

NATIONAL JUDICIAL ACADEMY



TRAINING PROGRAMME FOR MYANMAR JUDGES AND JUDICIAL OFFICERS

[SE-05]

5th to 8th December, 2022

Programme Coordinators

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Objective of the programme

A Memorandum of Understanding (MoU) had been entered between the National Judicial Academy (NJA), India and the Office of the Union of Chief Justice (OUCJ) under the Supreme Court of the Republic of the Union of Myanmar for organising training and capacity building programmes for Myanmar Judges and Judicial Officers in India. In pursuance of the said MoU, a 4 days program for the Myanmar Judges and Judicial Officers was organized by NJA at Bhopal from 05th to 08th December, 2022. The program included sessions on judicial skills, constitutional, civil, criminal, human rights laws, principles of natural justice and correlative jurisprudence. The program also aimed to acquaint participants with elements of judicial behavior- ethics, neutrality and professionalism, skills of judging and judgment writing and facilitate discussions on court & case management and use of ICT in administration of justice. While giving the account of the Indian Judiciary the transition to a gender just society was also underscored. The evolution of Environmental jurisprudence along with the contribution of the Supreme Court of India and alignment with global standards formed part of the discourse. Additionally, scope of forensic evidence in civil and criminal trials was also outlined. An insight into the general principles of appreciation of evidence including electronic evidence is intended to be shared and discussed.

Session 1 - Constitutional Vision of Justice

Panel - Justice U. U. Lalit & Prof. (Dr.) V. Vijayakumar

The session began by discussing with introduction of '*Justice*' that could be explained in the context of constitutional vision. All the features of the Constitution promote justice (social, economic and political) which the Constitution assures to its citizens. Both the criminal as well as civil law are dealing with social, economic and political justice. Further, it was remarked that there are two concepts of equality i.e. formal equality and proportional equality. The former means that law treats everyone equal and does not favor anyone either because a person belongs to the advantaged section of society or to the disadvantaged while the latter expects the state to take affirmative action in favor of the disadvantaged sections of the society within the framework of liberal democracy. It was referred that part IV of the Constitution would also in one way or the other fall within the purview of judicial review though there is no mention found in our Constitution. It is one of the pragmatic concept of bringing about social economic justice. Thus it could be stated that an idea of a just and egalitarian society remains one of the foremost objectives of the Constitution.

It was clarified that the Constitutional Vision of Justice is not about interpreting merely the Constitutional provision, but lies in the spirit and goals which the Constitution envisages and propagates to establish justice (social, economic and political). It is about interpretation of the

statutes and the clauses by a court of first instance in a manner most suited for socio-economical justice; e.g. even while interpreting private law of contract, when the court recognizes in a given situation the “contra authoritative rule” (i.e. interpreting a rule against the author of the contract). The subordinate judiciary needs to apply the principles laid down by the suitable precedents, so as to extend the Constitutional Vision of justice at the grass-root level.

The judicial system is a part of the political process and it has been considered as the protector or custodian of rights of the citizens. The judiciary under our Constitution is watchdog of the Constitution. It looks into both law making and the law implementation by the other two wings of the Constitutional democracy. The functions and role of these institutions are essential for successful operation of Constitutional democracy in our country. It instills in the people the feeling of trust and confidence in the citizens towards the judicial system. Further, the doctrine of separation of powers was discussed and it was stated that it becomes significant to prevent too much concentration of power in the hands of the government. There are two important pillars of constitutional democracy i.e. rule of law and respect for the minorities. It was remarked that personal prejudices must never come in the functioning of the judges as the very concept of justice is lost if judges are partial.

