

NATIONAL JUDICIAL ACADEMY



SE-07: SEMINAR FOR FOREIGN JUDGES [BANGLADESH]

13th– 19th December, 2019

Programme Report

PROGRAMME CO-ORDINATORS

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National Judicial Academy (NJA) organized a seminar for judicial officers from Bangladesh from 13th-19th December in furtherance to a 'Memorandum of Understanding' between NJA and the Supreme Court of Bangladesh with the objective of training and capacity building of the participant judges. The seminar included sessions on constitutional, civil, criminal and human rights law and correlative jurisprudence. The seminar also aimed to acquaint participants with elements of judicial behaviour- ethics, neutrality and professionalism, skills of judging and judgment writing. The seminar also facilitated discussions on court and case management and use of ICT in administration of justice.

Session 1 - Overview and Architecture of the Indian Constitutional Arrangement

Speakers - Dr. Justice B.S. Chauhan, Justice G.S. Kulkarni and Prof. (Dr.)V. Vijayakumar

The speaker emphasized that the Preamble to the Constitution is the indicator of core beliefs and vision of the Constitution. The ideals of justice, liberty, equality and fraternity were highlighted as the goals of the Constitution. It was stated that framers of the Constitution foresaw the need to provide such a Constitution that redeems the people from slavery, poverty and inequality. The speaker discussed the law on slavery and untouchability as an example to draw a distinction between rule of law and justice i.e. law may not always be just and unjust practices may be permitted under law. The speaker emphasised on the Constitution as a social contract. It was stated that the Preamble to the Constitution begins with the term '*We the People*' and ends with the words '*Hereby Adopt, Enact and Give to Ourselves This Constitution*', which indicates that the Constitution was made by the people and given to themselves. It is a social contract wherein the people determined a common goal, recognised rights of all persons and agreed to impose certain limitations upon themselves for greater good. It recognises the sovereign will of the people and the rights and restrictions imposed by the people themselves. The achievements of this social contract include providing structure and organisation of government, empowering government and ascribing limits to the powers of each branch. The Directive Principles of State Policy were emphasised as objectives of the State. The speaker distinguished between 'Fundamental Rights' and 'Constitutional Rights', and analysed the nature of certain

fundamental rights as inalienable rights vested in every person rather than a right given by the State. The speaker also discussed the provisions relating to distribution of financial powers and pertaining to trade and commerce in the Constitution and stressed on the relevance of these provisions in ensuring harmonious functioning between the Centre and the States. The speaker also stressed on the need for flexibility in the Constitution to meet the emerging challenges and the significance of the amendment provisions as a measure of flexibility to ensure longevity to the Constitution.

Session 2- Indian Judiciary: Organizational Structure and Jurisdiction

Speakers - Dr. Justice B.S. Chauhan, Justice G.S. Kulkarni and Prof. (Dr.)V. Vijayakumar

The speakers emphasised on the similarity in certain powers of the district judiciary and the High courts and Supreme Court and stated that judges in the district courts also have wide powers. The speaker stressed on the responsibility of the district judiciary as the face of the judiciary. The origins of the term ‘Sessions Court’ and evolution of bail were also explained during the course of the session. The speaker also drew a comparison between Article 141 of the Constitution of India with Article 111 of the Constitution of Bangladesh. The speaker elaborated upon the concept of ‘global justice’ and emphasised on the role of the courts in ensuring global justice. In this regard the provisions of Article 253 of the Constitution of India and the role of the Supreme Court of India in giving effect to international conventions was emphasised. The distribution of powers under the Constitution and rationale for such distribution was also discussed. The speaker emphasized upon the independence of the judiciary as a basic feature of the Constitution in light of judgements viz. *S.P. Gupta v. Union of India* [AIR 1982 SC 149], *Supreme Court Advocates-on Record Association v. Union of India* [(1993) 4 SCC 441], *In re Special Reference 1 of 1998* [(1998) 7 SCC 739] and *Supreme Court Advocates on Record Association v. Union of India* [(2016) 5 SCC1].

