



Judicial Education

NJA

*Newsletter of the
National Judicial Academy*



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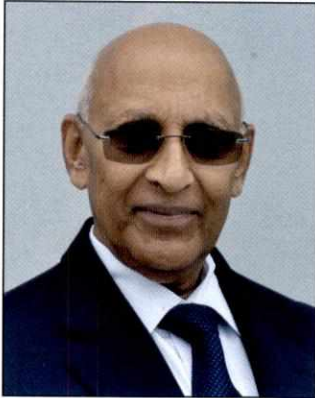
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From the Desk of the Director, NJA

This newsletter covers programs organized by the National Judicial Academy during January to March, 2018. Twenty academic and training events were organized by the Academy during the period.

The calendar year 2018 commenced with a National Orientation Program for Junior Division Judges covering a range of themes including the Constitutional vision of Justice; Role of Courts in a constitutional democracy; Discovering current judicial methods; Judging skills: The Art, Craft and Science of Drafting judgments and orders; Managing the Docket: Court and case Management; Electronic and Forensic evidence; and The Role of Courts in securing gender justice; apart from sessions on managing and coping with stress and ADR.

During 5th to 11th January a seminar for Judges from Bangladesh was held covering Magistrates, Assistant and Senior Assistant level judicial officers of Bangladesh. Your Academy is privileged to have received a very favorable response from participant officers and the team leadership on the training program, the thematic content, the research and reading material provided as well as arrangements made for the participant officers. Five other programs were also organized during this Month; a Refresher course for Presiding Officers of Labor Courts; West Zone Regional Conference held at Jabalpur, hosted by the Madhya Pradesh High Court facilitating participation of High Court Justices, Junior and Senior Division Judicial Officers from the High Courts of M.P, Rajasthan, Gujarat and Bombay. During 19th to 21st the Academy organized two parallel programs, a National Conference for newly elevated High Court Justices and the other for Principal District and Sessions Judges, on Constitutional and Administrative Law, to sensitize District level Judicial Officers to elements of the constitutional vision of justice and to social context judging. A Colloquium for Superior Courts Judges of Egypt was held during 22nd to 27th January; 25 Judges of the Court of Cassation and the Supreme State Council participated and interacted with an eminent panel of resource persons, to share experiences and knowledge on our laws, judicial methods and impart information regarding the systems and architecture of adjudication in Egypt.

Seven academic sessions; a National Judicial Conference for High Court Justices; a National Seminar on "Court Administration, Management and ICT" for Principal District

and Sessions Judges; a Workshop for Additional District Judges; a National Seminar on “Access to Justice and Legal Aid” for Principal District and Sessions Judges; a National Conference on “The Regime of Goods and Services Tax” for Justices of High Courts; a Workshop for Additional District Judges; and the South Zone Regional Conference at Hyderabad, for Justices and Judicial Officers of the southern region were organized during February, 2018.

March commenced with a National Judicial Conference for High Court Justices, followed by a National Seminar for Presidents and Members of District Consumer Fora. Four other programs in the month were, another Seminar, for District, Additional and Joint District and Sessions judicial officers from Bangladesh, during 16th to 22nd March; the North Zone Regional Conference organized at Chandigarh in collaboration with the Punjab and Haryana High Court and the Chandigarh Judicial Academy, covering High Court Justices and other level judicial Officers from the States of Allahabad, Uttarakhand, Jammu and Kashmir, Himachal Pradesh and Delhi besides from the host High Court of Punjab and Haryana; during March 23rd to 25th the Academy organized parallel sessions in Bhopal, a National Judicial Conference for High Court Justices and a meeting of Directors and Faculty members of State Judicial Academies, to discuss and prepare draft calendars for the ensuing academic year, for consideration by the National Judicial Academic Council.

The Academy places on record our gratitude and regard to the several domain experts, to the Hon'ble judges, serving and retired of the Supreme Court and the several High Courts, Professors and other academicians who came over to guide our sessions and shared their wide and profound knowledge and experience with participant judicial officers. As ever, we could not have provided the consistent and qualitative judicial education and training the Academy was conceived to deliver upon without support from our patrons.

Justice (Retd.) Raghuram Goda
Director

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P-1077

NATIONAL ORIENTATION PROGRAMME FOR JUNIOR DIVISION JUDGES

January 05-11, 2018

Mr. Yogesh Pratap Singh, Research Fellow &
Mr. Sumit Bhattacharya, Research Fellow



The National Judicial Academy (NJA) organised a 7 day “National Orientation Programme for Junior Division Judges” (P-1077) from 05 – 11 January, 2018 at the National Judicial Academy, Bhopal.

The Programme was conceived as capacity building programme of judicial officers at the primary tier, viz. Civil judges (Junior Division). The sessions were designed to provide a forum for the participant officers to share experiences and views with counterparts from other States; to facilitate better appreciation of the judicial role; responsibility of judicial officers in a constitutional democracy; recent developments in juridical thinking and technological advances relevant to accreting our performance standards; and to deliberate on several aspects of law and practice relevant to enhancing the quality of their performance.

About 34 Judges, nominated from different High Courts participated in the programme. The programme was divided into 20 sessions over the duration of 7 days on following themes.

Constitutional Vision of Justice

- This session focused on the guiding principles of the constitution to interpret the law.

- The role of trial Judges in context of the constitution was also discussed. It was emphasized that the trial judges play a critical and crucial role in building the foundation of a case.
- The concept, meaning and theories of Justice within the Constitution of India were discussed and explained during the session.
- While discussing the idea of constitution at vision of Justice, it was highlighted that every judge must look into Justice from Social, Economic and Political point of view for greater welfare of citizens in general and society in particular.

Role of Courts in a Constitutional Democracy

- The importance of having a deep understanding of architectural cartography of the Constitution of India under various provisions was discussed. The doubts regarding the interpretation of the language of a particular statute was also emphasized in the session.
- The duty of the Judges to uphold the

Constitution a values under the constitution and the law of the land was emphasized as primary role of a Judge in a constitutional democracy.

- It was highlighted that Court has to protect individual rights as embedded in the Constitution of India. To elaborate this further post-independence scenario with respect to the tussle of power, instances of clashes between the Legislature and the Judiciary, landmark Judgements of the Supreme Court and a strong nature of Indian judiciary was explained to the participant Judges in the session.
- It was suggested that as a judge, they must try to discover the language of the Constitution in true spirit. The wider your vision, the wider will be the interpretation.
- It was emphasized that the Judges are surgeons of a social pathology. They shouldn't be too passionate while writing a judgement. The Judges should maintain the equilibrium of conflict and continue to remain neutral and professional. Therefore, broad and a deep understanding of the constitution become significant.
- It was further suggested that the judges should be reflective and not reactive.

Discovering Current Judicial Methods

- The session began with the screening of Michael Sandel's movie called '*Justice: What's The Right Thing To Do?*' Discussions were then followed on whether one can justify killing if the other person consents. During these discussions, the concept of 'law' and 'society' was defined and explained.
- Further, *The Case of the Speluncean Explorers* was discussed and viewpoints and comments of the participant judges were heard. After discussion it was suggested that judges should be innovative. They should look within the norms in order to deliver a better judgement. It was also advised that the judges should not let the exceptions become the rule; rather they must

look up to the precedents and apply them accordingly.

- Two aspects of Judicial Methods, Discovery and Justification explained to the participants. Discovery means how a judge reaches a particular decision and the other is Justification; means how a judge justifies a decision. It was further explained briefly the difference between the two by stating that the former is a realistic approach and is more important while the latter is less important.

Adherence to Core Judicial Values

- This part of the session was premised on the three core judicial values- Competence, Independence and Impartial Judiciary.
- It was advised and suggested that the judges must build public trust and confidence. Building up the credibility by having an impartial conduct and unquestionable integrity, both inside and outside the court, will help in building public trust and confidence.
- In order to maintain independence, it was advised that Judges should avoid contact with undesirable elements.
- Emphasis was also laid on maintaining one's integrity, competence, diligence and having a sense of containment and propriety.
- Four essential characteristics of a Judge were highlighted that includes- hearing courteously, proceeding wisely, considering soberly and deciding impartially.
- It was emphasized that Justice shouldn't only be done, but it should be seen to be done. Therefore, its projection is also equally important.
- Emphasized on the fact that since people expect certain standards from the judges, the 'quality of service' is one of the most important judicial values.
- Certain objectives of judicial values such as Accountability, Independence, Commitment, Confidence and Professionalism by

demonstrating competence and efficiency were explained in the session.

- With respect to the impact of technology, the judges must be able to use the technology and deploy it for legal research.
- It was suggested that the Judges should play active role in referring matters to Alternative Dispute Resolution by counseling litigants about the benefits of ADR for speedy Justice.
- Certain statutory principles like Statement of Values of Judicial life (as adopted by the bench of Supreme), Bangalore Principles of Judicial Conduct, The Universal Charter of Judges 2017 (International Association of Judges) were briefly explained to the participant Judges.
- Impartiality of the judges was considered to be the most critical value in a judicial process. They should not develop any human biases.
- The Judges must always keep their minds open and should focus on institutional values and not their individual values. Therefore, in other words, judges should always project the image of the institution instead of their own.
- It was further suggested that Judges should avoid discussing their judicial work on any social platform. They should avoid making any comments, opinions or expressions and shall also not respond to comments or criticism.

Judging Skills: Art, Craft and Science of Drafting Judgment

- The session commenced with a discussion regarding need to provide reasons in the Judgement and its importance thereof. It was emphasized that it is not only a duty but a statutory obligation to provide reasons in the Judgement.
- It was further pointed out that Judgements should always be written in small, simple and understandable manner and must record all their findings on every issue.
- Two core values relating to writing judgements such as Transparency and Accountability were

explained to the participants.

- It was highlighted that redundant phrases and repeating sentences should not be included in the judgement.
- On Language, style and length of the judgement, it was pointed out that the judgements should be written in a non-complicated fashion and the relief part must be clear.
- Words like 'careful', 'thoughtful' or 'anxious' should be avoided. Strong or disparaging remarks should also be avoided.
- On writing a good Judgement, it was suggested not to worry much about the result of one's judgment's approval as there is no absolute right or wrong. The judges were advised not to stress on it and be fearless.
- Original thought process and element of creativity while writing a judgement is always appreciated.

Managing the Docket : Court and Case Management

- The session was based primarily on how to manage the court effectively and practice case management efficiently and provide quality.
- Various methods of time management and measures to reduce stress and workload were discussed.
- Suggestions such as referring a case for ADR, appointment of Court Managers as Advisors, regulation of one's board by bringing it within the manageable limits and not overburdening were also discussed during the session.
- E-court system was explained to the participants.
- It was further suggested that Judges should monitor their cases. Judges must observe minute details of their courtrooms and should avoid getting in arguments with the counsel.

Information Technology and Cyber Crimes

- The session began with a brief overview on the current technological advancements, the pros

and cons in context of day to day judicial functioning and role of Judges in effectively tackling cyber crimes.

- The provisions with respect to digital evidence under Indian Evidence Act were discussed.
- Characteristics of digital evidence such as Invisibility, easy alteration or destruction were discussed. The requirement of specialized training and expert testimony and challenges before the Court were also discussed during the session.
- Various stages and concept with respect to investigation of a cyber crime were explained to the participants in detail.
- The provisions with respect to the proof of Electronic Evidence under Information Technology Act were also discussed during the session.
- A long discussion then followed regarding the challenges social media poses and how easily it can be misused. Cases where the Supreme Court upheld the internet ban were discussed briefly.
- Some questions were posed to the participants regarding their experiences in dealing with the cases of electronic evidence, its reliability and admissibility at the stage of trial.
- What a judge must do when the electronic evidence is tempered was explained to the participants by citing various examples

Electronic Evidence: Collection, Preservation and Appreciation

- The session commenced by citing various practical examples by way of questions posed to the participants, to illustrate as to how technology can be used to extract evidence and what should be the approach of courts in considering electronic evidences.
- The evolution of electronic evidence was explained.
- It was highlighted that regardless of whether the evidence is physical evidence, trace evidence, biological matter, or electronic evidence

residing on a specialized device, all evidence must be treated the same.

- On where electronic evidence exist, It was explained that Electronic evidence can exist in any kind of storage device, Computers, CD's, DVD's, floppy disks, hard drives, thumb drives, Digital cameras, memory sticks and memory/SIM cards, PDA's, cell phones, Fax machines, answering machines, cordless phones, pagers, caller-ID, scanners, printers copiers and in CCTV.
- Role of electronic evidence in crime investigation and various challenges during investigation were also explained.
- The legislative framework under Information Technology Act with respect to electronic evidence was explained in detail with the help of relevant provisions of law and landmark judgements of Supreme Court and High Court
- Various terminologies related to cyber crime were also explained in detail.

Forensic Evidence in Civil and Criminal Trials: DNA Profiling

- The session began with a discussion on the role of Forensic Science in the Criminal Justice System.
- It was explained that forensic Science is the application of science for legal purposes in order to evaluate circumstantial sort of evidence. It is therefore supplied always by an Expert Witness.
- Two types of evidence, Direct and Circumstantial, were discussed.
- The speaker talked about DNA, its types and its characteristics. New technologies in DNA profiling that would address the issues of time and expertises were also discussed.
- It was discussed that there is a lack of scientific methods in investigations that ultimately hamper the delivery of justice. Investigating Officers are also not well equipped due to which Judges have no other option but to rely on witnesses.

- There is a lack of DNA testing infrastructure in India. DNA is not collected properly due to lack of required knowledge and expertise. In order to avoid contamination of DNA samples, certain guidelines were discussed that an Investigating Officer must take care of, emphasizing on their training, skill and expertise.

Understanding Stress & its Implications, Managing Stress through Emotional Intelligence and Occupational Stress

- The session began with a discussion on stages of stress such as relaxed, pressurized, worried, stressed, depression and breakdown.
- After a short exercise, various causes of stress and the ways to deal with were discussed with the participants.
- Various aspects related to stress in professional and personal life were also discussed in detail during the session.

Role of Courts in Securing Gender Justice

- The session began with a discussion on need of sensitization of judicial officers with respect to gender Justice.
- The difference between the definition of 'sex' and 'gender' was also explained during the session.
- The concept of Gender Justice and provisions thereto as enshrined in the Constitution of India in Part III and IV, International treaties, conventions and landmark Judgements of the Supreme Court on Gender Justice were also highlighted during the session.
- Various legislations dealing with Gender Justice were also discussed in the session.
- The speaker through various examples emphasized and explained that there is a gender bias in the courtroom as well and therefore, there is an urgent need of gender sensitization of Judicial Officers.
- It was further emphasized that task of the judges is to be sensitive in order to bridge the gap between reality and law. Therefore, the judges

were suggested not to deal with the cases mechanically.

ADR and Plea Bargaining

- The speaker began the discussion by posing the challenges faced by the justice delivery system in India so far and why there is a need for ADR mechanism.
- It was stressed that ADR is although not a substitute for courts, but it is a complementary mechanism that provides pragmatic approach towards realization of justice.
- The origin of ADR regime in India, landmark Judgments of the Supreme Court, constitution of Mediation and Conciliation project committee by the Supreme Court and present scenario were also explained and highlighted during the session.
- Advantages of ADR such as creative resolution time efficient, informal, economical, private, and easily accessible were discussed during the session.
- The speaker explained the importance of mediation and defined it as an amicable resolution of disputes by using specialized communication and negotiation techniques by the mediator who does not adjudicates, but facilitates.
- In order to explain the process of mediation, the speaker conducted a simulation exercise involving participants as a mediator and as parties to the dispute.
- It was explained that process of mediation is impartial, purely confidential, creative and flexible and since the parties themselves find the solution to the dispute, it also recognizes the right of self-determination. Therefore, it changes confrontation into collaboration.
- The session concluded with a short discussion on Plea Bargaining. It is defined to be as a negotiation between the Complainant, accused, investigating agency, public prosecutor and the defense counsel, if so desired by the accused. It

was therefore introduced in the year 2006 in the Criminal Procedure Code of 1973, by virtue of the Criminal Law (Amendment) Act 2005.

Law of Precedents and Challenges in Identifying & Applying *Ratio Decidendi*

- The session began with a discussion on certainty in law with respect to precedents. It was emphasized that there has to be certainty in law and that it cannot be changed frequently. However, there are times when the judges are tempted to make decisions contrary to the settled law, but the precedents cannot be overruled. The freedom of the judges, therefore, is limited to the law of Precedents. Precedents can only be broken by legislation, subsequent decision or the changing law and the needs of the society.
- Article 141 of the Constitution of India clearly mandates that law declared by the Supreme Court is binding and thus, reflects the principle of *Stare Decisis*. But for the High Courts, there is no such mandate and it is only the precedents that are binding.
- The speaker explained the difference between *Res Judicata* and *Stare Decisis* stating that former is the decision binding only to the parties and the latter is the decision where question of law is settled and is binding on the subordinate courts.
- The speaker cautioned the participants to follow the *Ratio Decidendi* carefully as sometimes the Counsel might lead them to *Obiter Dicta*. Thus, they have to distinguish between the *Ratio Decidendi* and the *Obiter Dicta*.
- The speaker also explained the distinction between Judicial Precedents and Legislative Rules, where the former is generally evolved during the course of time and stated in wide terms. Whereas, the latter are made or enacted and are precise in nature.
- *Stare Decisis* was distinguished from precedents as it means standing by the things decided. Precedents, on the other hand are persuasive and

binding.

- It was explained that it is the discretion of the judges to decipher which part of the earlier decision is binding upon them. Even the binding judgements need not be binding if they can easily distinguish from it.
- It was stressed that precedents although discourages independent thinking, common sense and initiative, it brings consistency and uniformity.
- The difference between Overruling, Reversing and Distinguishing was discussed briefly.
- Few pointers were also discussed by the speaker in order for judges to identify the *Ratio* in the precedents.
- While discussing the exceptions to the law of precedents, it was advised that the Rule of *per-incurium* and *sub silentio* should not be used.
- In cases where a long-standing precedent is wrong or is a perpetuation of justice or opposed to public policy, the judges should accept and refer it to the higher court or a larger bench.

Courtroom Technology: Use of ICT in Courts

- The session began by highlighting some of the recent developments and technological advancements in the e-Courts system so far.
- It was highlighted that in 2005, an E-Committee was formed and a plan was prepared for Phase-I that included delivery of hardware's to the courts, preparing a CIS system and preparing websites for each district. In Phase-I, computers were given to all states and in order to train the judicial officers, Cyber Law Training was given through the "TOT" Programme.
- In the Process Re-Engineering Program, a Committee was formed in every High Court to amend the rules in order to standardize the rules of all states into one. Core and Periphery Model was given, and source codes were given to all States.

- In Phase-II program Cloud Computing was introduced, configuration was made better and the courtrooms were provided with computers and video conferencing facilities. Additionally, finding the case details became easier because of the Case Number Record (CNR) on the E-courts website. Inter-operable Criminal Justice System was developed wherein the database was connected with jails, court, police stations and the hospitals. Digitalization of courts records was also introduced.
- The speaker also explained about the National Judicial Data Grid, its functions and utility.

Art of Hearing; and of Regulating Appropriate Decorum in the Court Room

- The session began with an introductory remark by the speaker that judges perform a public function in their courtrooms and therefore, they should be very cautious and careful. Hence, the skill of art of hearing is essential for every Judge.
- Attributes of hearing includes- civility, politeness and courteousness; and the principle function of a judge is Hearing.
- Fairness and Impartiality – Judges should not give more importance to either of the parties and should give equal time in equal measures by being fair to the parties.
- Facial Expressions – Judges should not keep smiling and should give the expression of attentiveness only. The parties are always watching them and their behavior.
- Open Mind – Judges are advised to not close their minds to the case and always keep their minds open to the society, the litigants and the arguments.
- Neutrality – Remain neutral throughout the proceedings. Be equal to all the parties and take active participation in hearing them.
- Make Notes – Take notes at the time of the hearing and develop your own style of making notes. This will not only make judges confident, but it will also help them writing the judgement.
- The speaker advised the judges to not behave arrogantly when the client wants to talk to their lawyer and make them feel that they have been heard.

Perceptions and Prejudices

- The session began with a discussion regarding our prejudices in our day-to-day lives. The speaker conducted an activity that demanded views of the participant judges on a hypothetical situation. On basis of this exercise, he explained how many things in our lives influence our process of seeing and understanding things.
- It was explained that our every action influences our biases and many a times, we found ourselves to become forcefully biased on a particular situation. Perception Processes are therefore getting influenced by our beliefs, actions, biases, etc, which are again susceptible to change.
- It was further stressed that perceptions are influenced by our beliefs, values, attitudes, motives, interest, experience, expectations, background, repetition, time factor, work setting and social setting.
- The speaker advised that one must be conscious about one's perceptual biasness. One must think consciously before taking any decision. It is not the facts, but the way facts are presented and hence, we should try to collect more data and statistics, take a pause and re-think.
- Since subconscious bias is always lurking behind our thinking, we should always ask ourselves a question as to why we are taking this decision and whether anything extraneous is affecting our decision. Judges, therefore, were advised to de-sanitize themselves from all such prejudices.

SE-09
SEMINAR FOR FOREIGN JUDGES (BANGLADESH)
January 05-11, 2018

**Dr. Amit Mehrotra, Assistant Professor and
Mr. Shivaraj S. Huchhanavar, Research Fellow**



The National Judicial Academy, Bhopal organized a training programme for Bangladesh Judicial Officers from 5th to 11th January 2018. The programme was spread over 17 Sessions over the period of 5 days. The target group was comprised of a mixed group of judges including Senior Assistant Judges, Assistant Judges and Magistrates.

The programme involved deliberations on the emerging issues in the field of constitutional law, principles of law relating to evidence in civil and criminal matters, judicial skills and human rights law, etc. Efforts were made to explore and understand the correlative jurisprudence of India and Bangladesh, and to share the 'best practices'.

The programme was inaugurated with an extensive discussion on overview and architecture of the Indian constitutional arrangement. The broad outlines and structures of Indian constitutional framework were discussed at length. Emphasis was laid on constitutional spirit, ideals and values while interpreting the constitutional provisions. The divergence in understanding secularism in the backdrop of the social, political and constitutional context of India and Bangladesh were appreciated. It

was viewed that the Constitution of Bangladesh, despite having a State religion, guarantees equal protection to other religions. Efforts were made to foreground the historic struggle for liberation in Bangladesh and its contribution in the making of the Constitution. Further, the concept of procedure established by law and in accordance with the law was discussed in detail. The salient features of Indian constitution, namely quasi-federal structure, separation of powers, preamble as a key to constitutional interpretation, fundamental rights and directive principles of state policy, etc., were deliberated.

The theme for session two was "Indian judiciary: organizational structure and jurisdiction". The session covered various aspects of organisational set-up, jurisdiction and functional similarities and differences in the judiciaries of both countries. The constitutional provisions on judicial independence, appointments, devolution and jurisdictions were analysed.

In the next session, goals, role and mission of courts in the milieu of constitutional vision of social justice was deliberated. It was emphasised that the aspirations of the people, as well as the vision of the constitution, were reflected in the preamble of both countries' constitution.

The preamble can be referred to as the preface which highlights the entire Constitution. The resource persons emphasised the role of the lower judiciary in ensuring protection to fundamental rights and in enforcing directives principles of the state policy. It was reiterated that the enforcement of rights—both fundamental and legal rights—is considered as the most important component of courts' constitutional duty. Issues relating to access to justice, judiciary's role in providing legal aid and services to the needy, and judicial outreach programmes for prisoners, under-trials etc., were discussed at length.

To facilitate an informal discussion on important topics that emerged in previous sessions a roundtable group discussion was arranged. The participants were directed into four groups and were with a specific topic. Within allocated timeframe, they were required to have an inter-group discussion on the topic and identify challenges they are facing and also offer solutions to effectively address those issues. The topics which were assigned to them were the judge as a leader of the court: challenges and suggestions, objectivity/just sentencing and prison reforms, issues relating to prosecution and investigation, alternative dispute resolution mechanisms.