Session 2 - Elements of Judicial Behaviour: Ethics, Neutrality, and Professionalism

Panel - Justice Ram Mohan Reddy & Justice R. C. Chavan

The session focused on the judicial values that must be adhered to by the judicial fraternity at all levels. Some of these values are: (a) Independence - A judge should exercise the judicial function independently on the basis of the assessment of facts and in accordance with a conscientious understanding of the law, free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason; (b) Impartiality - It is essential to the proper discharge of the judicial decisions. It applies not only to the decision itself but also to the process by which the decision is made; (c) Integrity - The behavior and conduct of a judge must affirm the people`s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done; (d) Propriety – A judge shall in his personal relations with individual members of the legal profession who practice regularly in the judge`s court, avoid situations which might reasonably give rise to the suspicion or appearance of favoritism or partiality; (e) Equality - Ensuring equality of treatment to all before the courts is essential to due performance of the judicial office; (f) Competence and Diligence - The judicial duties of a judge take precedence over all other activities. It was pointed out that sobriety is essential and that certain classes of litigation involve emotive content. How to attain sobriety in your dealings in the court was also deliberated upon. The speakers highlighted some personal examples and explained the importance of social coalition and public peace. How to use appropriate language to present oneself in the judgment was another area that was focused upon during the course of discussion. It was stressed that as a judge there should be sobriety in their conduct that includes conduct not only inside the court but outside the court as well. The session also threw light upon favorable biases and constitutional biases and highlighted the

difference between the two. A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

Session 3 - Developing Efficient Judicial System: Court and Case Management

Panel - Justice R. C. Chavan & Justice Ram Mohan Reddy

The session included discussion on methods to coordinate efforts on key areas of court administration and management. The term “management” suggests judicious deployment of resources including human resource for optimum output. The session included discussion on how judges and court administrators must work together and coordinate their efforts in key areas of court administration and management. Since the overall functioning of a court depends heavily on the interplay between judges and administrative staff, it is important to set up a system capable of building a shared responsibility between the head of the court and the court administrator for the overall management of the office. It was also pointed out that behaviour of the judge in the court is the one of the most important aspect in court management. Handling disruptive persons, aggressive lawyers, reluctant witnesses, sluggish staff, would go a long way in effective disposal of cases. The judge presiding over a court must monitor unnecessary delays and ensure that there are no uncalled for adjournments. The use of ICT is another way to support and automate case management practices of courts.

The session also focused upon the introduction of the use of Information and Communication Technology (ICT) in the courts. The session began with an insight of what ICT is and how it is useful in bringing transparency in the courts. The discussion went on to analyse the historical background of the Information Technology and its arrival to the courts in India with special focus on the achievements of Phase I and II of the e-Courts project. Further, the benefits of ICT were highlighted in the course of discussion.

Session 4 - Protection of Environment and Wildlife: The Judicial Approach

Panel - Justice A. K. Goel & Prof. (Dr.) M. K. Ramesh

The session began with the assertion that environmental justice is part of socio-economic development of the society. The superior judiciary has made tremendous progress in distributing environmental justice. It was highlighted that for the past few decades, the Indian Supreme Court has been actively contributing in the protection of the environment. In addition to its role of interpretation and adjudication, the court has been active in evolving new principles of environmental jurisprudence and creating new institutions and structures through its various directions and judgments. It was pointed that one of the main reasons for the judiciary to take pro-active role in the environmental regime is the failure of the other organs of the government in discharging their constitutional and statutory duties. Further, it was remarked that the constitutional framework of the country incorporates provisions for not only incorporating the internationally recognized principles within the national regime but also

provides scope for the judiciary in evolving the environmental jurisprudence. The various innovations brought about by the judiciary as part of the environmental law while according recognition to the fundamental rights of the people which have formed part of both substantive as well as procedural law are worth appreciating.

