



NATIONAL JUDICIAL ACADEMY
NATIONAL CONFERENCE ON
DEVELOPMENT IN THE AREA OF
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VERBATIM REPORT

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INTRODUCTION

The National Judicial Academy organized the “National Conference on Development in the Area of Constitutional Law’ from 15th to 18th October, 2015. This conference provided a forum to the High Court Justices to share views and express their problems with their counterparts.

Since its creation over six decades ago, the life of India’s Constitution has involved much political contestation and various forms of improvisation. Formally amended over a hundred times and informally interpreted and reinterpreted in countless judicial decisions, the document symbolizes the idea of common citizenship and a shared political allegiance while its practices reveal shifting socio-political norms, ideals, and aspirations. Constitutional challenges in India as elsewhere are hardly static, even if countries must ever so often wrestle with tensions that acquire an enduring character. How do countries negotiate new, changing socio-political landscapes within the terms of already set rules? What kinds of challenges have emerged in India in the recent past and what sorts of new questions do they require us to explore?

With such questions in the background, the NJA has organized this conference for High Court Justices because since the 1970s, the judiciary, has come to acquire a prominence in Indian political life that it lacked in the early years of the Republic and regardless of the ultimate decision delivered and there is little that has remained outside the purview of the court’s jurisdiction. Total 13 High Court Justices participated in the conference.

This conference has encouraged conversation about our current constitutional challenges, and addressed contemporary themes, to understand how High Court Justices think on matters related to judicial appointments, rise of social media, extent of right of privacy, interpretation of state under Article 12 and so on. The objective of the conference was to search for coherence between the different benches of the High Courts to constitutionality of several remedies that can be awarded. The conference has helped high court justices to reflect upon institutional, structural concerns outside the judiciary, in particular Parliament.

VERBATUM REPORT

Day1

The theme of the **Session 1** was **Evolving a Constitutional Vision of Justice**

Prof. (Dr.) G. Mohan Gopal---I wish all the Hon'ble judges a very good morning. I always begin by saying as to welcome to your Judicial Academy. You don't need any welcome here and that time I used to say that we are all are birds of passage but judges are the permanent members of this Academy. We all move on but judges will always be here so you don't need any welcome here but it's a great honour and a privilege, I know some hon'ble judges for many years. My name is Mohan Gopal. I have the privilege of working here at National judicial Academy first as an adjunct professor from 2003 to 2006 and then 2006 to 2011 as the Director and from 2011 Hon'ble Chief Justice of India Mr. Kapadia has nominated me to Chair the National Court Management System Committee which we are gradually developed in the last four years. So, you could say that nearly a dozen years 12 years I have been working very very closely with the judicial system, interacting literally with the thousands of judges in many many conferences and learnt very deeply from the interactions with the... in these conferences for myself, from my part I am been educated So I always say I am student who learnt from thousands of judges about the judicial system also I observed it and I think the whole idea that we brought here to the National Judicial Academy I came here to see the judicial process in the judicial academies as simply the process of dialogue and exchange of views, a chance to reflect. I used to say that the word academy as you know right from the Greek Plato's academy and I learnt that the Plato's academy got the name academy because it was located in the suburb of Athens which is then was in suburb called "Akademos". It was called "Akademos" and one of the meaning of "Akademos" is place of silence. So academy is supposed to be a place of silence. It doesn't mean you don't speak in Academy. It is a place of silence because Academy is a place of reflection. And I think that as a judge or and an academician or as a student of law like myself there is always a need to reflect on why we do, what we do, how we do it and what are we doing, what are the consequences, just to reflect maybe at the end of reflection we might all be satisfied that what you are doing is optimal and correct and move forward or we may find ways to do even better. But that the process of reflection of what we do and how we do

is extremely important. What we said in 2006 is that is are the places of reflection, so we actually abolished that the teaching and training from this Academy. Then I came here the programme was numbered as T2, T32 or T34 when I came here. So even that we change P for programme. The guest houses really used to be called as hostels. I came from University but I found the Academy was using all the vocabulary of the University like classroom classes this class that class, Hostel, training solely abolished the word training, abolished frankly the word education, it is a place of reflection. People and with extraordinary experience with unique experience extremely complex nature come together share their experience and also share thoughts with those who are observing, studying and reflecting on those experiences. Ms. Usha Ramanathan for example here is more experienced than me; but we both try to observe and understand the legal education process and we share that. Judicial process is a process where every citizen has a stake and then long before you became judges you were be a citizen. So as the citizen we have a stake to reflect our experiences and then after that reflection judges go back and it is up to them to assess the value of that reflection what has to be done about this. That I think has been a change/shift to the role of the Academy and that I think it is a very positive sign and thus there is of very genuine process of reflection and it goes on. But then we saw very soon as it involves various sections of the Society from 2006 onwards a very big change in the attitude of government and authorities towards the judiciary and support came to the judicial system. There is much broader and deeper engagement between various stakeholders in the judicial system. But we never discussed actually any individual cases, pending cases or future cases. We sometime used past judgments to reflect and understand the judicial system. So we are only discussing the working of the system that has actually produced the huge positive impact. In fact after 2006, it has touched the number.. it was not a good indicator, but a very commonly known indicator number of...that has not crossed 3 corers. It is actually kept as 3 corers through lot of interventions. Again this is not good numbers but Productivity has gone up, disposal has gone up even if you take those numbers by all parameters contrary to what people say there has been a lot of improvement in the functioning of the judicial system and that has created space for discussing some of the most fundamental issues about what this Justice, what we should do at higher-level. For example there is a problem for a few male

judges even for female judges in many parts of this country they even do not have toilets India Courts. They say how do you function when you don't have a toilet so at that level, and it was no attention to it to this problem. We also because of this discussion at National judicial Academy with Hon'ble Justice Kapadia we created National Court Management system and in every High Court there is now State Court Management system simply as a mechanism which for example Karnataka High Court now started to regularly do it is every other Saturday the judges meet a district level, local level they have a meeting, they identify the problems they are facing. Then those problems are fed to the state Court Management system committee. Systematically they are collated, analysed and solutions are formed. And what can be done is done at local level locally and state-level is done at state-level and if some National intervention is required it sent to the National Court Management system committee. At working level it also includes statistician and It includes judges and Registrar Generals from several High Court's. They do the analysis and the recommendations are submitted to the advisory committee which includes the next Chief Justice of India or over the most senior judge after that – committee decides gives it to Chief Justice of India and it formally transmit to the government to implement. So I will not get into the detail, number of actions has been taken and quickly implemented. In the history of this country till the NCMS was set up there was no more institutional mechanism to identify the problems faced by the judges within the judiciary. Process them converted them into set-off actions that are required to solve those problems and then formally transmit them. So we have now have created a mechanism and started to operate and then it get strengthen and grow I think it will have a very positive impact. So the discussions are very very important and has strengthened the judiciary. So we've actually calling it as conferences, seminars and not training programmes. These are just conferences of judges to listen, to share experience, to give guidance to others also. For example if you feel there is an area we need to research more this is an opportunity for you to tell us we would like to have research support in this area. These are the questions that we have in our mind then it is our job to deliver it to you. So it is the place where you can reflect on and you can ask for the institutional work to be done. The work that will strengthen the system in the country. So this is the evolution of the process that take place here. So I come here to learn, come here to share and to get from you the guidance

that would be useful for NCMS to do for me to do as an individual researcher. What other kind of issues you would like to think about, come out about which is very helpful to us to reflect. So thank you for this privilege and honour to share a few thoughts with you. I think since this is the first session with the normal trend that to introduce ourselves so I introduced myself so I hope that this would not mind introducing themselves.

Introduction of the participants, resource person Prof . Sandeep Gopalan and the persons present in the conference.

Prof. (Dr.) G. Mohan Gopal---So we have been reflecting and on a question with your permission in the next hour or so and reflected many years and in also regional conference the idea of Constitutional Vision of Justice if so then what is it and how do we understand it, What is the role and relevance of justice. Justice Chauhan will remember we have many discussions and with Mr. Shankaran in many occasions. It is an ongoing discussions for us to share our experience and thoughts with each other. I would submit that there is no more important question because the first objective of the republic as stated in the preamble of the Constitution of India is to secure to our self-Justice Social, economic and political. The word justice drips in many forms of the constitution and in many of its provisions and Supreme Court is a part to do complete justice. Yet for such a very important concept there is not any adequate attention, adequate clarity. It is comparable with the concept of good health medicine for example. It is always a elusive idea what is good health, who is healthy and who is not healthy. But medical science have come up with a idea what is good health, what is healthy what is not healthy so some parameters are there as normal temperature or normal blood pressure whatsoever there are different parameters they came up with the research. It is dynamic like today they say 98.4 and after 100 years they may say 97.4 you know so it was not a fixed idea. There is a very large amount of medical science devoted to the idea of understanding what is the concept of health, how you fix the problem of ill health. But that kind of commensurate energy has not been expended on understanding Justice with any clarity. And therefore which is used in many different ways and in many convenient ways, everybody use and anything can be done and closed with the idea of justice. So I asked literally thousands of judges a question informally how you know, what you done results

in justice or not and I got a variety of answers some structured and some not. Many people said I know it when I decide and sleep well at night I know what I have done is justice. And that is similar to and not a view that is in considered; For example I have put a quotation on the screen I will just read it, It says consider what you think justice and decide accordingly But never give your reasons. Your judgment be probably be right but your reasons certainly be wrong. This was said in the 18th Century by Lord Mansfield who was one very experienced judge. He was advising..not a judge but a colonial governor saying please consider what do you think justice. Why he say that because ultimate all actions at conscious and unconscious level driven by some that this is what I must do. You cannot do without sense of why is conscious or subconscious level this may be misplaced may be wrong may be considered may be not considered. Actions is always preceded with some sense of why. Now the advice of Lord Mansfield is do consider that because he said that don't operate it at subconscious level, consciously consider what is justice according to you and decide accordingly but never give your reasons because your judgment be probably be right but your reasons certainly be wrong. So this is what Lord Mansfield said. Now if we followed this advice, of course you can see that some 200 years this kind of thinking is marginalize is not still in great shape today, so doesn't seem too have worked very well. Any case if we operationalize it today we may have 17 thousands... As far as Court is concerned or judicial system is concerned we have 17,001 version of Justice. And even if a judge is not consciously aware of what you consider Justice, I think lawyers have spent a lot of time in understanding what is the judges idea of Justice. In fact in India lawyers makes an enormous amount of money not because they know the law, not because they know the judge personally but this study what is the judge own sense of Justice, in which direction he would likely to move. And then they know what arguments is to make instinctively that appeal to you. All this is because that you are not a judge but you are a human being. There is nothing to do with the judge. So, earlier we have some long sessions and detailed discussions here on cognitive processes, on human cognitive process of judging. Because then you become a judge and put on a Court you may look different but you are the same person before you become a judge. Of course your mind is constantly changing, experience will shape but a fundamental level they don't appoint different human being. At a human level there is

