

NATIONAL JUDICIAL ACADEMY



TRAINING PROGRAMME FOR BANGLADESH JUDGES AND JUDICIAL OFFICERS: (SE-10)

6TH - 10TH NOVEMBER, 2023

PROGRAMME REPORT

PREPARED BY:

RAJESH SUMAN & KRISHNA SISODIA,
FACULTY, NATIONAL JUDICIAL ACADEMY,
BHOPAL

Overview 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 2023-2024, it was proposed that seven batches, each of 50 judicial officers will visit India and participate in the training programme. 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 judicial officers nominated by Bangladesh, from 06th – 10th November, 2023 was organized by NJA at Bhopal. The Programme included sessions on judicial skills, constitutional, civil, criminal, human rights laws and correlative jurisprudence. The training also aimed to acquaint participants with elements of judicial behavior- ethics, neutrality and professionalism, skills of judging and judgment writing. The programme facilitated discussions on court & case management and use of ICT in the administration of justice.

Session 1: Indian Constitution and Judiciary: Overview and Architecture

Speakers: Justice Sanjib Banerjee & Justice S. Talapatra

The session was commenced with discussion on the Constitution as a social contract. The relevance of the Constitution to the district judiciary was highlighted and it was opined that the trial court can send a reference to the High Court for the determination of a question of law. The Constitution provides overarching set of principles under which all laws are interpreted. The speaker then explained constitutional reasoning and constitutional ethos. It was suggested that the preamble is the summary of the rights and of the Constitution and judges should promote the preamble of the Constitution.

The role of district court was explained with discussion on the Union Carbide Case where interim compensation to the victim of gas disaster was awarded by the district court. The judgment of the Supreme Court *Municipal Council, Ratlam vs. Shri Vardhichand & Ors.* 1980 SCC (4) 162 was also discussed. It was suggested that trial court judges are in direct contact with the common man and they are the first hope of common man.

The principles related to due process requirements according to the Constitution was discussed and various judgments of the Supreme Court were referred in this regard including *A.K. Gopalan v. State of Madras* AIR 1950 SC 27 and *Maneka Gandhi v. Union of India* AIR 1978 SC 597. The deliberations of the Constituent Assembly of India were also referred. It was opined that by the creative interpretation of provisions of the Constitution, the Supreme Court has incorporated the due process requirements in *Maneka Gandhi* case. Then speakers focussed on the role of judiciary vis-à-vis other organs of the government. It was opined that fair and transparent procedure should be followed by the executive while implementing the laws.

The legal systems of India and Bangladesh was compared and common features were highlighted. The speaker then discussed laws relating to affirmative action which provided opportunity to weaker sections of the society and give them entry into the workspace. Then

the doctrine of rule of law was discussed and it was opined that Article 13 (1) of the Constitution preserves the system of law introduced by the British in India including the basic common law structure and Articles 14, 19 and 21 intrinsically adopt the applicability of the rule of law. The discussion then focussed on the doctrine of separation of power and basic structure.

Session 2: Constitutional Vision of Justice

Speakers: Justice Sanjib Banerjee & Justice S. Talapatra

The session was commenced with focussing on various facets of Justice including social, economic, and political. Then it was opined that resources in the society should be better distributed and that will improve the economic situation of the country. The wealth must spread out and people should have the right to choose the government which they want.

The importance of the institutions for local self-governance was highlighted and it was opined that it is a constitutional arrangement and it enhances democratic values among people. Then it was opined that the Indian Constitution provides equality of opportunity to people of the country and the system of cash subsidy through Aadhar enabled system was referred in this regard. The prevalence of caste system in India was referred. The discussion then focussed on the issue of access to justice and it was opined that due to e-Court project and enablement of virtual hearing the access of poor persons to justice have been increased. However still a large majority of poor persons do not have technical amenities to participate through the virtual hearing system. Emphasis was paid on enhancing the quality and responsiveness of justice through the use of technology.