The theme for session five was elements of judicial behaviour- ethics, neutrality and professionalism. It was emphasized that judging is not a profession but a way of life. The judge trying a case himself is on trial as he always remains under the public gaze. It was stated that the term ethics derives from ancient Greek (ethikos), from (ethos), meaning 'habit or custom' and highest value of human conduct. Ethics is the science of conduct and there are different schools of thought on the role of ethics in legal jurisprudence. It was deliberated that Bangalore Principles of Judicial Conduct are one of the major reference points on judicial ethics which set out six core values that guide the exercise of judicial office are independence, impartiality, integrity, equality, propriety, competence and diligence. It was observed that the element of the fear, favour, affection or ill-will should not play any role in the formation of a judicial opinion or affect the judicial behaviour. Thus, judges are expected to be neutral and to serve the public interest.

Judging skills: art, craft and science of drafting

judgments were discussed in session six. It was stated that while writing a judgment, a judge should be careful and should write in such a manner that it is final and no change or alteration is needed. It was suggested that expressions like 'it seems' or 'it appears' should be avoided in the judgments as they show an element of uncertainty. It was emphasized that judgments should be precise, clear and brief. The language of judgment should be simple and must be backed by reasons.

The topic of session seven was on "judge the master of the court: court & case management". The resource person, while explaining the court and case management, discussed the challenges faced by the judges in the courtroom such as managing lawyer, staff, infrastructure, government functionaries and asserted the significance of self-knowledge, expertise, decision-making abilities, and meeting deadlines, etc. Five steps to be followed by the judges for court and case management namely, planning, organizing, directing, coordinating and controlling were also explained to the participants. It was suggested that lawyers should be treated equally. The art of managing and denying unnecessary adjournments was also discussed.

The theme for session eight was principles of evidence: appreciation in civil and criminal cases. The basic architecture of the Indian and the Bangladesh evidence statute was explained. Issues such as "what constitutes an evidence?" "What can be admissible as evidence?" etc., were discussed. The key provisions on the appreciation of evidence were discussed. A comparative analysis of the procedure for recording evidence in Indian and Bangladesh was made. It was observed that evidence can be broadly classified into six categories, namely direct and indirect, primary and secondary, oral and documentary, real, original and hearsay, and presumptive. The law of circumstantial evidence, that it is required to prove the circumstances beyond reasonable doubts and that such proved circumstances should form a complete chain, without any missing link, unerringly pointing to the guilt of the accused and that there is no other hypothesis which is inconsistent with the guilt of the accused. It was asserted that though affidavit is not an evidence within the meaning of section 3 of the Indian Evidence Act but the same can be used as evidence if, for sufficient reasons, the court passes an order under Order 19 of the

Code of Civil Procedure. Further, the deliberation was made on what constitutes sufficient evidence to establish a fact. It was agreed that there is no universal formula to answer the issues of 'sufficient evidence'.

Evidentiary presumptions; onus and burden of proof were discussed in session nine. It was observed that the rule of presumption is a rule that courts may or shall draw a particular inference from a particular fact or evidence, unless and until if so permitted the truth of such inference is rebutted. It was opined that a presumption is not in itself is an evidence, but only makes a prima facie case for a party for whose benefit it exists. It was deliberated that the Evidence Act provides for three types of presumption, i.e., (i) may presume; (ii) shall presume and (iii) conclusive proof. 'May presume' leaves it to the discretion of the court to make the presumption according to the circumstances of the case. 'Shall presume' leaves no option and court has to draw the presumption and it is bound to take the facts as proved but it can be rebuttable. 'Conclusive proof' gives an artificial probative effect by the law to certain fact. 'Conclusive proof' is irrebuttable and no evidence is allowed to be produced with a view to prove or disprove it.

In the tenth session new horizons, collection, preservation and appreciation of electronic evidence were discussed. This session was initiated with a demonstration of practical problems in deciphering the genuineness of source of electronic evidence. The importance of establishing as to whether an SMS or a WhatsApp message has been sent from the device of the victim was demonstrated. The resource person also demonstrated how the spoofed WhatsApp messages and emails can be sent through someone else's account and shared the information as to how to identify whether a message or an email sent is a genuine message or email or is spoofed one. Judicial officers were suggested to be very careful and cautious while dealing with electronic evidence.

The theme for session eleven was forensic evidence in civil and criminal trials; DNA profiling. It was explained that DNA stands for deoxyribonucleic acid, which is the strands of identity that living beings receive from their ancestors. It is chemical of heredity and carries genetic instruction for growth, development and functions; it is responsible for the various character

of each person - hair colour, eye colour, body structure and functions. Every person has a unique strand of DNA. The resource person explained the Locard's principle. It was stated that if biological stains are left over the crime scene, DNA of suspected accused can be then matched with the leftover biological sample over the site.

The resource person highlighted few advantages of DNA over conventional investigative methods. It was emphasized that DNA evidence is reliable, scientific and unbiased. The resource person illustrated how the disputes of paternity and maternity, rape and murder cases, etc., are decided using DNA evidence. The speaker highlighted some of the leading case laws in India where DNA helped solving the cases, namely 1995 Tandoor Murder case, Priyadarshini Matto Murder case, Nirbhaya case and Sheena Bora murder case. A comparative analysis of Human DNA Profiling Bill, 2017 and DNA profiling laws in other countries was presented. It was suggested that the DNA test is not to be directed as a matter of routine. Such direction can be given only in deserving cases and the court must exercise its discretion.

In a session on criminal justice administration and human rights, references were made Part-III of the Indian constitution and also to the Protection of Human Rights Act, 1993. It was emphasized that the State has been ordained to protect the human rights of the people but it is the biggest violator of human right. International instruments on human rights namely Universal Declaration of Human Rights, Covenant for the Rights of the Child (CRC), Convention for Elimination of all kinds of Discrimination Against Women (CEDAW), Convention on the Elimination of all forms of Racial Discrimination (CERD), Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Covenant on Civil & Political Rights (ICCPR) and International Covenant on Economic, Social & Cultural Rights (ICESCR) were discussed. The national laws for the protection of human rights were also discussed including Indian Penal Code, Immoral Traffic Prevention Act, Bonded Labour (Prohibition) Act, Domestic Violence Act, Child Labour (Prohibition) Act, POCSO Act and Juvenile Justice Act. While deliberating on national laws, the

resource person emphasised on the criminal justice administration in India. It was suggested that there is a need for change in the criminal justice system, for example, victim support centres, victim examination centres, video recording of statements and video recording of evidence.

The theme for session thirteen was human rights: fair and impartial investigation. The issues relating to the deliberately tainted investigations, negligence and lack of competence were discussed at length. In this regard, it was observed that the confession made by the accused must be voluntary and must not be induced by fear, advantage etc. It was deliberated that factors necessary for the protection of human rights include impartial investigation, prevention of illegal arrest and detention, torture and various types of protection against discrimination. It was stressed that there should be a humane treatment for prisoners and undertrials at all stages. The resource person emphasized on the role of judges to ensure that the investigation is conducted in accordance to law. The judges cannot direct the mode of the investigation but they can ensure that the procedural and substantive laws are followed. The speaker made various suggestions to the judicial officers as to prevent the human right violation. It was suggested that in cases where the accused is not produced before the court the bail may be granted.

ICT developments in the administration justice in India were discussed in the fourteenth session. It was explained that the e-Courts Integrated Mission Mode Project is one of the National e-Governance projects being implemented in District/Subordinate courts across the country. The e-Courts project has been conceptualised based on the "National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary - 2005" prepared by the e-Committee of the Supreme Court of India. IT facilities at the High Courts level like digital display monitors, online cause-list, SMS facilities, web-publication of judgments etc., were explained to the participants.

How to identify a ratio in a precedent and various related theories were discussed in the fifteenth session. The three sources of laws namely customary law, having its source in custom; enacted law, having its

source in legislation; and case law, having its source in precedent were discussed. The speaker while comparing the custom of both India and Bangladesh stated that customs have played an important role in moulding ancient Hindu as well as Mohammedan law. In modern times, legislation is the most important source of law. It was stated that the legal system of both India and Bangladesh is based on the English pattern. Further, deliberation focused on judicial precedent as an independent source of law and it was emphasised that precedents play an important role in the justice system. The resource person explained the methods of identifying ratio in a binding precedent. The difference between ratio decidendi and obiter dicta was also briefly explored. It was stated that obiter dicta are statements made by a judge in the course of a decision, arising out of the circumstances of the case, but not necessary for the decision. Though not a binding precedent, an obiter of the Supreme Court, being the highest court of the land, is worthy of considerable weight and respect.

The theme for session sixteen and seventeen was Landmark Judgments in India. It was stated Article 32 of Indian Constitution is one of the most important provisions as it confers upon the people a capacity to address their grievance directly before the highest judicial forum in the country. Deliberations were made on the concept of judicial review with relevant case laws. It was stated that Supreme Court exercises a variety of judicial powers such as appellate powers on the civil and criminal sides, special appellate powers under various statutes, writ jurisdiction, original civil jurisdiction and the special advisory jurisdiction. It has also special power constitutionally conferred under Article 142 to do complete justice. The resource person discussed some of the landmark judgments namely *Kesavananda Bharti v. State of Kerala* AIR 1973 SCC 1461, *Golak Nath v. State of Punjab* AIR 1967 SC 1643, *Maneka Gandhi v. Union of India* AIR 1978 SC 597, *S.P. Gupta v. Union of India* 1981 Supp. 1 SCC 87, *Supreme Court Advocate on Record Association v. Union of India*; AIR 1994 SC 268, *Justice K.S. Puttaswamy (Retd) v. Union of India* (2017) SCALE 1, *Shayara Bano v. Union of India and others* (2017) 9 SCC 1.

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REFRESHER COURSE FOR LABOUR COURTS
January 12th – 14th, 2018

Mr. Shashwat Gupta, Law Associate



The National Judicial Academy organized a Refresher Course for Labour Courts from 12th to 14th January, 2018 which was attended by 28 participants. The objective of the course was to accrete the knowledge base of participants with contemporary developments in law and to identify methods to improve the efficiency of labour courts. The course also aimed to facilitate discussions and deliberations on contract labour, dismissal, discharge, retrenchment, lay off, reinstatement and unfair labour practices.

Session 1- Labour and Management: Evolving Perspectives in Contemporary Climate: Constitutional Perspectives and Role of Courts

The speaker initiated the session by highlighting several issues which impact the functioning of industries i.e. existence of large number of central and state enactments, applicability of the labour law legislations to only a tiny percentage of the workforce and complex machinery for settlement of industrial disputes.

The speaker also discussed the various codes drafted by the ministry to consolidate the existing labour law enactments. Subsequently, the speaker discussed the impact of liberalization on judicial approach towards interpretation of various labour law enactments. He opined that there has been a marked shift from job security to income security. He further opined that the court should strive to balance social justice with efficiency. The responsibility of the government was also emphasized and it was stated that it is the duty of the government to frame policies which provides job security.

Session 2- Contract Labour: Issues and Challenges

The speaker initiated the session by elaborating upon the difference between job contract and labour contract and further discussed that termination of fix term contract does not amount to retrenchment. He also discussed that in a genuine contract, anyone can raise a dispute but if it is a sham contract, only the workmen is entitled to raise the dispute. Thereafter he elaborated upon various examples of sham contracts and stated that a long term contract does not necessarily imply that it is a genuine contract.

Session 3- Unfair Labour Practices

The speaker initiated the session by reflecting upon the differences between victimization and unfair labour practice. Thereafter he analyzed various circumstances which would come under the ambit of unfair labour practice. The speaker also discussed about bipartite and tripartite bodies for settlement of industrial dispute. He opined that the parties should strive to settle disputes amongst themselves rather than approaching the court. Subsequently, the speaker also discussed several concepts like picketing, gherao, go- slow strike, pen down strike and sit-down strike.

Session 4- Dismissal and Discharge

The speaker initiated the session by bringing forth the distinction between dismissal and discharge. Thereafter he elaborated upon the adjudication of dispute regarding discharge and dismissal under Section 11- A of the Industrial Disputes Act, 1947. He stated that Section 11-A of the Act did not apply in case of discharge simpliciter but is only applicable in cases of discharge by way of punishment. He discussed that

the jurisdiction of the court is only limited to the reference order. The speaker also discussed various pleadings usually taken by employer and employee before the labour court in cases of dismissal and discharge. Furthermore, he discussed that the employer has to conduct a proper domestic enquiry before such dismissal or discharge and that such an enquiry should follow the principles of natural justice.

Session 5-Reinstatement and Backwages

The speaker discussed that under reinstatement the workman is restored to the same position which he occupied before his termination or dismissal. The workman would also be entitled to full back wages for illegal termination from service. However award of back wages would not be considered as an automatic or natural consequence of reinstatement. He also focused upon various factors to be considered while awarding back wages and that the industry should not be compelled to pay back wages when no contribution was made by workmen. The speaker stated that burden of proof is on the workman to prove that he was unemployed during the intervening period and that he made efforts for getting employment. Lastly, it was discussed that there has been a shift from reinstatement to compensation in recent years.

Session 6-Retrenchment and Lay Off: Balancing Rights of Labour and Interests of Employer

The speaker commenced the session elaborating upon the definition of retrenchment and lay off as provided under the Industrial Disputes Act, 1947. Thereafter he discussed the ambit of the term "retrenchment" which has been expanded by various judgments of the Supreme Court. The speaker also laid emphasis on the conditions precedent for retrenchment as provided under Section 25F of the Industrial Disputes Act, 1947 and the judicial approach towards the provision in recent years. The speaker discussed the provisions relating to lay off and the conditions necessary for the employer to undertake such action. Further, he also opined that a standing order would be legal even if it allowed for closure without compensation and that if a lay-off had been undertaken by the employer deliberately and maliciously, it would not be considered

a lay-off.

Session 7- Strike, Lockout and Closure

The speaker started the session by providing statistical information about the total man days lost due to strikes across the country which was followed by a brief overview of the strike, closure and lock-out provisions provided in the Industrial Disputes Act, 1947. Thereafter, he dealt with the ingredients of strike and the different types of strikes resorted to by the workers. He also elaborated upon the concept of closure and distinguished between lock – out and closure. The speaker focused upon provisions which prohibit strike and lock-out until certain mandatory conditions are fulfilled. The prohibition of strike and lock-out in public service utility and provisions relating to illegal strikes and lock-out was also discussed during the session. Lastly, the speaker suggested that industrial units should hold regular meetings with their workers so that they are able to ventilate their grievance which would in turn mitigate the chances of strike and lock-out.

Session 8- Improving the Efficiency of Labour Courts: Constraints and Solutions

The speaker commenced the session by discussing various factors on which the efficiency of the labour courts is dependent i.e. court infrastructure, training imparted to presiding officers, pendency, staff and maintenance of files. He then discussed various constraints which adversely affect the efficiency and hinder the proper functioning of labour courts. The main areas of concern highlighted by him included discourteous behavior of representatives in court, difficulty of presiding officer in adjusting to labour court, lack of induction training to the presiding officer, frequent adjournments, lack of legal knowledge on part of the labour representative, shortage of funds, lack of proper IT facilities, security issues and large number of vacant post of presiding officers. Thereafter the participants gave several solutions for improvement of the courts including uniformity in appointment of presiding officers across India, appointment of process serving agencies/personals and creation of separate cadre for presiding officers of labour courts.

SUGGESTIONS

- Judicial officers of a particular rank should be only appointed on the post of presiding officers across India.
- Appointment of agencies/ personals for service of summon
- The judicial officer should be appointed permanently in the labour court.
- Legal aid should be provided to the workers.
- Writers/Stenographers should be made available in the court for noting complaints
- Police protection should be provided to the presiding officer of labour court.
- Adequate infrastructure including high speed internet connection should be made available for optimum functioning of the court.
- Immediate appointment of presiding officers on all vacant posts.
- Salary parity among presiding officers across India.
- Proper training to workmen representative
- Total control of the labour court should be given to the High Court
- The labour court should be provided with a well stocked library
- Induction training to the presiding officer of the labour court.

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WEST ZONE REGIONAL CONFERENCE ON ENHANCING EXCELLENCE OF THE JUDICIAL INSTITUTIONS: CHALLENGES & OPPORTUNITIES

January 13 & 14, 2018

**Ms. Paiker Nasir, Research Fellow &
Ms. Nitika Jain, Law Associate**



The National Judicial Academy organized a two-day regional conference on the theme 'Enhancing Excellence of Judicial Institutions: Challenges & Opportunities', in collaboration with the High Court of Madhya Pradesh and the Madhya Pradesh State Judicial Academy, at Jabalpur. The conference was attended by High Court Justices and Judicial Officers from the High Court of Rajasthan, High Court of Gujarat, High Court of Bombay, and High Court of Madhya Pradesh.

The Regional conference was designed to provide a forum for exchange of experiences, communication of knowledge and dissemination of best practices from across clusters of High Court jurisdictions from the western region of the country. The purpose was to accentuate the experience of familial community between High Court and Subordinate Courts judicial officers; besides established and imperative norms of a Constitutional vision of justice were also revisited; elements of Judicial behaviour; Social context judging; Access to Justice: Information and Communication Technology in Courts as well as Court and Case Management formed an integral part of the discourse.

The first session on the theme "*Constitutional Vision of Justice*" exemplified how inevitable it is for the district judiciary to comprehend constitutional vision of justice. It was stressed that judicial officers ought to understand the constitutional philosophy. The discourse suggested that keeping the constitutional vision of justice in mind will help judicial officers regulate their judicial conduct and will also aid them in upholding constitutional values. The discourse emphasized that constitutional vision of justice is not only for superior courts rather every single judicial officer should strive to achieve it. Therefore, knowledge of the constitution and its underlying idea is what all judicial officers must be accustomed with. Then only justice delivery will enhance. The discussion also highlighted that the role of the judiciary is to strike a balance between the law and society.

The session on the theme "*High Court and District Judiciary: Building Synergies*" discussed that the only communication that takes place between the higher judiciary and the district judiciary is disciplinary communication and that is conceived to be not the robust way of going about. It was stressed that to

heighten democracy an incessant sequence of communication between the hierarchies is essential which also contributes to accumulate efficiency of the deliverables. It was submitted that to build synergies between the high court and the district judiciary it is important that the district judges pragmatically handle the appeals of junior judicial officers and subsequently guide them to ratify. It was also pointed out that the judges should be open to accepting dissent from the judicial officers. It was emphasized that the amount of disempowerment is too much among the district judiciary and this, in turn, affects the amount of justice they impart.

The session on the theme “*Elements of Judicial Behaviour: Ethics, Neutrality, and Professionalism*” emphasized on the *Bangalore Principles of Judicial Ethics* which may be referred to as the fundamental duties of a judge. It was highlighted that judges are the tools to achieve the objectives enshrined in the Preamble to the Constitution. Therefore, it is significant for judges to strive and work in a manner that creates as well as enhances public trust and confidence in the justice delivery system. It was suggested that a judge must also ensure that his only responsibility is not just judging rather his/her mission must be to deliver improved justice for which he must develop a good understanding of the social values. It is substantial for all judges to comprehend that they honor the judicial office, which they hold as a public trust. Likewise, judges must persistently observe the ethics-intensive circumstances that they encounter and the competing discussions convoluted in managing those situations. This will benefit them appraise their character and demeanor.

The session on “*Social Context Judging as a controlling element in Statutory Interpretation and exercise of Discretion*”, focused on social issues like poverty, human manual scavenging, food starvation, caste discrimination, gender bias etc. prevalent in the society and how a judge should address them to do social justice while upholding the provisions of the constitution. The vision of Dr. BR. Ambedkar as a drafter of the constitution was highlighted to understand the social scheme of the Indian Constitution. It was emphasized that judiciary as a



protector of the Constitution is expected to act beyond to curb such social issues. While quoting Dr. BR. Ambedkar statement that, 'political democracy cannot last unless there lies at the base of it the social democracy', it was opined that it is something that the judges have to collectively work to achieve. It was pointed out that judges while interpreting a law also contributes in social reforms. During the discourse it was suggested that while judging, judges should not simply apply the law but try to understand the social context behind the case to do justice. A judge must be completely free of prejudices and try to remove the imbalances prevailing in the society. The *Doctrine of Necessity* was emphasized upon in light of *Bandhua Mukti Morcha* case. Few other landmark judgements on the theme discussed during the session were, *Prem Chand Paniwala* case, *Burial Ground* case, *Noon Meal Scheme* case, *Gita Hariharan's* case on gender justice and *triple talaq* case.

On the theme “*Access to Justice: Information and Communication Technology in Courts*”, the speaker Hon'ble Justice Madan B. Lokur discussed the broad scheme of e-courts project and emphasized upon 4 components of the project i.e. availability of Hardware, Software used, training programmes and beneficiaries. It was highlighted that the main aim behind the e-courts project is to make court processes litigant friendly. During the session the National Judicial Data Grid (NJDG) and its purposes were also discussed. It was pointed out that the third component i.e. training is an important component for development and working of e-courts project at various levels of judiciary. Further, Justice Muralidhar opined that every judicial officer



must get used to technology and have knowledge of it whether they want or not. The participants were shown the functioning of Delhi High Court as paperless courts. A suggestion put forth was that we must adopt reverse learning in digitized era i.e. in judicial family the High Court judge may learn the use of technology from a district judge and a district judge may learn from junior division judges and so on.

Last session was on the theme “*Access to Justice: Court and Case Management*”, broadly dealt with 3 areas – case management, court management and managing oneself and the family. With the help of NJDG management of cases was discussed. Under case management important points such as, planning of board on daily basis, planning dates of cases category wise to be listed, scientifically arrange cases according to their stages within same category, and take efficient help of staff to manage the board, checking accuracy of data through NJDG and matching the pendency and other data with one's court. On court management it was emphasized that it solely depends upon the presiding

judge and includes not only managing the cases but also managing the resources available in the court. Lastly it was mentioned that it is very important for a judge to manage himself both physically and mentally because the peace of mind is necessary for healthy judging. It was suggested that a judge should always be in control of his court and should be capable of making changes in its functioning if required.

The discourse suggested that keeping the constitutional vision of justice in mind will help judicial officers regulate their judicial conduct and will also aid them in upholding constitutional values. With respect to ICT reverse learning may be adopted in this digitized era i.e. in judicial family the High Court judge may learn the use of technology from a district judge and a district judge may learn from junior division judges and so on.

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NATIONAL JUDICIAL CONFERENCE FOR NEWLY ELEVATED
HIGH COURT JUSTICES ON PUBLIC LAW
January 19-21, 2018

Ms. Ankita Pandey, Law Associate



The National Judicial Academy, India (NJA) organised a two and a half days programme for newly elevated high court justices from 19th to 21st January, 2018. The programme was aimed at providing a forum for the participant judges to stimulate discussion on themes like separation of powers, the theory of basic structure of the Constitution and also to assess the problems faced by the judicial fraternity and the means to overcome them.

Session 1: The Constitutional Vision of Justice:
Round Table Discussion

The speaker initiated the first session with the assertion that constitution is a coherent and integrate piece of national vision that preserves our rights and culture. The Constitution entails a vision that represents cherished values and has a potential to expand and enrich itself through the celebrated judgements. The horizon of understanding of the constitution hence expands when judges analyse these judgements critically and reflect on it. Constitution, therefore, is a social document wherein the Fundamental Rights are the heart and soul of the Constitution. It was further discussed that the concept of Justice has not been

defined in any constitution of the world. Although thinkers like John Rawls and Amartya Sen have attempted to give analytical insights of justice however, it still remains debatable. Further, *Privacy Judgement* and *ADM Jabalpur* were discussed highlighting the constitutional vision of justice. The session concluded with the view that Fundamental Rights cannot remain ornamental and have to be enforced and interpreted by the judiciary every now and then by exercising Judicial Review.

Session 2: Court Management

The session was premised on the problems judges face in their day-to-day lives in managing their court and how to overcome the same. It was pointed out that difficulties arise while dealing with the lawyers as they mislead the court at times and therefore, it was advised that judges should read the case on their own and be well-versed with a particular branch of law. It was further asserted that fresh matters should be taken home in order to segregate and classify them into three possible courses – routine matters that can be settled quickly, life-threatening cases that needs to be dealt with immediately; and cases requiring deep

deliberations. With respect to pendency of matters it was suggested that judges should deal with the cases meaningfully and if they are unable to do so, they should rather adjourn the matter for some other day. While delivering a judgment, keeping one's personal philosophies and predilections is a big challenge and therefore, judges should consider this and continue to remain within the judicial discipline.

Session 3: Information and Communication Technology in 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. The following benefits of ICT were highlighted in the course of discussion:-

- ICT provides facilities for presentations in courts instead of arguments and also makes video-conferencing possible.
- Introducing ICT to the courts can make the service of processes easier and allow the lawyers to address while sitting in their own offices.
- ICT can enable lawyers to be present different matters in different courts, thus achieving time management.
- Digitized petitions will be introduced wherein the petitions could then be filed from the lawyer's office.
- ICT would ensure a setback to corruption prevailing in the judicial system.

