justice Ved Prakash Sharma

The initiation of the human rights discourse as a consequence of the atrocities witnessed in the World Wars and the exhaustive documentation and recognition of human rights through international law was discussed. It was stated that human rights are not a creation of law but are vested in every individual from birth; and are necessary for conducive life and development. Human rights was emphasized as the core of democracy, rule of law, peace and tranquility. Recognition of human rights in the Constitutions of India and Bangladesh were also discussed during the session. The speakers drew the attention of the participants to the right to be heard as a facet of human rights in criminal justice. The speakers referred to human rights as an inbuilt mechanism of checks and balances in the criminal justice system.

The speakers discussed the provisions of the Universal Declaration of Human Rights and emphasized on the UDHR as the nucleus of the Constitutions of India and Bangladesh. The speaker stated that human rights are natural rights vested in every person from birth and are inalienable. The speaker discussed the definition of human rights under the Protection of Human Rights Act, 1993 and discussed the relevance of human rights in the criminal justice system as an inbuilt mechanism of checks and balances. Articles 20, 21 and 22 of the Constitution of India and Articles 32 and 35 of the Constitution of Bangladesh were stressed on as the foundation of the criminal justice system.

SESSION 13

Human Rights: Fair and Impartial Investigation

Speakers: Justice U.C. Dhyani & Justice Ved Prakash Sharma

In the session on *Human Rights: Fair and Impartial Investigation*, the speakers stated that adverse inferences should not be made against accused on account of his non-cooperation as the accused has the right to have the charges proved against him without self-incrimination. The speaker also dwelt on the duty of the police to disclose inculpatory as well as exculpatory materials against the accused, as the objective of a trial is to arrive at the truth. The speaker also dwelt on torture, forcing confessions, arm-twisting and pressurizing suspects by police as

a violation of human rights. The speaker also stressed on the constitutional rights under Article 20 of the Constitution of India and Article 35 of the Constitution of Bangladesh with regard to investigation and criminal trial. The standards prescribed in International law for protection of human rights during police investigation were discussed. The speaker discussed various methods to minimize human rights violation in investigation such as –

- Adoption of a standard operating procedure in investigation.
- Training of police in modern investigation techniques
- Improved supervisory mechanism.
- Strict and prompt administrative action on complaints of atrocities
- Adoption of Victim support mechanism
- Establishment of civilian oversight bodies

SESSION 14

Judging Skills: Art, Craft and Science of drafting judgments

Speakers: Justice U.C. Dhyani & Justice Ved Prakash Sharma

The speakers dwelt on the objective of writing a judgment and the necessary elements of a good judgment i.e. clarity, comprehensiveness, brevity, adequate preparation, planning and structuring of content, timely delivery, judicious and legal soundness. It was stated that a judgment requires systematic study, evaluation and communication. It was stated that the judgments should address all the points which were raised during the course of the arguments. The judges were advised to write their judgment in such a manner so that it is logically connected with the earlier and subsequent paragraph. The practice of reliance on precedent without scrutiny and verification of applicability was discouraged and the participants were advised to avoid unnecessary reliance on precedents and not to refer to judgments only on the basis of the head note or digest note.

SESSION 15

Identification of Ratio in a Precedent

Speakers: Prof. (Dr.) V.K. Dixit & Prof. (Dr.) A. Lakshminath

The speakers discussed the common law origins of the *doctrine of stare decisis*. Precedent was eluded to as a generalization of facts and establishment of a certainty in outcome in similar fact scenarios. The speakers elaborated on the precedents as a measure of judicial discipline and certainty, and discussed the prerequisites of a binding precedent. The theory of precedent or stare decisis is founded on judicial discipline to stand by the decision of earlier court or superior court and is a generalization of the facts and decision of the earlier decision of the court. The speakers urged the participants to sift through the material and immaterial facts in a precedent and establish generalizations which can be applied to the case at hand. The wider the generalization greater is the scope of application. It was stated that precedents should be not be followed if it leads to unjust outcome. In such case it should be distinguished. The concepts of *obiter dictum*, *ratio decidendi*, *per incuriam* and *sub silentio* judgements were discussed. The speakers dwelt on the precedential value of overruled judgments and partly overruled judgments

SESSION 16 & 17

Landmark Judgments in India

Speakers: Prof. (Dr.) V.K. Dixit, Prof. (Dr.) Faizan Mustafa & Prof. S.P. Srivastava

In the discussion on *Landmark Judgments in India*, the speakers dwelt on the recent judgments pronounced by the Supreme Court of India with specific emphasis on judgments relating to empowerment of women. The speaker critically analyzed the reasoning of the Supreme Court in the judgments of *Indian Young Lawyers Association*, *Shayara Bano*, *Joseph Shine and Navtej Singh Johar*. The speakers also traced the development of law on Muslim women's rights in marriage and discussed the landmark judgments in *Shah Bano*, *Danial Latifi and Shayara Bano*. The speakers stressed on the need to understand the rationale behind the judgments and stated that the law must be interpreted in light of the cultural, social and religious circumstances in India. The speakers also discussed the judgments on judicial appointments, from the *SP Gupta* case to the *NJAC* Case to highlight the development of law on judicial independence.