

NATIONAL JUDICIAL ACADEMY



ORIENTATION PROGRAMME FOR JUNIOR DIVISION JUDGES

Programme Report [P-1199]

Programme Co-ordinators:

Mr. Sumit Bhattacharya and Mr. Prasadh Raj Singh, Faculty

National Judicial Academy

Session 1 - Constitutional Vision of Justice

At the outset, setting the context it was underscored that the Constitution of India is not only a legal document “*Suprema Lex*”, but is equally an essential socio-political document of the nation. It was highlighted that the great document is not a mere transfer and assumption of power from British legacy, but a soulful organic derivative from “*we the people of India*”. Tracing the provenance of “*justice*” in its myriad forms of social, economic and political milieu, its contemporaneous value was examined. “Equality” was referred to as yet another indispensable rubric of constitutional vision. It was exemplified that although Constitution of India assures “equal access to justice”, but perhaps the quality of legal aid is often not equitable or indiscriminate. The two concepts of equality i.e. formal equality and proportional equality were explained. The discussions subsumed examining the approaches to constitutional interpretation adopted by jurists and judges of various schools *viz. originalism, institutionalism, textualism, pragmatism* etc. It was emphasized that “justice with dignity” is one of the constitutional vision of justice while striving to get rid of judges’ prejudices was labeled as another constitutional vision. Tenets of “judicial review”, “liberty”, “fraternity” were discussed apropos constitutional vision of justice. Doctrine of “separation of power” and the fundamental freedoms and their scope were briefly discussed.

Session 2 - Role of Courts in a Constitutional Democracy and Adherence to Core Judicial Values

In the Indian polity judiciary is considered as the protector or custodian of rights of the citizens. Constitution reposes the role of a watchdog on the judiciary. The mission of the courts is to be in consonance with the constitutional fundamentals i.e. to read every legal provision with reference to the constitutional vision of justice and the goal is to respect, regard and promote the fundamental rights. The Chief Justices Conference (1999) and Bangalore Principles of Judicial Conduct (2002) were cited to deliberate upon core judicial values. The seven core values of judicial ethics, *viz.* independence (individual and institutional); impartiality; integrity; propriety; ensuring equal treatment to all; competence and diligence; and neutrality which are sacrosanct to the life of a judge were discussed. Distinction between personal independence and institutional independence was drawn. Whereas, personal independence implies complete independence in making decisions and it is the characteristic of a fair, efficacious and impartial judge; institutional independence, on

the other hand, is the freedom of judiciary from executive and legislative interference. It was urged that a judge must watch-out for insidious infestation of personal prejudices in one's judicial role as the same propels sabotage of justice delivery. The oxymoron concept of being an "honest judge" was pulverized by clearly establishing that honesty and integrity are cardinal values inherent to judgeship and thus

Session 3 - Discovering Current Judicial Methods

The session witnessed deliberation on the evolution of the judicial methods, with special focus on the contemporary methods adopted by the courts. Detailed approaches to law relating to "literal" and "purposive" interpretation was discussed. The rules of "harmonious construction" and its applicability was discussed citing case law jurisprudence. The discourse included the elements of "objective" and "subjective" angles of interpretation. Impact of extraneous factors in interpretation was discussed in the light of recent case law jurisprudence *viz.* *Indian Young Lawyers Association v. The State of Kerala*, (2019) 11 SCC 1s; *K.S. Puttaswamy v. UoI*, (2017) 10 SCC 1; *Navtej Singh Johar v. UoI*, (2018) 10 SCC 1. The immaculate role of a judge in balancing conflicting interests in a socio-economic set-up was discussed. The exception to the general principle of tortious liability i.e. "who reaps the benefit pays the cost" was elaborated contextually by citing cases *viz.* *Narmada Bachao Andolan v. Union of India*, [2000] 10 SCC 664; *N.D. Jayal v. UoI*, (2004) 9 SCC 362. It was urged to the participants to be cautious and vigilant on maintaining the delicate balance between "judicial activism" and "judicial overreach". The concept of "ultra vires" was explained. In explaining the evolution and practicing of principles of law in the instant topical context to "judicial methods" the following case law were relied upon: *Rayland v. Fletcher*, [1868] UKHL 1; *Donoghue v. Stevenson*, [1932] UKHL 100; *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241; *Aruna Ramchandra Shanbaug v. UoI*, (1994) 3 SCC 394. It was emphasized to ponder novel ways to enable ease of "access to justice" and easy and effective ways to dispensation of justice.