The low judge to population in India was highlighted and it was suggested that judicial infrastructure should be enhanced. It was opined that judges are not embodiment of god and they are not discharging divine duty. Judges are officers in the constitutional scheme to uphold the rule of law. Then the doctrine of basic structure was referred and the NJAC judgement was discussed. The essential features of representative democracy were highlighted and it was emphasised that democracy should be representative of all segments of community. The role of the Indian Constitution in enhancing representative democracy in the country was explained and various provision of the Constitution were referred in this regard. The role of preamble in interpreting the Constitution was highlighted and the justice in all its forms as mentioned in the preamble was explained. The words of Dr. B.R. Ambedkar were referred and it was opined that a good Constitution will fail if it is in the hands of bad people. It was emphasised that the capacity of judges should be enhanced for the effective working of the legal system. Various strategies to improve the system of access to justice were discussed with the participants. It was emphasised that judges must ensure that courts functions to serve all segment of the community and poor persons get proper legal aid.

Session 3: Ratio of a Precedent: An Analysis

Speakers: Mr. V. Sudhish Pai & Prof. (Dr.) V. K. Dixit

The session commenced with the discussion on the meaning of precedent and the common law tradition of precedent was explained to the participants. The speaker highlighted the historical background of the system of precedent. The comparison was drawn between the common law system and civil law system with regard to the sources of law. The judgment *East India Commercial Co., Ltd., Calcutta & Ors v. Collector of Customs, Calcutta*, AIR 1962 SC 1893 was discussed. Article 141 of the Indian Constitution *vis –a vis* Article 111 of

the Constitution of the People's Republic of Bangladesh were discussed. The provisions of the Constitution of India were referred including Articles 141, 144, 215 and 227. The discussion then focussed on principles related to ratio decidendi, stare decisis, obiter dicta and subsilentio. It was opined that stare decisis is not an end in itself and that it is instead the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. The judgment *Vasquez vs Hillery* 494 US 254 1986 and *Adarand Constructors Inc. vs. Penn* 515 US 200 1995 were discussed. The methodology of identifying ratio in a precedent was discussed in detail and two methods i.e. Wambaugh's Test and Goodhart's Test were referred. The speaker discussed the role and exercise of judicial choice in the selection of precedent in a particular matter. It was opined that judicial choices lie within the matrix of the rule of stare decisis and how a judge marks out and determines that area largely determines the type of judge he is. The concept of super precedent was discussed and it was defined as a precedent which has been widely and uniformly accepted by public authorities including the court. It was opined that a case may have more than one ratio decidendi when a judge gives two reasons for his decision and both are binding and it is not permissible to pick out one as being supposedly the better ratio. The ratio decidendi in cases involving multiple judgements by multiple member bench was discussed and ideas were shared on various problems in the determination of ratio decidendi in such situation. Then speaker focussed on dissent in a judgment and what is the significance of dissent. It was opined that dissent is not a sign of institutional weakness and rather it reflect intellectual honesty and application and exercise of the judges' intellectual and mental faculties.

Session 4: Elements of Judicial Behaviour: Ethics, Neutrality, and Professionalism

Speakers: Justice S. G. Gokani & Justice Ved Prakash Sharma

The session was commenced with discussion on the various ethical standards necessary for judges. It was opined that there is gradual erosion of social values and the expectation of society is focussed on judiciary and the burden on judges to meet this expectation is increasing. The speaker emphasised the need of professionalism in court and it was opined that there should be professional attitude in the work culture among judges. The meaning of professionalism was explained to participants and five essential attributes of professionalism including professional competence, spirit and attitude of serviceability, judicial temperament, humility and courage were explained. Five key aspects of professional competence for judges were discussed. These included knowledge of the law and ability to carry out research including the ability to use I.T. tools, ability to perceive, comprehend, understand and communicate concepts and ideas, skill to marshal facts and appreciate the evidence, ability to reason their opinions and decisions as per relevant law and to communicate and the ability to hold court hearings. The spirit and attitude of serviceability was emphasised. The speaker then focussed on judicial temperament which is the ability to communicate with counsel, witnesses and parties in a dignified way. The elements of judicial temperament including patience, open-mindedness, sensitivity, courtesy, firmness, understanding, forbearance under provocation and the ability to deal with others without giving offense were explained. The speaker opined that calmness and tranquillity is very necessary to discharge judicial function in an objective manner. The speaker highlighted the importance of judicial humility and courage as the necessary attributes of judicial ethics. The Bangalore Principles of Judicial Conduct 2002 was discussed and its various values were highlighted. These included independence, impartiality, integrity, propriety, equality, competence and diligence. The discussion then focussed on the concept of judicial neutrality which consists of reasoning with the values that are provided by law and not the subjective opinion of a person. It was

opined that the duty of neutrality may be breached if a judge makes moral judgments as per his own beliefs leaving behind the legislative intent while interpreting the legal provisions.