always something operating your sense of justice and lawyers studied that and then that affects the outcome. Susan compared the Justice decision of Justice S.B. Sinha and Justice Arjeet Pasayat on death sentence you can see a very different approach. Both justified them by the judgment. Justified in their sense; they think that that is Justice, it don't think that they are doing injustice. And they believe that all their experience, all their knowledge, of the of law they have come to the considered view and acted accordingly. But many different approaches. And the other many many other examples there is not much time to go into that. Yet this is very important operational consequences. It includes live or die. And if you bought to Justice Desai of Justice Krishna Iyer case of landlord and tenant that how does that judgment is likely to end up. And so the sends you consider the Justice is always operating in all human minds. Justice is not a legal idea and is not a judicial idea. It is a very fundamental idea of humanity. It is of particular impact in certain area particularly at the operative of executive branch and judicial branch it has a huge impact. In other sector it may be relatively less. So we spend an hour or so long to reflect on question and think about how to think about. And the main point that I want to submit, that this driving my approach is, that we have tried so far only by studying European ideas which is also gone to other countries to Americans, Australians and so on that what is Justice. The idea is of European philosophers and later American philosophers on what is Justice. If we look at our judgments we will find on the quotations from all these sources and may find a continuity on this discussion on before 1950 and after 1950 and it still continues. The question that I have can we go back the feudal idea of Justice when our society was not a democratic on the egalitarian society. Those idea of Justice are appealing to those who has privileged position in that society. Why do I except an idea that do not give me the dignity? So for some sections of Indian going back to precolonial feudal ideas is satisfactory because it is that they are comfortable with it. But for 90% of the people that system did not give equality, did not give them equal status, however renationalize it. So that does not acceptable also. So we can't turn entirely into western discourse; we can take something useful that; we can take something useful from the Colonial discourse; that is not entirely bad. There are elements, which are positive. We can take something positive from the traditional, feudal, precolonial discourse. But what can be a source that synthesizes so that we can turn consistently to derive our idea of

Justice. Like western's are deriving their idea of Justice from the own social and political history. They are not pulling the idea from vacuum. They also have a history were there are positive and negative ideas. They are selectively drying from their own history and deriving their own concept of Justice. So my submission to you is that what I have been trying to do for the last many years is to locate our idea of Justice in our constitution. As a document that has created this Republic in this nation. And in turn asked the question were did constitution come from; the constitution actually comes from the National struggle for freedom. But one aspect of that struggle was led by Mahatma Gandhi. You can say that the plurality of the struggle is number people led by Mahatma Gandhi.. That prospective deeply influenced the constituent assembly while creating the constitution. We have to look the constitution continuously with the freedom moment and understand it. And understand from the freedom moment what were of the values which we're the source. Now freedom moment draws into it a mixture of modern ideas, traditional ideas of Colonial realities, constitutional and political document of Colonial times. In a sense to me freedom struggle is like a blend that goes before it. It brings it together. It submits to democratic discourse. It is a very ready democratic moment. And what emerges from that present us a very interesting source, authentic source of the constitution. Therefore the constitution itself has a blend.. Because of freedom moment the constitution has a blend of modern, traditional, Colonial and various ideas together. It is a consensus document of over 1.2 billion people. And has got wide acceptance in this country. And frankly the Indian Republic is only a latest on political entity in this ancient land. It is a very new idea, the Republic of India which the constitution has created. It is the product of the constitution. The constitution itself is an expression which emerges from struggle. Comparable for example South African constitution which emerge from similar, comparable struggle. It is an extraordinary document. It strengthened draws that it was not drafted by some consultants sitting in a room. It emerges from struggle. So we have to find and locate our ideas of Justice...Our possibility to locate our idea of Justice in the constitution. And that is the subject of discourse what is the constitution, what is the freedom of struggle that cannot be a single view, it will be my different views. But we must debate it. Through that debate we will gradually start to evolve clarity about what this the minimum idea of Justice. Because we don't advance the idea of Justice the Republic we'll

be in trouble. If you disconnect the idea of Justice from the constitution's struggle and Republic then who have constitution that comes out of the struggle creates the Republic. Constitution appoints you all a very senior officials to carry forward that Republic. But if at that the end of the day the idea of Justice that is motivating the functioning of the judiciary is disconnected from the constitutional freedom of struggle and republic then Republic is in trouble. Because then executive or judiciary is creating some another goal which is not the real struggle of freedom moment and it is not the sole of the constitution. So the main submission we are which is very very important for our self also as many other countries have done to evolve our own understanding of idea of Justice.. And I submit to debate what are the core idea of freedom moment that constitute an idea of Justice for us. The main point I want to make. And all the honorable judges of the constitutional Court you can play a very very important role in encouraging this development, evolution of constitutional idea of Justice based on our own freedom struggle and engaging in the process of reasoning., public reasoning in that struggle. So if you say something other the judge may disagree some scholar may disagree but you will create a debate around which there will be a greater evolution of the idea. And stronger the idea, clearer the idea of constitutional Justice; is stronger of the Republic will be. And Republic will be guided by that idea and will pursue the right goal rather than subjective and personal goal.

Amartya-Sen in his book idea of Justice has made an institutional approach to Justice and on the other hand he was arguing on realization approach of Justice. Justice must look at fighting or removing manifest forms of injustice in the real terms. He said that including Rawls and other approaches he called an institutional approaches with he want to create a perfect institutional arrangements or perfect Justice. And then he said whatever the decision come from the institution will be Justice. Because Justice is simply that arrangement whereas his approach would be to look at the consequence of the decision. And consequence of the decision should not be to advance Justice but at least to fight and remove manifest of injustice. For example and Abolition of slavery. It is simply said that slavery is obnoxious and we have end it. Now simply saying that institutional framework to get rid of slavery is not enough. I agree what Prof Amartya-Sen said but also think it is important to have and to see that institutional arrangements to achieve that

results. You can't just not look at the institutional arrangements. So I think there is more than these two institutional arrangements and the realization approach which we need to address in our context. So it is a process or is it simply fairness for example Rawls talks about Justice as fairness and Amartya-Sen criticizes Rawls by saying that Rawls idea of fairness is that there must be institutional arrangement that must be fair. So that's how you can explain why Justice and injustice can coexist. If there is effective system of Justice there should be no injustice. It is like that if you have effective system for the eradication smallpox there should not be smallpox. But if the system coexisting with injustice that this insight there is injustice.. The decision has been taken, one court for example will say that is injustice the result of another court. Because we're really looking at the institutional process. Is the institutional process fair then whatever it produces is Justice? So fairness is not as an outcome, not as a realization but as an institutional arrangement, set of rules, processes. You know Say for example following such institutional arrangements.. as in 1857 the United States Supreme Court has decided that slaves are not citizens they are just pieces of property and that decision was made by Chief Justice Satney considered one of the finest judges of the United States. Because institutional framework was very fine. Justice Satney might have gone home, have a nice dinner, slept well that night thinking that he has made very well and very fair decision with everybody has praised. And in his mind he did good judgment to his idea of Justice. The result was according too many historians the decision was the main cause of civil war in United States. It result in the two percent of the population dying and property Court destroyed.. there was no reconciliatory approach, the lost the faith in the judiciary in the Supreme Court. After that Supreme Court keep on issuing decisions and Lincoln would be tearing and throwing it in the race people basket. Because they lost the faith in the decision of the Court. And frankly after that Supreme Court of United States never confronted the political, executive till today. Because they had a very bitter experience. So that is fairness.. What is the principle guiding that.. who decides that? Some of the most difficult questions, what are the parameters for decision.. What is due to somebody.. We make decisions and that what many people think it to be injustice and that is it compassion, is it punishment, is it balancing. My view and here I agree with Prof Sen who argue that these type of policy decision cannot be based on one parameter and on one

consideration. There are multiple Justification's and parameters. So some of these various considerations are relevant and maybe applicable but still this alone cannot be satisfactory for us for working here and understanding of Justice. And how we can have an objective approach what is Justice as a goal and not in terms of exactly how we decide, but there should be a goal that should guide our decision-making.

Now what is an another way to understand the Justice. And this is my own submission with little terminological liberty. But to communicate better I divide the word Justice into two words use and stis. Now Amartya-Sen in his book touches on this but he doesn't analyse it in detail. In my view, in couple of areas he because of lack of time does not take the analysis to the proper conclusion. Use means as you know the right value of right or right norm. That why we say your decision is just, we also say just give me a half cup of coffee. What we mean is that decision and half a cup are both right norms. Half a cup is a right norm, I don't want full cup. So just means something that meet some norms. The questions comes what norms. There if you take the word stis. Stis actually has a same origin. Terminologically Stis stands for root or Stha or stahi. The origin comes from stha that is why we say sthai something which stands. So use means Shtahi use. So justice simply means Sthai mulya. So the constitution say to secure us to Justice social, economical, political what it means is that we want to construct a Society were all relationships social, economic and political shall be governed by Sthai mulya. The Republic was not created because Court will deliver Justice. Justice social, economic and political simply means that we want to create a nation were economic, political and social relations are governed by Sthai mulya. Why do we do that because ultimately nation is set up by set of values? It is not just a physical territory, it's not its people, it's not its building. It is only a set of values. Now justice Shankaran and I became from Kerala, till 1947 and till 1950 we had no political relationship with Delhi. Our cultural relationships are closer to Srilanka than to the northern part of this country. Why did it we become part of this union. The first 10 word of the Indian constitution after the preamble are India that is Bharat shall be a union of states. India is a union of states. The word Centre isn't figure in the constitution. The idea of strong India and strong center is not a constitutional idea at all. It is simply a union of states which we voluntarily joined, the people of joined. Why did we joined? Now speaking for myself and not for Justice Shankaran. I have a lot of

respect for his own views.. But speaking for myself I believe that we joined union because of the values that union represent. And union is nothing more than values. And he set the institutional arrangements to implement those values...And the territories within those values are being implemented. And if these values are diminishing or deferred then frankly speaking I have no interest in staying in this union. I'm not saying let us not to be ruled by the people in Delhi. That's why we have not joined the union. We were happy to our self. For example in our little Travancore from beginning of time till 1947 no outsiders have ruled us. Am I correct Justice Shankaran. So I say from 1947 the little Travancore has lost its independence and not gained it. But we lost it for the good purpose and that good purpose was that now we are going to have a set of good ideas, values and rights that love us to overthrow the petty local terrines that has enslaved us in that little Travancore. That is the exciting possibility for us. And if that possibility goes away, I have to reconsider this whole thing. I was not trying to look at the set off rulers to rule us. So values constitute the nation. That is by taking my own little terminological liberty I say the word constitution must be understood as a codification of the values that constitute a nation. That is why we call constitution. It is a codification of the values. They can change administrative arrangements and other but we can't change those values. Because a common understanding of Sthai mulya or stahi values that constitute this nation is the constitution. And in that constitution I believe the people are the guardian of these values. Within the state the judiciary has an extraordinarily role in protecting these values. So if justice is of set of eternal values and our Republic is created in order to ensure that all are social, economic and political relationships are guided by a eternal values. Then the question is what are these eternal values? What is in hindu word, muslim word, Christianity, all religions used the word Dharma. And dharma means what upholds. So values that uphold anything is Dharma. The Justice is comparable concept, it is set of values on which upon political group and idea..This should not be confused with the content of Dharma in any particular religion but it is comparable because religion always also constituted by certain values. People come together because of those values. Similarly, in a sense a nation is always compete with ideas of values. So, that is why some judges including Justice Krishna Iyer talked about constitutional dharma. What it means that what we want to have is that set of values which is being described by our