Session 4 - Courtroom Technology: Use of ICT in Courts

An analysis of historical background of the Information Technology (*hereinafter* IT) and Information and Communication Technology (*hereinafter* ICT). The journey from the recent past, was resounded, "Eagle has landed", the first words echoed on earth on July 20, 1969 (transmitted by Apollo-11 that operated on a 4 KB RAM), when man landed on moon. The incidence was

juxtaposed five decades hence, against the simple devices operated by kids and elderly alike, and perhaps pocketed by everyone in the remotest of part of a village in India, a “smart phone”; often powered with 8 GB RAM and 256 GB storage (and expandable further). The advent and adoption of IT and ICT by the courts in India with special focus on achievements of Phase I and II of the e-Courts project set the course of discussion. It was reckoned that, the Phase III is likely to spectacle the new generation advancements *viz.* 5G application, artificial intelligence, augmented reality, machine translation, mobile collaboration, speech recognition. It was asserted that such ingress of novel technologies would catalyze to ensure a more transparent and accountable judiciary. Transformation of a conventionally functional “paper based” court to a completely “paper less court” with its significant advantages were discussed. Advantages of digitization *viz.* space (for storage), time (faster disposal), cleanliness and health (dust free environment) etc. were highlighted. Procedural ascendancies *viz.* faster and assured services of summons and notices, enablement of electronic evidences (recording, production and preservation), telepresence in court room hearings, access to multimedia (audio and video files), display boards etc. were discussed during the session.

Session 5 – Managing the Docket: Court and Case Management

The session included discussion on how judges and court administrators must work together and coordinate their efforts in key areas of court administration and management. It was asserted that the term “management” suggests judicious deployment of resources including human resource for optimum output. The five cardinal elements of management i.e. planning, organizing, directing, co-coordinating and controlling were underscored. For a court to optimize management a couple of important points were shared *viz.*: need to remove non- value added items; “Pareto principle” (also known as the 80/20 rule, the law of the vital few, or the principle of factor sparsity) which states that, 80% of the work can be done by spending 20% time and effort. Hence, it is of paramount importance to identify and prioritize the high value tasks in administering a court. It was highlighted that since the overall functioning of a court depends heavily on the interplay between judges and administrative staff, it is important to set up a system capable of building a shared responsibility between the head of the court and the court administrator for the overall management of the office. It was suggested that effective negotiation of disruptive persons, aggressive lawyers, reluctant witnesses, sluggish staff, would go a long way in effective disposal

of cases. The judge presiding over a court must admonish and stop forthwith bad practices viz. unnecessary delays owing to uncalled for adjournments. Best practices such as “rolling list” v. “daily list” (work to be finished on daily basis) were discussed. Issues relating to “docket explosion” v. “docket exclusion” were highlighted.

Session 6 - ADR and Plea Bargaining

After a brief account of historic overview of the evolution of the dispute redressal systems in India the essence of ADR was examined. ADR serves as an alternative to the conventional civil and criminal judicial process that provides resolution generally in a win-lose model. ADR instead essentially is modeled on a win-win resolution system for the contesting parties. Mediation was argued to be the preferred ADR. The basic difference between Mediation and Conciliation was explained, wherein in the former model the external doesn't propose solution to the disputant parties and is neutral but the latter may propose the positive solution and actively participate to help dispute resolution between the parties. It was suggested that the judge may also attempt to shift from mediation to conciliation if the situation so demands, thereby exhibiting flexibility. The concept of Med-Arb i.e. a hybrid model of both mediation and arbitration was discussed enlisting the benefits of the process. The types of suits which may be transferred to the *Lok Nyayalayas* was discussed which included, Motor accidental claims, Land references, Banking related suits, Summary suits, Family disputes, Section 498A IPC cases, Section 138 NIA cases, or for that matter any other issue by consent of the parties. Typically speaking cases suitable for ADR include, possession suits or recovery of possession, Specific performance, Commercial disputes, corporate litigations, Matrimonial disputes like maintenance, custody of children. It is the discretion of the courts or tribunals to consider such matters for referring them to ADR for much speedier, socially acceptable amicable solutions saving enormous adjudicatory time and money. Some disadvantages and challenges of mediation were also discussed.

