

NATIONAL JUDICIAL ACADEMY



SEMINAR FOR FOREIGN JUDGES [BANGLADESH]

SE-6

15th to 21st February 2019

PROGRAMME REPORT

PROGRAMME COORDINATORS:

Ms. Paiker Nasir & Mr. Rahul I. Sonawane

Faculty, NJA

The National Judicial Academy organized a “Training Programme for Bangladesh Judicial Officers” from 15th to 21st February, 2019. The programme was divided into seventeen sessions over the duration of seven days along with three study tours. The participants were a mixed group of District Judges/Sessions Judges, Additional & Joint Sessions Judges and Additional District Judges. The programme facilitated deliberations among participants with the objective to discuss the Indian Constitutional Arrangement; Indian Judiciary: Court Management & Case Management; E-Judiciary; Judging Skills; Criminal Justice System of India and Landmark Judgments of India.

SESSION 1

Overview and Architecture of the Indian Constitutional Arrangement

Speakers: Justice N. Kotiswar Singh & Justice G. S. Kulkarni

The session commenced with emphasis that the main purpose of a judge is to serve justice and to provide the same the Constitution of India was drafted. Which happens to be the worlds’ longest codified Constitution. The uniqueness in the contents and spirit of the Indian Constitution was stressed upon. Part I and Part III of the Constitution were elaborately discussed. It was stressed that Part III of the Constitution is the most important part as it contains the provisions regarding fundamental rights. Thereafter, the difference between Part III [Fundamental rights] and Part IV [Directive Principles of State Policy] was highlighted. The discussion also underlined the similarities between the Constitution of India and the Bangladesh Constitution.

SESSION 2

Indian Judiciary: Organizational Structure and Jurisdiction

Speakers: Justice N. Kotiswar Singh & Justice G. S. Kulkarni

The session commenced by emphasizing that Indian judiciary is an independent body separate from the executive and legislative wings of the Government of India. The organizational set-up of the Judiciary in India was elaborated upon with discussion on the procedure for appointment of judges in the Supreme Court, High Court and District Judiciary. The deliberation discussed some of the landmark judgments like- *I.C. Golaknath and Ors. vs State of Punjab and Anrs.*¹, *Maneka Gandhi vs Union Of India*², *Kesavananda Bharati v. State of Kerala*³, *NJAC Judgment*⁴, *the Judges' Transfer Case*⁵ and their impact on the democratic set-up of India.

SESSION 3

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

Speakers: Justice N. Kotiswar Singh & Justice G. S. Kulkarni

The session commenced by emphasizing that the main goal of courts is to secure and impart justice. The role of the judiciary is to protect the rights of the people against the ever expanding powers of government. The only check that the Constitution has provided to this runaway inflation of power is the judiciary. In other words, judiciary is the guardian of the conscience of the people as well as of the law of the land. The discussion also emphasized the significance of Article 14 of the Indian Constitution, which prohibits the state from denying to any person equality before the law or equal protection of laws. No discrimination is permitted as between citizen and citizen and no

¹ 1967 AIR 1643, 1967 SCR (2) 762

² 1978 AIR 597, 1978 SCR (2) 621

³ (1973) 4 SCC 225

⁴ Supreme Court Advocates on Record Association v. Union of India (2016) 5 SCC 1

⁵ S.P. Gupta Vs. Union of India (AIR 1982 SC 149)

citizen is branded as a second class citizen or suffers from any disqualification because of his caste, community or sex. *Sabrimala case*⁶ was discussed in this regard. Thereafter, the rights under Article 21 of the Indian Constitution like- Right to Livelihood, Right to food, Right to Education, Right to housing, Right to health were discussed. Cases like *Justice K. S. Puttaswamy (Retd.) & Another v. Union of India & Ors* ⁷, *Bandhua Mukti Morcha v. Union of India*⁸ and *Olga Telis v. Bombay Municipal Corporation & Ors*⁹ were discussed. The concept of Locus Standi was also discussed in brief.