The global concerns for environmental crisis have led the evolution and remarkable growth of international environmental law. Like international human rights law, discipline of international environmental law has been one of the most important phenomena in post Stockholm period. The growth of international environmental law has compelled us to revisit to our existing political, economic and social values and structures at the national level. The evolution of various environmental doctrines such as the Precautionary Principle, Polluter Pays Principle, Public Trust Doctrine etc. were traced. Substantive and procedural innovations of the judiciary in evolving the environmental jurisprudence were discussed which includes Public Interest Litigation, Expansion of 'right to life', Spot visits, Continuing Mandamus, constitution of Expert Committee, Environmental awareness and education. Various important judgments of the Apex Court were referred during the course of discussion such as M.C. Mehta v. Union of India AIR 1986 SC 1086, M.C. Mehta v. Kamal Nath (1997) 1 SCC 388, 415, Indian Council for Enviro-legal Action v. Union of India, AIR 1996 SC 1446, Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715, Andhra Pradesh Pollution Control Board v. M.V. Nayudu AIR 1999 SC 812, M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu AIR 1999 SC 2468, Ratlam Municipality v. Vardhichand and Others AIR 1980 SC 1629, Pahwa Plastics Pvt. Ltd. v. Dastak NGO, 2022 SCC OnLine SC 362, Animal Welfare Board of India v. A. Nagaraja and Others, 2014 7 SCC 547. It was finally remarked that given the crisis within the executive and legislature in discharging their Constitutional duties, the Supreme Court's innovative methods have attempted to arrest the dysfunctional trend of other organs and enabled the effective enforcement of environmental laws.

Session 5 - Judiciary and Media: Need for Balance

Panel - Justice L. Nageswara Rao & Justice Asha Menon

The session focused on the balance that need to be struck between judiciary and media so as to ensure an efficient administration of justice. It was remarked that to check government and its organs an independent media is required. Both the judiciary and the media are engaged in the same task: to discover the truth, to uphold the democratic values and to deal with social, political and economic problems and therefore, both are essential for the progress of a civil society. Highlighting the significance of media in reporting of matters the Supreme Court in Sahara India Real Estate Corporation Ltd. and Ors. v. Securities and Exchange Board of India and Anr., (2012) 10 SCC 603 has observed media has a right to know what is happening in courts and to communicate the information to the public which strengthens the confidence of the public in the transparency of the court proceedings. Sometimes a reporting of trial that is accurate and fair like a murder trial would anyway give rise to a substantial risk of prejudice that might not be related to the pending trials but later in the connected trials. The fairness of

the later or connected trials is not only safeguarded by the postponement but it also helps in preventing the possible contempt by the Media. However, in recent times media is overstepping its boundaries due to too much of corporatization and its never ending race to engage maximum viewership. This results in violation of the principles of a fair trial. Under the fundamental right of freedom of speech and expression, the media claims the right to investigate, to reveal, to expose and to highlight the criminal cases. On the other hand, the judiciary is keenly aware of the fundamental rights of the accused to a fair trial and of due process of law. It was asserted that since pre-trial publicity can derail a fair and a speedy trial, the judiciary has to balance the competing fundamental rights. While the freedom of speech and expression of the media, the right to know of the people need to be protected and promoted, the right to fair trial of the accused needs to be secured and guaranteed. While discussing the restrictions on the freedom of speech and expression, the Contempt of Courts Act was also referred.

Recently, in *T.N. Suraj v. State of Kerala and Others*, 2022 SCC OnLine Ker 2710 it was remarked that It is the well-accepted thumb rule that the Press shall not indulge in sensationalism; or in speculating upon the guilt or otherwise of any accused or other individual; or to create an opinion about the comportment or character of a person involved in the Trial; and not to embellish, by impelling or sponsoring an opinion they seek. Media can't usurp courts' jurisdiction and cannot be given right to speculate on outcomes of ongoing investigations or criminal trials. In *Rajendra SAIL vs. M.P. High Court Bar Association & Ors*, (2005) 6 SCC 109 it was pointed that while the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgment of a Court for public good, it should not cast scurrilous aspersions on, or impute improper motives or personal bias to the judge. Nor should they scandalize the Court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge. The judgments of Courts are public documents and can be commented upon, analyzed and criticized, but it has to be in a dignified manner without attributing motives. It was finally noted that it is time when media should call itself for responsible self-regulation. The media should ensure that its trials should not deter a fair trial and more so should not create prejudice against the defendant of the accused.