Session 3 - Goals, Role and Mission of Courts: Constitutional Vision of Justice

Speakers - Dr. Justice B.S. Chauhan, Justice G.S. Kulkarni and Prof. (Dr.)V. Vijayakumar

The structure of the Indian judiciary was explained and the jurisdictions of the Supreme Court of India and the High Courts were delineated. The process of removal of judges was discussed and it was emphasised that the process of removal is stringent to ensure independence of the judiciary. The provisions of appointment of judges in the High Courts and the subordinate judiciary and the power of superintendence of the High Courts was also discussed in the session. The speakers also discussed the powers of the Supreme Court and the High Courts under Articles 32 and 226. The role of customary law and applicability of customary practices in legal system; and trial by customary tribal courts were discussed. The speaker emphasised on liberty as the most cherished right and the role of the judiciary in ensuring this right. The evolution and recognition of equality as an inalienable right was also discussed. The speaker discussed the doctrine of 'Basic Structure' and emphasised that it is an essential element for sustainability and longevity of the Constitution. It was stated that Part III of the Constitution is the heart and soul of the Constitution. The cases of *Brown v. Board of Education* [347 U.S. 483 (1954)] and *Plessy v. Ferguson* [163 U.S. 537 (1896)] were discussed to highlight the role of courts in ensuring justice for all sections of society. Concerns were also expressed regarding increasing pendency and its impact on the quality of justice.

Session 4- Judging Skills: Art, Craft and Science of Drafting Judgments

Speakers - Dr. Justice B.S. Chauhan and Justice G.S. Kulkarni

The speaker emphasized on judgment writing as a core skill of a judge. The definition and essentials of a judgment as stated in the Code of Civil Procedure, 1908 was highlighted and it was stated that judgment writing is also an art. The necessary elements of a good judgment were delineated *viz.* language, coherency, simplicity in style of writing, clarity and brevity. It was stated that a judgment must necessarily include reasoning of the court and rationale for arriving at the conclusion. Every issue agitated must be adequately

if not conclusively dealt in the judgment. The presence of reasons are necessary to inform litigants, appellate court and public as to the basis of the conclusions arrived at in the judgment. The participants were advised to refrain from unwarranted remarks in a judgment. The participants were also advised that their judgments should not be unduly lengthy. The speaker also stressed that the judgment should be delivered within reasonable time and inordinate delay must be avoided.

Session 5 - Principles of Evidence: Appreciation in Civil and Criminal Cases

Speakers - Dr. Justice B.S. Chauhan and Justice S. Nagamuthu

The speaker discussed the concepts of admissibility, credibility and sufficiency in appreciation of evidence. The speaker discussed probability as the yardstick of appreciation of evidence and the extent to which it can be relied upon. Appreciation of evidence was stated to involve weighing of various probabilities and preponderances thereof. Admission by the party as the best evidence was also discussed. The speaker discussed circumstantial evidence as drawing inferences on the basis of attendant circumstances; in cases where there is no direct evidence. The standard of proof in circumstantial evidence was discussed and it was stated that the circumstances must firmly establish the facts and must lead to a single conclusion that the accused committed the offence. There must be a chain of evidence; each link being proved, and it must prove the hypothesis of guilt. The speakers stressed on motive as a crucial link in circumstantial evidence to establish culpability. It was averred that omissions and contradictions in witness statements are bound to occur due to human error and lapse of time. These discrepancies can be ignored, unless there is material discrepancy which goes to the root of the matter. The speaker also emphasized on corroboration as a rule of prudence and stated that corroborative evidence is not required if evidence is cogent and convincing. The speakers also highlighted the principles of appreciation of evidence of experts and children apart from the evidentiary value of dying declaration and medical evidence.

Session 6 - Evidentiary Presumptions; Onus and Burden of Proof

Speakers - Dr. Justice B.S. Chauhan and Justice S. Nagamuthu

The speakers highlighted the concept of 'burden of proof' i.e. whoever asserts a fact has to prove it and the evidentiary requirements to prove certain facts. The standards of 'burden of proof' and the presumptions under the Indian Evidence Act, 1872 (IEA) were discussed. The speakers expounded upon the concept of 'reverse burden of proof' and the necessity of such provisions. Sections 106, 107, 108, 113A, 113B and 114 of the IEA were also emphasized upon during the session. The speaker emphasised on presumption from the standard of a prudent man and the acceptability of certain facts as rational assumptions of fundamental facts.