Session 5: Judging Skills: Art, Craft, and Science of Drafting Judgments

Speakers: Justice S. G. Gokani, Justice U.C. Dhyani & Justice Ved Prakash Sharma

The session was commenced with discussion on the importance of judgment and it was opined that judgment replicates the individuality of the judge and therefore it is indispensable that it should be written with care and caution. Then essential elements of a judgment were explained and the structure of judicial writing was discussed. It was opined that the judgment is not for the sake of self-satisfaction of the judge and rather it is a document having utmost importance to various stake holders, including parties to the case, their lawyers, appellate court and other persons interested in the outcome of the case. It was added that a judgment constitutes the considered opinion of the court on the basis of facts pleaded, points raised, evidence adduced, argument addressed and the law applicable to the facts of the case. The judgment as an art was discussed and it was suggested that it is an art because it involves application of the intellect, intelligence, understanding, rational capacity, power of comprehension, power of expression and the power of communication of a judge. The speaker then stated that writing of a judgement is a science as well as an art because it requires a systematic analysis of facts emerging from the conflicting pleas raised by the parties as well the law applicable to the facts. The importance of brevity in writing judgment was emphasised that it was opined that brevity is the essence of a judgment. The arguments should be narrated in the judgment in the summary form and writing arguments in detail should be avoided. The importance of judicial modesty and moderation in a judgment was highlighted. Then the area relating to the application of law was discussed and it was suggested that application of law in the judgement should leave no ambiguity as to the manner in which the case was decided. The court has to apply principles of law in the matter by implementing a just, sensible and appropriate analysis.

Session 6: Principles of Evidence: Appreciation in Civil and Criminal Cases

Speakers: Justice M.L. Tahaliyani & Justice Asha Menon

The session begins with defining the evidentiary standards in civil and criminal cases i.e. preponderance of probability in civil cases and proof beyond reasonable doubt in criminal cases. It was stated that in criminal cases the standard of proof is stricter than standard of proof in civil cases because in criminal cases the life and liberty of persons are at stake. It was opined that in criminal cases all circumstantial evidence should be beyond reasonable doubt and it is quality of evidence and not quantity of evidence which is necessary and the standard of proof also depends on the facts of the case. The proof of facts by accomplice was discussed and the onus and burden of proof and their fundamental elements were explained to the participants. Section 106 of the Indian Evidence Act where facts which is exclusively within the knowledge of the accused was discussed. It was stated that if the accused fails to adduce evidence which is within his knowledge then an adverse inference can be drawn against him. The accused cannot be compelled to give evidence against himself and the right of prosecution and right of accused should be balanced by the court. Article 20 of Constitution of India was discussed. The reverse burden of proof was compared with confession of the accused. The case of Ajmal Kasab was discussed in this regard and it was stated that the confession of Kasab revealed that the conspiracy for attack was hatched in Pakistan.

The reverse burden of proof was discussed and it was opined that even though the accused has to prove that he is not guilty, the prosecution must prove the foundational facts. The cases under the POCSO Act, NDPS Act and dowry cases were discussed in this regard. Section 114 of the Indian where the court may presume existence of certain facts was highlighted. The evidence by the hostile witness was discussed and the competence of child witnesses was deliberated upon. The process of collection of evidence was discussed and it was opined that it is the most crucial part of investigation and all protocols should be followed in the collection of evidence. The importance of chain of custody was highlighted and the proof of unregistered document was discussed.

