

WORKSHOP ON ADJUDICATING TERRORISM CASES

OBJECTIVES

Balancing National Security and Rule of Law

Analysing provisions of the Constitution, Code of Criminal Procedure and Unlawful Activities (Prevention) Act 1976 in light of the Hague Memorandum

Highlighting the good practices outlined in the Hague Memorandum for fair trial

THE HAGUE MEMORANDUM

Good Practice No. 5: Supporting the Right of the Accused to a Fair Trial with Adequate Legal Representation

The UDHR and the ICCPR identify a number of individual rights related to criminal prosecutions, including:

- (1) the right to a fair hearing without undue delay;
- (2) the right to a public hearing and pronouncement of judgment with limited exceptions;
- (3) presumption of innocence;
- (4) freedom from compulsory self-incrimination;
- (5) the right to be informed promptly and in detail of the accusation;
- (6) adequate time and facilities to prepare a defense;
- (7) the right to legal assistance;
- (8) the right to examine witnesses;
- (9) the right to an interpreter;
- (10) the right to appeal the conviction and sentence; and
- (11) freedom from ex-post facto laws.



Session 1	Fair Trial	Justice Sanjeev Kumar
Session 2	Terror Laws	Justice Kotiswar Singh
Session 3	Framing of Charges	Justice P.N. Prakash
Session 4	Case management	Justice G.S. Kulkarni
Session 5	Evidence	Justice Atul Sreedharan
Session 6	Security	Justice Joymalya Bagchi
Session 7	Forensics	Justice Joymalya Bagchi & Justice Atul Sreedharan
Session 8	Media	Justice Suhasis Talapatra
Reference resources:		Bhopal.nja@nic.in

SOURCES OF LAW

INTERNATIONAL LEGAL SCENARIO

International Covenants on Civil and Political Rights (ICCPR)

Universal Declaration on Human Rights (UDHR)

Hague Memorandum on Good Practices for the Judiciary in adjudicating terrorism offences

SOURCES OF LAW

NATIONAL LEGAL SCENARIO

Article 21 and 22 of the Constitution of India.

Provisions in the UAP Act.

Section 243(2) of Code of Criminal Procedure, 1973.

A FAIR TRIAL : GENERAL PRINCIPLES

An adversarial trial system, Presumption of innocence, Impartial and competent Judge, Knowledge of accusation, Open trial

Protection against illegal arrest

Right to Free legal aid, Speedy trial, Bail

Trial and Evidence in presence of the accused

Right against Self-incrimination and Double Jeopardy

ATTRIBUTES OF FAIR TRIAL

Concept of Reverse Burden

Speedy trial through the lens of terrorism case

Open vs. In-camera trials

Sub-conscious bias/Preconceived notions

CONCEPT OF REVERSE BURDEN

Burden of proof on the prosecution

Presumption of Innocence

Presumption of Guilt and Shifting of onus

Major Precedents

Woolmington v. Director of Public Prosecutions [1935 AC 462]

V. D. Jhingan v. State of Uttar Pradesh [AIR 1966 SC 1762]

K. Veeraswamy v. Union of India [1991 (3) SCC 655]

State of West Bengal v. Mir Mohammad Omar [2000 (8) SCC 382]

Sher Singh @ Partapa V. State Of Haryana

Sanjiv Kumar V. State Of Punjab, (2009(16) Scc 487)

Rangammal V. Kuppuswami, Air 2011 Sc 2344

Comparing Key Provisions

Section 43 E of UAP Act with Section 113B of The Evidence Act and Section 304B of the Indian Penal Code

SPEEDY TRIAL THROUGH THE LENS OF TERRORISM

Article 21 of the Constitution.

Good Practice No.2: Continuous Trials in Terrorism and National Security Cases

Good Practice No.3: Develop Effective Trial Management Standards

Good Practice No.8: Creation of Special Courts for trial of terrorism cases

Assignment of cases to the trained Judges

SPEEDY TRIAL THROUGH THE LENS OF TERRORISM

Section 309(1) of the Code of Criminal Procedure: Inquiry or trial to continue till all the witnesses in attendance have been examined and adjournment only if necessary and that too for the reasons to be recorded

Complexities of investigation in terrorism cases: Collection and Production of electronic, digital and other types of transnational evidence

CASE LAW

Abdul Rehman Antulay and others v. R.S.Naik and others reported in 1992(1) SCC 225

Hussainera Khatoon and others v. Home Secretary, State of Bihar, AIR 1979 SC 1369

Moti Lal Saraf v. Union of India and others, 2007(1) SCC Cri 180

OPEN JUSTICE v. IN-CAMERA TRIAL

“The law belongs to the people. Access to the legal system is a basic right and public good”

- Chief Justice of Canada, The Rt Hon Beverly Mc Lachlin

The open justice is a Constitutional Principle of the highest order. It can be disapplied only when the administration of justice is disserved by adherence to it

OPEN JUSTICE v. IN-CAMERA TRIAL

In the words of Justice Bachawat with regard to open justice contained in the judgment of Naresh v. State of Maharashtra are noteworthy: “Long ago, Plato observed in his Laws that the citizen should attend and listen attentively to the trials. Hegel in his Philosophy of Right maintained that judicial proceedings must be public, since the aim of the Court is justice, which is a universal belonging to all. Save in exceptional cases, the proceedings of a Court of justice should be open to the public”.

OPEN JUSTICE

Open Justice work with its own ideals such as adequately facility for public and press to sit

Report the proceedings to the public

For the public to inspect the pleadings

For the accused to know the trial and to be tried before him and the accused to confront his accuser

OPEN JUSTICE

This is based on Principle of Natural Justice and Doctrines such as “*audi alterm partem and nemo judex in causa sua.*”

Indian Constitution “that the judgment of the Supreme Court of India shall be delivered only in open court.”

The stress to Open Justice can be seen in order XVIII Rule 4 of Civil Procedure Code, 1908

OPEN JUSTICE

The HAGUE MEMORANDUM also advocates open trial as a means to safeguard fair trial right of accused.

SECTION 327 of the Criminal Procedure emphasis necessity of Open Court.

OPEN JUSTICE: EXCEPTION TO THE RULE

If it is necessary in the interest of proper administration of justice

The presence of the public and press at the trial will often result in increased stress for the accused, the invasion of his privacy, and damage to his reputation

Smt. Ujjam Bai v. State of U.P. “The power to prohibit publication of proceedings is essentially the same as the power to hold a trial in camera and the law empowering a trial in camera is a valid law and does not violate the fundamental right in regard to liberty of speech”

OPEN JUSTICE: EXCEPTION TO THE RULE

Section 327 of the Code of Criminal Procedure, advocates open trial with well recognized exception trial in rape cases are needed to be held in cameras

Section 44 Unlawful Activities (Prevention) Act, 1967 also provides for holding trial in terrorism case in camera, ostensibly for the purpose of protecting witnesses

CONCLUSION

SUBCONSCIOUS BIAS / IMPLICIT BIAS

Types of Biases

- Racial
- Regional
- Caste
- Gender
- Implicit Bias against the perpetrators of the terrorist act aimed at endangering security of the State; Bias triggered by feelings nationalism and patriotism: Community affiliations and other stereotypes

SUBCONSCIOUS BIAS / IMPLICIT BIAS

Effects of subconscious/implicit bias

Remedies: How to mitigate the effects of subconscious /implicit bias

Studies: Effect of implicit or explicit bias on adjudication of cases

Conclusion