constitution..which is the foundation on which this nation exists. We have to uphold those values.. That is similar to justice. Now this I will go over..So, I argue if justice is a set of values we must understand the justice is the standard of human conduct. That's why is a typhoon hits this place and we all get affected we won't say it is injustice but if somebody comes and attack us we will say it is injustice. Because injustice is in a standard of human conduct. And the only apply and describe human conduct... And a job of the Court and a Judge what I term logically say is to decide according to its use. To declare the authoritative use of norm or the value. So the State has said we are declaring a set of values, we are committing to a set of values and we are creating an institutional structure to uphold those values. And we are empowering a local people among others as officials to actually do nothing else but to ensure that those values are correctly understood, declared and followed. So for judges, more than lawyers, more than anyone else clarity about the understanding what are the values that actually constitute Justice very very important. Because it is those values that must guide you. But for all those values what I called JP (Justice according to your personal understanding) in which case we have 17, 0000 versions of Justice. And that is not what the state is being constituted on May or may not be what state is being constituted. So we have to actually uphold the constitution of values and this is from the Supreme Court. Every citizen is under duty to abide by the constitution and respect the ideas and institutions. Those who have been entrusted with the task for administrating the system and to operate various constituent of this State and take oath to act accordance with the constitution and uphold the same have to set an example by exhibiting total commitment to the constitutional ideas or values. This principle is required to be observe with greater rigour by the members of the judicial fraternity who have been bestowed to the power to adjudicate upon the most important and legal issues and to protect and preserve the rights of the individuals and the society as a whole. If the court command others to act in accordance with the provisions of the constitution and rule of law it is not possible to contravene the provisions and constitutional values by those who are required to laid down the law. In Supreme Court there are many judgments, I just picked one has read it clearly said that look that constitutional values are what should guide Court, guide judges and what is there responsibility. So it is true that judges are constitutional invigilators and statutorily

interpreters. But they are also responsible to put forward the constitutional values in detail... transformation of the social, economic order. Judiciary shares revolutionary purpose of the constitutional order and when called upon to decide the social legislation must be animated by goal oriented approach. This is a part of the statutory interpretation in the developing countries..were the court are not converted into the rescue shelters for those who seek to defeat justice...So here again I am introducing a slightly different idea that you can't simply dismiss a personal justice are personal values, the exist in society. We derive those personal values from our family, communities. And in India there is enormous diversity values and ideas. So we have constitutional values and we have society values some of these are concurrent and some of these are in conflict. So there is always a Mahabharat going on in the minds of judges, lawyers and many people between the constitutional values and the values of the community we belong. And in this Mahabharat constitutional values have to win otherwise constitutional fails. Additional complication in India, also many countries like in South Africa.. The constitutional values are in direct conflict with consciously and deliberately targeted against with some social values. For example equality which we will talk more in the afternoon. And the Republic was created and express purpose of the constitution is to destrin these values and establish the constitutional values in that place. And the Supreme Court has said in many many decisions, the constitution is therefore is a social revolution. It is not my word, it is a Supreme Court words. What is social revolution means? According to mean, the Society is only a set of values. A shared mindset. That is what society is. And be absorb that mindset, contribute to it, shaping it, it is a very dynamic mindset, it is constantly evolving mindset. But when we say society we mean a shared mindset. A multiple shared mindset. Social changes that changing that shared mindset. So the constitution says we must change the social values, we have to change the shared mind set in society from believe in inequality to believe in equality. So, the complication of the executive branch and of the judiciary and State in India it is not simply that its values are unique and distinct. But it values are not only different from many social values but in some areas particularly freedom and equality. It is not only in conflict but it is impended and to destroy the value of freedom and equality. The greatest respect I say to my colleagues in the legal Academia, members to the Bar, law student with great respect to all judges if you are not

prepare to this then really we should not be in the system. He should not be in the system to defend the traditional values which the constitutional is trying to destroy and which is against the constitution... And this is being recognized by many Supreme Court judgments that the constitution is an instrument of social change. It means change in values and commonly shared values. Not defending traditional values, but changing the, attacking them, defeating them. For example of gender or an individual freedom or equality, very difficult areas. It's not easy. Therefore, the idea of Justice in India must be an idea which is socially transformative idea of Justice. It is not a static idea of Justice. It is not the... Idea of Justice is that has evolved through a process of.. social revolution and social change then the revolutionary forces have won and have declared a new constitution successfully. This is a declaration of set of values which are part of the process of revolution. The revolution is ongoing. It is being fought. So the judiciary is actually a revolutionary force according to the Supreme Court. Again it is not my words. But according to the Supreme Court, Justice Desai has said and asked the judicial education in the law commission report he did on judicial education that so we need to understand the idea of Justice in the Indian context as set up external values, Sthai Mulya. But a set of Sthai Mulya should brought into the constitution particularly to attack and defeat particular type of Sthai Mulya which exists within the society and are unacceptable to the 90% of the people because it degrades them. One last point on the context in which we have to understand the idea of Justice is that one question to all those who are engaged in thinking about the best for the people in this subcontinent, from the 18th century, 19th century and 20th century, the question that is to be asked that why it is such a vast section of the society is living in such a suffering, such poverty, such degradation. Denying human dignity, equality that is available to other human beings in other parts of the world Why? Many different interpretations and idea have come. But one common to all of them, the solutions are different but the problem they all agreed is that one reason that India.. The people live in India are oppressed and exploited a lot is that are very diverse people and are not adequately united. And that disunity creates the space for others to come in and attack and defeat. So, being the unity of the country which is also in the preamble is very very important objective. Now the two ways you built your unity one is homogenization that what the European did, that what the Americans did, that is

what the Chinese did, Homogenize everyone, make sure of the shared the same set of values, same set of beliefs, same set of thought and then there will be unity. But India is a very vast and diverse place and we have wonderful traditions, wonderful uniqueness and so some of the leaders of India and not all said we have to do something different to bring unity in diversity. By saving the rights of every individual and every group, to maintain the identity we must bring unity. This something, frankly no other the country in the world when India started had attempted. How to believe Cooperation and the unity amongst diversity. By a allowing them to be what they are. So that the union, that's why the idea of union in diversity not in union in homogeneity. Then they analyze how to do this. Then they realized that the reason of this diversity is you can't have people those who suppress each other and get united. They must have equality, they must have freedom, without that we cannot co-operate. I cannot take your freedom, brainwash you be like me and then get united. But if I allow you to think, then we have to build, we have to respect each other's freedom and equality and therefore we can't build unity without equality and freedom and dignity and nonviolence. We cannot force unity through violence. And truth. And then we understand the fundamental values around which we can built unity in diversity is Satya, ahinsa, truth, nonviolence. Swaraj which is an individual freedom. And therefore the idea of Swaraj is very fundamental to the freedom moment. And then compassion, thinking of the welfare of all. And thinking of idea of diversity and building unity. Therefore, I am submitting that the destruction of ideas of the homogenization, destruction of the ideas of inequality of freedom is essential to the unity of people of India. Because homogeneity can never be achieved, it is impossible over 1300 million people. Therefore unity can be built only on these principles which are there in the constitution and without those principles we will be disunited and fragmented and he will be back to square one. So, values that are in the constitution have been picked to bring about social change, to bring about better future for those who have denied freedom and equality. But for also for ensuring that we can built unity in diversity through peaceful means and constitutional means. So this is the context in which our constitutional Justice has evolved. Therefore, constitutional Justice is prevalent for those human values that sustain the type of Society which is based on freedom, equality, diversity, dignity and all these ideas. Now, are these ideas are simply imported from European ideas or are really

anchor in our own freedom movement. Very quickly, I would argue that these ideas are actually based on these 5 core idea of freedom movement that united that actually all strands of that freedom movement... First is Swaraj, Swaraj is not only for the country but also for the individual's. Autonomy of the individual. There are a lot of writing about it. Granville himself said Swaraj of the individual and not Swaraj of the community based on Satya and ahimsa. Sathya means actually truthful discourse include right to speak, right to question. Truth emerges through the process of discourse.. So democracy becomes very important. Therefore idea of democracy is derived from these values. Our idea of democracy all are ultimately derived from these values. Similarly, Welfare State ideas in the part four of the constitution comes from which is very very important in the freedom movement. That is why such provisions of the constitution fit so nicely into our consciousness and into our constitution. I actually, I wouldn't have it here, but when I was here I actually identify 75 values in the constitution and put them under each of these heads. And then you'll find that the main energy of the constitution is actually the Swaraj. I put freedom and equality in the Swaraj. Because you cannot have Swaraj without freedom and equality. Now why we use the word freedom, equality, dignity because these are actually rights that emerge from these ideas.. One it is a set of rights freedom, equality, dignity. And other it is set of in principles of governance secularism, socialism, democracy. These are principles of organizing this State and organizing society. These all come form the core ideas according to me of the freedom movement. And therefore what will argue that and I end with two quick examples having made the main point that constitutional Justice means eternal values, Sthai mulya and for us all people connected with state has to be constitutional values others who are not State officials can have their own idea of what are Sthai mulya. We looked in that constitution gives that freedom. But public officials must be or are expected to be by the people of this country to be committed to the values of the constitution. The constitution is to bring about the change in our Society, create a new type of Society which is based on these core values of the constitution. And for that we have come up with an institutional arrangement, a set of rights. And all the rights, the vocabulary of those rights we have taken from the terms that are available, very understood to advance these values. But that understanding doesn't limit us, we have to expand the understanding as many judges in the Supreme Court has

done. Expand the understanding of the quality, expand the understanding of the freedom, and expand the understanding of dignity such that the idea of Swaraj and Ahinsa and Satya and Antyodya and Sarvodya get advanced. And how we do that is a practical matter, I will very quick give you two examples and then we can have a short discussion. One example is a historical example that how important it is to understand what important is a Sthai mulya. That was a judgment of a judge Broomfield was in the one who judged Mahatma Gandhi in his sedition trial speech in 1922 in Ahmedabad. And I have more time and I will show you with his additional time speech were the Gandhi spoke extremely uncompromising word about the terrible conditions on which the people of this country are in and the government. He actually used the word prostituted itself to the interest of the exploiter. He really attack the government. He was prosecuted for the sedition and was produced before judge Broomfield who convicted him because Gandhi pleaded guilty. Broomfield was very courteous judge. He said you are pleading guilty and I am no one to judge someone like you but I have to do it and how did I give you sentence and he refer to Tilak getting six year earlier and he said OK you are also great leader, Tilak got 6 years, so you should will also get 6 years. He apparently broke his pen and ended the matter. Now, if judge Broomfield had actually reflected and considered as Mansfield said that what are the Shathi Mulya behind the empire? See Britain had a big argument between empire and imperialism. What is the way forward? They lost Unites States and the loss of the Unites States in last 18th century has counted a big debate that how do we ensure that we don't lose more and actually we continue our success. One group said that the best way to do is to ruthlessly repressive and that is called imperialism. We should have imperial power. You lost America because you are not imperial enough, You keep India if you imperial enough, you know be tough and violent and suppress them. The other group said no, they have to build an empire. Empire the place where everyone has equal rights. Being will set those values, those rights and whatever the values and rights we set will be equally applicable to all the members of the empire including us. And empire must not be based upon suppression and operation because it is not possible global empire where you are suppressing the rights. So you have to actually ensure that there should be good governance. And people are supported and then they will support us and we will move the world. And that's the way to rule the world. That's debate take place.