Session 7: Forensic Evidence in Civil and Criminal Trials

Speakers: Justice M.L. Tahaliyani, Justice Asha Menon & Ms. Nisha Menon

The session began with discussion on the Locard's principle of exchange. The principle of exchange implies that every criminal can be connected to the crime by contact traces carried from or left at the crime scene. Various types of physical and biological forensic evidences were discussed. The importance of expert witness was highlighted and it was stated that an expert operates in a field beyond the range of common knowledge and he is a person who by reason of his training or experience is qualified to express an opinion. The discussion then focussed on DNA evidence. The biological explanations for the DNA was discussed and it was opined that DNA evidence is based on analysis of chromosomes which controls visible characteristics including eye, hair, and skin color and also invisible characteristics like blood groups and inherited diseases. The types of samples from where DNA evidence can be collected was discussed. The emerging technology in DNA evidence i.e. M-Vac technology was highlighted and its main features were discussed. It was stated that Touch DNA, contact DNA or DNA material (usually epithelial cells) that has been deposited by the perpetrator by grabbing, touching or pressing up against an object, is an area where the M-Vac System works well. When compared to swabbing or taping, it consistently collects more DNA material. The M-Vac System's ability to collect from the top surface and in the cracks and crevices of the evidence helps retrieve trace amounts of DNA material. Various case studies were discussed where DNA evidence was used by the prosecution including Naina Sahni case, Nirbhaya case and Shradhha Walker case. The method, packaging and storage of biological forensic evidence were explained. It was opined that it should be ensured that the sample and testing procedure are reliable and tests are performed properly as per the standards. The use of DNA evidence in paternity cases was discussed.

Session 8: Electronic Evidence: New Horizons, Collection, Preservation and Appreciation

Speaker: Dr. Harold D' Costa

The session commenced with providing an overview of the *modus operandi* of different types of cybercrimes viz., online financial frauds, sextortion, cyber stalking, etc. Further, the session focussed upon certain investigation techniques by providing live demonstration of WhatsApp chat modification, message date/time modification, RT-PCR certificate modification and location spoofing. The discussion further pertained to preservation/retention of electronic data as well as ascertaining its authenticity. The procedure for proper collection of cyber evidence in terms of pre investigation assessment; evaluation of scene of crime; collection of physical evidence and digital evidence; forensic duplication; seizure of digital evidence; packaging, labelling and transportation; legal procedure to be followed; and gathering information from various agencies was elaborated.

While referring to the Locard's Exchange Principle it was highlighted that each user's interaction with digital devices leaves both user data and certain remnants of digital data that is contained in the device. Further, the process of documentation of digital evidence was traced from identification/preparation; search and seizure; preservation; examination; analysis; reporting and finally presentation in court. In this regard, it was stated that since electronic evidence can be altered or damaged it is necessary for the court to ascertain that chain of custody is properly maintained without which it would be difficult to prove the integrity of the evidence. The Secure Hash Algorithm (SHA) must also accompany the chain of custody form.

Session 9: Criminal Justice Administration and Human Rights

Speakers: Justice M.L. Tahaliyani, Justice Talwant Singh and Mr. E.V. Chandru @ E. Chandrasekaran

The session began with stressing that criminal justice administration should be viewed through the prism of human rights. Emphasis was placed on Magna Carta, Bill of Rights and Declaration of the Rights of Man and of the Citizen. The Universal Declaration of Human Rights, 1948 (UDHR), International Covenant on Civil and Political Rights, 1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) were also discussed. It was asserted that Articles 20, 21 and 22 of the Constitution of India embodies the basic principles of human rights. The right to free legal aid, right to fair trial and right to legal representation were also discussed in the light of the Constitutional provisions read with relevant procedural provisions. The landmark decisions of *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 488, *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98, *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416, *Mohd. Ajmal Kasab v. State of Maharashtra* (2012) 9 SCC 1 were referred.

Further, drawing a distinction between the Constitution of India and Bangladesh it was highlighted that in the Preamble of the Constitution of Bangladesh there is express mention of the term 'human rights', however, in the Indian Constitution, there is no express mention. It was opined that in India the human rights are implicit in the fundamental rights. The session concluded with a discussion on the challenges in protection of human rights and the role of judiciary in ensuring its compliance.

Session 10: Judge as the Master of the Court: Court & Case Management

Speakers: Dr. Justice S. Vimala and Justice Talwant Singh

The session began with the assertion that the need of court management arose because of failure of courts to deliver justice within reasonable time. Elements of management such as planning, organizing, direction, coordinating and controlling as propounded by Peter Drucker were outlined. A reference was made to the Lord Woolf report and suggestions incorporated in the Civil Procedure Act 1997 of the United Kingdom were highlighted viz. length of time for litigation, fixed time-table, exchanging witness statements, video recording of evidence, etc. Further, various stages of trial where case management is required such as issue of plaint, service of summons, interim applications, admissions, issues, evidence, court commissioners, rejection of plaint, oral applications, original documents, preliminary decree, arguments, judgment (oral & reserved) and summary suits were underlined.