SESSION 4

Elements of Judicial Behaviour- Ethics, Neutrality and Professionalism

Speakers: Justice N. Kotiswar Singh & Justice G. S. Kulkarni

The session accentuated the basic tenets of ethics, neutrality and professionalism among judges. Initially deliberation focused on the 16 canons of judicial ethics and emphasized that these canons are the “restatement of the values of judicial life” and are not meant to be exhaustive but illustrative of what is expected of a Judge. These canons serves as a guide to be observed by judges, essential for independent, strong and respected judiciary, indispensable in the impartial administration of justice. The origin and meaning of ethics was discussed and emphasis was laid on values of neutrality, independence, professionalism and sensitivity to the needs of litigants. Various sources of ethical norms for judges were discussed that included Constitution of India, Bangalore principles of judicial conduct and the restatement of values of judicial life. Further it was stated that judges survive on public confidence and to maintain the same independence, impartiality, integrity, propriety, equality and competence & diligence should be inculcated in a judge. It was highlighted that the values and standards required from a

⁶ *Indian Young Lawyers Association & Ors. v The State of Kerala* Writ Petition (Civil) No. 373 of 2006

⁷ (2018) 1 SCC 809

⁸ (1993) 3 SCC 19

⁹ (1985) 3 SCC 545 : AIR 1986 SC 180

judge varies with changes in the society and it is important that judges be aware of these changes. Judges must constantly be aware of their role and position in the society.

SESSION 5

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

Speakers: Justice Sanjib Banerjee & Justice Ravi Tripathi

The session commenced with discussion on court and case management schemes in India. It emphasized the significance of court and case management in the smooth functioning of the justice delivery system. Emphasis was also placed on the fact that a judge is the master of the court and therefore, it is his/her outmost duty to be aware about everything happening in the court. A judge must ensure that all the stakeholders of the court have faith in him and must be sure that they are at the right place to seek justice. Such public trust in the eyes of public can only be achieved when court and case management is done with the sincerity and justice is delivered. It was suggested that a judge must always remember that he/she plays the most essential role in speedy disposal of the disputes that leads to the augmentation of public trust and confidence in the justice delivery system. It was also suggested that a judge must be open to ideas from the stakeholders that may enhance the systems in the court. Scarcity of resources and lack of infrastructure also formed an integral part of the discussion.

SESSION 6

ICT and E-Judiciary: Indian Perspective

Speakers: Justice Sanjib Banerjee & Justice D. Seshadri Naidu

The session commenced by drawing similarities and differences in the judicial systems of India and Bangladesh. The augment of ICT in the Indian Judicial system and how the e-courts projects were phased out was elaborated upon. In what way the use of ICT enhances judicial productivity both quantitatively and qualitatively was elucidated to the

participants. It was accentuated that the use of ICT undoubtedly makes the justice delivery system much more affordable, accessible and transparent. Alongside, the significance of the National Judicial Data Grid (NJDG) was stressed. The working of NJDG was also demonstrated to the participants.

SESSION 7

Judging Skills: Art, Craft and Science of Drafting Judgments

Speakers: Justice D. Seshadri Naidu, Justice Ravi Tripathi & Justice R.Y. Ganoo

The session emphasized that judgement writing can be of two types i.e., Prescriptive or Descriptive. Writing of judgements in a story-telling manner is associated with descriptive judgment writing. On the other hand, the language of the judgment is also very important. A judge must write in a manner that is easy for all to understand and follow rather than, resorting to the toughest form of vocabulary. The best way to write a judgement is to keep the reader in mind. A judge must have clear thinking to write a clear judgment. The discussion suggested that reliance on summaries written in law reports must be avoided. The best way to write a judgment is by arranging the segments like- table of contents, issues for determination, facts and procedural history, analysis and discussion, conclusion, disposition and bibliography. It was also suggested that a judge must try dictating the judgment at the earliest this will ensure lesser probabilities of errors in the judgment.

SESSION 8

Identification of Ratio in a Precedent

Speakers: Justice Sanjib Banerjee, Justice D. Seshadri Naidu & Justice R.Y. Ganoo

The session began with discussion on the meaning of Ratio Decidendi and how it is different from Obiter Dicta. It was stressed that the underlying principle upon which the authoritative element of a precedent is formed is often termed as ratio decidendi. The judges were asked to be cautious in understanding the difference between the two. The

difference between Judicial Precedents and Legislative Rules was emphasized i.e., judicial precedents gets evolved with due course of time however, legislative rules are endorsed and are specific in principle. It was also pointed out that precedents are persuasive and binding whereas *Stare Decisis* means, standing by the things decided. It was also explained that it is for the judge to interpret which part of the former decision is binding. Even the binding judgement need not be binding if they can certainly extricate it.