Because it is not possible to implement the imperial argument on the global scale. Under the empire argument everyone was entitled to Justice. Equal rights. That's why from the empire argument we got the penal code, we got the evidence act, we got the number of progressive piece of legislation, more than pieces of legislation. And got more than more modern idea than imperialism. If judge Broomfield has been aware of the core fundamental values of the empire, he should have done what, he should have thanked Mr Gandhi to having brought to the attention of the government about all these activities are taking place repression, operation, denial of rights that Gandhi has said the European are getting justice where Indians are denied Justice. System.. He was of the word racist. These are the wrong things, we have to correct them, you can't plead guilty we are discharging you. Calling the Chief Secretary to make sure that happens because this is all inconsistent with the values of the empire. Right. And he should discharge Gandhi. And understood what the real value of his empire was. And not really behave like a clerk were he said this of the law, this is the charge, he pleaded guilty the way only to mean case to sentence. This is actually what he said. You plead guilty and the only job is to sentence. He acted like a clerk. And in the process of handed over the flagging campaign of Gandhi, a great boost. There are people who said that Gandhi wanted to be sentenced so that he could revive the freedom movement. And in fact when Lokmanya Tilak sentenced in Bombay when he came out he told somebody that this one punishment to me is worth thousand agitations and struggles. So, they all were happy to suffer that punishment. So that is one example I gave you. Why the judge must have in deciding a particular case, even in the magistrate Court while sentencing someone must reflect what are the real values, Sthai mulya of this republic which gives me the power to be a judge. And ultimately we should realize that Stahi mulya that handle the judicial decision is ready to promote freedom and equality and Swaraj of the common people of this country. The Republic is meant to be an instrument of powerless against the powerful. And once you realise that so, my last example and that gives you amazing result. This is the favorite example of mine. It is a Delhi High Court judgment Ram Lakhan V/s State of Delhi. Ram Lakhan was a very.. beggar and the Bombay begging Act is applies to Delhi. So, he was somewhere of standing in Delhi with his arms outstretched and Anti Begging Party Caught him. They found something 20 rupees or 30 rupees 10 coins in his pocket. But nobody

saw him receiving anything. They took him to the beggar's Court. The beggar's Court sought witnesses. He is soliciting arms they said. Actually it's not an office, it is not a criminal statute. It is the prevention of begging Act. It is supposed to actually help and rehabilitate the baggers but Magistrate actually use the word conviction. So he convicted him of the offence committed under the act and sent him for one year to the beggar's home after taking the evidence of the officials. He appealed to the district Judge who also in a very short judgment upheld the conviction of Magistrate. Then it comes in legal aid appeal not as the writ petition to Justice Badar Durrez Ahmed in the Delhi High Court. Justice Badar Durrez Ahmed took a very different view and write what I think is an extraordinary judgment. He started the question what is begging? What is the purpose of this statute? He said that there are 4 kinds of begging. He said somebody is begging because he has been captured and forced to beg by a gang. There is begging because somebody is addict and cannot work and want to get money for his drug. There is begging because someone is utterly destitute has no other means of survival. Now, Lakhan was in this category admittedly. He has a wife and three children and have absolutely no source of income. He tried to get some work but could not get any work. One day passed, second day passed, third day passed. He can't eat unless somebody gives him money. No way to live or exist. So he sought the help of fellow human beings. So, Justice Badar Ahmed said that the right of a person to speak and seek the help from the fellow citizens in order to survive, he said is a part of the right of fraternity. And he said that the right of fraternity. He said the right of freedom and equality is merely a code of paint without right of fraternity. He said about the very unexplored right that this right of fraternity. So Justice Ahmed said this is part of your right of fraternity. And he said that right to speak to your fellow human beings and ask for help when you are destitute. Then you are not criminal, not alcoholic or something like that.. The 3rd category that you think that this is the best way to live your livelihood. You make a conscious decision I want to do this. I want to beg and make my livelihood. So he said that the begging act is made only for this 3rd category. It is not to punish them but persuade them to learn some location so that they can have productive means of livelihood. Number one need to send to the re-addiction center. And those who are trapped and enforced to be free and liberated. And those were destitute has a right to ask help from his Fellow being. Right to beg is protected from freedom of

speech under 19 (1) (A) and can be subjected to the restrictions that meet constitutional standards. So he overturned that order. And later found that RamLakhan has not been sent to the beggar's home but sent to the Tihar Jail. So, he said in a very nice sentence that no Society should allowed a citizen to reduce to a condition were you are forced to beg to live. But if that happens, you should not have to get insult the dignity by punishing them. Now, here the Ramlakhan was not violating the fundamental right/ values. He didn't go and rob somebody or assault somebody. The respected the Core values of ahinsa. In order to protect his very existence he done under Swaraj. So, when the judge understood, you cannot interpret the law in India where you have to offend these values. If you actually punish Ramlakhan the creditability of entire judicial system would have been weekend in the eyes of the ordinary citizen. Instead of extending help to him they are punishing him for the only crime of being impoverished. So, one of this example the judge was not aware of this fundamental values and made a big mistake that has actually cost the British India. These 2 judges, the one who sentenced Tilak, and the other who sentenced Gandhi. Very costly mistakes. And here is an another example of High Court Judge was quite abusive to Tilak also who said something wrong with you, you have to be sent to some psychiatric treatment. He was very insulting to Lokmanya Tilak. Whereas Boom field was very courteous, respectful except he would probably be not a trained lawyer or judge. He was like an IAS or IPS officer. So he behave like a clerk. I have no problem with clerk, but he did not behave like use and just. So here is a 2nd example of the judge would reflected on what are the core values. And said that this public is about compassion, about kindness. And the **son** values which Amartya Sen himself recognizes in his book. And are not accommodated within the modern ideas of the good ideas of Justice. How to take into account compassion and so on. So, Justice Ahmad also really deftly uses juris and necessity to come to the conclusion. He said when you decide under juris and necessity then even if you violate the law, there is no liability for it. So he was a very wonderful judge. He advanced the Core idea of Justice. So, let me conclude by simply saying that the measure of Justice as far as I am concerned is the way to advance the Justice as a standard of human conduct. The role of Courts, in my view is to understand constitutional Justice and a standard of human conduct which is expected from the constitution. Upholding the values of the constitution which you can understand in terms of the legal

values and legal expressions which include equality, dignity, liberty. And the values that underlying the principle of constitution of secularism, socialism, democracy. But to understand this better we can locate this in the freedom struggle which make the very clear connection. We must understand the concept in this way, that can advance in our country be ideas of Swaraj those who don't have it that is the weakest and poorest. The most marginalized person. And also to protect the ideas of nonviolence and the compassion for the weaker and poor. So, this Court refuses to take the away the Swaraj and refuses to promote violence not physical violence but any kind of violence and promotes compassion then I think the basic idea of India which derived from the freedom moment will be strengthen. And will provide us clear guidance how we can come to a particular decision and judgments. I'm sorry I have spoke more 45 minutes or so. I want to develop more detail idea. Normally I do couple of sessions before going into detail. But now the time is limited so I stop here, if you have any comments, corrections, judgment submit to that.

Participant (Hon'ble Ms. Justice Mridula Ramesh Bhatkar):- ..There is a matter of necessity. They eat a boy that is a very famous case R v/s I just slipped form my mind and they were convicted as the view was taken that they want to survive so they killed and eaten but they said you killed a boy because he is weak, you did not killed a man who is stout.

Participant:- (Hon'ble Dr. Justice P. Devadass) :-They justify that the boy was almost to die. He was also weak.

Participant (Hon'ble Ms. Justice Mridula Ramesh Bhatkar):- And we are saying necessity that is out of compulsion. The there are other necessity of life.. And Delhi High Court has taken a view which is very progressive.

Prof (Dr.) G. Mohan Gopal:- That is a very quick, useful and helpful intervention because I am making a very distinction between the understanding that what are the fundamental values that we should promote in our Justice, in our decisions. And 2nd question is what kind of argumentation and instrument are useful for that purpose. So, necessity was used as an argument and instrument to advance the idea and so on. But if it is not convenient then don't use, do something else. So if you want to use the knife use the knife, if you

want to use the fork use the fork. We should not say look I can only use the knife. I want to cut this guy because I want to use the knife. We should understand why we are doing it. So, what I said in the beginning with me that Justice is the why of judicial decision making. That I started with the Mansfield quotation. Considered justice but don't say it sometime reasons may be wrong. So I am saying that understand that every decision made by any or junior division judge is always motivated by some conscious or unconscious level of what is right or wrong and how do I go about it. Look up about you conscious about it and once you got your conscious about it.. In fact I have no time for that. I have much discussion with judge and developed what I described an alternative approach to the process of decision making in adjudication which I called normative judging were star with identifying the norms that you have to look into and the clarity of what is the value that I have to defend in this case. We have to be very clear about that first. So, Boom filed asked what is the value I have to defend in this case. I have to defend the value of the equal rights of all the members of the empire and if Gandhi is telling that that the Indians are treated badly, it is the violation of that value. So, I have to decide in a way that the values are protected and that this man is punished. He must be clear that the values are protected. Gandhi stared as a supportive of the empire. When he found that the empire is not actually practicing the values, he turned against the empire. If the empire is supporting his values, the problem of the empire was that there is sincerity of the values. They are only preaching these values and are not practicing them. That got exposed. My submission is that Justice is something that must be clear about as Mansfield said opportunity to consider what is the value of human conduct that I have to protect in this case. And from where does the value of from, it come from my personal morality, by community morality or it comes from constitutional morality. So I have to identify the value that comes from constitutional morality and constitutional values and then can say how can I decide this case that advances these values. Unlike Mansfield I would say that to write about those arguments that helps everyone, students, and we should have a public discourse on that. So, in some cases necessity may be important in other cases it may not. Say for example, the example gave one of the core value is ahinsa. So in any case, if a theft case to be decided we should take a different view were a thief simply taking food to eat to survive there I think necessity can be invoked as an argument as a defense