Session 7 - Electronic Evidence: New Horizons, Collection, Preservation and Appreciation

Speaker- Ms.N.S. Nappinai

The speaker discussed recent developments in appreciation of electronic evidence in India and drew a comparison with developments in Bangladesh. The speaker also discussed the concept of cybercrime and the various judicial pronouncements of both India and Bangladesh. The speaker discussed the phenomenon of misuse of technology for the commission of offences and highlighted the case of Arafat Sunny in Bangladesh and the orders of Supreme Court in *Prajwala Letter Dated 18.2.2015 Videos of Sexual Violence and Recommendations, In Re* [(2018) 15 SCC 551]. The speaker also dwelt on technology as a medium for commission of crime and the possible measures to combat such misuse. The speaker discussed the concept of cyber defamation and discussed the law in India and Bangladesh. The following issues pertaining to electronic evidence were deliberated upon viz. collation, retention, evaluation and appreciation of electronic evidence; establishing authenticity of author of the content; ensuring integrity of the content and non-repudiation of evidence.

Session 8 - Forensic Evidence in Civil and Criminal Trials; DNA profiling

Speaker- Dr. Arneet Arora

The speaker discussed the use 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 also discussed the process of DNA profiling and the sources from which DNA can be retrieved. The recent developments in forensic science were discussed and it was emphasised that DNA can be extracted even from minute tissue samples. The speaker discussed the process of collection of sample, the devices for storage of the sample and preservation of such samples. The speaker also elaborated upon 'Touch DNA' and its uses. The challenges in collection of forensic evidence was also elaborated upon during the session

Session 9- Elements of Judicial Behaviour: Ethics, Neutrality and Professionalism

Speakers - Justice R.C. Chavan and Justice K. Kannan

The session was initiated by the speaker by deliberating upon the role of courts in society. Different viewpoints put forth by participants regarding the role of courts were, establishment of rule of law, administration of justice, building trust, resolving disputes, interpretation of the law and acting as guardian of the society. The speakers exhorted the participants to ensure that their personal attitudes, beliefs, preconceived notions and opinions do not affect the adjudicatory process. It was also stated that the goal of judges should not be limited to career advancement, but should also include satisfaction of litigants, clearing pendency and dispensing of justice according to law. The participants were advised to remain politically neutral to maintain the independence of the judiciary. Furthermore, it was stated the judges should follow the doctrine of *stare decisis* to maintain judicial discipline. The speaker also elaborated upon the different types of judicial attitudes i.e. liberal, moderate and conservative. It was stated that judges should not ascribe to a particular attitude and should not be influenced by the media or personal religious beliefs. It was stated

that the justice should be seen to be done; and therefore, judges should provide a patient and fair hearing to the parties. Their conduct should project an image that they are not biased towards any party. Furthermore, a judge should maintain judicial independence and should not accept any benefits from any individual. The participants were further advised not to be biased based on religious, linguistic or ethnic grounds. The judges were advised to maintain a lifestyle comparable to their income and they should not be swayed with financial allurements. Emphasis was placed on judicial neutrality to ensure that judges adopt an unbiased stance without any leaning to either party. However, in cases where the Constitution mandates protective discrimination in favour of disadvantaged and marginalised sections of society, judges must adopt such an approach of protective discrimination. The various facets of professionalism in courts were discussed and it was stated that it is the key to quality and efficiency. It was stated that the judge should take care about his appearance in court and should appear energetic and well-organised; his demeanour should express confidence. The various qualities which a judge should possess were highlighted i.e. kindness, patience, courtesy, empathy etc.

Session 10- ICT and E-Judiciary: Indian Perspective

Speakers - Justice R.C. Chavan and Justice K. Kannan

The speaker emphasised upon the need and benefits of ICT in judiciary and its contribution in ensuring transparency and accountability in the judicial system. Streamlining of various procedures and processes of the court through ICT assist in speedy dissemination of justice. The availability of data regarding disposal and pendency aids in caseload management and judicial administration. The participants were informed that all the judgments and orders of the courts in India are available online. This reduces the physical barriers for the litigants and saves a lot of unnecessary expenditure. The participants described the status of computerization in their courts and stated that it is at a very nascent stage. It was stated that computers are predominantly used for judgment writing. They also discussed initiatives by certain courts in Bangladesh which include uploading their cause list; recording of evidence by computers; using projectors to display

the depositions being typed by stenographers. It was also stated that a system has been developed in Bangladesh whereby bail orders are uploaded as soon as they are delivered. It can be accessed by the lawyer or the litigant instantly. This reduces the delay in such orders reaching the lower courts and also dilutes the possibility of fake orders. It was mentioned that the judgments and causelist of the Supreme Court of Bangladesh are uploaded on website. The speaker also demonstrated the functioning of the National Judicial Data Grid (N.J.D.G) and stated that the data available on the platform aids in case management and court management. It is beneficial to both the judges and policy framers at micro and macro level as it assist in establishing new courts, assessment of future judge requirement and case management. The various initiatives under e-Courts project were also discussed.