Session 4: Theories of Judicial Review

The session was initiated by defining Judicial Review as the art and science of interpretation that can be done in several ways. Law is a command from a person in authority. Thus, judges should interpret purposively and fill in the gaps that are left by the legislature. As there is no strict formula for balancing the interests of the people, it then depends on the wisdom of the person balancing the interests and the facts and circumstances thereof. The discussion further delved into serious problems concerned with Judicial Review. It was stated that judges are falling prey of a popular support instead of accrediting faith in public. They are making reactive

and not reflective judgements. It was suggested that as judges, they shouldn't be concerned with public opinion but with the 'public good'. When the law is clear, the judges are advised to merely interpret it. But when it comes to purposive interpretation of a text or a statute, judges tend to fertilize the text with their own persona, experiences and prejudices of life. Therefore, this dilemma will always remain as to whether society is able to accept the decisions given out of discretion or whether the judges should pay great amount of deference to the text by only looking at the constitution as a bedrock.

Session 5: Separation of Powers

The session began with the discussion regarding prospective overruling leading to the question of separation of powers. It was stated that prospective overruling is a very critical aspect of judicial review as although the Legislature is the authority to make policies, in case it fails the test of post-mortem analysis by judicial branch, it gets overruled. It was further pointed out that the question of separation of powers isn't between the Legislature and Executive rather, between the Executive-cum-Legislature and the Judiciary. The main problem arises when judiciary interprets the law framed by the legislature and fill in the gaps left by the latter. Sometimes they even tend to bend a little too far and therefore, this is something they must avoid. They should reflect on their institutional limitations and look at the legislations traditionally, keeping in mind their jurisdiction. Lastly, it was opined in situations where there are no legislation or precedents, the judges should strive to decide the case in consonance with the principles of equity, good conscience and justice.

Session 6: Allocation of Legislative Powers: The Federal Architecture

The discussion of this session was premised on the federal architecture of the constitution, drawing parallels with the American Constitution. The Constitution of India has nowhere mentioned the word "federal" but the commentators have called it a 'quasi-federal judicial system'. In America, a federal constitution was imposed upon them, while federalism in Indian Constitution came spontaneously. Legislative powers are distributed in the Indian Constitution under



the arrangements of State List, Union List and the Concurrent List, which are again centre-centric. Wherever there is a conflict between the legislative powers, it is for the judicial bodies to exercise the art of decision-making. It was also stated that even though the legislative powers are distributed, judiciary still remains unitary. Thus, it is the distribution between these powers that have made the judiciary maintain its sovereignty, unlike in other regimes. Therefore, it is necessary for us to have separation of powers so there is no threat to the courts from within and outside. The session also went on to discuss the allocation of legislative powers that finds its identity in Seventh Schedule of the Indian Constitution, running across Articles 445-455.

Session 7: Fundamental Rights and Restrictions on Entrenched Rights

The session commenced with a brief introduction of the constitution, the role of the courts and a panoramic view of fundamental rights. The Preamble reflects the constitutional values where the idea is to protect the goals mentioned in Part-IV and preserve the freedom in Part- III. Fundamental Rights are reasonably restricted and these restrictions are prescribed by law and the role of the judiciary here is to uphold the constitutional values and to test the reasonableness of the restrictions imposed by law. Thus, it is the constitutional reasonableness that has to be examined by the courts. The speaker then went on to discuss the meaning of 'entrenchment' that first arose in the American Constitution. In America, it essentially meant that the

basic fundamental rights are to be treated as limitations that must be curtailed by the courts in the form of Judicial Review. But in India, there is another level of Entrenchment which is called as 'Double Entrenchment'. The best example of this could be the *Kesavananda Bharati* case where it was held that since fundamental rights aren't per se a part of basic structure, they can be amended by state legislatures, but not at the cost of breaching the basic structure of the constitution.

Session 8: Theory of Basic Structure: Contours

The session began with an introduction to the historical background of basic structure doctrine in India. The first two amendments in 1951 and 1952 were discussed and stated that the theory of Basic Structure was first formulated by the *Kesavananda Bharati* case wherein it was held that fundamental rights cannot be amended so as to change the basic structure of the constitution. It was then in the *Kuldeep Nair's* case that it was held that the Basic Structure Doctrine can be a ground to make constitutional amendments only and not to attack any other law. The latest application of the doctrine can also be seen in the *NJAC* judgement. The session then went on to analyse the various case laws through which judicial review was held to be one of the basic structures of the constitution. It was pointed out that there has always been a tension between the anti-majoritarian aspect of judicial review and the role of legislature. Hence, it was conclusively remarked that the Basic Structure Theory comes out to be very vague and undefined, which could perhaps be moulded by the judiciary while preserving judicial review.

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NATIONAL SEMINAR FOR PRINCIPAL DISTRICT AND SESSIONS JUDGES
ON CONSTITUTIONAL AND ADMINISTRATIVE LAW
January 19-21, 2018

Ms. Shruti Jane Eusebius, Law Associate



OBJECTIVE

National Judicial Academy organized the Seminar for Principal District and Sessions Judges on the theme of 'Constitutional and Administrative Law with the objective of engaging participant judges in deliberations of Constitutional and Administrative law and the application of these public law norms during adjudication within their jurisdiction. The seminar was conceived with a view to root District level judicial officers in the Constitutional vision of justice, acquaint participants with social context judging, and sensitize them to the imperatives of adhering to and applying constitutional and administrative law norms while interpreting and executing the substantive and procedural legislative mandates applicable to causes coming before their court. The sessions included deliberations on the role of courts in enforcing constitutional rights and principles of natural justice alongside other seminal principles of public law which substrate all laws.

In the discussion on *Separation of Powers & Contours of Judicial Review*, the speaker explained the concept of separation of powers. The speaker also discussed the concept of rule of law and its relation and linkage to the

concept of separation of power. It was stressed that absolute power corrupts absolutely and hence there is need for separation of powers and for check and balances in the exercise of the power to ensure that power is not abused. The speaker then dwelt on the recent trend of specialisation of knowledge and its impact on the organs of the state. The speaker then discussed delegated legislation as a method of specialisation of legislative function. The concern expressed in this regard was that many essential functions are delegated. The speaker then highlighted the tremendous increase in powers of executive and judiciary. The functions of the legislature are decreasing as the powers of the legislature are being taken over by the executive and the judiciary. The speaker stressed on the necessity that some impartial body exercises control on legislature as legislature is the one organ that is populist. The speaker then dwelt on the creation of bodies like SEBI, Competition Commission of India, LIC RBI etc. 'headless bodies' which hold all powers – legislative, executive and judicial as an example of the failure of separation of powers. The speaker cited the faith deficit in the executive and legislature as a cause of the rise of such



bodies. The speaker raised the question that when other organs of the state are not functioning effectively, whether it is legitimate on the part of the judiciary to usurp their functions? A view expressed was that two options exist in this situation; one option being that the judiciary carries the extra burden indefinitely and the second option of allowing the system to function with all its inadequacies and failures as an exercise in learning and development. It was stated that in a democratic system, the second option of allowing all wings to function in their domains and not to usurp the functions of the other wings should be followed.

In the discussions on *Social Context Adjudication*, the speaker discussed the inherent inequalities in the judicial system and differentiated between ascribed inequalities and acquired inequalities. The speaker discussed the causes of such inequality – the lack of money, lack of education, lack of material resources, asymmetry of information, cultural inequality, power imbalance and language. The speaker dwelt on inquisitorial adjudication and adversarial adjudication and the impact of inequalities in these judicial systems. The speaker then discussed the major legislative actions towards removal of inequalities in the judicial process. The speaker then discussed initiatives towards gender equality and the landmark judgments on gender equality. The speaker dwelt on cultural realities as a cause of inequalities and the need to factor in these causes in deciding cases. The speaker then dwelt on the concept of justice, justice as mentioned in the preamble and stated that the term 'justice' is not defined in the

Constitution. The speaker dwelt on what kind of justice is to be attained by the judiciary. The speaker then discussed the concept of distributive justice. Public interest Litigation as a tool for social context adjudication was discussed and change in the role and goals of PILs – from concerns of the poor like food, clothing etc. to concerns of middle class like clean environment etc., was highlighted.

On the theme *Fair Trial Rights: Role of the Judge*, the speaker discussed the common law system and its origins. The speaker then discussed the rules of natural justice and its evolution. The speaker dwelt on the dynamism of the rules of natural justice and the evolving and expanding range of rules that are included in its domain. The speaker elaborated on the various rights that are necessary elements of a fair trial viz. right against torturous and inhuman punishment, right to be recognised as a person before law, access to legal system, impartial courts, speedy trial, effective hearing, speaking order, self-incrimination and public hearing. The speaker emphasized that the judge should not be a mute spectator. Different cases and persons need different approaches and the judge should be vigilant to ensure that the person approaching the court should be provided a fair trial and should be ensured all the rights that are a necessary concomitant to fair trial.

In the sessions on the theme *The Indian Constitution: An Overview*, the speaker highlighted the preamble as the heart and soul of the Constitution. The preamble, Parts III and IV of the Constitution spell out the vision and ideals envisioned by the Constitution. Tremendous



developments in Constitutional law have been made in the new millennium and the Supreme Court has been instrumental in enlarging the fundamental rights and in evolving a mechanism for checking abuse of power. The landmark judgments in *Kesavananda Bharti*, *Minerva Mills*, *E.P. Royappa*, *Maneka Gandhi*, *Unnikrishnan* and *S.R. Bommai* that evolved new dimensions of Articles 14 and 21 were discussed. The speakers dwelt on the role of the judiciary in enforcing fundamental rights and stressed on need for purposive interpretation of the Constitution rather than a literal interpretation. Article 32 – the right to judicial remedy for enforcement of fundamental rights- is the unique feature of the Indian Constitution and was called the heart and soul of the Constitution by Dr. Ambedkar. The speakers distinguished between the usage of the word 'fundamental' in Part III and Part IV of the Constitution and stated that in Part III the word 'fundamental' indicates that the rights are basic and essential while in Part IV the usage of the word indicates that the goals of Part IV are fundamental. The fundamental rights have a negative connotation as they impose a limit on the state's power which the Directive Principles of State Policy have a positive connotation as they provide a goal/ direction to the State. The speakers dwelt on federalism as an essential feature of the Indian Constitution. The speakers addressed the misconception that the district judiciary need not know about the Constitution. The district judiciary is enforcing the constitution. The Constitution is the basic document and the entire concept of fair trial springs from the Constitution. Several concepts which are

necessary concomitants to fair trial also spring from the Constitution such as right against double jeopardy, right against self- incrimination and the right to fair trial. The opening words of the Preamble –'We the people' is the most important part of the Constitution and it indicates that the Constitution of India is a social contract and a social experiment in democracy.

The speakers discussed the concept of rights and differentiated between enumerated, unenumerated and derivative rights. The speakers dwelt on the value of fundamental rights in a democracy. The speakers dwelt on the value of Fundamental Rights in a democracy and stated that Constitutional Rights are an important tool for social transformation in India. The core values in the Constitution are inalienable. The speakers highlighted the Judiciary as a crucial agency to protect constitutional rights. The speakers also dwelt on the provisions in the Constitution dealing with interstate trade and commerce and the recent judgment in *Jindal Steel*. The speakers impressed on the participants to view their function from the lens of the Constitution and also view statutes through the perspective of the Constitution.

The speakers dwelt on the power to amend the Constitution and stated that when the Constitution is amended the legislative exercise is a more profound power than legislative power and is a constituent power. The speakers highlighted the minority view of Justice Hidayatullah in *Sajjan Singh's* case where it was held that amending power cannot be used to escape absolute constitutional restriction and it is not a plaything of absolute majority. Justice Khanna's judgment in *Kesavananda Bharti* was cited as an example of judicial adherence to the values of the Constitution. It was stated that the Constitution is a living organ and not a fossil. The speakers dwelt on Article 13, the interpretation of the word 'law' and whether law made under Article 368 would be law. It was stated that law is a product of legislative exercise and not a product of the exercise of constituent power. The speakers then discussed the jurisprudence with regard to the amendment of the Constitution. The speakers also dwelt on the meaning of the word 'amendment' as expounded by Justice Khanna in *Kesavananda Bharti*, to indicate that the original Constitution and identity

must not be altered by amendment. The speakers also dwelt on the basic structure doctrine and briefly laid out the criticism levelled against the doctrine. The speakers emphasised that the power of amendment of the Constitution as a Constituent power which must be used circumspectly.

On the theme *Article 141 as a Necessary Element of Judicial Stability* the speakers discussed the dependence of precedence in criminal matters. It was stated that there is a recent trend of overdependence on precedents even in factual cases and the question was raised to whether so much reliance on precedent is necessary. It was stressed that judges need to apply their mind to the facts of the case rather than to merely apply precedents without considering whether the precedent applies to the case or not. The speaker stated that judges must see the ratio and reasoning in a precedent and then decide if it applies to your case. Precedents are irrelevant in procedural matter. Where the provision of law is clear and unambiguous, precedents are not required to decide the case. The speakers also dwelt on the tendency to follow precedents due to the fear that the judge would be face strictures for not following the

higher court's judgments. The speakers opined that if the law is applied properly then the judge must not be afraid.

In the session on *The Art of Hearing* the speakers stated that the judge should be an active participant in the courtroom and must be vocal rather than a silent spectator. One of the reasons for not speaking in the court is that the judge is not prepared. Another cause is the belief that if the judge speaks in the court he will be perceived to be prejudiced. The speaker drew a difference between comment and queries and urged the judges to ask pertinent question in the court to direct the discussion. Judges should not let the bar control the court. The speakers differentiated between hearing and listening. Hearing implies a conscious participation. Judges must not hesitate to interact with the parties and think that interaction is interrupting. Interaction helps to focus the discussions and arguments. Hearing requires the judge to have an open mind without forming prior opinions. Hearing should not be mechanical. Patience is an important requirement in hearing. Another important element that was stressed on was the body language as a demonstration of hearing skills.

Suggestions by Participants

- The rights of women especially with regard to land laws suffers due to patriarchy resulting in exclusion from inheritance rights. There is an urgent need to amend the land laws and public opinion must be built to start the change.
- Disciplinary actions on judges should not be done in public and while setting aside orders of the lower court, the higher court should not cast aspersions on the judicial officer as it impacts the dignity of the judiciary.
- A participant shared a concern on the grant of bail on humanitarian grounds to persons from another state, and the interests of justice requires that the person enlarged on bail should not abscond. In such cases the court should while granting bail, direct the police to escort the person.

SE-16
COLLOQUIUM FOR SUPERIOR COURTS JUDGES OF EGYPT
January 22-27, 2018

**Mr. Rajesh Suman, Assistant Professor &
 Mr. Prasidh Raj Singh, Law Associate**



The National Judicial Academy organized Colloquium for Superior Court Judges of Egypt from 22 to 27 January, 2018 under the ITEC Program [Indian Technical and Economic Cooperation] with due approval from the Ministry of External Affairs. The Colloquium was attended by 25 Judges of Cassation Court and Council of the State from Egypt. The primary objective of the Colloquium was to promote exchange of ideas between the judicial systems of two countries. The Colloquium provided an opportunity to discuss challenges and issues being faced by the judiciary of two countries and ways to resolve them.

The Colloquium substantially focused on Constitutional law and interpretation including issues related to Architecture of the Indian Constitutional Arrangement, Effectiveness of Judiciary as an Institution of Justice Delivery in Evolving Socio-Economic and Technological Dynamics, Approaches to Constitutional Interpretation and Evolving a Constitutional Vision of Justice, A Judge in a Constitutional Democracy and Role of Constitutional Courts in securing the Rule of Law. The Colloquium also involved discussions on Judicial Accountability, Ethics and Independence of Judiciary, Art, Craft and

Science of Judgment Writing, Information and Communications Technology (ICT) for Courts and Court and Case Management. Justice T.S. Thakur, Mr. V. Sudhish Pai, Justice D.M. Dharmadhikari, Dr. Moolchand Sharma, Dr. Faisan Mustafa, Justice A.K. Ganguly and Justice Deepak Gupta were invited as Resource Person.

Major Highlights and Suggestions from Colloquium
Session 1: Overview and Architecture of the Indian Constitutional Arrangement

The speakers initiated the discussions by highlighting the context about framing of the Constitution of India. The basic components of the Constitution and the process of formation of the Constitution were discussed. The speakers discussed the way Constitution sustains and nourishes the diversity in India. The importance of fundamental rights mentioned in Part III of the Constitution was emphasized and the mechanism of their enforcement was discussed. The value of Directive Principles in ensuring good governance was highlighted. The speaker also discussed the doctrine of separation of power in India and the scope of legislative powers of central government and state governments.

The role of courts regarding legislative powers of central government and state governments was discussed. The framework about establishment, composition and functions of various institution such as Public Service Commission for states and Union Public Service Commission for Centre, Comptroller and Auditor General of India, Election Commission and other institutions as provided in the Constitution was highlighted by speakers. The vital growth of the Constitutional law through courts and survival of the Constitution despite various crises in Indian democracy were discussed.

Session 2: Approaches to Constitutional Interpretation and Evolving a Constitutional Vision of Justice: Issues and Challenges

The speaker initiated the discussions by emphasizing the role of courts in expanding rights and filling in legislative gaps. For instance, the Supreme Court of India has substantially expanded the right to life mentioned under the Constitution. The speaker discussed the power of the parliament to amend the Constitution and limitation of this power. The Supreme Court through basic structure doctrine held that the basic structure of the Constitution cannot be amended. The Speaker discussed elements of basic structure of the Constitution and discussed the recent Supreme Court's judgements on **National Judicial Appointments Commission (NJAC) Act, 2014** where the Supreme Court declared that NJAC involves interference of autonomy of judiciary by the executive which amounts to tampering of the **basic structure of the Constitution** whereas Parliament is not empowered to change the basic

structure. The speaker highlighted the Supreme Court's power to interpret reasonable restriction. The speakers emphasized that the Constitution has devised a structure of power relationship where through checks and balances, limits are placed on the powers of every authority under the Constitution. The speaker also discussed the scope of contempt power of the Court.

Session 3: Vitalizing Democracy: Role of the Judiciary

The speakers initiated the discussions by focusing on the role of judiciary as a guardian of democratic values in India. The speakers highlighted that the Indian judiciary ensures that no authority either executive or legislature exceeds the authority provided to them under the law. The judiciary ensures that State and its instrumentality should not infringe fundamental rights of the people. The Supreme Court has made election process fairer through its judgments which led to strengthening of the democratic values in the country. The speakers opined that the Supreme Court has relaxed the rules of locus standi through many public interest litigations. This has enabled poor and marginalized people to raise their grievances at the level of the Supreme Court. Many judgements relating to public interest litigation jurisprudence were discussed.

Session 4: The Judge in a Constitutional Democracy

The speakers initiated the discussion in an interactive way and participating judges from Egypt discussed various Constitutional protections available in their country. The speakers compared various provisions of the Constitution of India and the Constitution of Egypt. The speaker discussed protection of religion and state





of secularism in both the countries. The speakers highlighted that in India any law even if it comes from shariat but against the Constitution, shall be struck down by the courts. In a recent case of Tripal Talaq, the Supreme Court declared triple talaq as unconstitutional. The speakers emphasized the need of balancing of religious practices and Constitutional rights by courts. The speakers ended the session by emphasizing the role of court in nourishing plurality in society.

Session 5: Role of Constitutional Courts in Securing the Rule of Law

The speakers emphasized that courts should protect basic structure of the Constitution. In India the Supreme Court has intervened many a times to make elections fairer. The Supreme Court has ensured that the basic structure of the Constitution remains intact and this has resulted in strengthening of the constitutional democracy in the country. The speaker discussed various judgments through which the Supreme Court has ensured rule of law in the country through mechanism of creative interpretation. The speaker also discussed the process of inclusion of concept of secularism in the Constitution of India through 42nd amendment in 1976. The speaker expressed their views on Supreme Court's rulings on parliamentary actions and emphasized that active judiciary is better than

activist judiciary.

Session 6: Judicial Accountability, Ethics and Independence of Judiciary

The speaker commenced the session by discussing the quality of judgments and when judge should be retired. They advocated enhancing the age of retirement if judge is healthy and fit. The speaker emphasized that there should not be any outside intervention for ensuring discipline in the judiciary. In India judiciary has their own in-house mechanism to maintain discipline among judges. The speakers discussed various principles mentioned in Magna Carta, Beijing Statement of Principles of the Independence of the Judiciary, Bangalore Principles of Judicial Conduct and Restatement of Values of Judicial Life. The speakers highlighted the importance of contempt power of the court for effective enforcement of judgments.

Session 7: Art, Craft and Science of Judgment Writing

The speaker commenced the session by emphasizing the importance of reasoning in a judgement. The process of decision making must be objective however subjective elements may also be there in the judgment. The speaker opined that Judge has a duty not to make predispositions. She/He should ask questions to the lawyers to clarify doubts. A judge should not express his views or comment on any burning issue before the



decision of the issue. The speaker said that drafting of a judgment starts from the hearing stage itself. Judgment should be given only after the conclusion of arguments. Adjournment must not be given unless it is a serious case. A judge should deliver judgments in simple and clear language. The language should not be ambiguous. It should be precise. A judge should clearly mention why a party won and other one lost. A judge should never think about the consequence of her/his judgment. The speaker concluded the session by emphasizing that a judge must follow the principle of equity, justice and good conscience. A judge should read all the international conventions and apply it in the orders to protect the rights of victims. A judge should be impartial and neutral.

Session 8: Social Context Judging

The speaker commenced the session by highlighting the basic elements of social context judging. The speaker said that on many occasions, the facts of a case do not depict the current situation of a case. It is very difficult to judge in such a situation where the court needs to choose between law and public policy. Law is an instrument of social engineering. A judge has a duty to balance unequal social situations. The speaker compared various welfare measures provided in the Constitution of India and the Constitution of Egypt. The speaker emphasized that courts should ensure implementation of the human rights conventions and instruments. The situation regarding the implementation of international human rights instruments was discussed by the participating judges.

Session 9: Information and Communications Technology (ICT) for Courts

The speaker initiated the discussion by explaining the establishment of e-Committee in the Supreme Court of India which was established in the year 2005 for improving use of Information Technology in the Indian Judiciary. The first phase of the e-court project focused on hardware provisions, establishment of judicial service centers and development of Case Information system [CIS 1]. In the second phase all districts were integrated in one system with inbuilt mechanism of daily updating of data. After that the participants were

shown various features of the National Judicial Data Grid and its usefulness in monitoring delay and pendency. The speaker also discussed web based accessibility of the judgements of Indian courts from Supreme Court to District Court level. The process of video conference facility in court was explained by the speaker. It was followed by presentations by Egyptian judges about their judicial system. The Egyptian judges explained the powers and functions of their courts at different levels.

Session 10: Court and Case Management

The speaker discussed about training of judges in court and case management by judicial academies in India. Various tools of court management such as preparation of time schedule for disposal of cases, adherence to schedule hearing dates, management of human resources and implementation of case management rules in India were discussed. The speaker emphasized that for better case management, there should be better time management. Courts should fix similar cases together, follow case management rules and should give priority to cases related to women, children, under-trials and senior citizens.

During the sessions, participating Judges from Egypt asked many questions about Indian legal system focusing on issues such as accessibility of people to the Supreme Court of India and other courts, legal remedies for violations for Constitutional rights, scope of judicial discretion, judicial remedies when law is silent about a particular issue/situation, implementation of human rights provided under international human rights conventions and treaties, process of data entry under National Judicial Data Grid, security of data uploaded on National Judicial Data Grid and impact of e-Court project in reducing delay and arrears in Indian courts among others.

Visits for Participants

The local and sightseeing visits were organized for Egyptian Judges. On 24 January, 2018 participants were taken to Taj-Ul-Masjid, Lake View and Van Vihar. On 26 January, 2018 participants were taken to Bhimbetika and Bhojpur Temple.

P-1082
NATIONAL JUDICIAL CONFERENCE FOR HIGH COURT JUSTICES
February 02-04, 2018

Mr. Yogesh Pratap Singh, Research Fellow



The National Judicial Academy (NJA) organized a three day “National Judicial Conference for High Court Justices” (P-1082) from **02 – 04 February, 2018** at the National Judicial Academy, Bhopal.