because it is stealing a food to stay alive. Why can't I take a piece of bread to stay alive. If I am get exonerated from murder to keep myself alive. So, surely I should be exonerated from taking a piece of bread if it genuinely for keeping myself alive. The value that should be advance if compassion, Karuna and it is important for us. I've not saying that it is important for the west. So my simple request that value of Justice is a very practical idea. And not an theoretical idea. Because it is an idea that can help us to ask a simple question, every case I decide I am advancing some values consciously or unconsciously. Mansfield said consider what are the value that are going to advance is important. And make sure that they are the constitutional values and not those values which are subjective and personal. Because constitution has been designed choosing those values very carefully because it want to create a very different kind of Society. But you may not on always find the right instrument to advance that value and that is the space for judicial creativity. Judicial creativity is not in terms of manufacturing values that you advanced. It comes only from the constitution. Judicial creativity is in finding the legal truth and methods and orders to ensure that these values are protected. Because Justice is only these values and nothing more and then only the constitution will get strengthen. I am trying to push the argument little more. So, for example the US constitution deliberately after discussion they said that all men are created equal. They excluded women, they excluded colored men. They said all white men are created equal. But that now understood to include women and colored men. Similarly in our country in our contest there is huge disparity and so we read in the same way and it differ as per the circumstances. And I cannot say a person who is stealing the food..There is no mensrea..but we have to conceptualize the idea of property. In say that theft that interesting thing that Justice Ahmad did that he went into the concept of what is begging? For me the corresponding discretion will be what is theft?? And say that they are there three four types of theft. And which type of theft is meant and which law is prohibiting and what is now happening is not theft. Then you are creating a space were people will not even get prosecuted. Otherwise some are prosecuted brought to jail, brought before the judge and then exculpated. I think, the law is applied to the situation where the person is being deprived to live. This is something to debate.

Participant:-- I have been reminded what is said about Justice Krishna Iyer said. Coming back to the issue of what is happening in the completing constitutional values and then how it has to be judged.

Prof (Dr.) G. Mohan Gopal:- Again a very profound comment. My own sense is sir we have to make a hierarchy of goals and objective of the different piece of legislations and the values that underline those goals. So there should be the hierarchy of values and goals and rights and then the application of those rights through law. So I would say that the highest level of constitutional values are have to be small in number. In any constitution. So for example, if you take US constitution life, liberty and pursuit of happiness. You are reducing it to the core of that three values. This is my argument. So, that individual Swaraj subject to Satya and ahinsa and further to get antyodaya and Sarvodaya. So, I said core set of values...

And in this academy when I came here there are many women work on the garden here and cutting grass. So, my first or 2nd day I asked them is there a toilet for these woman. And I was told that there was no toilet for these women. The only the whole day. So I said we have to create the toilet for these women. So the staff here work before me they said that we do it no problem. It would take 6 months, they have to float the tender and to do this, that. I said what these woman with do for 6 months. They have no toilets. So I said my family does not live with me, I live alone in that very large director's residence designed for a retired Supreme Court judge. So I said to them I have a solution, I live alone there. They will use the toilets in my residence till you believe the toilets. They said, no Sir this is not your residence, this is director's residence and they cannot enter into that. I said, that is my decision please inform them. Today and from right to know they can go and use the toilets whichever toilets in that place. They went and within half an hour they said there is one toilet which is somewhere there and they can opened and can be given to them and it was given to them. So, in a sense the solutions can be found if the values are clear. So that's why clarity of values is and what Justice Krishna Iyer Justice Bhagwati has said. They have the clarity of values. Why are they there, why are they judge? Simply to secure and promote the values that this country has establishes through the constitution common values and not my personal values. And that will then

pose a great challenge to us. For example, there is no difference between goal and objective, but practical difference is being how you deal with stealing in one way or the other way but and both are fine as end of the day we want to say that poor person taking a piece of bread, I won't say stealing bread but taking a piece of bread to live you know should not be punished. That there are many ways in which we can do that can be legally upheld and the person will not be punished. Now unfortunately for us in the state system, I can tell you this because I worked with executive branch also. It is only a judicial system where this argument can only be advanced. Now I have and more than an hour and quarter taking about this idea and you be very engaged and interested. I don't think that it is possible with any other group frankly. Which you're already doing. I am not saying anything new. What is said in the beginning, I was saying what I have learned from judges like you? In fact one additional district Judge, very experienced told me something very profound. He said sir, what you are saying that in every law is there always for a good purpose. What he meant by purpose that what will advance the values of the constitution. Challenge of the judge is to find the good purpose and advance it. Not to manufacture his own good purpose. But to find that good purpose in the constitution and say fine how could I advance that good purpose and come up with the legal argument. That's why I cited Ram Lakhan judgment a brilliant example to understood the purpose, and find the right argument to take it forward. Amrtya sen in his book said, the powerful idea in contributing the idea of Justice, he said that look at the consequences. And he actually write about the Bagwat Gita in a slightly critical way. Now he may get attacks if he comes here. He writes about Bagwat Gita and he said Krishna advised Arjuna to fight and that is to say absolute idea of justice. This is your dharma. Uphold your dharma and don't worry about the consequences. And then he fought. But there was lot of death and destruction in that violence. And so he said may be the Krishna's advice was not right. May be Arjuna was right because we had to care about the consequences of the actions also. You should not be selfish and seek selfish results for yourself. But you have to look at the consequences of idea of justice also. That's not my argument that's Amrtya Sen argument in his book. So that is different from a pure consequentialist argument where we are looking at the common goal. We are looking at how the judgment effected the weak and the disadvantage. That why the values system comes in. The poor and the

marginalized because they cannot turn to anyone else. They have no remedy. A very limited remedy...

Participant: - There is a law for homeless that no one should be homeless. If we are going to provide is through facilitating the law. But are the people amongst the rulers and they say they are better being homeless as per their choice and what is your problem with that. And they have a logic for that why they prefer homelessness....How did that lay the idea of Swaraj..

Prof (Dr.) G. Mohan Gopal:- Absolutely, Absolutely. There are lot of welfare legislations that takes away autonomy, takes away agency...Ya.. So if we are clear in the name of protecting someone we cannot take away the Swaraj. And that's what the purpose this republic has been created.

Participant:- That I Adar card

Prof (Dr.) G. Mohan Gopal:- Adar card case is little complicated. We have Adar expert here..

Prof (Dr.) Geeta Oberoi:-Time just flies away when you are listening to Prof. Mohan Gopal and Usha Ramanathan. These speakers keep us all engaged and engrossed in our thoughts. It would be refreshing to take a 15 minutes tea break and we come back at 12:15 or do you want tea to be served here. That can be done.

Participants:- No we want to go there.

Prof (Dr.) G. Mohan Gopal:- We will just walk around.

Participants:- Is it an end by itself or only a stop guard for it and if not if diversity is being eradicated what steps according to you should be taken

Prof (Dr.) G. Mohan Gopal:- Yes sir, Sir I will see the essential consequences of Swaraj. I must have the freedom to be what I want to be. So, diversity like a nature sir. It is constantly dynamic, constantly changing. It's not static. Uniformity is something imposed, artificial. It cannot last. But in India, it is a one to bring a nation 1200 million people who

has diverse because of Swaraj and United in the peaceful, constitutional method without conflicting, and resorting the differences in the peaceful and constitutional way. Actually if it succeeds it would become an example for the whole world.. And sir this is longer discussion and when Geeta will get a..but i am happy to..

Participant:- We have a lokayukta. There is an Act..

Prof (Dr.) G. Mohan Gopal:- My submission to you. You are far more experienced but basically we say the law is unconstitutional because it is not rational. Rationality as against the reasonableness. The definition of rationality is for the positive purpose. Any law which does not have a positive purpose is an irrational law and irrational law will be struck down. But every law has to have a positive purpose. It may not be implied in that manner. It may not be implemented in that manner..Sir, my submission is that ultimate without goodness all will be destroyed. So you have to protect. I agree with you but that's why we have to correct the lack of goodness which you see and make sure but I agree with you there's the law which lacks that. That's what you have to see the irrational law..Striking down the law for irrationality is a judicial standard and that what I am saying and not beyond that. Because of rationality is a positive purpose. Now Justice shankaran point is a complex issue there again very briefly not to take this further I think the word caste is a very misleading word. Its not an Indian word. When Vasco da gama people came to Calicut sir, they used the word caste. We have to look at Varna and jati. Jati is a dynamic, flexible, organic combination of people constantly mixing each other. it's a set of human forming groups, changing groups and there is no hierarchy like. Varna according to many scholar, it is a very recent idea. It is a political idea. It is hierarchal. It is not an organic idea. So we can see Varna is actually a barrier to Swaraj. So, we can certainly question that or any other idea that are barriers to Swaraj. But Jati is all Italian, American, we use the word jati means the people who was born in a similar community. People who share some relationships by virtue of their birth. Has dynamic people, these jaties are also constantly changing, moving. Ambedkar Rights, how India was a very Exonymous country, which is by if you just look around the state it will be very difficult to say which part of the country it comes from. Although we come from very different geographies...My point is to respect the right of each community and their own values as

long as they don't take the Swaraj. We respect everybody. Even if somebody believes in verna, let them believe verna system. But don't impose on others. We have to interfere and say when it is against the Swaraj. If I want to go and worship because many temples have a very interesting origin in Trivandrum which my home town. 100 of crores of wealth has been found. Now the local story is that originally it is the Temple of dalit women actually and captured by various groups and guru and then it becomes a big temple. So everybody feels that it is our temple. So, if we say you belong to this varna you cannot enter, people will say no you are not right. That's my Swaraj. You can't compel someone to go in that Temple. You cannot come that someone to go out from that Temple. So, let us now break for coffee.. Swaraj to coffee...Right to coffee..

The theme of the Session 2 was Contribution of Civil Society organizations in making constitution relevant to Disadvantaged Sections of Society.