SESSION 9

Principles of Evidence: Appreciation in Civil and Criminal Cases

Speakers: Justice Dharnidhar Jha, Justice K. C. Bhanu & Justice A. M. Thipsey

The session drew similarities and differences in the civil and criminal codes of India & Bangladesh such as – key provisions on appreciation of evidence, procedure for recording of evidence, circumstantial evidence, evidentiary presumption, onus and burden of proof. It was stressed that there is no universal rule or formula that state as to what constitutes sufficient evidence to establish a fact. It was suggested that the evidence on record should always be suitably and prudently considered and appreciated. However, conflicting versions with apparent actualities makes appreciation of evidence all the more difficult. Therefore, a judicial officer must imbibe fair amount of common sense, perceptiveness, knowledge and understanding to regulate her/his coherent demeanor. Some of the leading case laws in this regard were also discussed upon.

SESSION 10

Evidentiary Presumptions; Onus and Burden of Proof

Speakers: Justice Dharnidhar Jha, Justice K. C. Bhanu & Justice A. M. Thipsey

The session initiated by emphasizing that the foremost requirement for a judge while presiding over a matter is that he/she need to unbiased. The judge must take into

consideration the neutrality and credibility of evidence while appreciating the same. It was suggested that while appreciating evidences a judge should keep in mind that whether – the witness is present or not, if he/she is present it is credible or not, conduct of the witness at the scene of occurrence, whether he/she is a interested witness or not and lastly he/she is disposed towards the offence or not. It was observed that the rule of presumption is a rule that courts may or shall draw a certain inference from a certain fact or evidence, unless and until if so indorsed the truth of such inference is refuted. It was opined that presumption makes a prima facie case of a party for whose benefit it exists. The three types of presumption under the Evidence Act i.e., may presume, shall presume and conclusive proof formed an integral part of discussion. Expert opinion under Section 45 of the Indian Evidence Act was also elaborated upon. It was emphasized that court is not bound by the evidence of the experts which is to a larger extent advisory in nature. The court must derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into consideration the authorities on the point on which he deposes. Documentary evidence and its admissibility was also discussed. Thereafter, the discussion preceded to Section 106 of the Indian Evidence Act which talks about burden of proving fact especially within knowledge.

SESSION 11

Cyber Crimes & Electronic Evidence: New Horizons, Collection, Preservation and
Appreciation

Speakers: Justice Dharnidhar Jha & Justice K. C. Bhanu

The session initiated with discussion on what Digital Evidence and Cyber-crimes are. In the age of technology electronic evidence is inevitable and judiciary has been put at a task to appreciate the electronic evidence. Thereafter, the stages of leading electronic evidence and the standards of proof with reference to section 65B of Indian Evidence Act, 1872 were elaborated. The problems in proving and appreciating the magnetically recorded

confessions and their evidentiary value in criminal trials was discussed. The discourse also discussed some of the important cases viz., Anvar v/s. Bashir etc. At this point of time most of the participants expressed their problem saying that unlike India, Evidence Act & Procedural laws of Bangladesh are not suitably amended to include leading and appreciation of electronic evidence. To this problem, panel members suggested that even in absence of suitable amendment, they can accept & appreciate electronic evidence by applying the same standard as that of general documentary evidence, because in today's digital world, electronic evidence is inevitable in each and every case. With this remark, session on electronic evidence was concluded. *(After this session, participants were taken to District Court, Bhopal for field visit)*

SESSION 12

Forensic Evidence in Civil and Criminal Trials; DNA profiling

Speakers: Prof (Dr) Abhishek Yadav & Prof (Dr) Jayanti Yadav

The session commenced with brief introduction to forensic science and its importance in civil and criminal trials. It was highlighted that forensic has two wings viz. Forensic Medicine and Forensic Science and both are useful for the judiciary in arriving at the right conclusion in a trial before them. Forensic evidence is based on Locard's Exchange Principle which says - "Every contact leaves a trace". The job of forensic expert is to find out that trace and render its evidence before the court. During the course various sub-categories of forensic experts and their role was discussed. Those categories included Forensic Narcotics, Forensic Toxicology, Forensic DNA analysis, Forensic Serology, Forensic Ballistics etc. Concepts like DNA fingerprinting, DNA profiling and DNA data banks were discussed in details with its importance in the justice delivery system. Furthermore, the advantages and disadvantages of forensic evidence were discussed. Major advantages included scientifically proven evidence because man may lie but circumstances may not, conclusive nature of forensic evidence, reliability etc. whereas disadvantages included improper collection of evidence may vary the result, improper