The objective was to facilitate discussion on developments in the area of Constitutional law, Judicial Review, Supervisory powers of High Courts over Subordinate Courts and Economic crimes. Challenges and evolving jurisprudence in the area of designated themes and possible solutions was also discussed in the conference.

About 20 Hon'ble High Court Justices from different High Courts participated in the conference. The conference was divided into eight sessions over the duration of 3 days on *following themes*.

High Courts: Guardians of District Judiciary

- The session began with discussion on constitutional provisions with respect to supervisory control of High Court on District Judiciary; the distinguished speaker explained that effective administration of the subordinate judiciary is a mandate under Article 227 of the Constitution and also forms part of basic feature of the Constitution of India. Article 235 of the

Constitution, the High Court has been given the supervisory control over the subordinate Courts. Art. 229 confers such powers on the Chief Justice of the High Court in respect of the employees of the High Court.

- It was further stressed that the power to control is given to High Court to secure Independence of the subordinate judiciary. This control is also over the discipline of the subordinate judiciary, and is complete subject to the statutory rules and the constitutional provisions.
- Attention was drawn to the landmark Judgments of the Supreme Court where the scope and meaning of Article 235 was elaborated. The speaker further elaborated the meaning of Control, Vest and Deal under Article 235 of the Constitution.
- The High Court functions as a guardian and it does not have only control over the subordinate judiciary but also takes them under its care and custody. The High Court has a role of shaping the careers of the judges of the subordinate courts.
- This function must be exercised by the High

Courts in a circumspect manner, to ensure that the independence and accountability of the judiciary is upheld, and the dignity and respect of the Judiciary is protected.

- The speaker stressed that complaints against judicial officers must be handled discreetly and the High Court must conduct a discreet enquiry to ascertain the legitimacy of the complaint received to weed out the false complaints. The High Court must stand with the judicial officers as a guardian and guard against judge bashing.
- It was also stressed that the superior court should not make adverse and undeserving remarks against the officers of the subordinate courts unless it is so essential that it forms a part of the reasoning given in the judgment and thus were necessary to be so made.

Tribunalization of Justice: Boon or Bane

- The session began with a discussion on historical background of tribunals and its objectives in context of India.
- While elaborating the scope of tribunals, it was pointed out that In India 'Tribunal is an administrative body established for the purpose of discharging quasi-judicial functions. An Administrative Tribunal stands somewhere midway between a Court and an administrative body. Establishment of Tribunals is primarily aimed at tackling the problem of delay in administration of justice, which is the main obstacle in our justice delivery system. The system of adjudication in tribunals is not as elaborate and costly as that of courts of law.
- While elaborating the establishment of Tribunals, It was pointed out that based on Swaran Singh committee report, Part XIV-A was added by the Constitution (Forty-Second Amendment) Act, 1976, titled as 'Tribunals' which provided for the establishment of 'Administrative Tribunals' under Article 323-A and 'Tribunals for other matters' under Article 323-B. The main objective of establishing tribunals was to reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress.
- While citing many Judgements of the Supreme Court, the distinguished speaker further explained and elaborated the scope, meaning, objectives and contribution of tribunals in India. It was pointed out that the basic and fundamental feature that is common to both the Courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State.
- It was also highlighted that there was no Constitutional prohibition against Administrative Tribunals in performing a supplemental as opposed to a substitutional role. The decisions of these Tribunals created under Articles 323-A and 323-B of the Constitution of India will be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction, the concerned Tribunal is located.
- On appointment of members of tribunals, it was stressed that technical/expert members should be appointed only if the tribunal is required to decide technical issues. More so, such appointments should be made of persons of proven ability, integrity and standing, having special knowledge and professional experience or expertise of a sufficient long time in the field to which the tribunal relates. It was further pointed out that the members appointed in these Tribunals should possess the qualifications equivalent to that of the High Court Judges.
- On superintendence and control over tribunals, It was pointed out that the High Courts have unquestionable power of superintendence and control over the Tribunals under the Constitution. However, the overriding effect in Articles 323-A and 323-B under Part IXV-A cannot in any case denude the High Court of its power of superintendence under Article 227 of the Constitution. Therefore, the exclusion of jurisdiction of all the Courts except the Supreme Court cannot be construed to mean that, the



power of judicial review vested in the High Court is also excluded.

Superior Courts: Managing Judicial Review within the Democratic Framework

- The session began with an explanation on evolution of judicial review and its historical background.
- While citing Jurist view on the Constitution, the distinguished speaker pointed out that Constitution is the supreme law of the land and validity of other laws is to be checked according to the Constitution and the task to check the Constitutionality of the laws and of the action is on the judiciary. This is termed as the 'judicial review'. Thus, judicial review defined as 'the power of the court to determine whether the acts of legislature and executive are consistent with the Constitution or the Constitutional values.
- While elaborating the scope of judicial review, the speaker explained the concept under following heads.
 - Judicial Review of Administrative Action
 - Judicial Review of Policy Decisions
 - Judicial Review of the Economic Policy
 - Judicial Review of Price Fixation
 - Judicial Review of decisions based on Expert Opinion
 - Judicial Review of Sub-Ordinate Legislation
 - Judicial Review in Contractual Cases
 - Judicial Review in Disciplinary Proceeding

- Judicial Review of the Quantum of Punishment
- Suo Moto Judicial Review

Contemporary Challenges for Judicial Review, Policing Governance within Separation of Powers Framework

- The speaker began with citing Juristic views on administrative law and governance followed by describing the scope of constitution through the text of Constitution assembly debates on the powers of the tree organs of the state- the executive, the judiciary and the legislature.
- While discussing contemporary challenges, the speaker pointed out that India's biggest challenge today is its virtual absence of Constitutional morality and the basic reason for this absence is the virtual absence of education of citizens in the spirit of the Constitution.
- It was further pointed out that Courts, at all levels, have the greatest responsibility to preserve the Constitution and Constitution morality.
- On separation of powers, the speaker stated that Separation of power is the inbuilt check and balance mechanism under the constitution. It was stressed that strict adherence to constitutional values and limitations can only be enforced by the judiciary and none else. Therefore, Judges must not be afraid to enforce the Constitutional values so long as demanded in the interest of Justice.

Construing the Sounds of Constitution's Speech: Meanings Beyond Text

- The speaker began with citing text from constitutional assembly debate on making of the constitution.
- While citing plethora of Judgements of the Supreme Court on interpretation of the Constitution, It speaker stressed that provisions of the Constitution shall normally have to be construed having regard to the expressions used therein and question of interpretation of a Constitution would arise only in the event the expressions contained therein are vague, indefinite and ambiguous as well as capable of being given more than one meaning.
- The speakers traced the interpretation of the Constitution of India by the Supreme Court under following heads;
 - Inclusion of various rights, under the right to life and the enlargement of the scope of the fundamental rights.
 - Duties and powers of the Comptroller and Auditor General
 - Appointment of Judges to the Supreme Court and High Court
 - Right of Minorities
 - Amendment of the Constitution
 - Basic structure of the constitution
 - Interpretation of entries in list I, II, III and VII schedule

Free and Fair Elections – Vitalizing our Democratic Fabric: The Way Forward

- The session began with a discussion on functioning of democracy in India. Four important component of successful functioning of democracy such as Competitive elections, Political freedoms for all, Peaceful transfer of power and no retribution and Real power with elected governments were highlighted during the session.
- The speaker also highlighted some challenges in the democracy in following order.
 - Positive Power restricted and Negative

Power unchecked

- State organs are dysfunctional
- A system of alibis and Victims of vicious cycle
- Change of players and No change in the rules of the game
- Political process ought to be the solution but has become the problem itself
- Four essential purposes of politics were also highlighted by the distinguished speaker as follows.
 - The process should attract the best talent into public life
 - Public spirited, capable citizens should be electable through ethical means and rational methods
 - There should be real choice to voters in terms of ideas and agenda
 - A government once in office should be able to deliver on the agenda
- The speaker also stressed upon importance of rule of law in democracy and mentioned that effective rule of law will accelerate change by Enforcing accountability, Preventing/checking abuse of authority, Enforcing rights of the weak and poor, Reducing incentives for criminals & corrupt to enter politics/capture the state and Punishing corruption swiftly.

Corporate Fraud & Manipulation: Repercussions, Deterrent Mechanisms & Judicial Approach

- This session began with the discussion on recent changes made in the company legislation and leading judgements of last few years which makes the substantial changes in corporate world.
- The speaker further elaborated the following concepts.
 - Corporate Frauds
 - Insider trading
 - Independent Director
 - Role of the Judges
 - Corporate Social Responsibility (CSR)

- Some contemporary issues pertaining to commercial laws for effective adjudication of commercial disputes were also discussed during the session.
- Attention was also drawn to recent cyber frauds on how technology was misused to commit corporate frauds.
- Provisions with respect to cyber frauds and digital evidence under Information Technology Act and Indian Evidence Act were also discussed during the session.

Jurisprudence of the PC & PNDT Act & Cultural, Social and Economic Factors that Promote Gender Bias: Context of the PC & PNDT Act in India

- Discussion took place on how the diverse social conditions prevailing in different parts of India provide for diverse legal scenarios.
- Reference was made to statistical data to illustrate the trends followed by the sex ratio in the country over the past few decades, also citing reasons that were instrumental in impacting the sex ratios.
- It was also highlighted that in areas/regions where women have greater access to economic resources, women exercise greater liberty in decision-making as regards giving birth to a female child, resulting in better sex ratio in those areas, which indicates the effect of economic empowerment of women on the sex ratio.
- It was also pointed out that the decline in sex ratio is widespread across all religions, communities, castes and sections of the Indian population without any exception.
- Instances of medical clinics rampantly carrying on sex determination were narrated to illustrate the gravity of the situation, even after more than a decade has passed that the PC & PNDT Act has been enacted and brought into force.

- Causes, consequences and implications of declining sex ratio were also discussed during the session.
- It was highlighted that the P.C. & P.N.D.T. Act aims at preventing and mitigating not only sex determination of the foetus during the course of the pregnancy but also sex selection at the pre-conception stage by using artificial insemination and in-vitro fertilization (I.V.F.) procedures.
- General behavioral trend of preference to a male child over a female child was indicated as the reason which necessitates the P.C. & P.N.D.T. Act in India, in order to protect and preserve the Constitutional promise of gender equality, as guaranteed under the fundamental right to equality in Article 14 of the Constitution, and to give effect to certain Directive Principles of State Policy.

Supreme Court Judgement in *Voluntary Health Association of Punjab v. Union of India and Ors.* 2016 SCC Online SC 1244 was discussed in detail quoting that the Constitutional identity of a female child cannot be mortgaged to any kind of societal norms or concepts that has developed to be prevalent in the society, allowing no room for any kind of compromise and only permitting affirmative steps that are constitutionally postulated. Attention was drawn to the directions that have been issued by the Supreme Court in the present case, in addition to the directions that had been issued in earlier cases.

Suggestion

The topics of general importance which are in roster of the High Court should be addressed.

P-1083

NATIONAL SEMINAR FOR PRINCIPAL DISTRICT AND SESSION JUDGES ON COURT ADMINISTRATION, MANAGEMENT AND ICT

February 02-04, 2018

Mr. Krishna Sisodia, Law Associate



The National Judicial Academy organized National Seminar for Principal District and Session Judges on Court Administration, Management and ICT from 2nd-4th February, 2018, which was attended by 37 Principal District and Session Judges. The objective of the Seminar was to enhance the knowledge and understanding about administrative and managerial skills involved in Court Administration. The programme aimed to motivate judges for efficient use of technology to enhance administration both inside and outside the Courts. The Seminar provided a forum for participants to discuss, deliberate amongst themselves and share experiences, knowledge and best practices in exercise of jurisdiction.

On *Reengineering Court Process through effective use of ICT*, it was highlighted that technology is a powerful enabler which can empower courts which require to meet core purposes and responsibilities in times of economic crisis, low court staff and in close court locations. To harness technology for the purpose there is a need to make serious efforts to examine process re-engineering opportunities since over 5000 crores of the taxpayer's money have been spent and still the desired result has not been achieved. Courts must plan to

migrate from document to content management, initiate customer management to improve accessibility, quality of justice and enhance public trust. The session concluded with suggestions from the participants on how to make court administration more efficient by electronic filing, competent staff selection and ideological shift to achieve the object of the National Action Plan.

On the theme of *Court and Case Management: Case flow Management for Docket Control*, it was pointed out by the panel that most High Courts have framed their own rules for case flow management. These rules provide a guide for the judge to develop an efficient court. The rule provide specific timelines for significant stages of a case and seek to ensure that a case is disposed off in time. While the rules act as a guide, it is for the judge to ensure that his court functions efficiently and is litigant friendly. The judge as the leader of the court must motivate his staff to function effectively and to meet the timelines prescribed in the rules. The session concluded with suggestions from the participants on how to make court administration more efficient by through court managers by making guidelines for their recruitment, scope of work,



remuneration and policies.

On the subject of *Stress Management*, The speaker discussed that stress is of two kinds Eustress – positive eg, promotion, marriage, and Distress – negative eg, bereavement, loss of a job. It was emphasized that a judge himself is on trial when he is conducting a trial in the court. Judges deal with people who are stressed and this stress passes over to them, knowingly or unknowingly. It was deliberated that stress may be caused by environmental, organizational and personality-related variables. It was emphasized that Stress occurs when the pressure is greater than the resource. There are two major reasons of stress i.e. when a person perceives a situation as dangerous, difficult, or painful and two when the person does not believe that he/she has the resources to cope with a situation. Therefore the most important point is to recognize the source of negative stress. It is a way to identify the Problem and plan measures to overcome it. It was further suggested that stress management/stress control can be done through ABC Strategy, where 'A' is Awareness, 'B' is Balance and 'C' is Control.

On the theme of *Implementation of E-Courts Project*, the panel gave a brief introduction of both the phases of the E- Courts Project. Thereafter, the panel highlighted certain security and connectivity issues and stated that until and unless these are not resolved no meaningful purpose can be achieved. It was suggested that merely providing hardwares will not serve any good as scanning of records is also a significant aspect and the principal district judges have an important role in

implementing the phases. The session was concluded by realizing the need for ideological change as no policy formulation in itself can achieve the objective.

On the theme of *Digitization and Paperless Courts in India*, the panel highlighted that scanning is a sub-sect of digitization. Scanning old records and putting them into the system reduces the chances of misplacing of records. It was also observed that through electronic transmission .i.e. sharing of papers by e-power, reduction in case files, we are saving manpower. Computerisation of work flow management serves better in courts. The panel also highlighted the significance of video conferencing in cases where person appearance can be dispensed with, for example, Section 138 NI Act, family members in 498 A IPC, etc.

On *National Judicial Data Grid*, the speaker highlighted the key points of e-court project, discussing various phases of the project and the extent of its implementation in different district courts. The sessions also involved discussions among participants relating to record management and the level of digitalization. The speaker through a live demo showed the participants that the status of any case even at the Taluka level can be accessed and even the number of adjournments that has been granted by a particular court can also be seen.

On the topic of *Efficacious Resource Allocation in Courts: Optimal Utilization of Manpower, Technology, Infrastructure and Finances*, It was discussed that judiciary is a type of organization which depends on individual contribution and to improve its performance

management of human resource is an importance task. This mainly involves selection, recruitment and reassignment of workforce through job design, remuneration, training, promotion, performance review and discipline. It was suggested that court systems require effective leadership and management practices to respond to issues such as public trust and confidence, court and community collaboration, timeliness and consistency. Improving judicial infrastructure involves improvement of processual, technical and legal systems. Case and Court management will be part of processual dimensions of Model Court while the technical aspects include deployment of audio-video facilities in the courtroom, digitization of records, introduction of e-filing, electronic delivery of summons and notices etc. On the legal side, examination of the current rules of procedure of each court and suggestions for amendments for standardisation, if any, may be required. The session also deliberated on issues relating to planning of budget, how to efficiently utilize the available financial

resource, and how to improve the day to day working with the available infrastructure.

On the theme of *Staff Management and Supervision: Role of Principal District Judges*, it was emphasised that in order to develop an efficient judicial system, four aspects are to be taken into consideration - accountability, performance from all stakeholders, efficiency and effectiveness. To achieve these 4 aspects of an efficient judicial system, leadership from the judges is a necessity. The lack of clarity and uniformity in the role and responsibilities of court managers has proved to be an issue as the expertise of court managers has not been utilised to its full extent by the courts. To have good coordination, we have to drop the idea of superiority and at the same time good way of communication is required to deal with the staff. It is also necessary that important work must be communicated to a person through whom it is going to be executed. Decentralisation of power, teamwork and leadership by the judge are necessary to have an efficient system at the court.

Prominent Suggestions by Participants (Principal District Judges)

- Court managers having knowledge of managerial skills as well as computer software can contribute to make the judicial system user friendly by creating applications for litigants and also can create software to streamline the judicial process.
- Inefficiency of staff members is one of the main challenges, but the problem of inefficiency can be removed by adopting efficient recruitment process. Immediately after recruitment, there must be training programmes to enhance their knowledge, efficiency, and communication skills.
- Hardware is in abundance; ideological shift is required to develop an ecosystem of digitization.
- The NJA as well as other State Judicial Academies should provide the reading materials in e-format and should lead the way in the process of digitization.

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WORKSHOP FOR ADDITIONAL DISTRICT JUDGES
February 02-04, 2018

Mr. Rajesh Suman, Assistant Professor



The National Judicial Academy organized “Workshop for Additional District Judges” from 2 to 4 February, 2018. The participants were Additional District Judges nominated by respective High Courts. The Workshop aimed to discuss critical areas concerning adjudication at the District Court level. The sessions involved discussions on issues related to Alternative Dispute Resolution [ADR] system, Role of Judges in Court and Case Management, Fair Sessions Trial, Electronic Evidence, Cybercrime and Sentencing. The Workshop also focused on appellate and revisional jurisdiction of District Judges under criminal and civil justice administration.

Major Highlights and Suggestions from the Workshop

SESSION 1: Challenges in Implementation of ADR System in Subordinate Courts

The Speaker commenced the session by discussing the statutory framework for ADR system in the Indian legal system. The speaker then highlighted advantages of ADR system and emphasized importance of needs of parties behind the emergence of ADR system. The power of the court in ADR system is limited. Section 89 of the Code of Civil Procedure lays down the role of court viz-a-viz ADR system which is a blend of judicial

and non-judicial system. The speaker also highlighted Sections 8, 5, 9, 27 and 34 of the Indian Arbitration and Conciliation Act which also clarifies the role of the court in ADR system. The jurisprudence relating to the ADR system was discussed with focus on role of courts. The speaker also focused on various conditions under which a court can refer a matter for redressal in ADR system. One of the major constraints which ADR system is facing is the lack of awareness among parties. The ADR system is popular in metropolitan cities and it is less appreciated in other region. There is need of advocates who are trained in ADR system and there should be a panel of mediators in every district. The speaker opined that unit based system of evaluation of judicial performance is an obstacle in the promotion of ADR system. Court should give due consideration to the intention of parties. The speakers discussed principles relating to limitation for commencement of arbitration and the grounds to set aside arbitral awards. Judges should take care of the time frame within which the arbitration should be commenced

The mediation should be left free at the discretion of the parties. The process of mediation could be voluntary but the reference to mediation could be mandatory.

SESSION 2: Court & Case Management: Role of

Judges

The speaker commenced the session by highlighting the data relating to delay and arrears in the Indian judiciary. One important thing which should be practiced by judges to reduce delay and arrears is to keep the processes simple and they should avoid too many rules. There should be timeline for court processes and judges should ensure that all stakeholders are following such timelines. The judges should work with their staff in team spirit and should motivate all stakeholders for better court management. Judges should care for their staff and should ensure a positive environment in the court room. Every judge should maintain a notebook for case laws and should update it with latest case laws. Such practice will help in reduction of time in adjudication. There should be a committee in every court to analyze precedents and there should be regular discussions on precedents.

SESSION 3: Civil Justice Administration: Appellate and Revision Jurisdiction of District Judges

The speaker commenced the session by highlighting the jurisdiction of district judges under various statutes other than the Code of Civil Procedure. The appellate power of district judges under different statutes was discussed. The speaker clarified the situation where a party seeks appellate remedy before a wrong forum. Various aspects of interim relief in an appeal and injunction under section 5 of the Code of Civil Procedure were highlighted. The issue regarding stay of decree and injunction by appellate authority was also highlighted and Order 41 (5) and 39 (1) and (2) of the Code of Civil Procedure were analyzed by the speaker. The situations regarding status quo in a decree and status quo ante were clarified. Court should not ask for proof of documents which are registered documents such as sale deeds. The aspect of appeal without condonation of delay was dealt in the session. The speaker also emphasized that when consent decree obtained by fraud then parties should file application in the court which granted the decree. Section 23 of the Limitation Act was also discussed in the session.

SESSION 4: Fair Sessions Trials

The speakers commenced the sessions by highlighting various elements of fair trial and duties of each stakeholder in the judicial process. The objective of trial as truth finding process was discussed and

timeliness in trial was emphasized by speakers as delay affects the rights of accused as well as of the victim. Various legal provisions mandating active role of judges during trial were discussed. The speakers opined that judges must instruct parties for the production of evidence if the presented evidence suggest suppression of evidence by prosecution or defense. The realistic appreciation of evidence and method to apply legal principles were discussed. It was emphasized that fairness of trial starts with investigation. The judges must find out that whether any torture or third degree method has been used by police during investigation as it reflects the quality of prosecution evidence. Therefore the scrutiny of pre-trial process by judges is crucial. The rights provided in international human rights declarations and covenants are important and courts should give due importance to such rights. The speaker opined that standard questions should not be asked from witnesses and questions should be framed after careful analysis of facts and evidences. The session was concluded by emphasizing that judges should not come under the pressure of media especially in sensational cases and should decide cases according to facts and evidences.

SESSION 5: Electronic Evidence: Collection, Preservation and Appreciation

The speaker commenced the session by demonstrating the misuse of mobile numbers and WhatsApp. The method of identifying fake WhatsApp messages was explained to participants. The fake message can be detected by clicking on the forward link of the message. The signs which in ordinary circumstances appear on header are not shown in fake messages. The requirement of certificate under Section 65 (B) of the Indian Evidence Act, 1872 for admitting electronic evidence during trial was discussed with participants. Various aspects related to transmission of messages via Voice over Internet Protocol was discussed. The speaker highlighted various ways to detect the misuse of IMEI number of mobile. One of the major issue discussed in the session was lack of training for prosecution and investigating officer regarding collection, preservation and presentation of electronic evidence. The speaker highlighted various safeguards for preservation of electronic evidence. The role of judges in ensuring the authenticity and reliability of electronic evidence was discussed by the speaker.

SESSION 6: Laws relating to Cybercrimes: Advances and Problem Areas

The speaker commenced the session with discussion on various contours of cybercrime and various recent instances of cybercrime across the globe. One of the emerging form of cyber-attack is denial of service attack under which unnecessary spam data is feeded in the servers of service providers which disable the services. Another kind of cybercrime is data theft by former employees in an organization, credit and debit card frauds and revenge porn attacks. The speaker discussed various features of amendment of the Information Technology Act in the year 2008 focusing on section 66 of the Act. Various legislative and jurisprudential principles for adjudication of cybercrime were discussed by the speaker. The speaker opined that there is very low awareness regarding cybercrime and about 80% of cybercrimes goes unreported.

SESSION 7: Sentencing: Issues and Challenges

The speaker commenced the session by highlighting the need to reduce the effect of personal ideology on sentencing process and making it objective. Sentencing should not be too harsh or too lenient rather the focus should be on imposing a balanced sentence with possibility of reformation of offenders. The speaker opined that role of judges is very crucial in sentencing as it has to be according to the facts and circumstances of the case. The manner of committing offence, social impact of crime, chances of reformation of accused, victims and his/her dependents and circumstances as well as the conduct of the accused should be analyzed during sentencing. The accused must be heard on the quantum of sentence u/s 235 (2) of the Cr.P.C. If accused has not been heard in trial court then the appellate court can hear the accused on the quantum of sentence. The need to avoid mechanical approach in sentencing was emphasized by the speaker. The needs of the victim should get due attention during sentencing

especially with respect to their right of compensation. The compensation should be sufficient for effective support to the victim.