Dr. Usha Ramanathan:- Hello. Well come back. I must confess that I'm totally delighted that I have become friends with you before I'm trying to do this. Because it is very difficult and confident to talk to High Court judges. Because judgments we all study and come back and talk to you about it. So it is little awkward. Happy we have that good moments before. I think since that was there in the first session we will go with the continuity. Okay, I will first introduce myself. I am Usha Ramanathan, I work on law and poverty and over the years it became that I work on jurisprudence of law of the poverty and rights broadly. So, there is no particular field that I should leave out of the work that I do. May be I haven't done much work on State, duty or something. But largely the idea is being, my approach to the subject is that we don't have theory of Indian law. Therefore we have to bang on the kind of jurisprudence that has been used in various jurisdiction in the other countries. That was of other kinds and preserved for other purposes. And we try and adopt that to our kind and purposes which doesn't work very well. And the other certain Specificities about our situations including our understanding for the rule of law for instance and what does that understanding for the rule of law does to the way of life , to the way we respect the law or not. That makes a huge difference. The fact that we have such a large number

of population that cannot reach out the rights themselves. And you can't become a constitutional citizens on their own. On this make a difference to jurisprudence that we need to have for our self. So, over a passed about 25 years, approximately what I worked on into is to approximately find out the different constituency of people and found that all jurisprudence and all legal theory comes when you're looking at law through a certain lens. We look at it as a lawmaker, you look at it as are law implementer. So the idea was to look at the law from the lens from those whom the law impacts or who can't or control or overcome the law when it acts against them. So, that are basically various persons in previous conditions of poverty. But it also include people whose issues like civil liberty issues like mass displacement. Like the Bhopal gas disaster and the whole idea of corporate venture because there are inequalities of power that are there..Its not to suggest that certain things should exist and other things should vanish. But it is to understand this relationship between the power control and authority. That being bodily approach has been taken for all these years. Now what I will be saying with come from that understanding. The one person that I found who talked that how to look at the constitution differently from the case law, you know constitution and case law method, and it did it very effectively to my generations people and the next generation is KG Kannabiran who some of few. He is from your Bar. He is highly respected by the people who do that kind of work. He was a lawyer, also Civil Liberties lawyer and among the many thing he did was to promote the idea of fundamental rights. And he talked about the idea of rights amongst all classes of people. Then you were adopting about Antyodaya and sarvodya, he dealt with the growth and his idea was community included and left nobody out. So that right reach everybody. And power should not be used to take life. And you know the very idea of life is itself is away from people. So he gave us a few, there is a book he put together his writings which is called the religious of impunity. And that we used like our ,you know Basic test were we try to understand our constitution. And he made some statements in this book and that I say one or 2 things before you that help us to understand the contest, at one point he said he started talking about the fundamental rights and what kind of fundamental rights are about and its reasonable restrictions. And he explained at one point saying that over the years it would appear that the restrictions have become fundamental. And the rights are what is only left over after

all the restrictions has been imposed. And then in discussions after that he extended it further to say that those rights that are left over after all the restrictions can be exercised with permission. So it is virtually like vanishing the rights and the consequences that has how that...develop is huge. The other statement that he made which we all take very seriously is this that he says the progression, ya ya please.. So the task that he gave to us he said that his generation has watched and disappeared themselves the rights. He said the fundamental rights are not fundamental because they are either ornamental or it is a type an extravagance that you can enjoy. But without them there is no constitution at all. And a simple statement which he made was very often it is mistaken that the constitution is about the power of the State. He said actually it is not about the power of the state, it is about the limits of the power of the state over the people. So if we keep that understanding in the minds then the way we look at our rights, the way we look at the relationship between the state and the people. And which also means the relationship of power between those who are weak and those who are strong then it will be much clearer. So, for instance he kept telling us that the constitution is about protecting that Prof Mohan Gopal also repeatedly said that it is about protecting the weak against strong. And the 2nd statement he told is that constitution is an anti-majoritarian document which means you don't allow the majoritarian point of view imposing itself on various classes of people. Now, in this circle in which we work they say that actually when you think about it, you say it is an anti-majoritarian and it is about protecting weaker against the strong. It comes out that the Corporates are the weakest, they need most constitutional protection. Because we just look what happening to them, they want to go and set up a Project, they want land, they want environmental clearance, they want forest diversion. But everybody protest and stops them weakening them with such a point that they unable to function. And it is anti- majoritarian which means you got to think about the minorities, who is a smaller minority than those who carries the maximum capital that they has. So, there is itself it convert into a joke, the way it representing, it's a lighter way of representing the problems which we are seeing and emerging.. There is a journey that all of us has to make, many people, many community has to make, specially oppressed people has to make being slaved to becoming subject. And from being subject to becoming citizens. And in all our conversation you say and if you think that you acquired citizenship then

don't think that can take it for granted. Keep battling it to make sure that you retain what citizenship offers you. Otherwise, you quickly slide, may be not all the way to the slave which many people do but even those who don't reach.. or become subject to the State again. And the constitution is not made for that, this is a logic by the people called as civil servant and by somebody is called a public servant. They are not masters. And you must understand what the constitution give us. So this is set of framework which is understanding how you treat.. How you read the constitution in the context of large masses of people who were otherwise among they dispossessed. You know, how you read it. The 2nd thing that I want to.. That it comes from the example that Prof. Mohan Gopal gave of Gandhi ji trail. And I have slightly different opinion on that when the sedition trials happened Gandhi told the court you do what is your business to do and I will do what is my business to do. I believe that this is unjust law. So it was a battle against unjust law. And he said that as an Magistrate if you think, if you recognize your work as being enforcing the law then you do what you have to do and I will do what I have to do. Now, at a metaphysical level I understand that every person must have a understanding of a constitutional value and find that way for bringing that constitutional value into judging. There is a little danger in that. That there is a especially after you started having your own constitution, we have our parliament, we have our public debates and many things. Courts have been said to be a forum which is more democratic than any others. Because everybody's case at an individual level have to be heard before a Court in a courtroom. But we also know that most of these hearings that happen, happens through the medium. You aren't not hearing the people themselves. And in that medium there are many things that get lost. And one of the problem that I found that lawyers really don't know who they are representing, they don't know how the live; and talking about the cases of persons of poverty of previous kinds. There is homelessness or it is people custodian of different institution. People who are the, who has been left out as the, or the person in begging for instance or in all those categories of people and they masses of people.. Lawyers don't know how they live. I had a very interesting experience, once I was evaluating a programme that was happened in Orissa. And there was in lawyer.. The programme was this that the lawyer will be placed with an non-government organization for a year and he will be getting stipend for it. It was not High Court lawyers or Supreme Court lawyers, it

was the district Court lawyers. So, they would be placed. And in this case it was a man and he was given a stipend and he had to go to the NGO whenever they found it mutually convenient and he would help them to understand the law and the legal framework on what they were working. They were working with child labour, they were working with trafficking, they were working with number of issues and they did not work on tribal issues. So he would go for that and the NGO in turn will be using him to the field. When I went for the evaluation, he said from the beginning Madam I could not go because I am a lawyer and as a lawyer I can't go to my client. It is an ethical for me to go to my client. Client has come to me. So he said that I don't leave my room. They have to come to me and I will deal with their case here. Then he said but you know this NGO told me that they are all tribal people at some place, come and talk to them about the constitution. So, I said all right it is my own constitution, my own people, I will go and talk. And then he went and spoke there and he went I realise, he said before I went to that seen, people who have come to me with a problem I would first file a case because that's the only way I can get fees out of them I am working for them. Its not that I am not doing nay work for them. But I need to get my fees for which I have to file a case. Then if I am able to proceed with it that's fine. Otherwise, we will try and negotiate it, negotiate out court settlement and finish it off. He said but after going and seeing how people actually live and releasing that even that what I was suggesting it that they have no ability to give. I changed my approach. So when they come now I evaluate have ability, he has of course not changed the fundamental approach but he said I evaluate whether the person has anything at all to give. If they don't have I help him to settle and negotiate it outside the court to myself. So, when we have public interest litigation, it bring possible to bring the causes of many people to the court, we realize that the people bringing the causes to the court those who are arguing in the court room has to inform you as judges about what is happening with the people outside. Are themselves unknowingly ignorant about what poverty really is. In the morning discussion I have noted one thing that poverty is often said to be nuisance...most of the situations in the context we set up were the poorest are seen to be nuisance. That one of the common and the most benign way which it is characterized. And there is the whole concept of illegality. So, we found that this idea of illegality is pervaded in these two words I have heard so much in my 30 years are illegality and

encroachment. People are either encroachers or they are illegal. Now, the ability to be legal is not a constitutional right. The ability to be legal is a physical value. Whether we have the economic capacity to be able to be legal. So there are many people who cannot afford legality and therefore are dropped out as illegal and as encroachers without the State taking any responsibility for them. Multiple kind of ways of understanding law that we have done but about that later but I was thinking on this question of law and how far should judges move away from black letter law and what are its implications to do that. Because we found that there are certain kinds of things to look at when we are looking at the how judgments get made... judgments can be made on principles. But the principles is very often, the principles that each of us revises for ourself is very often not based upon knowledge. Because it is very difficult to know everything and everyone. And context of poverty is really very difficult to understand for which one has to step out and see various places. It is very difficult I know. But sometimes I think, never mind maybe you need to know it. To Get up at 1 o'clock at night and see were the people are sleeping. And why that they are not getting into the night shelters which exist. Just to get an understanding what this all about. And I just want to pause and tell you a little episode that happened when students from school in Chennai has come to Delhi and they are from one of those schools which you know is a liberal school were they send their children out to try and understand what the world is about. They went to Rajasthan and sometime to some non-governmental organization, then they came to Delhi and we have a meeting with them, they sent to see beggars home and the night shelters. They came back in the evening and in the discussion they were asked about to say what you thought about it and one of them said he is speaking on behalf of all the students. He said I want to confess to be very ashamed because the same route, the same place where people have sleeping on the Street, it is like a flyover and it is ledge and people were sleeping on the ledge. He said that we passed by in the morning and I believe that they were in the morning they didn't even strike to my eye. It was only when I was taken latter in the day and shown them they were there then I said oh but I think they were in the morning too. So there is a way were certain things don't even get registered with us unless we go and look into it. So may be given specially the context of poverty and disadvantaged that we have in this country it is important to get out and asked to look at some of these things. So what I find