Covering the topic and application of “Plea Bargaining” it was emphasized that essentially it is a process wherein the accused may bargain with the prosecution for a lesser punishment. In simple words, Plea Bargaining is an agreement (contract) between the accused and the prosecution regarding disposition of the criminal charge levelled by the prosecution against the accused. In layman's language, it is bargaining done by the accused of a serious and severe offence, with the authority for a lighter punishment in lieu of a full-fledged trial. It was underscored that although

there seems to be a tardy beginning in adoption and implementation of the process in India. However, the concept seems to be slowly but surely catching up in Indian criminal law jurisprudence.

Session 7 – Law relating to Cyber Crimes: Advances and Bottlenecks

The session illustrated the history of internet and enlightened the participants on the pros and cons of social media. A brief landscape of the sample size of the population using online platforms for myriad reasons *viz.* social networking, e-commerce, e-education & learning, scientific and non-scientific data mining, news, banking and more. It was on this pretext, the expert sketched the contours of one's susceptibility to a cybercrime. It was cautioned that regulation of cyberspace is extremely difficult because of its jurisdictional issues, and also for the fact that the cyberspace is not owned by the government or any of its agencies. An inclusive account of the kinds of commonplace cybercrime was projected and discussed such as:

- ✓ Unauthorized use of trademark.
- ✓ Identity fraud.
- ✓ Unauthorized use of copyright.
- ✓ Online defamation. Privacy v. Publicity issues.
- ✓ Disclosure of confidential information.
- ✓ Corporate espionage.
- ✓ Cyber bullying.

A few cases and case studies were cited and discussed which includes: *Banyan Tree Holding (P) Ltd. v. A Murali Krishna Reddy*, 2010 (42) PTC 361 (Del) and *WWE v. M/S Reshma Collections* (highlighted while discussing the jurisdictional issues) in the later case Delhi High Court decided conclusively two *vita* points (a) that jurisdiction in e-commerce cases involving trademark and copyright disputes would be determined by the buyer's place of residence, and (b) contracts would be completed at the place where the acceptance is communicated just as in the cases of telephonic communications decided in *Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.*, 1966 SCR (1) 656; Estonian cyberattack of 2007; Ukraine power grid cyberattack of December 2015; the *Stuxnet* worm cyberattack on Iranian nuclear facilities in 2010 etc. Absence of uniform Rules at the international level makes it further cumbersome. It was underscored that, although

“cybercrime” has not been defined under the Information Technology Act, 2000; however, “cyber incident” has been defined under Rule 2(1)(e) of the Information Technology (Information Security Practices and Procedures for Protected System) Rules, 2018. The Government of India notification of the “E-Mail Policy” on 18th February, 2015 was discussed. National Cyber Security Policy, 2013 was discussed.

Session 8 – Electronic Evidence: Collection, Preservation and Appreciation

The session established the importance and impact of digital footprints and appreciation of electronic evidence in contemporary times. Electronic evidence is classified into two types – volatile evidence and non-volatile evidence. It was explained that electronic evidence by nature is intangible, mutable and fragile rendering it sufficiently susceptible. Therefore, it was suggested that the standard of proof in case of electronic evidence must be higher than those of regular documentary evidences. *Tukaram S. Dighole v. Manikrao Shivaji Kakota*, AIR 2010 SC 965 was cited. Such types of evidence generally reside in storage device, digital files etc. Electronic evidence can be classified into two categories – volatile evidence and non-volatile evidence. Electronic evidence akin to any other form of evidence is not conclusive in nature. The concept of computer forensic is termed as a sequence of packets in a computer network and it explains the digital artefact. Significance of Meta data helps in establishing the originality of any electronic evidence was discussed with many visual examples and it was stated that on front end it is created by the user and the machine creates it at the back end. It was underscored as to how a magistrate must deal with the often ongoing crime in the cyber space and collect such evidences with reference to Section(s) 2(1)(w) and 79 of the Information Technology Act, 2000. Regarding the reliability of electronic evidence it was urged that the court *must insist* as to how was it acquired (process)? Seek for the data about the acquired data i.e. metadata; audit logs by verification of the hash (#) value from the time of acquisition. It was iterated that before a digital evidence is accepted in a court of law, its relevance, veracity and authenticity must be ascertained. It was explained that section 65B certificate is only required while producing secondary evidence of the copy of the original and not when the original itself is being produced. Further, the requirement of section 65B certificate being procedural can be relaxed by the court whenever the interest of justice so requires.