Session 11- Judge the Master of the Court: Court Management &Case Management

Speakers - Justice R.C. Chavan and Justice K. Kannan

The speaker commenced the session by delving upon the meaning of “master” and stated that it connotes a person who is in charge or who has complete knowledge or proficiency. It was stated that the seating arrangement of a judge in a court indicates his position of authority. The speaker also discussed the essentials of court management during the course of the session. It was stated the judge while undertaking a leadership role should have a vision and should undertake strategic planning for court governance. Court management by judges should be based on the principle of public trust and confidence. The management of the court would include case flow and workflow management, operations management, public relations management, budget and fiscal management. It was stated that judges should be punctual in court and should undertake hearing in open court and deliver judgments expeditiously. He should also strive to maintain discipline, decorum and orderly conduct of the court, and should be immaculately dressed. He should not allow advocates to obstruct the functioning of the court. Judges should prioritize his causelist; and should innovate and curtail unnecessary time wasted in hearing. The process of court management also includes optimising disposal with quality of judgments. It was suggested that the participant judges can

create broad templates to deal with regular matters which have common features so that the orders can be delivered expeditiously.

Session 12- Criminal Justice Administration and Human Rights

Speakers- Justice Ved Prakash Sharma and Justice Mridula Bhatkar

The speaker traced the development of human rights standards commencing from the Magna Carta, French Declaration of Independence, and American Bill of Rights to the Universal Declaration of Human Rights. It was stated that the development of human rights is related to development of the civilization. It was highlighted that there cannot be peace without justice; justice without freedom and freedom without human rights. It was further stated that we should focus on protection of human rights in criminal justice administration. The participants discussed that human rights are inherent rights from birth which are inalienable and universal in nature. These are the rights which are required to live with honour and freedom. Thereafter, the criminal justice provisions (which are applicable for protection of human rights) were highlighted i.e. provisions relating to arrest and detention; production before court; right to defend; remand; bail; charge; speedy and fair trial; right to remain silent. It was stated that the judges should ensure a speedy trial and therefore, should strive to undertake hearings on a day-to-day basis. Unnecessary delay in hearing would result in faith deficit in judiciary. The participants were advised to not be mute spectator to a trial, but be pro-active and should ask relevant questions to parties. It was stressed that independence of the judge and impartiality of prosecutor and investigative agencies is integral to ensure fair trial. Moreover, the fairness in trial should not be limited to the accused. The rights of victims should also be taken care of. The speaker also drew a comparison between the constitutional provisions of India and Bangladesh relating to fair trial rights of accused and safeguards relating to arrest. The victim compensation scheme provided under Section 357A of the Code of Criminal Procedure, 1973 was highlighted by the speaker during the course of the session. The participants also discussed the prison conditions in jails in Bangladesh. It was stated there is no such practices of regular visit to jail premises by the judges.

Session 13- Human Rights: Fair and Impartial Investigation

Speakers- Justice Ved Prakash Sharma and Justice Mridula Bhatkar

The speaker stated that the police and other investigation agencies should not be swayed by media trial or public opinion. The speaker highlighted aims of police investigation, and stated that it includes apprehension of criminals through legal means. The interrogation of the accused should be conducted by the police by following all the human rights standards, and under no circumstances torture of the accused or undertrials should be allowed. It was also stated that the statement of witness should be taken with great care and caution, since it is the first available information regarding the sequence of events. The speaker highlighted the implications of ignoring human rights by police and the methods by which human right violations can be minimized.