SESSION 8: Criminal Justice Administration: Appellate and Revision Jurisdiction of District Judges

The speaker commenced the session with discussion on various aspects of appellate and revisional jurisdiction under the statutory framework of the Code of Criminal Procedure. Various aspects of intervention at appellate stage such as scope of intervention and how to ensure fairness were highlighted. During revision the legality and propriety of order of the lower court can be assessed. The participant asked query about interlocutory order and during revision which application should be considered as interlocutory order which was answered by speaker and debated by participants. An order which conclusively determines the rights and liabilities of parties cannot be an interlocutory order. The speaker emphasized that all orders should be supported by reasons and principles. In revisional jurisdiction the judges can highlight that rights have been conclusively determined so order under revision cannot be an interlocutory order. The speaker opined that judges must not be concerned about the review of their orders by higher forums. The participant asked question that when a complaint is dismissed on technical grounds and complainant was absent and matter was not finally disposed of on merit so whether there will be revision or appeal in such case. The question was debated and it was concluded that revision will lie because party's interest has been affected. Another question was that when a document has been filed in revision but not in lower court then whether that document can be considered during revision. After discussion it was concluded that when the nature of document is public in nature then such document can be considered in revision and if nature of document is not public then it cannot be considered during revision.

Participants Suggestions and Views

The participants suggested that prosecutors and investigating officer should be adequately trained for handling and presenting electronic evidence. They expressed concern on poor level of investigation and prosecution even in ordinary criminal cases because of which acquittal rate is rising. The participants also emphasized the need of enhancing awareness about the Alternative Dispute Resolution system among people. They further suggested that there should be an online portal for judges for academic discussion on legal principles.

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NATIONAL SEMINAR FOR PRINCIPAL DISTRICT AND SESSIONS JUDGES ON ACCESS TO JUSTICE AND LEGAL AID

February 9–11, 2018

Mr. Shashwat Gupta, Law Associate



The National Seminar for Principal District and Sessions Judges on Legal Aid and Access to Justice was conducted from 9th to 11th February, 2018 at the National Judicial Academy and was attended by 31 participants from across the country. The objective of the seminar was to address challenges which impede access to justice and to provide a forum for deliberations on methods for enhancing access to justice.

The first session was based on the theme “Access to Justice: Crucial Component of Constitutional Vision of Justice”. The session commenced with a discussion on the various meanings assigned to justice by several eminent personalities including Amartya Sen, John Rawls and Justice M.N. Venkatachaliah. Thereafter the session shifted focus on the fact that the Constitution does not define “justice” and concentrated on different facets of justice provided in the preamble i.e. social, economic and political. It was discussed that inequality is deep rooted in the Indian society which impede access to justice and therefore it is of utmost importance that the downtrodden are able to get access to justice. Subsequently there was a spirited deliberation on the difference between “court of law” and “court of justice”. It was also discussed that law is only a vehicle to achieve justice and any enactment providing for judicial forum can be considered as providing access to justice. It was further discussed that having opportunity to approach

court alone may not ensure justice or justice delivery and that access to court is only a stepping stone to access to justice. It was opined that delay in delivering verdict in divorce proceedings, custody of minors and partition suits would defeat the ends of justice and therefore such cases should be dealt on a priority basis.

The second session was on the topic “Social and Economic Impediments in Access to Justice”. The speaker reflected on various impediments which hinder the justice delivery system in India and include skewed judge/population ratio, infrastructural challenges, accessibility of courts to litigants, complex procedure, expensive litigation, hierarchy of courts and difference in efficiency of judges. Thereafter the speaker traced the efforts undertaken by the National Legal Service Authority for transgender rights and Vrindavan widows. The other speaker discussed that judgments are affected due to the inherent bias of the individual judges. The speaker also discussed various questions through which she portrayed that certain stereotypes are imbibed in our consciousness with regard to names, political parties, corruption, gender and nature of case. She opined that this unconscious bias closes our mind and it prevents us from accepting other opinions which can adversely affect the judgments.

The third session was based on the theme – “Timely and

Speedy Justice Delivery". The session included discussion that timely and speedy adjudication of disputes is an important facet of justice. The speaker also discussed that victims of natural disaster should be given free legal aid and their claims should be settled expeditiously through Lok Adalat.

The theme of the fourth session was "Legal Aid to Marginalized Sections of the Society". The speaker reflected upon gender based violence in India and the notions of patriarchy and masculinity existing in the society. Thereafter she reflected upon various obstacles to access to justice confronting women. The speaker briefly dealt with the Protection of Women from Domestic Violence Act, 2005 and discussed about the protection officers mandated under the Act. The speaker also discussed the Manodhairya scheme in Maharashtra and its various features including compensation, medical and legal aid, rehabilitation and counselling to victims. Thereafter the other speaker discussed in brief the major schemes operated by National Legal Service Authority. The speaker also opined that a small group of para legal volunteers can be assigned to one scheme so as to deliver optimum results.

The fifth session was based on the theme of "Undertrials and Access to Justice". The speaker initiated the session with a brief overview of the various international conventions relating to access to justice and legal aid. She further opined that access to courts encompasses speedy trial as well as production of the undertrial on all dates in the court. She also referred to various schemes of NALSA which could be utilized by the accused at various stages i.e. arrest, production, trial and appeal. The speaker stated that effective access to legal aid must be provided at all stages of a criminal case. She also focused on the problems faced by accused due to lack of representation which include torture, unnecessary detention and non-production before the magistrate within the stipulated 24 hour period. She opined that the list of names of panel lawyers should be made available in each police station and a para legal volunteer can be attached to them who can inform arrested persons of their rights after arrest. It was also discussed that there is lack of training of legal aid lawyers and there is no monitoring mechanism to ensure accountability of lawyers. The speaker also reflected upon the duties of the courts to act as custodian of the prisoners and their responsibilities with regard to prisoners. The speaker discussed the establishment of Under-trial Review Committee (UTRC) and elaborated upon their role and the course of action to be undertaken by them for

different categories of undertrials as laid down in various Supreme Court orders. Lastly, the speaker discussed the composition of different tiers of legal service authorities in India and expounded upon their role with regard to undertrials.

The sixth session was based on the theme - "Access to Justice and Legal Service Authorities: Role and Responsibilities". The session involved a break out group discussion wherein various hypothetical propositions were provided to the participants to analyze and discussions based on the hypothetical propositions were guided by the speaker. The hypothetical questions related to overriding of legal service authorities act by special enactment, role of the different tiers of legal aid institutions, limitations of institutions set up under legal service authorities act, expectations from institutions created under legal service authorities, role of trial courts under legal service authorities act, role of constitutional courts under legal service authorities act and refund of court fee.

The seventh session of the seminar was on the topic - "Efficient Judicial Systems and Access to Justice". The session was initiated with a brief outline of the judicial system existing in the country. Thereafter the speaker elaborated upon the various issues which plague the system. It was opined that number of courts should be increased to deal with the increased inflow of cases. It was discussed that lack of appreciation for more disposals has an impact on the morale of the judge. It was also discussed that increasing in disposal rates is adversely affecting the quality. Moreover it was stated that sometimes there is communication gap between the administrative judge and the judges of the subordinate judiciary. The speaker suggested several methods to the participants to improve their efficiency. It was suggested that the judges should identify methods to improve their legal knowledge, court library and computer training. It was also discussed that the participant can increase their knowledge by having exchange of ideas or group discussions with their colleagues. Thereafter the participants provided various suggestions for improvement of the existing system.

The last session was on the theme - "Strengthening Access to Justice at Grassroot Level". The speaker talked about providing legal aid to victims of human trafficking and disabled individuals. The speaker further spoke about the communal violence bill and the victim compensation schemes in various states in India.

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NATIONAL JUDICIAL CONFERENCE FOR HIGH COURT JUSTICES ON THE REGIME OF GOODS AND SERVICES TAX

February 09-11, 2018

Mr. Sumit Bhattacharya, Research Fellow



The National Judicial Academy organized a three day “National Judicial Conference for High Court Justices on the Regime of Goods and Services Tax” from 09th to 11th February, 2018. It was the second conference on the subject matter in the Academy during the academic year 2017-18 post rolling out of the Goods and Services Tax (hereinafter GST).

The conference aimed to provide an insight to the nascent legislation of the GST Act, 2017. It provided a forum for the High Court justices to discuss the subject matter pertaining to the newly legislated regime of national uniform taxation, and to provide a platform to deliberate upon the best practices, bottle-necks and the status of compliance and implementation of GST at State and Central level with special focus on the ramifications of the novel tax law within each High Court jurisdiction. Moreover, the conference explored the prospective areas of challenges in form of GST litigations. The issues pertaining to substantial question of law in matters of appellate jurisdiction of High Court and other jurisdictional issues were discussed during the discourse. An overview of the Constitutional amendments incorporating GST regime and their implications were delved in the course of the

conference. The important issues and topics forming the discourse are pointwise highlighted hereunder.

Session 1 : Overview of the GST Regime: Amalgam of Central Excise, Service Tax & VAT

In the first session emphasis was laid on the history and the evolution of the taxing system in India. The areas of conflicts and the nebulous between taxation levied by the State and the Union under the prevailing Constitutional mandate were discussed.

- Emphasis was laid over the prospects of the new tax regime brought in by the 101st Constitutional Amendment, as a paradigm shift from the prevailing approximately six decade old tax structure.
- Conflicts arising out of confluence, particularly in cases of fusion transactions viz. 'Works contract' where there was a service tax component for the sweat of brow portion and a sales tax or value added tax (hereinafter VAT) component for the goods portion was discussed.
- Problems including history of poor legislative drafting prevalent in India, leading to judicial

evaluation of the economic legislations in general and tax legislations in particular formed part of the debate.

- The introduction of the GST regime after the State and the Union consensus at policy level, was considered to be perhaps the first Constitutionally introduced structure of cooperative federalism in India. Therefore, it was voiced that, there is a need for a cultural paradigmatic shift in accommodating the features of the new regime.
- The session dealt with the contours of the operation of the tax system pre and post GST, and the salient features of the GST tax regime. It was noted that the new legislation after its genesis on 1st July, 2017 has already seen more than 100 writ petitions including the challenge that as to whether Art. 246A has an overriding effect over the Art. 246 itself.
- The need for having an uniform and comprehensive tax regime in the form of GST was advocated by illustrating the faults, issues and limitations of the discrete, truncated, cumbersome, ineffective (for many services and commodities would fall outside the tax bracket) and non-pervasive nature of the existing tax enactments.

Session 2 : Introduction of Concepts: CGST, SGST & IGST

It was highlighted that majority of the substantive law pertaining to GST can be found in the Central Goods and Services Tax (hereinafter CGST Act) itself. The State GST legislations are substantially *pari materia*, except for a few State-specific matters. Further, the key provisions under the State Goods and Services Tax (hereinafter SGST) statutes are largely the same as the CGST Act (except for State-specific aspects). The Inter State Goods and Services Tax, Act (hereinafter IGST Act) seeks to levy GST on all inter-State supplies of goods and services. Unlike in the case of intra-State Supplies, if effective GST rate on a supply of service is 18%, the whole 18% is levied under the IGST Act itself. The most important substantive aspect that emerges from the IGST Act are:

- ✓ provisions pertaining to 'place of supply'; and
- ✓ definitions of 'inter-state' and 'intra-state' supplies of goods and services.

- “State” and “Other Territory” as inserted under Clause 26B of Article 366 and Section 2(114) of the CGST Act was interpreted to determine their scope. It was explained that the inclusive definition of State includes a Union territory with Legislature. Hence, technically SGST cannot be levied in a Union Territory without legislatures i.e. Chandigarh, Lakshadweep, Daman and Diu, Dadra and Nagar Haveli and Andaman and Nicobar Islands, which are covered under the UTGST Act.

- In this session certain salient points were discussed. A few questions raised, explained and answered were:

- ✓ Has 'supply' been defined under the CGST Act?
- ✓ Is the said 'supply' a 'supply of goods' or 'supply of services'?
- ✓ What is meant by 'place of supply'?
- ✓ Whether this 'supply' will attract CGST and SGST of a particular State or will attract IGST (being inter-State in nature)?
- ✓ What is the value of such 'supply' on which GST needs to be paid?
- ✓ What is the rate at which GST has to be paid?
- ✓ What is the point of time at which the above GST liability accrues -what is the point of taxation (or in GST phraseology - what is the 'time of supply')? Etc.

- One of the issues anticipated in case of determining the “place of supply” under Section 10 (a) is in case of a simple transaction wherein the language renders confusion. If the recipient already received the goods ex-factory (thereby the supply being made at that instance itself), where is the question of a subsequent delivery to the recipient again at a different place? The



superfluity of the language of the provision was discussed in detail.

Session 3 : GST: Sectoral Impact

In this session three industrial sectors/domains were considered for discussion to understand the ramifications anticipated post GST compliance, they were a) Petroleum Sector; b) Power (Energy) Sector and c) Anti-profiteering.

- Addressing the query regarding selective quarantining of the 5 petroleum items as non-taxable i.e. i) Crude, ii) HSD (High Speed Diesel), iii) ATF (Aviation Turbine Fuel), iv) MS (Motor Spirit), v) Natural Gas, it was asserted that it would continue to operate under existing old tax regime i.e. VAT, Excise, CST etc. Exclusion from GST is only for HSD; Light Diesel Oil ("LDO") will be liable to GST. Moreover, goods e.g. Naphtha, kerosene, LSHS, FO etc. will be taxable under GST. This implies that the industry is liable to pay tax under a hybrid model comprising of some items falling under the GST and others on the older structure of CST, VAT, Excise Duty etc. Therefore, compliance would be a matter of concern.
- Power sector was explained to be one sector which faced a raw deal with the advent of GST. The concerned Ministries hitherto was tax incentive driven, particularly in projects of Mega Power Plants (1000 Mega Watt and above of power production capacity) and Ultra Mega Power Plants (4000 MW and above capacity).

This was because capital expenditure to build these power projects were free from excise and customs duty. The only tax levied was CST.

- Introduction of GST in other countries showed that there had been inflation and prices had increased after GST implementation. Hence, to curb inflation, an Anti-profiteering provisions was needed. Anti-profiteering clause has been provisioned under Section 171 of the CGST Act. However, it was informed that, the word 'profiteering' has not been defined. However, the marginal note to the section states "Anti-profiteering measure". The provision was explained to be a vehicle introduced in the Act to enable passing on of the benefit of the tax (revenue collected by the Governments) to the last consumer, thereby anticipate cost benefit to the customers and the citizen.

Session 4 : Administering GST: Dispute Resolution- Appeal & Revision Adjudication, Appeal, Revision, Demand & Recovery

This session was based on the pretext that with the advent of GST, the tax law jurisprudence (both Direct & Indirect Tax) has seen more dynamics in the last two years, than the last four decades globally owing to the changing facets of the world economics.

- The meaning and scope of the word "Assessment" (Section 2 (11)) of the CGST Act was discussed. It means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional,

summary and best judgement assessment. The Kinds of Assessment Proceedings under the GST were discussed, w.r.t. Chapter XII section 59 to 64 of the CGST Act as:

- ✓ Self-assessment (Section 59)
- ✓ Provisional Assessment (Section 60)
- ✓ Scrutiny of Returns (Section 61)
- ✓ Best Judgement Assessment on non-filing of returns (Section 62)
- ✓ Best Judgement Assessment of Unregistered persons (Section 63)
- ✓ Summary assessment in certain Special cases (Section 64)
- The relevant provisions of Appeal and Revision under the GST were discussed w.r.t the following provisions:
 - ✓ Order passed by Adjudicating authority
 - ✓ Appeal to the Appellate Authority (Section 107)
 - ✓ Revision powers of the Commissioner (Section 108)
 - ✓ Appeal to the Appellant Tribunal (Section 109 to 110)
 - ✓ Appeal to the High Court (Section 111 to 116)
 - ✓ Appeal to the Supreme Court (Section 117 to 118)

The nature of the Adjudicating Authority under Section 2(11) of the CGST Act was explained as both inclusive and exclusive. Moreover, scope of Appellate Authority (AA) was discussed under Section 107 of the CGST Act. While discussing the principles for condonation of delay by the First Appeal Authority appropriate case law were discussed. Similarly the powers of the Revision Authority (RA) under Section 108 of the Act was discussed. The powers and scope of Appellate Tribunal (AT) under Section 111 of the Act was discussed. Who and how an appeal to an AT can be filed was discussed w.r.t Section 112 of the Act. An appeal to the High Court (HC) was discussed w.r.t Section 117 of the CGST Act. It was discussed that, a person aggrieved by any order passed by Appellant Tribunal may file an

appeal to the HC, dealing with Substantial questions of Law. The High Court has the power to deal with the substantial question of law which are not formulated or improperly done so, after recording reasons, and can decide any issue not determined or wrongly determined by the Appellant Tribunal. Moreover, Judgement of the HC shall be given effect to by either side on the basis of a certified copy. Provision for Appeal to the Supreme Court (Section 118) was briefly discussed.

Session 5 : Administering GST: Inspection, Search, Seizure, Arrest, Penalties, Prosecution & Compounding

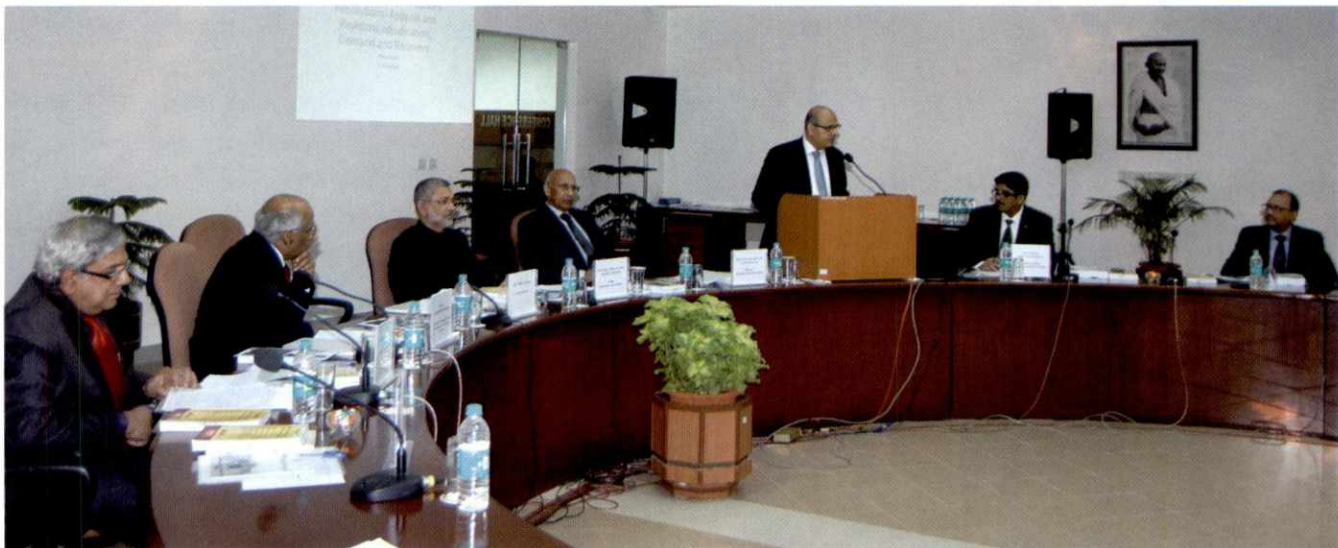
The session commenced with the deliberation that there are five powers provided to officers under the GST legislation during Investigation. These are power to:

- ✓ Search
- ✓ Seizure
- ✓ Summon persons to give evidence and produce documents
- ✓ Detention and Arrest
- ✓ Seek deposits during investigation before issuance of show cause notice

Hence, it involves the personal liberty of the tax payer. The jurisdiction to search is wide but the law caps it by providing that the same can be done by a *person not below the rank of a Joint Commissioner* (i.e. the “proper officer”). It was debated that throughout the Act “proper officer” have been indicated for various persons, which has eventually led to litigation and one such case is *sub. judice* before the Delhi High Court. Power of inspection has been dealt under Section 68 of the CGST Act. It states that inspection can be done where the proper officer has 'reason to believe' that any of the following three causes are there i.e.:

- ✓ There is suppression of transaction relating to 'supply'; or
- ✓ Inadmissible input tax credit has been claimed; or
- ✓ Contravention of provision of the act or rules to evade tax;

Query as to the scope of “place of business” or which are the places that can be inspected was satiated.



Moreover, the scope of the phrase under Section 67 'reason to believe' was discussed. It was argued citing case law that such a power is not arbitrary and unfettered. Discussing the "Power to Arrest" under Section 69 of the CGST Act, it was explained as to who and when a person can be arrested. It was debated as to whether there is a power to arrest even before adjudication? The question was answered w.r.t. the recent Delhi High Court judgment *Makemytrip (India) Pvt. Ltd.* Delhi High Court 2016 (44) S.T.R. 481 (Del.).

Session 6 : Concept of 'Supply' under GST: International Perspectives and Learnings for India

Explaining the meaning and scope of the word "Supply" a comparative was drawn between the law relating to GST and VAT globally. It was highlighted that 'Supply' has been defined differently in different jurisdictions – While EU and Malaysia have a restrictive definition, India and New Zealand have expansive definition. It was underscored that "consideration" and "in the course or furtherance of business" are two most important ingredient in the concept of "supply" under the GST law internationally. It was explained even in case of an inclusive definition of the term "supply", it is finite in nature.

Moreover, for "supply" there needs to be an "intention to create legal relationship". The basics of the Intent to create legal relationship could be traced from the leading case *Balfour v. Balfour* [1919] 2 KB 571. Wherein, Lord Atkin held that "many agreements do

not result in contracts even though there may be ... consideration for the agreement. ... they are not contracts because the parties did not intend that they should be attended by legal consequences." Other relevant and pertinent case law viz. In *Tolsma's case* Case C-16/93 were discussed in detail. However, the GST law of Australia had a contradictory view to the *Tolsma's Case*.

It was underscored that the term 'supply' is wide in its import and includes all forms of supply of goods and / or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. It includes import of service and it also includes certain transactions made without consideration. The respective Schedules i.e. dealing with classification of conditional activities to be treated/ not treated as a supply of goods or services with and/or without consideration etc. were discussed.

Session 7 : Time and Place of Delivery: An Overview of Relevant Provisions

The session commenced with the assertion that concept of "place of supply" in the pre-GST era was not even relevant. This was primarily because the erstwhile Central Excise Duty the taxation was on the activity of manufacture at the point of removal, i.e. removal from the factory. Similarly in case of services a person to operate across the country providing his services and be registered at one place. Such person was to pay one

service tax to the Central Government and file two returns in a year.

It was underscored that, identification of the “place of supply” is one of the basic sutras of the GST legislation. A rudimentary question as to why (rather than asking where) a “place of supply” was delved into was posed. Another basic query floated was, when a State is applying GST in the form of CGST + SGST; what is the role for CGST component, while a State charges GST? Since, the mere word “Central” denotes a notion of Union. The above points were discussed citing real life examples. A brief historic evolution of the indirect tax laws in India starting 1956 and until the advent of GST was traversed in order to appreciate the change in the economic scenario and the national revenue objectives for the progressive economic development of India.

It was further explained that under the CST regime it was “origin based” taxation (place of sale was the point of origin for a transaction). Under GST regime there is a complete migration from “origin based” to “destination based” taxation (i.e. the “place of supply” is the destination). The “destination based” taxation is the default rule or the cardinal principle.

Session 8 : Interpretative Challenges and Potential Areas of Conflict

In this session many areas under the statute law and the Constitutional provisions under the GST law were explored in order to ascertain objectively the scope, meaning and ramifications of certain provisions. The session aimed to identify anticipated legislative infirmities and brain storm to arrive at consensus on possible ways to approach them.

It was discussed that considering the definitional distinction between “goods” and “services” under the GST statute, can services be ‘*anything other than goods*’? Can services be a “thing” at the first place (which can be handled or touched etc.)?

Another issue discussed was in relation to “Works Contract”. In the GST law for the first time “works contract” has been defined under Section 2(119) of the CGST Act, to be an “immovable property. The issue raised was, what happens in the transactions which are

not linked to an immovable property, but has a component of both material and services? (*viz.* there could be a contract involving design, supply, engineering, commissioning, and installation of an Air Conditioning plant). This was contextually supported with the fact that, there are judgments which held that and AC plant is an immovable property.