Session 9 – Forensic Evidence in Civil and Criminal Trials

At the outset it was impressed upon that forensic evidence plays a vital role in the absence or insufficiency of direct evidence. Recommendations of Malimath Committee was referred. Credence of forensic evidence was underscored in cases of heinous crimes viz. Terrorist activities, sexual abuse against women and children etc. “Silent witness theory” was explained, particularly when a witness turns hostile, through the eyes of a video recording or photograph. Issues relating to the potency test, the problem of negative viscera reports and with the legal aspects of DNA profiling were discussed. Issues relating to eye witness v. medical report were discussed. Power of magistrate to order for analysis of “voice sample” as an evidence was discussed with reference to *Ritesh Sinha v. State of UP*, AIR 2019 SC 3592. It was discussed that Magistrate’s order is not mandatory for a police officer to obtain accused’s fingerprint specimen as an evidence with reference to *Sonvir v. State (NCT of Delhi)*, (2018) 8 SCC 24. Discrepancy between ocular evidence and medical evidence was discussed. Citing *Mahavir Singh v. State of M.P.*, (2016) 10 SCC 220; and *Shiv Prasad Kol v. State of M.P.*, 2018 SCC OnLine MP 414 it was explained that “where the medical evidence goes so far that it completely rules out the possibility of the ocular evidence being true, then such ocular evidence may be disbelieved”.

Session 10- Judging Skills: Framing of Charges

The speaker initiated the discussion by addressing the technicalities involved in the framing of charges. It was emphasized that judges may adopt innovative steps, considering that injustice is not caused either to the victim or accused. While framing charges, it was advised to go through the case paper comprehensively and that the prosecutor should be encouraged to make the process of the trial more effectual. It was suggested that the overall evidence on record has to be seen in totality and not on mere suspicion that the charges are framed. The session further deliberated upon the sentencing policy and corrective measures which magistrates may take while framing of charges. It was stressed that advocates, must be motivated to assist the court, which will surely increase the efficiency & effectiveness of the Judgement.

Session 11- Judging Skills: Art, Craft and Science of Drafting Judgment

The speaker initiated the discussion by highlighting the importance of judgment not only from the perspective of the judiciary, but stated that it has the power to impact the very soul of the society. Therefore, great skill and caution are to be placed while writing a judgment. A reference was made to *Sharad Birdhichand Sharda v. State of Maharashtra (AIR 1984 SC 1622)* which primarily

touched the issue of circumstantial evidence. It was stressed that this judgment must be studied to understand the best efforts and nuances of Art, Craft, and Science of Judgment Writing. During the session, it was emphasized that magistrates should also try to incorporate a compensation clause under Section-357 of the CrPC. The speaker further highlighted that there are many provisions in the law that are unused to date, which confers wide powers to the subordinate judiciary, and the same should be incorporated in judgments for making them more effective and efficient.

Session 12- Art of Hearing: Promoting Rational Discourse in the Courtroom

The session aimed to understand the intricacies of art of hearing that must be adhered by judicial officers while hearing a matter placed before them. It was emphasized that respect and opportunity should be given to advocates. Further, judges must be calm and patient while hearing arguments in respect of which following points should be considered as provided by the speakers:

- A judge must hear arguments with full concentration as sometimes points raised by advocates may provide a different perspective.
- Draw notes of the arguments posed by advocates.
- Prepare notes on the chain of evidence, testimonies, and authorities presented.
- Arrange the board and matters in such a way that smooth functioning is directed which will help judges to focus on each case.

Further, deliberation took place on the application, invocation, and preparation of the questionnaire for the purpose of Section-330 of the CrPC. Lastly, it was highlighted that, due caution by the magistrate should be given to the entire process from framing of charge, hearing, and judgment writing to yield positive results.

Session 13- Role of Magistrates at First Production of Arrested

The speaker initiated the discussion by highlighting the importance of Article 22 of the Indian Constitution and its correlation with Sec. 57 & 167 of the Code of Criminal Procedure. The reliance was placed on the very factum that the language of Article 22 only incorporates the word 'magistrate' whereas Sec. 57 & 167 includes the words 'executive and judicial' prefixed to magistrate showing that how constitutional guarantees are exercised by the statutory procedure.

Further, the pre-requisites which must be adhered in remand cases were discussed such as:

- Material on record must be glanced before granting either police or judicial remand.
- Probable age of the accused should be ascertained and further, an order for the production of documents be issued to the concerned department.
- Extract of the case diary is of utmost importance.
- A medical examination of the arrested person may be ordered if required.
- The discretionary power in remand cases must be cautiously used by the magistrate, because ultimately someone's liberty is being curtailed which should be well reasoned of.