that even in that development of the principal there are 2 elements which play a big role. One is prejudice. Most of us come with prejudices, that I've seen in so many of these judgments, there are some judgments where Krishna Iyer people are there at time..Not even bad people as judges I shouldn't be telling you this but I am saying that when I read some of the judgments I know they are not bad people. But they have not just got what the problem is. So there is a deep prejudice especially in the context of poverty because one of the reasons that I find is the idea of overwhelm. It is such a big problem that you feel that you cannot deal with it. Delhi High Court judgment for instance they said that you can't, use to have a policy to resettle slum dweller. You can't just go and demolish their home. All you want to have a process by which a victim from some public land. But you should also recognize that they should have a right to housing, that have the right to shelter and you cannot throw them out. So you must have resettlement colony or places for the resettlement and that should be reasonable with all set of parameters. And the Delhi High Court judgment in 2002 said if we wear actually resettle or the people who are in jhuggies, how long it'll take for us to do it. It'll take 272 years. So he said resettlement policy is rubbish and strike that down. So the answer to overwhelm was to do away with the resettlement policy because it is difficult to implement. But then what happens to people whose houses is being demolished. That is too big to handle and therefore illegality and encroachment become a way of excluding this category of people. So prejudice and the 2nd is pragmatism. Prejudice and pragmatism has a big role to play even in arriving at the principles. So even principle gets itself tainted by Prejudice and pragmatism. And that something to be very severe and avoided because we are dealing with people who cannot protect themselves. My understanding with the Court is that the Court is there to protect people who can't protect themselves and when the system is not helping. If the system would be helping them they would not be before you at all. So, that becomes important. In the cases where there is a certain compassion, certain kind of fraternity that you seek among judges this one little danger which you may want to guard against and that is paternalism. You know I will take care of them, they have my people. What I say is good for them. Some time that will not be true. Because you don't understand who they are. And the way the courtroom are structured, Supreme Court become inaccessible. You can't enter the Court now. So that's like another battle we have

to fight because it is no longer an open institution. But even in the high Courts, how many people can even get in. You have the whole slum area that's being demolished and five people are allowed in. It is happening in the language they don't understand. What is happening in the don't understand. It is not just the language whether it is English or the regional language but also the language of the law. It is very difficult for them to understand. And it's all happening among lawyers and judges. So it becomes a specialist's zone which people can't access. So there is a way in which, even that you know that in public interest litigation we were saying most damaging thing that happens if the appointment of an amicus curie. The point about public interest litigation is called going to hear people. People can actually walk in and tell them it's me and I am the part of that affected population. If you have not ever seen the bonded labour in their lives then you don't know that how much their stomach sticks to their vertebral column. Even these visual things are important for empathy to develop. And when that doesn't happen the good people sometime tried to get paternalistic. And the problem with paternalism is if it is done knowing a situation then it must not be such a problem. But when we don't know then we might end up making suggestions for instance children of prostitute women. There was a case taken to court saying children of prostitute women are being discriminated in the school where they go. So, then the Court said in the school they are having a very bad time so segregate them, separate them. And there should be a separate school for children of prostitute women. That was a bigger problem. It was then meant but it didn't understand what the ground situation was. You needed integration instead of which there was segregation which was suggested with well intention. But extremely misplaced. So sometimes these are the kind of problems that you would be forced to have because many of these cases that come up which concern the disadvantaged are not going to be cases where they have to be necessarily non-adversarial as far as the Court is concerned. However, adversarial might actually in practice. The court has to be able to lean in favour of the weak. We had a public hearing on torture.. And we have found a group of torture victim to speak before that public hearing. And in the discussion the person who is going to head the panel said that we must remember that, he was a retired judge. And he said we must remember that we are on nobody's side. We are neutral. The difference between the non-governmental person and a judge; he meant very well by saying he

should be neutral. And we are saying constitution doesn't ask you to be neutral. Constitution ask you to speak for and look more closely at the weak and support him through the process. You can't be neutral. Our job is not to be neutral. When you are looking at someone and you know it is a victim, you have to find out that whether at all he is a victim or not. But once you know there a victim of circumstances, victim of poverty, victim of abuse of power then there is no neutrality. There is a way by which we have find the remedies for the situations of like that. So that is one concept of things.

There was a discussion which is going on recently which is, you're talking about the Adhar matter. This came up in the Adhar matter. And it is a very significant moment in one sense, one thing that fundamental right to privacy is in question now whatever, but there was an another argument that was made that which I think at the Academic level it is important for us to address and that was by the lawyer who said that the poor, if they want the service more than they want their fundamental right, they should have the freedom of choice, to give up their fundamental right, to get the service more conveniently. This is the thing who will hear very often. There is a way in which poverty is seen as negating many of the fundamental rights there are and therefore the directive principles which are being inducted in to the fundamental rights it may be relevant for the poor. But the fundamental rights themselves mean nothing for them. There is a process, I am sure everybody is now deal with plea bargaining, most of you have dealt with some point or the other.

It is failed. It is failed. Can you just explain why and how?

Over the past 20 25 years there are two big problems that the judiciary has faced, the system has faced, one has been docket explosion and there are being all kinds of effort to get it down and I think that it is a really serious problem. We have to find whatever that means that we can do to bring that down. The 2nd is being overcrowding prisoners. Now for these two problems there should be various attempts to resolve this. At least to bring the problem down and not to keep it at such a high level. One of those for instance was that in all these smaller offences which are punishable upto 3 years, if the trial has not started in the first year then you can just close the case. You finish it and then that was exempted for few years and that was then overturned and then you can't do this. Then,

there is one thing happened which is called Camp Court. I think Bombay also had it for some time. In the prison area, you'll have the Court which is on the prison campus where only petty offences are taken. And in Delhi it was worked like this that if person confesses to the crime before the Magistrate then they will be let off. May be not the same day but after a week or after 10 days or whatever they will be let off. The ground was that you must be in prison for at least 2 months before you can be produced before the Magistrate and then be let off under this. Now, if the person is already being in the prison for 2 months for petty offences the probability that there may be anyone other than the poor person who doesn't have the ability to get bail through the regular Court system is very bleak. So, all of them are the persons in various conditions of marginality, whether they are completely poor or they are on the margins of legality or illegality that's a different question. And what are the kind of offences that would come, I have attended them three four years, everybody 3rd Saturday it would be held and you find that they have offences like found in possession of a knife, found loitering near early the station with an intent to commit an offence, stole a cycle, as per excise Act has more than four bottles of liquor, and they will be put away and after 2 months they will be brought out and they have a choice, you can either confess and get away early or if you think you are innocent you need not to confess but you will be put back in. Now, the problem itself, the very processes are the problem. In addition to that nobody explains to them that..I again going to pause but when the first time I went for hearing there were two lawyers and there was a Magistrate and these people who were brought one after the other with all these kinds of offences. And then at the end of the hearing, I went up to the Court Master who was preparing that record, I asked when is the next date of hearing, he said go and ask the legal aid counsel. I said where is the legal aid counsel, there was no legal aid counsel here. He said those two people. I thought they were the prosecutors. Because they were bullying the people who come there, saying you know what will happen if you come again. The Next time who will not be left out so lightly. And in Delhi there is an idea that everyone should go back from where they came from. It is a very common thing specially, for persons of poverty. So, they were told you will be given out one way ticket, remember if you come back you know what will happen to you. So these threats constantly being handed out. And at one time the Magistrate asked the question, he said you don't even

know for what you would have been accused of. What are you confessing to because they don't know the charge, he was asked to confess, he said okay I will confess but then he say I did not take the cycle. He said that was not you are charged with. You are charged with something else. And then the legal aid lawyer stood up to say Lordship, you know why this processes is happening, be now why it is happening, don't ask all these questions. So, it is a collusion with the system which we find deeply disturbing. And there is an additional reason because these convictions which are handed out, are handed out just like any other conviction which means that next time if they are picked up and many of the poor we must remember lives on the margins on legality .Very difficult for them to be totally legal and what constitutes illegality is also something different for us and different for them. Because we can afford various ways in which the don't need to be illegal. We can choose someone else to do the dirty work for us. Somebody doing that dirty work and get picked up. If I want much liquor in my house, I'm not go and pick it up myself. I will have somebody pick it up and then that person can get caught.. So it is idea of legality and illegality has got so acute I trying to deal with the system that you got own set of people who have convictions against them and they don't know the consequences. Now, the Assistant Public prosecutor who was there third or fourth month that I have went, she said this is not fairly at all because when these cases went to trial all of them would be acquitted. And this is what converted into a plea of bargaining system which is why in Delhi.....

Participant (Hon'ble Mr. Justice K.T. Sankaran): - Now, there is a chapter of Plea of Bargaining. But it has not worked properly.

Dr.Usha Ramanathan :- In fact, that was the interesting thing in the Indian plea bargaining system, they confine it to the offences which are punishable with less than 7 years. Know.

Ya, that's fine, but the point is that you have a pragmatic approach to how you need to dispense with your problem of docket explosion and I..

Participant (Hon'ble Mr. Justice K.T. Sankaran): -Madam, May I intervene, the problem of the person being jailed for two month or three month does not arise now because of the amendment. 167 Cr,P,C. says that the maximum period a person can be detained is

15 days and he has to be produced before the magistrate. This is one this 436 there is a proviso that if a person is indigent and unable to furnish surety, instead of taking bail of such person discharge him on executing a bond. You have to insist on it.

Dr.Usha Ramanathan :- This scan be done. It has not been done because many of us don't..

Participant (Hon'ble Mr. Justice K.T. Sankaran): - There is a further proviso where a person within a week of his arrest there is a sufficient ground for the officer or to the court presume that he is an indigent. So these are all benevolent provisions.

Participant: - What she is saying that what I see in Rajasthan people who get picked up for petty offences they don't even know what offence they were picked.

Participant (Hon'ble Mr. Justice K.T. Sankaran): - I will say one thing. The problem is not with the provision. Problem is.. Now I'm saying this one thing, no such cases and will happen in other state. Why?

Dr.Usha Ramanathan :- There are many things which don't happen in Kerala happens in other states. Actually not in that, I'm looking something different, in a sense that there is a certain stimulus that works in making in making of the law and that way in which the law gets implemented and enforced. And they seems to operate the ways were what is for the system. So we need to keep watching for that and we see this happens at least I watched it form 1997 systematically and in 2005 when it came in I have also seen..even in plea bargaining in Delhi they were told that they shifted from camp court system to this system and said that when we hear magistrate has been told to dispose of as many cases as you can through plea bargaining because actually no investigation happens in petty cases, there is nothing to present. There are no witness. The found that the criminal law at that level is being used as a measure of social control of the people who are on the margins of legality. And that is always the poor. So they get entangled with the law because the poor as law breaker. Most of them have not broken the law, they just get picked up as law breakers. That is a completely different thing. So that phenomenon I am focusing on. The rest of is of course and I can tell you

Participant (Hon'ble Mr. Justice K.T. Sankaran): - There are several factors contributing first the people are not aware of their rights. Then the media, very powerful. Third thing state judicial Academy should take their judicial magistrate to be sensitized. No man can be sent to jail if he is entitled to bail.