The session further dwelt upon docket exclusion and docket explosion. Then management of various levels in court was discussed and it was emphasized that judge should manage the court through cooperation and not through compulsion. A reference was made to the judgement in *Imtiyaz Ahmed v. State of Uttar Pradesh (2017) 3 SCC 658* wherein the Supreme Court took note of the huge pendency of cases and issued certain guidelines regarding the clearing of arrears, timely disposal of cases and infrastructural development of the Courts. Some principles to efficiently manage court including motivation, communication skills, leadership and team building, time management, and stress management were enunciated. The issue regarding how to dispose of cases by maintaining the cordial relationship with the bar and effectively supervising the court and subordinate staff was highlighted.

The profile of various levels of courts was explained and it was stated that circulars of High Courts should be implemented by staff with utmost sincerity. It was opined that the quality time should be given to complex matters and soon after finishing the arguments the judge must deliver the judgment without delay. The issue of access to justice was highlighted and it was emphasized that judges should manage their court in a way that enhances public trust and confidence in courts. It was stressed that time management, procedural simplification, decentralization are some examples of management in the judiciary which sets out the cornerstone for model and futurist court. Lastly, the session was concluded by quoting William Schwarzer, “*Judges who think they are too busy to manage cases are really too busy not to. Indeed, the busiest Judges with the heaviest dockets are the ones most in need of sound case management practices.*”

Session 11: Judiciary and Media: Need for Balance

Speakers: Justice R.D. Dhanuka and Dr. Justice S. Vimala

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 necessary. 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* observed that 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. Thereafter, the case of *Kaushal Kishor v. State of U.P., 2023 SCC OnLine SC 6* was highlighted wherein the Supreme Court held that no grounds outside Article 19(2) can be availed to restrict free speech. Further, while relying upon the transformative jurisprudence relating to the interpretation of Articles 19 and 21 of the Constitution of India held that the initial understanding that fundamental rights can only be claimed against the State has changed, and today, rights under Article 19 and 21 of the Constitution can also be enforced against persons other than the State or its instrumentalities. The expansive interpretation adopted by the Supreme Court ensures the continued relevance of the Fundamental Rights to meet the challenges of today’s day and age. However, it was opined that in recent times media is overstepping its boundaries due to corporatization and the never ending pursuit to engage maximum viewership. This results in violation of the principles of a fair trial. 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.

Further, 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 v. 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 or the accused.

Session 12: Landmark Judgments: Celebrating Decadal Masterpieces

Speakers: Justice R.D. Dhanuka and Prof. (Dr.) V.K. Dixit

The session emphasised upon cases involving constitutional rights with respect to the protection of human rights that have significantly affected the course of social fabric in the India. The first case that was discussed in this regard was *Shayara Bano v. Union of India*, (2017) 9 SCC 1, in the said case the practice of *talaq-e-biddat* or instantaneous triple talaq was held as unconstitutional. In *Joseph Shine v. Union of India*, (2018) 2 SCC 189 the Court decriminalised adultery, by striking down Section 497 of the Indian Penal Code, 1860 (IPC). On the aspect of sensitivity, the judgment in *Aparna Bhat v. State of MP*, 2021 SCC OnLine 230, was highlighted wherein the Apex Court gave directions to be considered while granting bail in sexual offences.

Thereafter, the session focussed on the judgment of the Apex Court in the case of *Anoop Barawal v. Union of India*, 2023 SCC Online SC 216 wherein the significance of democratic elections in ensuring fair democracy was highlighted. The discussions revolved around various constitutional aspects, including the interpretation of Article 324, the role of the Election Commission, the appointment of key positions and the concept of constitutional morality. The concept of constitutional morality was briefly discussed, highlighting its relevance in judicial decisions and constitutional interpretation. The significance of Article 326 of the Constitution, which guarantees universal adult franchise, was emphasized. The discussions acknowledged the importance of public participation in the electoral process for the strength of democracy. Further, the case of *PUCCL v. Union of India*, (2003) 4 SCC 399 was referenced, which introduced the concept of none of the above (NOTA) option. It was highlighted that NOTA was seen as a means to guarantee secrecy while casting a negative or neutral vote, increasing public participation, and empowering voters to register their discontent. The Apex Court observed that NOTA would empower the people, thereby accelerating effective political participation, since people could abstain and register their

discontent without fear of reprisal. It was believed that NOTA would compel political parties to field better candidates, thereby improving the quality of candidates and the overall election process.