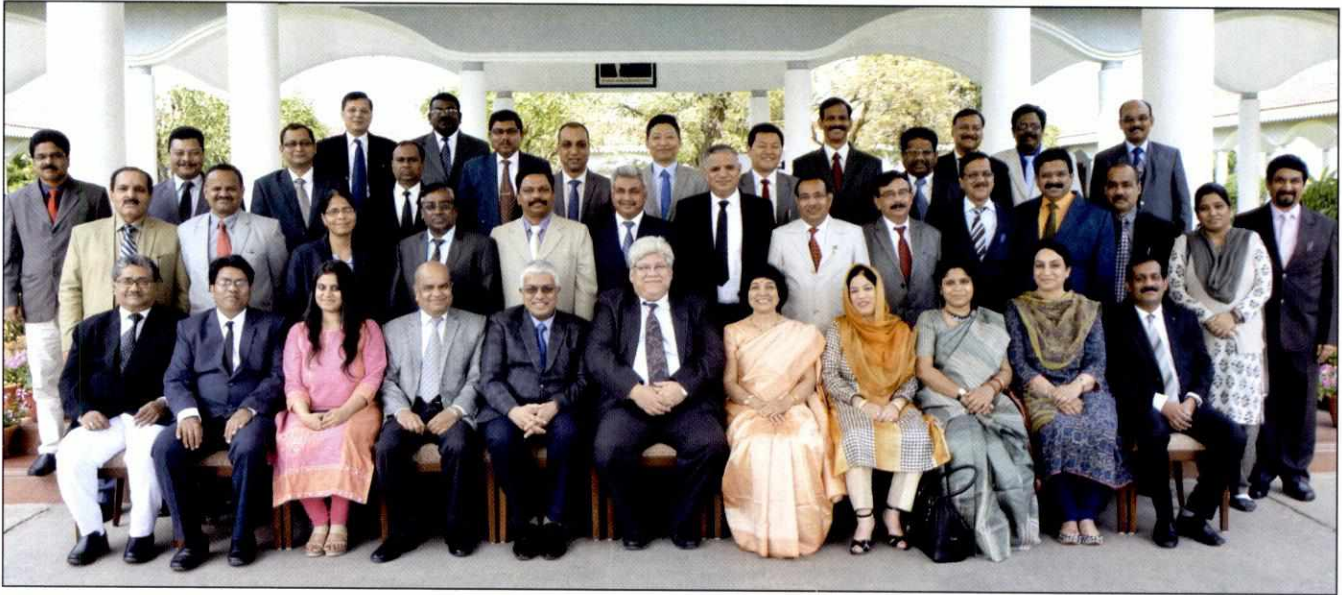
It was argued that, Courts of the country in future must consider that, whenever there exists a anticipated point of dispute between State sovereignty and rates recommended by the GSTC, the Courts should be mindful about the “one nation one market theory” rather than considering State sovereignty to the extent to defeat the concept of one nation with a uniform tax structure. The Sub Clause (6) of Article 279A was thereafter referred, which lays down the core philosophy and objective of GST. It was discussed that the confusion if at all it shows-up as to a choice between a national harmony or a State loyalty. One must look forward to the national interest as suggested by the GST council and stick to the uniformity of taxation as recommended rather than advocate narrow State interest under the garb of State sovereignty and recommendatory language of the Article 279A.

It was further reiterated that the tax is only “one” (i.e. Supply Tax) it is charged or levied by two agencies i.e. (Union and/or the States). The apportionment is for convenience but the market referred by the Constitutional provision is one and the tax is one.

The interpretation of the words “recommends” and “decision” used in Article 279 A in light of Article 246A was debated. It was considered that the question is not to encroach upon the State sovereignty, but it is of cooperative federalism which must prevail over absolute federalism, since on one hand a recommendation by the GST Council is subsequent to a democratically agreed upon decision (post voting process) as mandated under Article 279 A; on the other hand the States subsequently cannot be tipping the scales under the garb of parochial Statehood. States must give way to the national objective (as laid down under 279 A(6)).

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WORKSHOP FOR ADDITIONAL DISTRICT JUDGES
February 23–25, 2018

Ms. Ankita Pandey, Law Associate



The National Judicial Academy organised a two and a half days programme for the Additional District Judges from 23rd to 25th February, 2018. The workshop provided a forum to the participant Judges to discuss and exchange views regarding Civil, Criminal, Arbitration and cyber related issues in separate sessions and also to assess problems faced by the judicial fraternity and the means to overcome them.

Session 1: Challenges in implementation of the ADR system in subordinate courts

About three decades back there was a sudden inflow of cases in the courts, more and more people have started to come to the court system for the redressal of their grievances in case their rights are violated either by the Government agencies or by the private individual. Alternative Disputes Resolution system therefore, is the only hope for the future as far as civil cases are concerned. However, there are a few challenges in this regard, which includes building and enhancing functional capacity of mediation process and procedure, acceptability and creditability of mediation process, and propagation and promotion of mediation. The participant judges were advised to consider such referral as a part of one's judicial work in accordance

with the mandate of the Civil Provision Code.

Session 2: Court and Case Management: Role of Judges

The second session was based on discussion among the participant judges on the theme and to come up with best practices in relation to court and case management. For this purpose, the participant judges were divided into groups. Some of the ideas/suggestions formulated by the participants were as follows:

- To explore the possibility of settling a particular matter through ADR mechanism
- To decide interim applications on the same day on which they are filed
- To achieve the monthly goals in the ambit of healthy practices
- To ensure maximum use of ICT in managing the affairs of the court
- To address the issue of pendency by adopting proper identification based approach and grouping the cases accordingly
- To increase the manpower for better management of the courts



- To avoid unnecessary adjournments

Session 3: Civil Justice Administration: Appellate and Revision Jurisdiction of District Judges

The session commenced with the discussion on the role of appellate courts and section 96 of the Civil Procedure Code. The entire case reopens before the first appellate court and every aspect of it needs to be examined. A fresh approach is to be given to the matter keeping in mind the grounds of appeal and at the end consideration is to be given in the form of findings which are mentioned in the judgment by the court. It was further emphasized that when a trial judge has also taken a view and has supported it with reasons and evidences it shouldn't be disturbed. If the trial court has misread the evidence or overlooked some aspects in such cases only the findings should be interfered with. This is what is expected from a judge of an appellate court.

Session 4: Criminal Justice Administration: Appellate and Revision Jurisdiction of District Judges

Appeal is generally when there are some elements of finality involved and revision is for the other matters for which appeals aren't provided for. Just as in regular first appeal in civil matter, in criminal matters also, the entire matter is opened again but the appellate authority is not to supplant it, appellant discretion is to be exercised in addition to the discretion of the trial court. The provision of appeal is there to give the impression that Justice is not only done but appears to be done. That is to say it's a guarantee that even though looked from different perspective by each of the court similar

conclusion is arrived at. And sometimes the decision of trial court is changed because different perspective is being used. This is the reason we have aspects of Appeal and Revision. The scope of appeal and revision are totally different. Appeal is a statutory right provided under law, but in criminal appeal, the right to appeal is restrictive at times and may not be available in certain circumstances. Right of revision is provided in only certain circumstances and it is a discretionary right. It is a sort of supervisory power which is to prevent miscarriage of justice.

Session 5: Sentencing: Issues and Challenges

The lawmakers thought it fit to leave the element of discretion in matters relating to the quantum of sentence in a particular case. There are no fixed norms, so within the parameters, a particular judge may award the minimum or the maximum sentence depending on several factors. Judge made law provide some guidelines, but there is no sentencing policy in India. The various theories of punishment i.e. deterrent theory, reformatory theory, retributive theory etc were discussed in the course of the session. It was also mentioned that at times the judges' hands are tied where the maximum sentence is not prescribed. In such cases, due regard should be given to the state of mind in which a person commits an offence. Some offences are based on spur of a moment and such acts are challenging as to prove the guilt of a person. A balance is to be maintained with all such aspects before awarding a sentence. In sentencing there is no legal yardstick to go by with regard to theory or practice. Therefore, it differs from

one case to another case. The certainty of outcome cannot be promised when there is a wider range.

Session 6: Fair Sessions Trial: Best Practices

Fair Trial is an ongoing process and it is never constant as what amounts to fair trial have to be adapted with the time, and also procedure which falls within the largest scope of due process so that, a just form of participation is given to all stakeholders to arrive at a correct conclusion. There couldn't have been a fair trial if the reasons do not indicate the application of the mind to the matter which were in issue, the consideration of the relevant factor and the conclusion on that basis. The power under Section 313 Cr.P.C should be adequately used. An accused should be provided with a fair procedure and to be ensured that adequate representation shall be provided. The speaker emphasized on Section 301 of Cr.P.C and the intent of legislature behind enacting this provision of 'Appearance by Public Prosecutor' is to assist the court with the documents and proceedings. Further, the importance of Section 303 was discussed, where it is a right of person against whom the proceedings are instituted to be defended by a pleader of his choice. Then, Section 304, for providing legal aid to the accused. Section 309, power to postpone or adjourn proceedings. As per the International Covenant, it is provided, the right to adequate time and facilities for preparation of the defence.

Session 7: Laws relating to Cyber-crimes: Advances and Bottlenecks

The speaker gave an enlightening insight into the various aspects relating to cybercrimes so as to check whether such crimes can happen with ourselves at any point of time. Then the session also delved into the modus operandi of the cyber-crime, how the evidence is to be collected, preserved, admissible etc. The speaker also focused and briefed on technological aspects and the common breach which are prevalent in the modern society. The speaker further stated that spoof message comes under Section 65E – A printout of it along with the particular Section 65E forged certificate is admissible in court. It is the discretion of a judge to take it or not to take it or send it to the forensic lab and take its opinion. But prima facie, when an FIR is registered at the police station, the message authenticity should be

checked and then to be concluded whether FIR could be made against a person or unidentified person and then to start the investigation. The speaker also mentioned that there are two types of bio-metric device, one is Image-based biometric device and another is Sensor-based device. In Image-based biometric, the impression of someone's fingerprint can be used and this is the reason it is considered less secure. On the other side, the sensor-based devices are considered fully secure. Thus, the chances of fraud increase with image-based biometric.

Session 8: Electronic Evidence: Collection, Preservation and Appreciation

The speaker demonstrated about CDRs and the way it needs to be examined. He explained that, in one of the CDRs, the date was mentioned but there was no time mentioned in that particular designated column. In this case, anyone can state that particular CDR is manipulated. One can never find such CDR in which a particular column is left blank. And, in the case of IMEI number, one must always check the first 14 digits. Every IMEI has almost 15 digits to 17 digits. The number of IMEI being displayed depends on the number of sim card slots one phone has. Some mobile has almost four number of sim card slots. At last, he mentioned the ways in which the evidence can be preserved on a mobile phone. Some points which needed to be kept in mind are-

- Mobile phone should be kept in flight mode
- External SD card to be removed and a 'hash value' has to be generated. Hash value is a mathematical algorithm, that the external memory card is not tampered. Tools which are used to calculate hash value are, Winhex, Encase etc.
- Then it has to be sent to the forensic lab but hash value need to be calculated. The software which is used should also be licensed,
- To provide the password of the device,
- The type of information required with a questionnaire and what is expected, should be mentioned, and
- Charger is also needed to be provided along-with as it becomes easier for any sort of investigation.

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SOUTH ZONE REGIONAL CONFERENCE ON ENHANCING EXCELLENCE OF THE JUDICIAL INSTITUTIONS: CHALLENGES & OPPORTUNITIES

February 24 & 25, 2018.

**Mr. Shivaraj S. Huchhanavar, Research Fellow &
Mr. Prasidh Raj Singh, Law Associate**



The NJA, in association with the High Court of Judicature at Hyderabad and the Andhra Pradesh Judicial Academy, organized South Zone Regional conference on *Enhancing Excellence of the Judicial Institutions: Challenges and Opportunities* on 24th and 25th February 2018 at Hyderabad.

The regional conference was designed *inter alia* to provide a forum for exchange of experiences, communication of knowledge and dissemination of best practices from across clusters of High Court jurisdictions in the region and amongst judicial hierarchies; to accentuate the experience of familial community between High Court and Subordinate Courts; besides to revisit established and imperative norms of a constitutional vision of justice. Further, the elements of judicial behaviour, social context judging and other specified topics were enlisted for the 2-days deliberation.

The conference was inaugurated by an intensive discussion on the constitutional vision of justice. The intriguing questions—whether the constitution of India has a vision; if yes, how it is relevant to the judiciary as an institution; whether the subordinate courts have any

role to play in attaining the constitutional vision of justice, etc., formed the part of the open discussion. The resource persons explained to the participants the meaning of 'constitutional vision' in both narrow and wider sense. The concept of 'justice' in the social, economic, political and cultural context of India is discussed. It was observed that the constitution virtually translates freedom in its creative fullness as justice—social, economic and political; the dignity of the individual and equality of status and opportunity. The role of the grassroots judiciary in protecting rights of individuals interacting with courts and public offices were emphasized. It was concluded that if the toiling and tormented, deprived and humbled masses of our society are empowered to enjoy and enforce their constitutional rights our democratic social order then be said to be informed by equal justice.

The second session of the conference was on *High Court and District Judiciary: Building Synergies*. In his opening remarks the resource person emphasized that the administration of justice is the firmest pillar of good governance; hierarchical arrangement of the judiciary is to ensure independence of each judge within the

allotted sphere, and at the same it is to provide a review opportunity to the litigant who feels aggrieved by the court of the first instance. The rationale of constitutional provisions conferring supervisory and controlling powers on high courts was explained to the participants. It was opined that supervisory powers are coupled with a responsibility of ensuring judicial independence. Therefore, need for rationalizing court inspection practices, writing and maintaining annual confidential reports, appointment, promotion and transfer of judicial officers etc., were highlighted.

In the third session, the significance of ethics, discipline and professionalism in judges were emphasized. It was observed that it is not easy to analyze and catalogue the qualities that make outstanding judges, but the qualities of being honest, righteous, impartial and independent, and the burning indignation for falsehood, self-interests, etc., set apart the extraordinary judges from the rest. The need for strengthening the vigilance mechanism was discussed at length. During the discussion, the participants suggested for a comprehensive code on judicial conduct, it was highlighted that the Restatement of Values of Judicial Life is very concise and at certain places vague. It was concluded that judging is not genetic. Therefore, continuing judicial education and peer-learning are must for all-round development and excellence in judges.

Social context judging as a controlling element in statutory interpretation and exercise of discretion was discussed in the fourth session. It was emphasized that the judiciary is entrusted with implementation and interpretation of laws in a manner consistent and conducive to constitutional values and rights so that no sections of the society feel discriminated or left out. In other words, the role of the judiciary is to facilitate to build a just, fair and humane social order. Therefore, like the laws and the constitution, social settings are equally relevant for the just adjudication. It was opined that the 'social context' refers to an approach to judging which is grounded in the human conditions and in the social settings around. In this perspective, the PIL, judicial activism, expansion of fundamental rights

through beneficial and purposive interpretation of welfare laws and constitution, internalization of human rights instruments, etc., were discussed.

The session five was on *Access to Justice: Information and Communication Technology in Courts*. It was remarked that the Information and Communication Technology (hereinafter, ICT) is key for court's efficiency and transparency, and it helps expand the horizons of access to justice. The resource person, briefly narrated the history of ICT developments in Indian and explained the objective of the E-committee, the concept of e-Court, and National Policy and Action Plan for implementation of Information and Communication Technology 2005. The Phase-wise implementation e-Court project, its successes were critically audited. Further, the training of judicial officers and court staff to equip them with the computer and Case Information System (CIS) was emphasized. In the second segment of the presentation, implementation of e-court project in (Delhi) courts, merits of less-paper courts and various services made available to advocates, litigants and judges through ICT were explained to the participants.

Session six was on *Access to Justice: Court and Case Management*. It was emphasized that, for the common man, the courts and judicial processes appear to be wrapped in mystery; for efficient judicial system proper adjudicatory mechanism is necessary and such mechanism must be speedy and affordable. Therefore, proper management of court and case, of human resource employed in courts, the court infrastructure, minimum facilities at court campuses for the litigants or court users is necessary. Thus, court management includes all the activities inside and outside the court hall that pertains to the administration of justice. The resource person emphasized that effective collaboration between the judiciary and those who provide administrative support to the work of the court also needs to be organized and managed on the scientific lines. In this milieu, case filing, scrutiny, listing, prioritization, adjournments, and record management were discussed at length.

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NATIONAL JUDICIAL CONFERENCE FOR HIGH COURT JUSTICES
March 09-11, 2018

Ms. Paiker Nasir, Research Fellow



The NJA organized a three day “*National Judicial Conference for High Court Justices*” from 09th March 2018 to 11th March 2018. The conference was intended to provide a platform, for justices to share experiences, insights and suggestions with a panel of distinguished resource persons from the judicial branch and other relevant domain experts. The conference was designed to facilitate discussions on developments in constitutional law, corporate fraud and manipulations, supervisory powers of High Courts over Subordinate Courts, reproductive rights and contribution of the Supreme Court and High Courts to development of laws, tribunalisation of justice delivery and election laws.

The first session on the theme “*High Courts: Guardians of District Judiciary*” commenced with emphasis on the relationship between the High Courts and the Subordinate Courts. The discourse broadly covered issues with respect to the tensions within the judiciary, the communication gap between the higher court judges and district judiciary, monitoring and mentoring functions of high court, disciplinary conversations etc. The role of guardian judges and the supervisory role of the High Courts over the subordinate courts under Article 235 of the Constitution were discussed at length along. The discussion also

highlighted the difficulties faced by judges in managing judicial work and administrative work which needs equal attention and caution. Therefore, judges were suggested to inculcate such habits that can help manage their administrative as well as judicial responsibilities. It was suggested that supervision by guardian judge should not only be administration centric rather it should also focus on the kind of orders being passed by the subordinate judiciary. There should be regular assessment of judicial work as well. This will definitely enhance the quality of judicial work/pronouncements. Through National Judicial Data Grid [NJDG] Guardian Judges can keep track of the daily work accomplished by the judicial officers. The session emphasized that for effective inspection of courts, it is important to understand that inspection is not just to fulfil a formality but the purpose is to catalyse and do value-added work from what had been done hitherto. It was also suggested that inspection must always be a “fact finding mechanism rather than a fault finding mechanism”.

The session on “*Tribunalization of Justice: Boon or Bane*”, emphasized that increasing tribunalization excludes jurisdiction of civil courts. On the other hand judicial members having no experience of the technicalities of the tribunal or *vice-versa* creates problems. The discourse highlighted that there is no

normative basis as to why the tribunals are created. The larger question that arose during the course of discussion was how can tribunals be made supplementary limbs of the judicial system? In response it was suggested that the tribunals ought to be made independent being free from departmental control. An eco-system resembling independent judiciary is must for an effective and efficient administration of justice through tribunals. Questions about the role of the mainstream courts in respect of certain category of cases and the questions on the structural validity and reliability of having specialized tribunals to supplement the ordinary courts formed an integral part of the session. The other view suggested that there are certain sectors, such as intellectual creativity, finance, taxation, power, telecommunications, transport, infrastructure etc. that are basic to the economic growth and development of the country. Any adjudication arising in these sectors require complete knowledge of the dynamics of that sector and calls for specialized skills and expertise. Further, any delay in the adjudication of disputes arising in these sectors will have dire consequences that would go beyond the individual parties to the dispute and would cause harm to the growth of the sector as a whole.

The session on “*Superior Courts: Managing Judicial Review within the Democratic Framework*” commenced with discussions on the challenges of a democratic set-up. It was stressed that initially judicial review was very limited which is quite in contrast to the present scenario. The case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), a landmark judgement by Chief Justice John Marshall of the United States Supreme Court, which forms the basis for the exercise of judicial review in the United States under Article III of the Constitution, was discussed at length. It was highlighted that the problem with the constitution is that it is not a majoritarian constitution and contains many non-majoritarian provisions. The balancing of majoritarian and non-majoritarian tensions in the constitution texture has to be done by some organ, and judiciary is best suited for it, because of its non-subjection to periodic review of its actions.

The fourth session on the theme “*Contemporary Challenges for Judicial Review, Policing Governance within Separation of Power Framework*” exemplified that rule of law in all its dimensions has been given

upliftment by way of historical judicial review. However, judicial review has also been subject to criticism which expounds that judiciary has disregarded the theory of checks and balances. Nonetheless, the power of judicial review given to the constitutional courts is a power coupled with duty and it is a power which shall not remain underutilized so as to entrust public trust and confidence in the justice system. It is the duty of judges to keep this in mind while resolving the dilemmas. The discourse highlighted that the power of judicial review is a tool by which judges make the constitution respond to the social, economic and political requirements. Therefore, courts should make sure that the constitution is for those who do not have a voice. It was suggested that if our constitution respond with time then it can mold itself by way of judicial review.

The session on “*Construing the Sounds of Constitution's Speech: Meaning Beyond Text*”, by drawing inference from classical music emphasized that sound and silences brings about symphony in the constitutional text. Mentioning about what Dr. Radhakrishnan, once said that Constitution is the fundamental law of the nation, it should embody and express the passions, ideas and expression of the people, it must be based on the consent of all, and reflect the right of the people of this great land. It should reflect the interest of the people. Substantial part of the session discussed interpretative approaches in India classified in three phases - Phase I – where textualism was the dominant interpretative approach, Phase II – Structural/purposive was the dominant interpretative approach, and Phase III – result-oriented decision making using both the above approaches is dominant. In the light of these interpretative approaches the case law *AK Gopalan v. State of Madras* (AIR 1950 SC 27); *Sri Sankari Prasad Singh Deo v. Union of India* (AIR 1951 SC 458); *Sajjan Singh v. State of Rajasthan* (AIR 1965 SC 845); *Golak Nath v. State of Punjab* (AIR 1967 SC 1643); *Kesavananda Bharati v. State of Kerala* (1973 4 SCC 225); *Maneka Gandhi v. Union of India* (1978 AIR SC 597); *PUC v. Union of India*; 2013 10 SCC 1, *Suresh Kumar Koushal v Naz Foundation* (2014 1 SCC 1), *National Legal Services Authority (NALSA) v. Union of India* (2014 5 SCC 438) were discussed.

An Illustration of how interpretation of the Constitution is not static but progressive to absorb new ideas and

meet new situations in the light of the decision of *Shreya Singhal v. Union of India*; (AIR 2015 SC 1523) whereby the Supreme Court held S. 66 A of the IT Act as unconstitutional on the ground of infringement of freedom of speech was discussed at length. Recent interpretative conundrums with respect to the cases of *Aadhar* and *Right to Privacy* were elaborated upon.

The session on “Free and Fair Elections – Vitalizing our Democratic Fabric: The way forward”, commenced by discussing the jurisprudential aspects of election laws. The case of *People's Union for Civil Liberties and Anr. v. Union of India*, 2013(12) SCALE165 was emphasized. It was highlighted that the 225th Law Commission Report has a chapter on election petitions which discusses how delay in election petitions frustrates the purpose of elections. The discourse suggested that there should be a special bench to dispose off election petitions at the earliest. There is no disclosure of information at the high courts on the number of pending election petitions. The session elaborately discussed on the role, importance, strength and challenges faced by the Election Commission. It was emphasized that the governance of the country lies in the hands of the Election Commission. The judgment of *M.S.Gill & Anr v. The Chief Election Commissioner, New Delhi & Ors* 1978 AIR 851 was discussed on how independently free and fair elections should be conducted.

The session on “Corporate Fraud & Manipulation: Repercussions, Deterrent Mechanisms & Judicial Approach”, commenced with broad discussion on fraud; fiduciary duties; types of fraud; ingredients of fraud; types of liabilities and origin of the modern corporate fraud. The discourse addressed issues like- Can fraud be done without an intention? How is legislature dealing with bail related to fraud cases? Can a minimum penalty be evolved? When can negligence constitute fraud? Can an auditor unaware of fraud in a

company be liable for fraud? It was stressed that the line between the victim and perpetrator is becoming thin in the corporate world which needs to be addressed at the earliest. For this, there is a dare need to change the diagnostic practices rather than increasing the dosage of expired medicine. It was suggested that a regulatory institution building, as is being worked upon by the Financial Sector Legislative Reforms Commission [FSLRC] is also required and the judges too need to be pro-active and get into the depth of the information in such matters coming before them.