Session 14- Group Discussion

Panel- Justice Ved Prakash Sharma and Justice Mridula Bhatkar

The participants were divided into four groups and engaged in group discussion on the themes – Witness protection and Human Rights; media trial; bail/anticipatory bail and Human Rights; and encounter killing and human rights. The major points emphasised in the course of discussion were –

Witness protection and Human Rights – It was stated that witness protection emanates from the right to life under the Constitution of Bangladesh. This right encompasses protection both inside and outside the court. This right emanates from statutory provisions and is also a result of judicial activism. Witness protection encompasses maintenance of secrecy of identity and ensuring security of the witness. Security can be ensured by designating separate entrances to the court premises and separate seating for witnesses. Witness protection is especially important in sensitive cases like war crimes, in which case special witness houses are identified to ensure security of the witness. The judge must ensure protection of dignity of the witness in the court by disallowing offensive, indecent and scandalous questions.

Media Trial – It was stated that media trial is a hindrance to fair trial and is a concern for the judicial system as it encourages extra-judicial trial. Such trials which are essentially biased; result in dishonour of dignity of the individual and may amount to contempt of court. Media trial is also a concern as it puts significant psychological pressure on the judges who are adjudicating the matter involved in the media trial. Media trial also is a violation of the international standards of human rights. However, in some cases, investigative journalism also plays a positive role as a watchdog to unearth the truth.

Bail/Anticipatory Bail and Human Rights – It was stated that bail is the right of the accused and its denial should be an exception. Bail should generally be granted when an investigation or trial is in progress beyond scheduled time and also where allegations are not supported by the evidence. Anticipatory bail is a power of the High Court, and such power cannot be exercised by the Sessions Court in Bangladesh.

Encounter Killing and Human Rights – It was stated that encounter killing is a misuse of power and is not permitted under law. Encounter killing hampers the credibility of the criminal justice system and the judicial system. It is a violation of Article 10 of the Constitution of Bangladesh, and is contrary to the Universal Declaration of Human Rights and there is a strong need to enact legislation on this issue.

Session 15- Identification of *Ratio* in a Precedent

Speakers - Dr. Justice Shalini S. Phansalkar Joshi and Prof. V.K. Dixit

The speaker elaborated upon the doctrine of *stare decisis* and its importance. It was stated that precedents are required for consistency and predictability in judgments of the court. Thereafter, the speaker highlighted Article 141 of the Constitution of India and the binding nature of the judgments of the Supreme Court upon all the courts in India. Exceptions to the doctrine of precedent was also discussed including overruling, *per incuriam* judgment and *sub silentio* judgment. Subsequently, the speaker discussed the concept of *ratio decidendi* and *obiter dicta*. The speaker also elucidated upon the different methods to determine the *ratio decidendi* of the judgment, including the method laid down by A.L.Goodhart and Eugene Wambaugh. The

issue of determination of binding precedent in case of conflicting decisions of coordinate benches was also elaborated upon during the session by the speaker.

Sessions 16 and 17- Landmark Judgments in India

Speakers - Dr. Justice Shalini S. Phansalkar Joshi and Prof. V.K. Dixit

The speaker elaborated upon the various judgments related to personal liberty viz. *A.K. Gopalan v. State of Madras* [(1950) SCR 88]; *ADM Jabalpur v. Shivakant Shukla* [(1976) 2 SCC 521] and *Maneka Gandhi v. Union of India* [AIR 1978 SC 597]. The speaker also elaborated upon the Doctrine of 'Basic Structure' and contours of Parliament's is power to amend the Constitution by discussing the judgments of *Shankari Prasad v. Union of India* [(1952) SCR 89], *Sajjan Singh v. State of Rajasthan*, [AIR 1965 SC 845], *I. C. Golak Nath v. State of Punjab* [AIR 1967 SC 1643] and *Kesavananda Bharati v. State of Kerala* [AIR 1973 SC 1461]. Thereafter, the speaker traced the development of the concept of Public Interest Litigation (P.I.L.) and expansion of the concept of *locus standi* through this technique. It was stated that P.I.L. has played an important role in protecting the environment and in helping downtrodden and marginalized sections of society. The difference between the approach of the Supreme Court in the 1950s and 1980s was also elaborated and it was stated that after the removal of emergency, the Supreme Court played a proactive role. Lastly, the speaker emphasized upon various judgments related to gender justice including *Indian Young Lawyers Association & Ors v. State of Kerala & Ors* [2018 (13) SCALE 75] and *Shayara Bano v. Union of India* [(2017) 9 SCC 1].