Session 6 - Elements of Fair, Impartial, and Competent Investigation

Panel - Justice U.C. Dhyani

The session commenced by highlighting the difference between the adversarial and inquisitorial criminal justice systems. The provisions relating to FIR, and the difference between cognizable and non-cognizable offenses were accentuated. It was highlighted that the procedure for investigation should be as per the provisions mentioned in the criminal procedure code. In special cases, the statements of the victim of rape shall be recorded at the residence/place of her choice. The medical examination of the victim should be done with her consent or anyone on her behalf who is competent to give consent, if possible within 24 hours. Further, the provisions of the Criminal procedure (Identification) Act, 2022 were touched upon.

The purpose of highlighting this act was to demonstrate the authority it gives to take measurements of convicts and other people in order to identify them. It was further stated that measurements include finger impressions, palm-print impressions, footprint impressions, photographs etc. During the discourse, provisions related to the letter of request under sections 166A & 166B regarding the search by a police officer were discussed. Protection against arrest and detention in certain cases was discussed in light of Article 22 of the Constitution of India. The procedure is to be followed when the investigation is not complete within 24 hours was stressed upon. Inherent Powers of the High Court as provided under section 482 was emphasized. Witnesses are the eyes and ears of justice, and the schemes concerning witness protection were discussed. General principles of Natural Justice and the Human Right to fair and speedy Trial also formed part of the discourse.

Session 7 - Principles of Evidence: Appreciation in Civil and Criminal Cases

Panel - Justice U.C. Dhyani & Dr. Harold D' Costa

The session commenced with the importance of evidence and it was mentioned that evidence is something that is correct, true, which is perceivable, and which is believed to exist. It was mentioned that a trial is a voyage for the discovery of truth and it helps in the reconstruction of past events. Judge is a presiding officer of his court and his job is to adjudicate disputes as per procedure and as per law. Appreciation of evidence is the main task that is expected of a judge to perform. For a trial judge, the job is to record the evidence and then appreciate it. The importance of evidence was highlighted irrespective of the fact that the judges are considered to be impartial adjudicators. It was highlighted that appreciation of evidence is a challenge between assertions v. denial. The Hon'ble Supreme Court has time and again mentioned in various judgments that witnesses are the messengers of the court. The witnesses appear in court on invitation (issuance of summoning) and therefore, it is necessary to treat them with the utmost respect. It was highlighted that the standard of proof is different in civil suits and in criminal matters. It is the Preponderance of Probability in cases of civil suits and in criminal matters, it is the proof beyond a reasonable doubt. The difference between direct and indirect evidence including documentary, circumstantial, etc. was discussed during the discourse. The exceptions upon which the Evidence act does not apply like on Arbitrators and Affidavits was highlighted. The concept of the Dying Declaration was emphasized. The participant's attention was called to the Examination in chief, cross-examination, and Re-examination and they were made understood when the leading questions were asked. The difference between May presume, Shall presume and Conclusive proof was underscored. The concept of presumption in general offences and in offences under NDPS Act, 1985 were discussed. The reverse burden of proof was discussed in line of Hanif Khan @ Annu Khan v. Central Bureau of Narcotics. The type of witnesses viz eye-witness, dumb-witness, interested witness and child witness were discussed in detail.

It was emphasized that no one actually owns the internet and no single person or organization controls the internet in its entirety. The term 'Electronic Evidence' was elaborated as a piece

of evidence generated by some mechanical or electronic processes which is often relevant in proving or disproving a fact or fact at issue. The legal recognition under the Information Technology Act, 2000 was discussed. Whatsapp chat modification was discussed in detail. Even though WhatsApp chat is protected by security and biometrics, it can be modified was highlighted during the discourse. Message, date, time, caller id, email id everything can be spoofed. A number of procedures were emphasized for collecting cyber evidence, including pre-investigation assessments, evaluating crime scenes, and collecting physical evidence. The speaker ornamented the precautions to be taken while collecting the digital evidence. In order to avoid forensic duplication, the data should be copied accurately without making any change in it by logical backup. For appreciating the digital evidence, section 65(B)(4) was highlighted. The contents of the certificate, when it is applicable, and the template of the certificated was shared. Lastly, the speaker highlighted with the help of cases like *Om Prakash v. state* 2014 SCC Online Del 3213, *Avadut Waman Kushe v. State of Maharashtra* 2016 SCC online Bom 3236, etcetera, where section 65-B was not given, but the evidence was considered.