sampling etc. Some of the important cases like Sheena Bora murder case, Rajiv Gandhi Assassination case etc. relating to collection, preservation and appreciation of forensic evidence were discussed. The niceties of autopsies and related evidentiary also formed an integral part of the discussion.

SESSION 13

Fair Sessions Trial

Speaker: Justice S.S. Phansalkar-Joshi

The participants were asked what “fair” means to them and what do they understand by “fair trial”? what it is to all the stake-holders in a trial (stake-holders included Victim, Accused, Witnesses and also society at large). It was emphasized that procedural justice is very important aspect of a Fair Criminal Trial. Thereafter, various attributes of fair trial viz. speedy trial, presumption of innocence, right of representation by lawyer of choice, right to silence of accused, importance of public trial and public hearing, fair investigation, independent and impartial courts etc. were discussed. Some practical problems like hostile witnesses, weak investigation were also elaborated with day to day illustrations. It was suggested that a judge should not be a mute spectator in a trial rather a judge whenever required should take a lead to do the ultimate justice, this is a fair trial principle. It was submitted that most of the attributes to fair trial are provided in the Constitution and judges should try their best to follow these constitutional ideals during trial.

SESSION 14

Criminal Justice Administration and Human Rights

Speaker: Justice S.S. Phansalkar-Joshi

The session commenced with emphasis on “Human Rights”. The reason behind this terminology is that these are the intrinsic rights of the human beings. Every human enjoys

it merely by reason that he has been born as a human. These rights are not conferred by state on human beings but they were there even before state as an entity came into existence. State has just formally recognised these rights. In fact, even if one wants, no human being can surrender/waive his human rights because by nature they are inalienable. Such is the sanctity attached to the human rights and judiciary has been vested with responsibility to protect these rights. These human rights includes rights of accused, rights of victim and rights of society at large. Rights of accused include right to be produced before magistrate within 24 hours of arrest (Art. 22 of Indian Constitution), right against self-incrimination and protection from ex-post facto laws, right to remain silent, right against exploitation, right to protection from torture in custody etc. Various important case laws on the rights of accused which included Aghanoo Ganesha v/s. State of Maharashtra, Maria Swaraj Case, Selvi v/s. State of Karnataka, M H Hoskot Case, D K Basu case etc were discussed. The later part of the session discussed stressed that various national documents like Constitution and legislative Acts and also international documents like UDHR, ICCPR etc. have formally recognized human rights and expect the judiciary to act as a guardian of those rights. *(After this session, participants were taken to AIIMS, Bhopal for a field visit)*

SESSION 15

Art of Hearing: Promoting Rational Discourse in Courtroom

Speakers: Justice K. Kannan & Prof. V. K. Dixit

The session accentuated that listening skill is a great skill for judges. A judge should be a very good listener. To emphasize the same a YouTube video of William Ury on “The Power of Listening” was shown to the participants. Listening helps your mind change, it connects you to the other one, it builds a trust and it makes more likely to get “YES”. He said listening is a cheapest way of communication. Judges are expected to be receptive and hence, listening skill is much needed skill for a judge. It was suggested that a judge

must also comprehend what is not said in the court. Judges should try to understand the emotions of the litigants. Listening from the bench builds confidence in the mind of litigant and public about the judge and the judicial system. Four major kinds of listening viz. Active Listening, Passive Listening, Involved/attentive Listening & Detached/uninterested Listening were discussed. Judges are expected to be active listeners or at least attentive listeners. It was also highlighted that hearing by judges should always be active hearing or active listening. A judge should develop humility which is the basic criteria for being a good listener. Complexities are there and a judge must accept them as it is then only one you listen patiently. It was stressed that human beings have not evolved language to express feelings but to suppress them.