The last session “Jurisprudence of the PC & PNDT Act: & Cultural, Social and Economic Factors that Promote Gender Bias: Context of the PC & PNDT Act in India”, started with a brief discussion on the social and cultural bias against women in the society. It was emphasized that a judge ought to understand what a woman thinks and what are the reasons because of which she do not come to the court that easily. Talking about the Child Sex Ratio [CSR], it was highlighted that what started as an urban problem or issue has slowly disseminated in the rural areas. On the other hand the statistics suggested that women with no education have good sex ratio as compared to educated women. The reason being that educated women have knowledge of contraception which the rural or uneducated women does not have. Talking about the PC & PNDT Act [thereafter the act] it was highlighted that Constitution of India emphasizes on equality of status and opportunity. PCPNDT Act draws its origin and rigor from the Constitution. The act per say is very small but it calls for establishment of various bodies for its proper implementation. Section 4 and 24 of the act were discussed at length. The case law of *CEHAT v. Union of India* (2001)5 SCC 577 ; *CEHAT v. Union of India* (2003)8 SCC 398 ; *Gaurav Goyal v. State of Haryana Civil Writ Petition No 15152 of 2007*; *Hemant Rath v. Union of India* AIR 2008 Ori 71 formed an integral part of the discussion.

The discourse suggested that - Supervision by Guardian Judge should not only be administration centric rather it should also focus on the kind of orders being passed by the subordinate judiciary. There should be a regular system for assessing judicial work as well; with regard to tribunalization it was suggested that the tribunals ought to be made independent being free from departmental control with an eco-system resembling to High Courts then only they can aid justice delivery system

SE-12
NATIONAL SEMINAR FOR PRESIDENTS/ MEMBERS OF
THE DISTRICT CONSUMER FORUM
March 10-11, 2018

Mr. Rahul I. Sonawane, Research Fellow



Object and Background of the Seminar:

The National Judicial Academy, Bhopal organized a two day seminar for Presidents/Members of District Consumer Forum on 10th & 11th March 2018. The participants were the presidents/ members of District Consumer Forum from all over the states of India. The programme was aimed at capacity building for members of the District Consumer Forum towards speedy and effective disposal of cases. The seminar deliberated on the key issues relating to the redressal of consumer cases from different sections in effective and efficacious manner. The focus was also on infrastructural deficit, insurance sector and medical negligence, role of the consumer forum in housing construction, and determination of compensation. In relation to all these issues, resource persons had fruitful discussion with participants pertaining to application of the Consumer Protection Act 1986. The programme was intended to provide a platform to the participants to exchange their experiences, knowledge and best practices in exercise of jurisdiction and to revisit with the help of domain experts evolving horizons of relevant law & jurisprudence.

Session 1: Consumer Dispute Redressal Mechanism in India: Emergence and Overview

Speakers: Justice R. C. Chavan, Justice S. G. Gokani & Dr. J. N. Barowalia.

The first session started with the warm welcome of panel by Justice G. Raghuram, Director of The National Judicial Academy followed by the presentation by the speakers. The discussion was started by Justice R.C. Chavan. He started with the introduction of Consumer Protection Act, 1986 and why the word 'court' was avoided by the legislature. He discussed different types of consumer disputes and how to deal with them. He said that the object of Consumer Dispute Redressal Forum is to find means to redress the disputes effectively and not to dispose of the cases. He also added that it should also be ensured by the forums that their orders and decrees are executed. For that he suggested some measures viz. creating monitoring cell for execution, taking help of Commissioner of Police/Superintendent of Police and putting greater mechanism to work etc.

The Second speaker Ms. Justice S.G. Gokani started her discussion from the history of consumer and their disputes and threw light on the topic with reference to provision in Manusmriti, Kautilya's Arthshastra, Medieval Period literature, Muslim Rule etc. She also discussed Consumer Protection with reference to



International Law and conventions. She said that objective of The Consumer Protection Act, 1986 is to promote and protect the rights of consumer. She also discussed The Consumer Protection Bill, 2018 with special reference to pecuniary jurisdiction of Forums, provision for filing of complaints in e-mode and mediation process. The discussion involved a major concern about Power of District Consumer Forum to review ex-parte orders in the light of *Dosna Amit Kumar Shah v. Bombay Hospital Trust's* case. Several other case-laws such as *General Motors Case*, *The Guitar Case* and *BMW case* from United States were discussed. Dr. J. N. Barowalia could not make his presentation due to scarcity of time in this session. It was decided that he will complete his presentation in the beginning of second session and then topic of second session will be taken.

Session 2: Role of District Consumer Forum in Enhancing Consumers' Access to Justice

Speakers: Justice R. C. Chavan, Justice S. G. Gokani

The session was welcomed by Prof. D.P. Verma, Additional Director, National Judicial Academy after which Dr. J.N. Barowalia presented the topic. His main focus was on Consumer Sovereignty. He mentioned that Consumer Protection Act is Magna Carta for Consumers and only a consumer can approach the Consumer Forum. He discussed various provisions and case-laws to support his points.

The next speaker Justice R. C. Chavan, made a very

positive remark that as Judges of consumer court, one should not expect to earn a salary but to earn the satisfaction of providing aid to the consumer. He gave his views and words of caution on several topics, such as, online shopping, use of technology and video conferencing during the proceedings for evidence, automobile industry and what constitutes machinery disputes, bank locker disputes and insurance disputes and hospital bill disputes, etc.

Then Ms. Justice S. G. Gokani discussed that execution of decree under The Consumer Protection Act, 1986. Special reference was made on *State of Uttar Pradesh and Ors. vs. All Uttar Pradesh Consumer Protection Bar* [(2017) 1 SCC 444]. The case was discussed in detail with respect to infrastructure deficit, quality of members of consumer forums, execution of decrees etc.

Apart from the presentations by the speakers, this session also had a good discussion by the participants on the topic.

Session 3: Housing, Construction Industry: Timely Delivery, Quality, Maintenance & like issues

Speakers: Justice R. C. Chavan and Justice S. G. Gokani

The session was started by Ms. Justice S.G. Gokani. She discussed the provisions of The Real Estate (Regulation and Development) Act, 2016 with reference to housing and its meaning under the above

mentioned Act; housing Construction as per the Consumer Protection Act and the Black Law's Dictionary; and Construction Industry. Then she discussed the case of Lucknow Development Authority vs. M.K. Gupta [(1994) 1 SCC 243] in detail with various other case-laws on the topic. She also discussed about defects in service, illegal and unauthorized construction, delay in delivery, quantum of compensation and quality of justice in detail. She said that the Act is still new and it is not clear as to whether it excludes the jurisdiction of Consumer Forum, impliedly or not. So by the time some clarification is there, Consumer Forums should give due concern to the Act while deciding the consumer disputes with respect to housing and construction industry.

The next speaker Justice R. C. Chavan discussed Implementation of RERA, Statutory Obligation in Ratlam Municipality Case etc. he also said that till the time some clarification about jurisdiction of consumer forum in construction disputes comes from the Supreme Court or high courts, consumer forums can entertain the builder – consumer disputes.

Thereafter, Justice S. G. Gokani responded to the queries/questions asked by the participants relating to the topic of the session.

Session 4: Insurance Sector; Medical Negligence and Consumer Disputes

Speakers: Dr. J. N. Barowalia and Dr. S. M. Kantikar

The topic for the session was introduced by Dr. J.N. Barowalia, showing his concern alongside for unfair trade practices, poor response of business community towards consumers, registration of dispute being the biggest milestone and Maximum expenditure spent on food etc. He discussed various case laws with respect to the insurance companies and consumer disputes.

Thereafter, Dr. S.M. Kantikar started his presentation on the medical negligence and consumer laws. He discussed various legal issues with respect to medical negligence and explained that most of the lawyers are not aware of medical negligence and as a consequence most of the cases against doctors do not succeed. For which one of the participant responded a suggestion of

having good doctor- patient relationship. He also mentioned how complex it is for patients to file a complaint for issue as one needs to know about show cause notice, procedure to be followed and related issues. He discussed the present scenario viz. sharp rise in cases of medical negligence, cases of violence against doctor & hospitals etc. He also discussed the most common errors that are committed in medical negligence cases viz. Diagnosis or prognosis, Missing pathology/ failed surgery, Inadequate/ lack of communication, Lack/ poor medical records, Pressure etc. He also discussed the case of Samira Kohli in detail. Then he responded to the concerns and doubts expressed by the participants.

Session 5: Determination of Compensation: Key Issues

Speakers: Dr. J. N. Barowalia and Mr. Sharad Madke

The first speaker for the session Dr. J.N. Barowalia started discussion by quoting sec.14 of The Consumer Protection Act, 1986. He explained the ingredients of the compensation as Loss/injury suffered, mental agony etc. He cited some case laws to support his points.

The next speaker Mr. Sharad Madke, said that compensation has two aspects i.e. Constitutional Significance and Jurisprudential aspect. According to him, the tribunals do not take the issues seriously. He said that various things are to be kept in mid while determining the amount of the compensation viz. loss or injury, mental agony, inflation, cost of the litigation and treatment if any, remote damages and in exceptional cases, punitive damages. He discussed two landmark judgments on awarding compensation i.e. Kunal Shah Case and Bangalore Development Authority vs. Syndicate Bank case. He also discussed the principles of compensation as laid down by the Supreme Court in case of Sarala Varma. The discussion ended with a lot of questions viz. what is the scenario of compensation in e-commerce cases, how to provide compensation for goods ordered in online shopping etc. The conference concluded with expression of vote of thanks by the coordinator and filling of feedback/evaluation forms by the participants.

SE-13
SEMINAR FOR FOREIGN JUDGES (BANGLADESH)
March 16-22, 2018

**Dr. Amit Mehrotra, Assistant Professor &
 Ms. Ankita Pandey, Law Associate**



The National Judicial Academy, Bhopal organized a Training Programme for Bangladesh Judicial Officer from 16th March to 22nd March 2018. The programme was divided into 17 sessions spread over five days. The participating judges from Bangladesh comprised of a mixed group of judges including District Judges, Additional & Joint Sessions Judges and Additional District Judges.

The programme involved deliberations on the emerging issues in the field of constitutional law, principles of law relating to evidence in civil and criminal matters, judicial skills and human rights law etc. An effort was made to explore and understand a correlative jurisprudence between the two countries to share the 'best practices'. The program also involved visit of the participant judges to Forensic Science Laboratory of All India Institute of Medical Science, Bhopal (AIIMS) and the Central Jail at Bhopal.

The theme of **session one** was *Overview and Architecture of the Indian Constitutional Arrangement*. The speaker gave the background of constitution of India. The resource persons highlighted the objectives of preamble. The forum discussed the co-operative federalism and the basic structure of the Constitution.

Similar provisions of the constitution of India and Bangladesh constitution were deliberated. Important Indian judicial precedents on fundamental rights were discussed. It was delineated that the fundamental rights are not absolute and are subject to reasonable restrictions. Rule of law was discussed in light of constitutional values. It was emphasized that the rule of law is the legal principle that law should govern a nation, as opposed to arbitrary decisions of the government. The participant judges gave their reflection on working of Bangladesh Constitution.

The theme for **session two** was *Indian Judiciary: Organizational Structure and Jurisdiction*. It was stated that the Indian judiciary is an independent body divested from the executive and legislative wings of the government. The original and appellate jurisdiction of the District Courts, High Court and Supreme Court were discussed during the discourse. In the light of Art. 323A and Art.323B of the Constitution of India, establishment of tribunals were discussed. Article 32 and Article 226 of the Constitution of India was also discussed. It was emphasized that Supreme Court being the guardian of fundamental rights has the power to issue writs, which includes Habeas Corpus, Quo

Warranto, Prohibition, Certiorari and Mandamus. It was deliberated that under Article 129 Supreme Court is the court of record with the power to punish for contempt. It was stated that law laid down by the Supreme Court is binding on all courts within the territory of India. With regard to doctrine of precedent it was emphasized that per incuriam decisions do not constitute binding precedent. However, obiter dicta of the Supreme Court is binding on the High Courts and it has persuasive value on the Supreme Court. It was emphasized that the power of superintendence, vested in the High Court, is judicial as well as administrative in nature. The High Court is thus in charge of the administration of justice in the state. Curative petition under Article 137, advisory jurisdiction, and special leave to appeal to Supreme Court were also discussed during the discourse.

The theme for **session three** was *Goals, Role, and Mission of Courts*. It was stressed that every judgment must be made according to the judicial parameters and every judge must ensure the right of every citizen. It was stated that the three foundational pillars of the Indian state are –the Legislature, the Executive and the Judiciary. It was emphasized that in India, there is effectively a fusion of government power where all three organs are required to perform almost all the three functions. The three organs need to work in close coordination and are interdependent on each other. It was further asserted that judiciary reviews the actions of the other two organs –the Legislature and the Executive as to whether they have exceeded the limits set by the constitution or whether they have encroached the rights of the people through arbitrary laws and arbitrary actions. It was delineated that the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. The judgment of *L. Chandra Kumar v. Union of India* [(1997) 3 SCC 261], was discussed in which the Supreme Court held that the power of judicial review is a part of the basic structure of the Indian Constitution. It was emphasized that Article 142 empowers the Supreme Court to pass any suitable decree or order for doing complete justice in

any pending matter before it. It was deliberated that Indian courts have played a vital role in shaping fundamental right jurisprudence. Various Supreme Court judgments which includes *Vishakav. State of Rajasthan* (AIR 1997 SC 3011), *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, *J.P. Unnikrishnanv. State of A.P.*, AIR 1993 SC 2178, *Shayra Banov. Union of India*, *Suresh Kumar Koushalv. Naz Foundation* (2014 1 SCC 1), *National Legal Services Authority (NALSA) v. Union of India* (2014 5 SCC 438) and *Animal Welfare Board of India v. A. Nagaraja* [(2014) 7 SCC 547] were discussed.

Session four was a group discussion. The participant judges were divided in four groups. The topics that were assigned to the groups were judge as a leader of Court: Challenges and Solutions; objectivity/just sentencing and prison reforms; access to justice and victim compensation; alternative dispute resolution mechanism. Each group was asked to discuss on the topic allotted to them and were requested to make the presentation.

The theme for **session five** was *Principles of Evidence: Appreciation in Civil and Criminal Cases*. It was stated that the Indian Evidence Act does not apply to affidavits. Section 3 which defines evidence does not include affidavits, rather it includes oral or documentary evidences. It was emphasized that a case is to be decided on a balance of probabilities. Thus, the court has to weigh various probabilities and exclude the impossibilities and improbable probabilities, and determine where the preponderance of probabilities lies. It was delineated that admission is a substantive piece of evidence and a decree can be passed on admission. However, admission can be withdrawn or proved erroneous. It was stressed that it is settled law that parties are governed by their pleadings and the burden lies on the person who pleads to prove and further plaintiff has to succeed basing on the strength of his case and cannot depend upon the weakness of the defendant's case. The power of the Courts with regard to re-opening the evidence and recalling witnesses were discussed. It was stated that in the face of the documentary evidence on record, the oral evidence is not entitled to any weight. It was stressed that a copy is admissible as secondary evidence if it has been

compared with the original or if this copy is taken from the original by a mechanical process. It was further stated that any documentary evidence by way of an electronic record under the Evidence Act, in view of sections 59 and 65A, can be proved only in accordance with the procedure prescribed under section 65B of the Indian evidence Act. Ocular evidence, circumstantial evidence, corroboration of evidence, discrepancies in evidence, irrelevant evidence, presumption of a document, exclusion of oral evidence, test identification parade, medical evidence as an expert opinion, and examination of witnesses, child witness, interested witnesses and dying declaration were also discussed.

The theme for **session six** was *Evidentiary Presumptions; Onus and Burden of Proof*. Section 101 of the Indian Evidence Act was discussed. It was stated that it is settled proposition of law that burden of proof always lies upon the party who makes certain allegations and seeks relief on it. The Court has to address itself whether the party, which has made the allegations, has discharged the burden of proving the allegations. Distinction between the “burden of proof” and “onus to prove” was discussed. It was emphasized that failure to prove the defense does not amount to an admission, nor does it reverse or discharge the burden of proof of the plaintiff. It was asserted that when a person is bound to prove the existence of any fact, it is said that burden of proof lies on that person. Thus, the burden of proving fact always lies upon the person who asserts it. It was stated that in various Supreme Court judgments it was held that the burden of proving the facts rests on the party who substantially asserts the affirmative issues and not the party who denies it. However, the said principle may not be universal in its application and there may be an exception thereto. The statutory exceptions were also discussed and explained by the resource persons. The concept relevance and importance of Section 106, 107 and section 110 of the Indian Evidence Act were discussed during the discourse. It was delianted that the Evidence Act, 1872 provides for presumption in certain circumstances when the truth or fact remains unknown. In this light presumptions of fact and legal presumptions were discussed in detail. In regard to presumptions of fact

section 86, 87, 88, 90 and in reference to legal presumptions under section 79, 80, 81, 82, 83, 112, 113 A, 113 B, 114, 114 (e), 114 (g) of the Indian Evidence Act were referred and discussed during the discourse. Some important verdicts of the Supreme Court which includes State of Rajasthan v. Nandlal, 1993 Supp (1) SCC 681, A. Raghavamma v. A. Chenchamma, AIR 1964 SC 136, L.I.C of India v. Ram Pal Singh Bisen, (2010) 4 SCC 491, Sebastiao Luis Fernandes v. K.V.P. Shastri, 2013 (14) SCALE 761, Kalwa Devadattam v. Union of India, AIR 1964 SC 880, Gian Chand and Brothers v. Rattan Lal @ Rattan Singh, AIR 2013 SC 1078, Gajanan Dashrath Kharate v. State of Maharashtra, AIR 2016 SC 1255, Gullapalli Nageswararao v. State of Andhra Pradesh, AIR 1959 SC 1376, Bharatha Matha v. R. Vijaya Renganathan, AIR 2010 SC 2685, Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, AIR 2014 SC 932, Sate of West Bengal v. Orilal Jaiswal, AIR 1994 SC 1418, G.V. Siddharamesh v. State of Karnataka, (2010) 3 SCC 152 and Sher Singh v. State of Haryana, AIR 2015 SC 980 were debated and discussed during the discourse.

The theme for **session seven** was *Electronic Evidence: New Horizons, Collection, Preservation and Appreciation*. It was stated that the internet is worldwide, publicly accessible network of interconnected computer networks that transmit data by packet switching using the standard Internet Protocol (IP). It was further emphasized that no one actually owns the internet, and no single person or organization or government controls the internet in it's entirety. It was stated that ICANN (Internet Corporation for Assigned Names and Numbers) is a non-profit organization was established in 1998. Its mission is to help and keep internet secure, stable & inter operable. The resource person explained the concept of cyberspace and cyber-crime and exhibited a demonstration about the misuse of technology to the participant judges. “Digital foot prints” were discussed in detail. The admissibility of electronic evidence was discussed and in this light important Supreme Court judgments were deliberated which includes State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600, Anvar P.V. v. P.K. Basheer; (2014) 10 SCC 473, & Sonu @ Amar vs State of Haryana; (2017) 8 SCC 570. It was

emphasized that special law will always prevail over the general law. Cyber fraud, cyber stalking, cyber contraband, cyber trespassing, cyber laundering, cyber vandalism, cyber slandering, cyber theft, cyber porn and cyber terrorism were also discussed.

The theme for **session eight** was *Forensic Evidence in Civil and Criminal Trials; DNA Profiling*. It was stated that DNA stands for deoxyribonucleic acid, the strands of identity that living beings receive from their ancestors. It's a basic genetic material in all human body cells. No two people have the same DNA pattern. Every person inherits 50% of genetic material from their mother and 50% from their father. Every person has a unique strand of DNA. It was asserted that when biological stain that are left over the crime scene, DNA of suspected accused is then matched with the left over biological sample over the site. The concept of DNA profiling was explained by the resource person. It was asserted that DNA evidence are used in identification, disputed paternity, disputed maternity, baby mix-ups, abductions, inheritance, rape, murder and disaster victim identification. It was stated that DNA evidence is reliable, scientific and unbiased. Interpreting results of DNA Analysis in criminal investigation was discussed during the discourse. Various case studies which include Rajiv Gandhi murder case, 1995 Tandoor Murder case, Priyadarshini Murder case, Nirbhaya Gang Rape, Sheena Bora Murder case, Bodhgaya case and Arushi Murder case were discussed.

The theme for **session nine** was *Elements of Judicial Behaviour: Ethics, Neutrality and Professionalism*. It was stated that canons of judicial ethics have been attempted, time and again, to be drafted as a Code. However, it cannot be put in a straitjacket formula. In this connection the Bangalore Principles were also discussed which sets out six core values that should guide the exercise of judicial office, namely independence, impartiality, integrity, equality, propriety, and competence and diligence. It was further opined that the element of the fear, favour, affection or ill-will should not play any role in the formation of judicial opinion or affect the judicial behaviour of a judge. Integrity is the hallmark of judicial discipline. Dishonesty is the stark antithesis of judicial probity. Dishonesty and lack of integrity are hence the basic

elements of misconduct as far as a Judicial Officer is concerned. Judicial office is essentially an office of public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences.

The theme for **session ten** was *ICT and E-Judiciary: Indian Perspective*. The discussion mainly focused on the e-Courts project and it was emphasized that the objective is to provide for ICT enablement for courts to enhance judicial productivity both, qualitatively and quantitatively as also to make justice delivery system, affordable, accessible, cost effective, transparent and accountable. The e-Committee is involved in policy planning and providing strategic direction and guidance for the effective implementation of the project. Under the project, Common Case Information Software to be prepared for entire district judiciary with core and periphery models. The core being unified for 'national' use while the periphery as per the local requirements of each High Court. As part of the change management exercise undertaken by the e-Committee, Judicial Officers and Court Staff have been trained in the use of Ubuntu-Linux Operating System and Case Information Software (CIS) respectively. The participants were also made aware of the National Judicial Data Grid (NJDG) which is intended to be the National Data Warehouse for case data including the orders/judgments for Courts across the country. Further, the major targets to be achieved during Phase II of the Project were highlighted, namely computerisation of additional and new courts, District Legal Services Authority (DLSA) and Taluka Legal Services Committee (TLSC), Computer training labs in SJAs; enhancement of connectivity; service delivery through cloud technology; video-conferencing for Courts and Jails; judicial process re-engineering; judicial knowledge management system; services delivery.

The theme for **session eleven** was *Judge the Master of the Court: Court Management & Case Management*. It included discussion of how judges and court administrators must work together and coordinate their efforts in key areas of court administration and management. It was opined that the effective



administration of justice depends critically upon a successful partnership between the judiciary and those responsible for the administration of the courts. The main issues that were raised during the discussion were high rates of case pendency across India and that there are not enough judges to dispose of the cases before them, lack of other necessary infrastructure, the tendency of giving frequent adjournments, fragmented hearings and other related issues. It was further stated that the effective use of case management techniques and practices improve the efficiency in the use of justice system resources, hence reducing the costs of justice operation. By reducing the time required for resolving disputes, the appropriate use of case management may also help build public confidence in the effectiveness of the courts and the accountability of judges. The speakers suggested it must also be ensured that laws, regulations, and court policies are followed, that the needs of court employees are properly addressed, and that administrative tasks are carried out. The judge presiding over a court must monitor unnecessary delays and ensure that there are no uncalled adjournments.

The theme for **session twelve** was *Criminal Justice Administration and Human Rights*. It was stated that human rights are those rights which every individual has by virtue of his birth as a human being. They are inherent and inalienable. The extent to which human rights are respected and protected within the context of its criminal proceedings is an important measure of

society's civilization. The session also went into tracing the evolution of the human rights jurisprudence in India in accordance with the international standards. The Indian Constitution as illustrated by a number of decisions of the Supreme Court provide for protection of human rights. Further, reference was also made to the Protection of Human Rights Act, 1993 which provides for constitution of National and State Human Rights Commissions to enquire into complaints of violations of human rights and inefficiency on the part of the government machinery in preventing such violations and to suggest measures for effective implementation of guarantees provided by the Constitution and various laws of the country.