Session 8 - Forensic Evidence in Civil and Criminal Trials

Panel - Justice U.C. Dhyani & Ms. Nisha Menon

The session commenced by stating that forensic evidence is a fusion of science and law. There are many scientific methods that are to be understood broadly and sciences developing so fast, keeping pace with every traditional and modern forensic evidence is a new challenge. The term 'forensic' comes from the Latin word 'forensis' which means 'in open court' and forensic science is the use of science and technology for legal purposes. It was highlighted that the entire principle of forensic science depends upon the Locards' Principle of Exchange. It simply means whenever two objects come into contact, they always leave a trace on the other. There was a strong emphasis on the fact that every criminal can be linked to the crime by contact traces left at the crime scene or brought from the scene. Biological evidence and physical evidence are the two broad categories of forensic evidence, and forensic biology examines them. The evidentiary value of forensic ballistics was discussed in the light of *Ghurey Lal v. State of U.P* and *Kalua v. State of Uttar Pradesh*. The process of collection and packaging of evidence was emphasized. Further, the characteristics, stages of DNA and its two types viz, Nuclear DNA and Mitochondrial DNA were discussed during the discourse. It was mentioned that DNA evidence is a crucial tool in cases of investigation, the establishment of paternity and maternity, natural & man-made disasters, wildlife conservation, and sex determination. DNA chain of custody and its evidentiary value was emphasized.

The privacy rights in the collection of the biological sample were touched upon. It was mentioned that investigating officer should collect the evidence and submit the same for examination and a detailed report is submitted to the court of law. Rather than reading the report, the judge should check whether it has been properly exhibited. A report contains the expert's opinion, and if it cannot be proved, the court should not rely on it except under an exception provided under section 293 of the criminal procedure code. Abrasions, contusions,

lacerated wounds, punctured wounds, and stab wounds and the marks they leave on the body were highlighted. The 'Panchsheel Test' with respect to circumstantial evidence supported by forensic opinion to uphold the conviction was discussed.

Session 9 - Transition to a Gender-Just Society: Jurisprudential Developments

Panel - Justice Deepak Gupta & Dr. Kiran Rai

Talking of gender just society it was mentioned that the agony of women still persists in a male-dominated society. It was mentioned that on the basis of the experience of centuries together women are considered to be more responsible, and wiser, they have a gentle hand and they are an embodiment of all cultural values of the society. The question that triggered everybody was why women should be discriminated against and not treated at par when there exists a theory of duality of the existence of men and women, wherein it was appealed that let women make laws for themselves. It was highlighted that Judging is not only applying the law and deciding cases between parties but also includes being just, fair and non-discriminatory. Judiciary has the power to translate human rights enshrined in the laws of the country into a reality for the people as no law discriminates between men and women. Gender perspective needs to be adopted in all cases and should not be limited to only sexual orientation. Power imbalances in society can be rectified by playing a proactive role. During the discourse, some practical steps were highlighted for more gender courts like providing training in feminist lawyering, which will help judges to be better equipped to deal with gender bias arguments Secondly, the court should adopt a survivor-centric approach. Legal provisions must be used to assist the victim which includes in-camera trials etc. it was stressed that state-funded mental health professionals should be appointed for catering to the mental health needs of gender-based violence victims. In addition to this, it was advised that the court should adopt practices to prevent re-victimization and re-traumatization of the victim. An example of such policy is the International Criminal Courts Protocol on the vulnerability assessment and support procedure which is used to facilitate the testimony of vulnerable witnesses. Furthermore, some restorative measures were suggested like the focus should be more on safeguarding the interest of the survivor rather than punishing the perpetrator. The restorative justice system shifts the focus from the harm caused to who caused it, how it affected the victim, and how it can be rectified instead of the harm itself. Some notable international judgments like *Opuz v. Turkey*, *European Court of Human Rights (2009):2*; *Situation in Uganda, the Prosecutor v. Dominic Ongwen*, *International Criminal Court (4th Feb 2021)* were discussed in the light that gender-based violence is a form of discrimination. In the Indian context, *Hina Haneefa v. State of Kerala Ker HC, WP© 23404/2020*. *Nipun Saxena v. UOI* , *X v. The Principal Secretary Health & family welfare Department*, were discussed.