SESSION 16 & 17

Landmark Judgments in India

Speakers: Justice K. Kannan & Prof. V. K. Dixit

Sessions sixteen and seventeen were dedicated to *Landmark Judgments in India*. The session emphasized that the Constitution of Bangladesh is much similar to Constitution of India and hence, the landmark judgements of Indian Supreme Court on constitutional law issues are very relevant for Bangladesh judges. The landmark judgements of Indian Supreme Court were discussed thematically. Firstly, recent judgments on Constitutional Morality were discussed viz. (Triple Talaq Case¹⁰), Navtej Singh Johar v/s. Union of India¹¹ (Sec. 377 IPC and Homosexuality case), Indian Young Lawyers Association v/s. State of Kerala¹² (Sabarimala case) and Joseph Shine v/s. Union of India¹³ (Adultery Judgement). Constitutional Morality was the common thread in all these abovementioned judgements. In these judgments the Indian Supreme Court has used

¹⁰ Shayara Bano v/s. Union of India,

¹¹ (2018) 10 SCC 1

¹² Writ Petition (Civil) No. 373 of 2006

¹³ (2018) 2 SCC 189

“Constitutional Morality” to allow things which have been banned as taboo and prohibited in religion and to ban something which was allowed but not good for a civilized society. Secondly, cases related to the independence of judiciary viz. Minerva Mills case, S. P. Gupta cases, NJAC Case¹⁴ etc. were discussed in detail. National Legal Services Authority v/s. Union of India and others¹⁵, which takes into account the plight of transgenders in India directing state to provide identity to the third gender as Transgender was also discussed. Various cases which have expanded the right to life under Art. 21 viz. Common cause Case¹⁶ (Passive Euthanasia), K. S. Puttaswamy Case (Right to Privacy), Right to health and dignity cases, cases relating to clean environment as fundamental right etc were also discussed. Historically relevant judgments of cases like Narasu Appa Mali’s case, Babri Masjid Case, Sabarimala Case, Shani-Shingnapur case, Sarala Mudgal case etc. formed an integral part of the session. Environmental Law Jurisprudence and Human Rights Jurisprudence in India as developed from the cases decided by Indian Supreme Court were also deliberated.

Study Tour Details:

Apart from the academic session the judges from Bangladesh were also taken to various places as part of their study tour. The details are as follows:

Visit to - District Court of Bhopal, M.P.

To give practical exposure to the participants on the working of the district courts in India a visit to the Bhopal District Court was organized. Firstly, the participants visited the courtrooms of the District Judge (DJ), Additional District Judge (ADJ) and Judicial Magistrate First Class (JMFC). Where the participants observed the ongoing proceeding,

¹⁴ *Supreme Court Advocates on Record Association v. Union of India* (2016) 5 SCC 1

¹⁵ (AIR 2014 SC 1863)

¹⁶ *Common Cause (A Regd. Society) v/s. Union of India and another*, (2018) 5 SCC 1 ; (2018 Indlaw SC 178)

the infrastructure, record maintenance and other systems observed in these courtrooms. Thereafter, to interact with the District Judge and other senior judges all the judicial members assembled at the conference room of the District Court. The discussion was with respect to:

- Sanctioned and existing strength of the district court, Bhopal.
- Elevation procedure of the judicial officers, DJs and ADJs as well as of the High Court Justices.
- Incentives to Judicial Officers and judges in India.
- Ratio of pending cases
- Use and benefits of Information and Communication Technology in the courts

Visit to - AIIMS, Bhopal

To understand the attributes of forensic evidences the judicial members of Bangladesh were taken to the Forensic Department of All India Institute of Medical Sciences [AIIMS], Bhopal. The director of AIIMS welcomed the participants and briefly elaborated the role of forensic science in contemporary times. The specialists further elaborated upon the precautions taken during the conduction of Autopsy, analyses of physical and scientific evidence through scientific methods, how this whole chain of custody is maintained, how to seal and preserve an evidence and also gave a brief on the method of sealing and parceling. Thereafter they discussed how autopsy is conducted and how the post-mortem of the dead body is done. The experts at AIIMS also shared the formats of post-mortem reports and explained the various types of autopsies that are conducted. Thereafter, the participants were taken to the morgue where, the forensic doctors exhibited how the Department of Forensic Medicine provides mortuary services and preserves dead bodies. They indicated how a dead body is transported from the hospital to mortuary, intake procedure and maintenance of mortuary register.