It was further discussed that a sense of distinction between police and judicial custody should be adhered upon. It was highlighted that judges always sit in the open court while dealing with remand cases and refrain from passing orders while sitting at their chamber.

Session 14- Fair Trial: Fair Processes

It was strongly contended that the entire procedural code in context of criminal matters is a reflection of various facets of fair trial. A reference was made to Articles 21, 22, and 23 of the Constitution pertaining to fair trial which were discussed in depth. It was deliberated that evidence and their priority in proving the relevant fact is an important aspect of fair trial. As a word of caution, to effectuate the fair trial perspective it was suggested that a judge should detach himself after a case is disposed of; otherwise the same shall be reflected in subsequent judgments. The speaker further dwelt upon areas such as the presumption of innocence, right to remain silent, right against self-incrimination, right to free legal aid, and narco test analysis. A reference was made to various landmark judgments such as; *Miranda v. Arizona*, *Nandini Satpathy v. P.L. Dani*, *Selvi v. State of Maharashtra*, *Moh. Ajmal Amir Kasab v. Union of India*, *Hussainara Khatoon v. State of Bihar*, *Moti Ram & Ors. v. State of Madhya Pradesh* which were discussed during the session.

Session 15- Role of Courts in Securing Gender Justice

The speaker highlighted the importance of gender justice and focused on the constitutional provisions and emphasized upon the need for sensitization programs. The speaker explained the theme through the trilogy of words- Apathy, Sympathy, and Empathy. Other key concepts that were discussed included, feminist jurisprudence and the role of judiciary by citing the guidelines framed in Vishaka's case. Some of the judgements referred; *P.B. Vijay Kumar v. Govt. of Andhra*

Pradesh, Nargesh Meerza v. Air India, Neera Mathur v. LIC India, Gita Hariharan v. RBI & Anr, and Vinod Singh v. Union of India, which were discussed at length. During the course of discussion the speaker explained the ambit of sexual harassment while quoting the statutory provisions and thereby highlighting the case of Apparel Export Promotion Council v. A.K. Chopra. Further, the challenges in conducting medical examination and implementation of Medical Termination of Pregnancy Act were also deliberated upon during the session.

Session 16- Law of Precedents: Identification and Application of Ratio Decidendi

The session commenced with a deliberation on jurisprudential aspect of law, wherein legislation, precedent, and customs were discussed in depth. A reference was made to Article 141, 142, 226, 227 and 235 of the Constitution. A brief discussion was enthralled to identify and distinguish the difference between precedents and res judicata. The speaker further highlighted the tenets of obiter dicta and ratio decidendi; and how they could be recognized in each matter. Some of the exceptions in application of the precedents were highlighted such as; *Consent decree, Sub-silentio matters, Per-incuriam Judgments, mutatis mutandi and in pari materia provisions.*

The speaker highlighted that ratio decidendi is primarily based on material facts of the case to which law is specifically applied. In this respect, a reference was made to the case of *Rylands v. Fletcher* and *Kalandi Charan Sahu v. General Manager, South Eastern Railway.*

Session 17- Occupational Stress in Judges: Identification and Consequences of Stress

The speaker initiated the discussion by stressing upon the term “eustress”. It was stated that “eustress” is very essential and to some extent good for motivation & raising the confidence of an individual. To cope with stress, the speaker primary highlighted an excerpt of Rudyard Kipling’s 6 honest men which include ‘*Who, Why, Where, What, How and When*’. It was suggested that self-invited stress and personal stressors that largely contribute to occupational stress must be relieved at the initial level. It was emphasized that importance be placed on the identification of stressors and then uniquely devise a solution for it. Further, it was highlighted that the effects of the same set of situations are different from other and therefore, a solution which is beneficial may sometimes be inoperative in other cases. So, strategies to manage stress in the same sets of situations may differ from person to person which is primarily based upon the social and cultural background of an individual.

Session 18- Managing Judicial Stress: Institutional Strategies and Techniques

The session was commenced by the speaker highlighting some of the judicial stress like; overload of cases, heightened public scrutiny, disturbing evidence produced before the court, anxiety, overtime limits, and threats to safety were discussed at length. A reference was made to the *Miller and Richardson Model of Stress* during the course of discussion. The speaker further emphasized upon the signs and symptoms of the stress which one might face in four dimensions- Emotional, Physical, Behavioural, and Cognitive. It was suggested that emotions of guilt, sadness, anger, hostility, hate, resentment, jealousy should be openly discussed with close one. This is one of the best way to manage the occupational stress.