The theme for **session thirteen** was *Human Rights: Fair and Impartial Investigation*. The term "Human Rights" involves fair and impartial investigation and trial in an inherent form. The speaker asserted that the principle of fair trial is put in concrete terms of certain rights such as the right to remain silent, the prohibition of double jeopardy, the right to legal counsel, the right to be notified of charges, and so on. Each right has been crafted to ensure that every person coming before our courts is afforded – from the moment investigation or detention begins till the final disposition of the case – equal protection no matter what their birth or national origins; their social or economic status; or their religious or political beliefs; no matter how grievous the alleged crime. For better understanding of the

relationship between human rights and role of police during investigation and trial reference was made to the provisions of the UDHR such as Article 1,3,5,9 and 14 in conjunction to Article 21 of the Indian Constitution. It was further discussed how there is absence of mandatory compensation mechanism for the cases related to miscarriage of justice and it was considered as major impediment in fair and impartial investigation and trial.

The theme for **session fourteen** was *Judging Skills: Art, Craft and Science of drafting judgements*. It was stated that judgment writing consumes the major part of Judge's work. The judges by their experience, find methods to reduce this burden, by writing brief opinions. The judgment, however should serve the requirement of law without compromising with the quality. The judge must state the facts explicitly and consciously as they are found and the reasons for the decision. It was also explained that a judge must clearly write the operative portion of the judgment, which pronounces his conclusion over the issues brought before him. The judgment must give clear and precise direction and the manner in which the directions have to be obeyed in conformity with the prayers made in the plaint. The object of good judgment is to conclude the dispute and not to leave the matter undecided.

The theme of **session fifteen** was *Identification of Ratio in a Precedent*. The speaker initiated the session by describing judicial precedent as the process whereby judges follow previously decided cases where the facts are of sufficient similarity. This doctrine involves the application of the principle of *stare decisis*, to stand by what is already decided. The identification of ratio

decidendi in a case is not a mechanical process but an art which one gradually acquires through practice. In order to find the ratio in a case, firstly, the main issue addressed and decided by the court must be ascertained. Secondly, the judgment must be read in its entirety so as to identify the facts, rule of law, analysis, and conclusion, and thereby determine the reasons behind the court's ruling. Thirdly, judges interpret the law in order to apply it to the facts of the case before them. By making this interpretation clear in their decisions, judges make it easier for other courts facing similar cases to follow their reasoning.

The theme of **sessions sixteen and seventeen** was *Landmark Judgments in India*. The session broadly discussed the most critical judgments of the country which have fortified our faith in the Indian judicial system by paving the way for justice. The learned speaker traced the history of these landmark decisions by citing the most significant among them as *A.K. Gopalan v. State of Madras*, *I.C. Golaknath v. State of Punjab*, *Kesavananda Bharti v. State of Kerala*, *Indira Gandhi v. Raj Narain*, *ADM Jabalpur v. Shivkant Shukla*, *Minerva Mills v. Union of India*, *Mohd. Ahmed Khan v. Shah Bano Begum*, *Indira Sawhney v. UOI*, *S.R. Bommai v. Union of India*, *Vishaka v State of Rajasthan*, *Naz Foundation v. Govt of NCT of Delhi*, *Lily Thomas v. Union Of India*, *National Legal Services Authority v. Union of India*, *Shreya Singhal v. Union of India*, etc. An elaborate discussion also took place on some of the recent milestone judgments delivered by the Supreme Court of India in the NJAC case, Triple Talaq case and the Right to Privacy case.

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NORTH ZONE REGIONAL CONFERENCE ON ENHANCING EXCELLENCE OF THE JUDICIAL INSTITUTIONS: CHALLENGES AND OPPORTUNITIES

March 17– 18, 2018

**Mr. Sumit Bhattacharya, Research Fellow &
Mr. Shashwat Gupta, Law Associate**



The National Judicial Academy in association with the Punjab and Haryana High Court and the Chandigarh Judicial Academy organized the North Zone Regional Conference of Enhancing Excellence of the Judicial Institution from 17th to 18th March, 2018 at the Chandigarh Judicial Academy, Chandigarh. The conference was attended by 113 judicial officers from six High Courts of North Zone i.e. High Court of Allahabad, High Court of Uttarakhand, High Court of Jammu & Kashmir, High Court of Punjab & Haryana, High court of Himachal Pradesh and High Court of Delhi. The objective of the conference was to provide a forum for exchange of knowledge and sharing of best practices among the participants apart from holding discussions on certain specified topics i.e. constitutional vision of justice; elements of judicial behavior; social context judging; building synergies between District Court and High Court; Information and Communication Technology (ICT) in courts and Court and Case management.

The first session of the conference was based on the theme-“Constitutional Vision of Justice”. The speaker initiated the session by elaborating upon the role of

lower judiciary in achieving the constitutional vision of justice. The speaker stated that the constitutional vision of justice is provided in the preamble which strives to secure justice across social, economic and political spectrum. He also discussed Part III of the constitution which provides for fundamental rights and is considered the most vital part of the constitution. Thereafter the speaker reflected on the role of a judge in a democracy and stated the according to Aharon Barak it includes bridging the gap between law and society and protecting the constitution and democracy. The speaker also discussed the scope of Articles 14 and 21 and their purposive interpretation over the years by the Supreme Court to uphold constitutional values.

In the second session the speaker reflected upon the concept of social context adjudication and its application in litigations involving the weaker sections of the society. The speaker discussed about the introduction of concept of Public Interest Litigation and the paradigm shift in the concept of locus standi. It was stated that interpretation tools have changed the principle of locus standi. Thereafter the speaker discussed the landmark judgments given in the case of

Bandhua Mukti Morcha and Bhagalpur Blindings. The speaker also discussed that to advance the context we often use tools of interpretation which include purposive interpretation. Subsequently there was discussion of cases wherein the court has laid down guidelines to fill in the gaps of legislation.

In the third session it was stated that the judges should be impartial and should not allow their personal bias to affect their judgments. It was further stated that judges should maintain impeccable integrity and should not be afraid of any external agency while giving their judgment. It was opined that judges hold their position in public trust and should not conduct themselves in a manner demeaning the office.

In the fourth session the speaker reflected on the problem that the judges do not communicate with their administrative judges. The speaker opined that there is no incentive in the system for qualitative disposal of cases. The speaker stated that the judges should not have delusion that they are powerful individuals but are only undertaking a public function. The speaker reflected upon the contract theory and stated that judges were given right under the contract theory. It was also discussed that most of the communication between the District Judge and the High Court judge only relates to disciplinary proceedings.

The fifth session of the conference was on the theme- "Access to Justice: Information and Communication Technology in Courts". The speaker initiated the session by stating access to information is also a facet of access to justice. Thereafter he elaborated and discussed various initiatives undertaken by the Punjab and Haryana High Court in the domain of ICT in courts. He stated that now e- case diary is available in Punjab

and Haryana whereby any litigant can manage his own case portfolio. Similarly e-diary has been created for judicial officers wherein they can know the status of the appeal/ revision against their judgment. He also described various initiatives in the District Court which included publication of proclaimed offenders list, duty rosters of judges and judges on leave. The speaker also stated that video conferencing was available at all courts, jails, medical colleges and hospitals in the states of Punjab and Haryana and new software is being developed for e- tracking of notices, file tracking etc. Thereafter the other speaker gave a brief overview of the ITC enablement in Indian courts. He focused on Case Information System (C.I.S) software and the different phases of the e-Courts project. The speaker also discussed the National Judicial Data Grid (NJDG). Subsequently he discussed about development of Information kiosks in courts, centralized filing and service delivery through use of cloud computing.

The theme of the last session of the conference was- "Access to Justice: Court and Case Management". The speaker discussed the delivery of justice should be free of corruption, government influences and delay. The speaker stated that there is an immediate need of case management. It was also stated that the judges should deal with matters likely to take short time at the beginning of the day so that most of the docket is clear by the afternoon. The speaker concentrated on the various changes made in the system including the 2002 amendments to the Civil Procedure Code, 1908 which have inserted the alternative dispute resolution provisions. It was discussed that the life cycle of the case should be determined on a state to state basis. It was also discussed that judgments should be given promptly without any unreasonable delay.

P-1091
NATIONAL JUDICIAL CONFERENCE FOR HIGH COURT JUSTICES
March 23-25, 2018

Mr. Rajesh Suman, Assistant Professor



The National Judicial Academy organized “National Judicial Conferences for High Court Justices” during 23-25 March, 2018. The participants were High Court Justices nominated by respective High Courts. The objective of the conference was to provide a platform, for justices to share experiences, insights and suggestions with a panel of distinguished resource persons from the judicial branch and other relevant domain experts. The conference was designed to facilitate discussions on issues related to supervision and guidance of district judiciary, tribunalization of justice, judicial review within the democratic framework, contemporary challenges for judicial review, policing governance within separation of powers framework, construing the sounds of Constitution's speech and free and fair elections. The conference also focused on corporate fraud and jurisprudence of the PC & PNDT Act.

Major Highlights and Suggestions from the Conference

Session 1: High Courts: Guardians of District Judiciary

The speakers commenced the session by highlighting the constitutional scheme related to judicial and

administrative powers of high courts over the subordinate courts. The expansion of powers of high court concerning district court through judicial interpretation was discussed. The need to enhance fairness and reduction of bias on the part of high court towards district judiciary was emphasized. The influence of bar members on high courts' administrative decisions resulting in pressure on district judiciary was discussed. The enquiry against judicial officer should be done with proper care and information from all sides must be considered before arriving at a conclusion. The principle of preponderance of probability should be applied because strict proof of evidence is not available in all cases. For writing the annual confidential report of a judicial officer, the judgements for the assessment should be called in random manner rather than accepting good judgements by judicial officer concerned.

Session 2: Tribunalization of Justice: Boon or Bane

The speaker commenced the session by highlighting the evolution of the system of tribunalization in India. The 42nd amendment of the constitution after 1976 brought changes in legal regime and introduced tribunals. The amendment was to dissect Article 226

and 32 of the constitution to reduce powers of high courts and Supreme Court. The intention was to deprive the Article 226 of the constitution of its original power as high courts during emergency took decision against the government. The main idea behind tribunalization was that high courts do not possess adequate expertise. Tribunals are created for providing specialized forum for specific legal dispute requiring expeditious disposal. The idea is to reduce burden on high courts. The tribunals face shortage of infrastructure and manpower. Now in many tribunals one will find that only administrative members are functioning and there is no appointment of judicial members. On the positive side of tribunals, the speakers added that tribunals take away lot of burden from high courts and reduced litigation in high courts. This is a boon of tribunalization. The final determination of facts happens at tribunals and only cases having substantial question of law come to high courts. Some tribunals such as income tax tribunals and CESTAT function very effectively.

Session 3: Superior Courts: Managing Judicial Review within the Democratic Framework

The speakers commenced the session by explaining the meaning of judicial review and democratic framework. The judicial review is based on the assumption that the governing power should be subjected to constitutional limitations. The democratic framework involves constitution, laws framed by the parliament and binding precedents i.e. law interpreted by the Supreme Court. If parliament decide to make a law and unless it is repugnant to the constitution, the court should not interfere with such laws on subjective reasons. Within the democratic framework the court can do experiment but not beyond this. Judges should not bring in their personal opinions in judgements. It has been observed that many times superior courts have to reverse their orders due to improper exercise of judicial review. High courts during review of decision from subordinate judiciary should refrain from public admonishment and criticism. Strictures against judicial officer should be last resort and not the first resort. High courts should not direct the trial court for time bound disposal without assessment of situation in the trial court. The behavior of high court judges towards trial court judges should

be democratic.

Session 4: Contemporary challenges for Judicial Review, Policing Governance within Separation of Powers framework

The speakers commenced the session by explaining the origin of the doctrine of separation of power and judicial review. The speaker said that judicial review in India is of two kinds. One is judicial review of legislation and another is judicial review of administrative authority. We follow Wednesbury principle of proportionality where the reasonability of decision is assessed. Any decision which is outrageous warrant interference. The court can declare a decision arbitrary if it suffers from capricious and unreasonable assumptions. The manifest arbitrariness can be a ground to strike down legislation. Highlighting the Constituent Assembly Debates, speakers added that while framing of the Indian constitution, the due process clause was replaced by procedure established by law in the Article 21 of the constitution. The main concern was that whether the court should be conferred with the power to interfere with legislation specially the social welfare legislation on the basis of due process clause. However the Supreme Court evolved the procedural fairness through judicial interpretation in Maneka Gandhi case reversing the majority opinion in Golaknath case. So any law can be challenged on the basis of procedural due process. Another element is substantive due process where the Supreme Court has challenged legislations. The speaker raised concern that the court has to ensure that the constitutional mandate is given effect when legislature fails to enact laws for required situation. However the problem arise when different benches applies different meaning of constitutional mandate.

SESSION 5: Construing the Sounds of Constitution's Speech: Meanings Beyond Texts

The speaker commenced the session by explaining the meaning of silences in the constitution. The speakers said that rights are not just rights mentioned in the Constitution. These rights are empty vessels that have to be filled by future generations. It is left to the judiciary to interpret the fundamental rights. There is nothing wrong in reading certain rights as fundamental rights. Constitution is dynamic and it has to be read in



the context of changing time. Over the years many new rights have been read into the Article 21 of the constitution. Recently the right to privacy has been read into fundamental rights. Focusing on the recent judgment of the right to privacy, the speakers said that at the time of Constituent Assembly debates it was decided that right to privacy must not be included in the constitution. However the Supreme Court read right to privacy under fundamental rights as they declared that our constitution is an evolving constitution. The speakers emphasized that fundamental rights are mentioned in the constitution but the content and scope of fundamental rights can be determined through judicial interpretation.

SESSION 6: Free and Fair Elections: Vitalizing Our Democratic Fabric: The way forward

The speaker commenced the discussion by highlighting low rank of India in terms of democratic credentials. India is a successful functioning democracy to some extent as we have competitive elections, political freedom for all, peaceful transfer of power and real power rests with elected government. There are two underappreciated but remarkable accomplishment of democracy and those are linguistic diversity, federalism and other constitutional processes like finance commissions and economic stabilization etc. The speaker emphasized that the first problem with Indian democracy is that the power to do good is very

limited. The political process which ought to be the solution has become the problem itself. The system should allow people to participate and attract finest people into the public domain so that they pay attention to the collective good rather than the private good. Once selected to office, the leader must be able to deliver the promises made. Almost all these criteria in political system are washed off. This is the reason why we are unhappy with the mechanisms and political outcomes and there is a serious disquiet across large parts of the country. This is largely because we have not created conditions initially that are necessary for a democracy to grow. The speaker concluded by saying that the most important thing in the democracy is decentralization and a strong grass root level citizenship. In India there is centralization of power and at grass root level democracy is not powerful.

SESSION 7: Corporate Fraud and Manipulation: Repercussions, Deterrent Mechanism & Judicial Approach

The speakers commenced the session by discussing various aspects of corporate fraud which include concealment of fact or abuse of position by any person and an act done with an intention to deceive a company or a person. Asset misappropriation, consumer fraud and cybercrime were the most reported frauds across the country. The speakers highlighted fraud in Indian defense sector and opined that the magnitude of fraud

has increased in last 5-10 years. Globally, economic crime in the defense sector is one of the least reported crime as the defense industry is very secretive. Various nuances of the contract for defense goods were discussed. The speaker also highlighted role of courts if fraud happens in relation to defense contract. The aspects of blacklisting and its impact on defense contracts was explained. The speaker also discussed shell companies and their way of doing business and committing fraud. The IPO fraud in share market and fraud through fake demat accounts were also highlighted. The speaker concluded the session by discussing magnitude of bank frauds in Indian and their impact on the Indian banking sector.

SESSION 8: Jurisprudence of the PC and PNDT Act & Cultural, Social and Economic Factors that Promote Gender Bias: Context of the PC & PNDT Act in India

The speakers commenced the session by explaining falling male to female sex ratio in India. The gap is very steep and low. The gender equity index of India for girl child too fell from 108th rank to 87th rank. The advent of technologies which were invented to determine abnormalities of fetus are misused to determine the sex of the child. The speakers highlighted that the problem of decline in sex ratio is seen more in urban areas where people have access to technology while in rural areas as people have limited or no access to the technology, women keep on giving birth to girl child unless they have a boy. The estimate of missing girls per year is 5 lakhs and in 2012, 4.5 lakh girls were not allowed to be born. The causes of sex selection are dowry, family lineage and old age support. The speakers focused on the limitation of right to privacy viz-à-viz disclosure of information about sex of the child to parents.

Participants' Suggestions and Views

- Reasons should be recorded even in administrative tasks to ensure fairness in administration. The processes on administrative side of high courts should be kept separate from

judicial side.

- For writing ACR in proper way it is necessary that the portfolio or guardian judge knows the concerned judges from the district. Therefore the appeal against judgments from a district court should be placed before the concerned guardian judge so that the guardian judge can know the thinking of judges from the district court.
- In income tax tribunal system, the middle level authority i.e. the Commissioner [Appeals] should be removed and income tax tribunals should be made the first appellate authority after the assessing authority. This arrangement will solve lot of problems in terms of delay and cost.
- Tribunals should have judicial members because of unbiased and independent nature of judicial personality. In absence of judicial member in tribunals, the determination of legal right should not be allowed as rule of law must be followed in this regard.
- The capacity and powers of high court should be enhanced rather than creating more tribunals because in appeal the matter ultimately reach to high courts and to the Supreme Court where judges decide issues.
- In the matter of bank loan recovery the system is not accessible to debtors who have to travel all the way to state capital to represent his/her case. There should be an additional court of civil judge for cases [usually 50 cases per court] filed by banks for recovery. Each district court should have such kind of arrangement for resolving bank recovery disputes.

The court can frame law in areas where the legislature fails to make law leaving a void concerning rights and liabilities of people. In such situation judiciary can move beyond the separation of power doctrine to act in the interest of society.

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TRAINING OF TRAINERS FOR STATE JUDICIAL ACADEMIES
March 23-25, 2018

Prasidh Raj Singh, Law Associate



The National Judicial Academy, Bhopal organized a three-day programme for Training of Trainers for State Judicial Academies from 23-25 March 2018. The programme initiated discussions on various topics like- *Role of Trainers in Judicial Education, Adopting Adult Learning Principles in Judicial Training, Training of Trainers: Implementing Modern Judicial Methods, Continuous Training Modules on Specialized Subjects, Impact Assessment of Training Programmes, Vitalizing Faculty Development Module to Inculcate best Practices and Evolving Methodologies for Judicial Education and Training.* The programme was attended by Directors and senior faculty members of the SJAs from different High courts.

The objective of the programme was to develop methodologies, pedagogies and a standard framework for judicial training, with assistance drawn from in-house experience and domain experts; to explore new training modules for maximizing learning process.

The conference deliberated upon the importance of trainers in judicial education. The speaker emphasized that State Judicial Academies play an enduring role by conducting numerous induction programme for newly recruited judges. To elucidate further various role of

trainers were discussed and identified on the same theme such as: *trainer should impart skill to perform better, to enhance knowledge, to inculcate ethos, to deal with complexities in working, to inspire and motivate judges to become a catalyst for transformation.* The speaker further stated that selection of trainers should be done on priority basis. It was informed by the participants that in most of the state judicial academies a panel of the resource persons /trainers is prepared and prior approval is taken from the High Court, accordingly the speakers are invited for the training as per their expertise and requirement of the session.

It was further discussed that adult learning principles should be adopted in the training programmes which will enhance the learning capacity of the Judges. It was deliberated that there are four critical elements of learning which must be addressed to ensure effective training such as: motivation, reinforcement, retention, transference. The core principles of Adult learning were also discussed in detail amongst the participant judges. The resource person further stated that modern judicial methods may be implemented in the training programme. Further, the importance of KOLB'S Adult Learning Style was discussed where each stage is



mutually supportive of and feeds into next level. It was suggested that effective learning occurs only when participants are able to execute all four stages of the model i.e. experience, reflection, conceptualize and test.

It was further suggested by the participants that during initial training of judicial officers more emphasis should be given to the role play exercises, simulation exercises and group discussion instead of classroom lectures. It was further deliberated that it is important while proposing to use case studies, the content should be designed to achieve clearly defined aims and learning outcomes. Unreal atmosphere and lack of background detail may encourage impractical decisions.

Further, it was deliberated that modern technology is an important tool that should be fully exploited, knowledge, understanding of knowledge and applications could be fruitfully transferred through e-learning. The training providers should invest more in

e-learning and video conferencing technology. E-learning modules should take form of short sessions. They should provide users with a truly interactive and practice-oriented learning experience. Therefore, state Judicial academies should use new technologies and develop more distance learning programmes to integrate distance learning into the overall judicial training. The programme further discussed about the various learning methods such as DACA test and VAC test.

During the programme various key aspects of Impact Assessment were discussed at length.

1. Giving evaluation feedback separate
2. First level evaluation
3. Self-assessment must be done
4. Proper feedback must be taken
5. Result Evaluation
6. Participant Evaluation

Suggestions:

- The State Judicial Academies should promote e-court and impart training related to information and court room technology.
- The State Judicial Academies should impart knowledge related to DNA & live detector test to all the newly recruited judges.
- Role play exercise must be used in connection with child custody.
- Newly recruited judges must be taken to the specialized court such as POSCO & family court.
- All the State Judicial Academies should make use of video conferencing and web broadcasting.

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Governing Bodies of the NJA

A. The Governing Council

1. Chairperson of the NJA the Chief Justice of India
 - Hon'ble Mr. Justice Dipak Misra
2. Two Judges of the Supreme Court of India
 - Hon'ble Mr. Justice Jasti Chelameswar
 - Hon'ble Mr. Justice Ranjan Gogoi
3. Secretary, Department of Justice, Ministry of Law & Justice, GOI
4. Secretary, Department of Expenditure, Ministry of Finance, GOI
5. Secretary, Department of Legal Affairs, Ministry of Law & Justice, GOI
6. Secretary General, Supreme Court of India
7. Director, NJA Bhopal

B. The General Body

1. Chairperson of the NJA the Chief Justice of India
 - Hon'ble Mr. Justice Dipak Misra
2. Two puisne Judges of the Supreme Court of India
 - Hon'ble Mr. Justice Jasti Chelameswar
 - Hon'ble Mr. Justice Ranjan Gogoi
3. Chief Justice of a High Court
 - Hon'ble Mr. Justice R.S. Reddy, Cheif Justice, High Court of Gujarat
4. Judge of High Court
 - Mr. Justice D.N Patel, High Court of Jharkhand
5. Ex- officio members:
 - i) Minister for Law & Justice, GOI
 - ii) Chairperson, Bar Council of India
6. Secretary, Department of Justice, Ministry of Law & Justice, GOI
7. Secretary, Department of Expenditure, Ministry of Finance, GOI
8. Secretary, Department of Legal Affairs, Ministry of Law & Justice, GOI
9. Secretary, Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, GOI
10. Two Law Academics
 - Dean Faculty of Law, Delhi University
 - Director, NLIU, Bhopal
11. Secretary General, Supreme Court of India
12. Director, NJA Bhopal

National Judicial Academy

Conceived in early 1990s by the Supreme Court of India, the NJA had to wait nearly a decade to get its infrastructure in place. On September 5, 2002 the then President of India, Dr. A.P.J. Abdul Kalam, formally dedicated to the Nation, the beautiful sprawling complex of the NJA, spread over 62 acre campus overlooking the Upper Lake at Bhopal. The President on the occasion released a Second Vision for the Republic in which a new and dynamic role for the judiciary was envisaged with a view to make India a developed country by 2020. *"The Academy"*, he said, *"may aim at developing attitudinal changes to improve judicial integrity and efficiencies"*. The NJA commenced the rather challenging journey towards achieving higher standards of excellence in delivery of justice through human resource development and techno-managerial upgradation. Since 2003, NJA has successfully imparted training to more than 26,000 judicial officers of various levels.

Registered as a Society in 1993 under the Societies Registration Act (1860), the NJA is managed by Governing Council chaired by the Chief Justice of India. The Governing Council consists of two senior most Judges of the Supreme Court of India and three Secretaries to the Government of India from the Departments of Law and Justice, Finance and Legal Affairs. The mandate of the Academy under the Memorandum of the Society include following objectives:

- (i) to establish a center of excellence in the study, research and training of court management and administration of justice and to suggest improvements to the judicial system;
- (ii) to provide training and continuing legal education to judicial officers and ministerial officers of the courts; and
- (iii) to disseminate information relating to judicial administration, publish research papers, books, monographs, journals etc. and collaborate with other institutions both within the country and abroad.

With the support and guidance of the justices of the Hon'ble Supreme Court of India, the NJA has launched an ambitious plan of research, education and training activities to give the judiciary - the required intellectual inputs to assist the judicial system in dispensation of quality and responsive justice.



National Judicial Academy

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