Feminist jurisprudence is not a long process but it started in the mid or late 90s, it is nothing but to relook and rewrite the history of philosophy. While doing so, the misogynist view of male philosophers came to light. A feminist jurist was concerned about whether it was nature or nurture that discriminated against or caused stereotyping. It is not nature but nurture that

brings in different behavioral traits in both genders. Gender-stereotypic language, behaviors being set as default in the mindset of family and society at large was highlighted. The deliberation focused mainly on Social Equality, Political Equality or right to self-determination, and the Economic Equality given to women. Social Equality was discussed in the light of *Joseph Shine v. Union of India* (2018) 2 SCC 189 (Adultery Case), *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (Triple Talaq) and *Indian Young Lawyers Association v. The State of Kerala & Ors* (2019) 11 SCC 1 (Sabrimala Judgement) during the discourse. Through *Vishaka & Ors vs State Of Rajasthan & Ors* it was mentioned that economic equality is also of paramount importance. Lastly, In *Pratik Bhowmik v State of West Bengal* [CRM(DB) 3590 of 2022] Delhi High Court 2022 has ruled that the choice of medical termination can be practiced only by mother, was discussed in the light of right to self-determination. A plethora of cases viz; *Prakash vs. Phulavati*, *Daniel Latif v. Union of India* and *Danamma @Suman Surpur vs. Amar* etc. were also discussed under economic equality.

Session 10 - Alternative Dispute Resolution

Panel - Justice G. S. Sistani & Dr. Aman M. Hingorani

Alternative Dispute Resolution is not an alternative option, in fact, it is an appropriate dispute resolution because parties to the proceedings are freely entitled to take decisions, and decide the future course of action and there is nobody to arbitrate. The decisions sought through arbitration are considered more permanent in nature. It was mentioned that courts are now obliged to encourage this dispute mechanism more particularly in commercial disputes. Mediation whether codified or not but is ingrained in our society at almost every step. Section 89 of Civil Procedure Code, 1908 has four branches viz mediation, arbitration, Lok adalat, and conciliation. Mediation helps to resolve all issues between individuals because the mediator always has the inclination to listen. It was highlighted that mediation is a movement and have to march with it every single day. Section 12A of the commercial Courts Acts makes the pre-litigation mediation mandatory to the extent that the suit can be dismissed, except if a litigant is seeking an urgent remedy. Whenever a case comes up for litigation, judges should be proactive and refer the matter to mediation if it is suitable. Mediation is inexpensive, less time-consuming, proceedings are confidential, a mediator cannot share their notes in evidence and finality are some of the benefits of choosing mediation. Additionally, mediation helps restores relationships in disputes of property and sometime in matrimonial cases. It was suggested that while referring a matter to mediation, the approach cannot be cosmetic/plastic. The role of a judge while referring a matter to a mediator is very crucial. A judge with his sixth sense, with all his mind and heart, should be capable of referring the matter to mediation, and his advice should be taken seriously once it has been done. Also, once a matter is referred it is advisable to keep a track of it. Further, mediation should never be used as a tool for one of the litigants to delay the matter. Mediation should never be hurried; perhaps it is better to be a patient listener.

The traditional judicial function is adjudication and as judges, you decide it over. Mediation is an integral part of the formal legal system. It is a kind of vent to breathe else the system would collapse as suggested. The best possible definition of mediation is to understand the role of a mediator which is to break the conflict cycle and to do the same a mediator should have the skills. The mindset of a judge and that of a mediator should be different. Mediation has to be a voluntary structured process, its principles are parties' autonomy, self-determination, and confidentiality. Mediators should have the negotiating, facilitative skills, and communication skills to make parties shift from the stand they have taken to the underlining interest. Lastly, it was emphasized that mediation is one of the best methods for bringing peace in society, allowing people to restore themselves, and should be aspired for attaining a higher sense of justice