I to give you a happen story on this 3 to 4 years back then I started my conversation with Delhi judicial Academy. The Magistrate always start telling me, you are talking constitution that has nothing to do with us. We are here only to enforce the law. It took number of times where you have to tell them that you are bound by the constitution. They are not be able to strike down the law. How you read the law in the context of the constitution in the way which you applied. And you can do it perfectly and legitimately without any consequences from some supervising authority. Last month when I went back again, see after about 3-4 years. It was a completely different seen. I don't about Ram Lakhan and beggary Act. My throat has gone completely soar and initially there was certain amount of reluctance, now when we told Ok tell out the issues which you want to discuss. The beggary Act is the first thing that they mention. So I find that these discussions have a huge impact on improving understanding of grounds which you mention. And what was happening, it otherwise called Sociology of law, the consequences approach. That what happens to your judgment, what happen when you act in a certain way that can get presented back to you. Of course I feel inadequate doing it because I am only an observer of what happens in those fields. But I still think it is important for us to get out. Yesterday we had a discussion on what has to be changed in the nature and how judges are supposed to act. And we said that 30 years, 40 years, 50, 60 years back people would say judges have to be in the ivory tower because they should not be hop nobbling with anybody, he should not get out, they are better like arbitartors, like umpire and be there listening the 2 sides and make a decision. That has changed dramatically specially in understanding the past 20, 30 years. When you say that if you don't know who you are deciding about and if you have no experience at all then you lose your ability to do it. Or you don't acquire the ability to be able to do it. So, knowledge of economics, knowledge of Sociology, knowledge of people, the idea of anthropology, has all entered into this discussion. Which is in National judicial Academy when Prof Mohan Gopal came in here he brought everybody working on different fields. The people who are interacting directly

with them. Some of them come and speak who himself come from the community which is affected..And the kinds of problems they had. That changes to certain extent that way in which we appreciate the problems that are around us. One simple thing you know victims of disaster are invariably seen as a barrier or a problem. They are thorns on the side of administration. They were no sympathy for the victims. Then victims are seen as whiny people who are constantly coming and complaining. That's because we don't even know what being a victim is. In the idea which Prof Baxi has for the what victim is where he said that the is not just our victim is not just a victim. A victim is a bundle of victims within that victim because number of things happen. For instance the constitutional value of dignity is often deprived to a person who become a victim of some kind of disaster. So if you go Bhopal gas disaster site you would find this struggle is partly for compensation, partly for health but a lot for dignity saying that we are the people who suffered and asking for their dignity back again. There is another kind of notion came in the form of civil liberty, in relation to victims but also in relation to power. Where it is said in Punjab were all those disappearance that happens and mass cremation case. There are professors in couple of other universities who tried to figure out what happens when you have disappearance. We talk about torture, we talk about disappearance or hostage taking or whatever, we only referred to that one phenomena but it is a process through which that phenomenon happens and some of the paths is greater than the goal as presented to us. So, there is first an illegal detention, there is an illegal arrest, there is torture, date of his transfer from place to place. Without informing anybody there is non production before the Magistrate. And then, there would be illegal enforced disappearance possibly disposing of body without anybody know. It becomes state practice and when it becomes state practice you need to be able to assess what is the extent of damage because when you dealing with the case here, you are not dealing with that one case, you're dealing claiming of state power. And that's make more important. Once that the awareness is there it helps us a lot. When we have to go back into the field because the things that we find get constantly attack one is poverty and the other is dissent. Poverty is the fact which we have to get out off. And dissent is a necessity in any democracy. Both comes to you to protect. So, I will stop here because it is already 1:15 here. Geeta is very particular of time. And then when I to be out I have to face her.

Participant (Hon'ble Mr. Justice K.T. Sankaran): - A..said in 1960 in a public statement. If a man and a poor man comes before a court, the court will always lenient to the ..

Participant (Hon'ble Ms. Justice Mridula Ramesh Bhatkar):- All of us we come from either from middle class or from rich class. And very few of us extremely rare come from the poor class. It is not necessary to understand a particular problem you need to belong to that class. Otherwise male judge did not understand the problem of a victim of a rape. That I don't want to say. But still we are coming from those 2 classes so we don't have such exposure. We need to be more socially connected. Not as a being a judge but that worldly wisdom and the exposure I think it lacks. So that one quality of the judgment is to be kind. That kindness I think we need to cultivate more...

Prof (Dr.) G. Mohan Gopal:- Just of the factual matter on sedition trial think you said what all can I project it because I had that with me. Gandhi ji has made a very very powerful and interesting argument, what he said I just read it to you; I'm reading the last paragraph; the only course open to you judge, he addressing the judge is either to resign your post and disassociate yourself from evil if you feel that the law you're called upon to administer is evil. And that in reality I am innocent. Or to inflict on me the severe penalty, if you believe that the law and the system you are administering and good for the people of this country. And that my activities are injurious to the public. So I have analyses at dept. to say that Gandhi ji is actually, firstly we must remember specially at this time if we take is whole carrier he is longer as long he was a lawyer he was a political leader. So he was a very experienced lawyer. At this stage he was much more a lawyer than a political leader. This is 1922. So he was speaking with the lot of knowledge about the legal system. And he is basically saying, he is not saying that I am saying the law is bad. He is saying judge you decide. If you think that this law is bad, evil, not good for the people of this country, then you resign your job. If you think it is good for the people of this country give me the highest penalty because then I have done something against the people.

Participant:- Because of paucity of judges, resign kar dege to baut Dikat ho jaige.

Prof (Dr.) G. Mohan Gopal:- Some what I am saying is, the principal that I extract from this is that a judge can only act in the interest of public.

Participant: - What you're saying was we are in favour of poor people are less. Then we have legislate. This is what I'm saying

Prof (Dr.) G. Mohan Gopal:- No No let me come to that in a separate argument. I am simply saying as a judicial function you cannot act against the interest of public. That why he said that you have to resign. Why you have to resign that you acted against the people you have to resign because that is not the function you can do. So Gandhi is not saying the law is good or bad. If you cannot act in the interest of the people you have to quit you cannot be a judge anymore. Why because a judge cannot against the people. You decide that. So the role of the judge in judging by definition is only an action in the interest of people. Now that has to be derived from the judge what is good or bad. And for that you have to bring the constitutional framework. It can't be subjective because as a judge I may believe that killing someone is good for the people. Can I therefore do it? So, you have to have an objective standard and not subjective standard to decide what is good for the people or not good for the people. So, I think he is making a very well thought through written statement. It is not extempore. It is a written statement. He was making a very powerful argument. I think what the role of a judge is. Now last point there is an example I always use is Roko mat jane do. You say Roko, mat jane do or Roko mat, jane do. Right. So you have to read it in a way. See the law.. there is no cauma.. So my point is law is only word, if you can read all men are created equal. It is the say all men and woman created equal. So, it is how you read the law. So what he is telling the judge is you must always read the law in the interest of people. And what he is referring in the speech is poor people. The poorest people. So a judge should only be the law in the interest of the weak and disabled because the role of the judge is the Guardian of the powerless against the powerful and that is in a democratic system. In the feudal system the judge is the protector of the powerful against the powerless. That is a big difference between a judge in a democracy and a judge in the feudal system which is of such importance that the former Chief Justice of Australia has written a whole book on a judge and a democracy. Because he says that the rule of the judge in democracy is fundamentally different from the rule of a judge in an authoritarian regime. That is the point I think Gandhi bring forward.

Participant (Hon'ble Ms. Justice Mridula Ramesh Bhatkar):- There is a book on cases that Gandhi did in South Africa by author called Charles DE salvo. It is a brilliant book. How he develop as a lawyer. How he practiced in the court.

Prof (Dr.) G. Mohan Gopal:- As a lawyer also he practiced it. He never acted against the people. Gandhi also told at the end of his life cultivate resistance. So I always say that the court must become the legitimate channel of the resistance against authority. That's the role of the court. Thank you.

The theme of Session 3 was Movement away from “Public Function Test” laid down in Ajay Hasia and followed upto Pradeep Kumar Biswas

Hon'ble Justice C.K. Thakker:- Initially it was in England, you may also aware of it about Lord Denning. Lord Denning was several time was reversed by House of Lord's but so far as India is concerned India Supreme Court has obvious followed Lord Denning's. Say for example I think give you some cases decided cases. Say for example phonographic film shown on TV, now a person goes to a court.. I am not in PIL. PIL is recent development which we will go later on but apart from PIL, suppose a Professor files a writ petition that this should not happen and this must be stopped, some injunction should be granted maybe by me by way of civil action or may be by way of civil suit. Now, normally what is in law of tort, law of nuisance, you must be aware the provisions are there. If normal injury or normal inconvenience is caused to a person you, me then you cannot go to the Court of law and have to establish some special damages of some special costs. Now when such questions came up before the Court the Court said that no, if the Professor is not aggrieved, nobody is aggrieved... Suppose I am in my house and I am staying not only with my wife or with my friend also living with my daughter, I am living with my sister or mother and if phonographic film is shown say at regular hours etc, I can definitely say to be an aggrieved person. Several such cases came. You know thereafter it was said that if a person is merely a stranger, busy body or inter law firm, these are the expressions are used otherwise everybody can come to the court of law. So I want to say this that by passage of time the law developed and it was liberalized. Regarding filing of the writ petition's you know that this 226 and 32 does not say anything. Normal principle of law which was followed in 1950 and even now in 2015 is that the instrumentality must

be State within the meaning of article 12. Now article 12 you must be aware that it is an inclusive definition and interpretation of statutes also you know inclusive definition means that it may take it may take within its something more than expressly stated. Suppose it states that it includes legislature, includes government though judiciary is not mentioned but then it can be said that in appropriate cases it can be done and so and so etc. At one point of time in early 1950 that expression any other authority.. It was used as ejusdem generis. That also you know ejusdem generis means what preceded, government you know alright then, legislature is there then any other authority means along with or something like that. In fact judgments of there of some High Courts. In a leading case of Supreme 1962 Supreme Court said No, it should not be read as ejusdem generis. You'll have to consider what type of law or institution is there. In fact I distinctively collect that I was in first LLM. And In Rajasthan state electricity board and if I do not forget it is in 1967 Supreme Court. In 1967 Supreme Court Rajasthan state electricity board was held to be the instrumentality of the state within the meaning of article 12 of the constitution of India. Our Professor said that look Rajasthan state electricity board is held to be State. Then we have seen several cases Sukhdev Singh, ONGC case, Ajay Hasia, Som Prakash and several other judgments came and then Bangalore water and several other so much so that from Gujrat the matter has gone the trust.... Yes..and then the ..Mukti Morcha it was also held that it is a state under the meaning of article 12. And then several test of like Ajay hasia Test also that we will be discussing. Then come natural justice. As laid in 1963 after about 13 years of the constitution and in the establishment of the Supreme Court in one case the Supreme Court has said the learned Counsel for the appellants states and contend that principle of natural Justice were not observed but it forgot that it is purely an administrative action. And if an action is not judicial, or quasi-judicial within the meaning of that 1935 R V/s electricity Commissioner, if you are aware 1934. Yes. If it is their then obviously there is no question of application of principles of natural Justice. And hence their contention is rejected. And thereafter we have seen Rig V/s.. Again.. But several thereafter judgments Menaka Gandhi, I will not go with all those judgment but we have seen that all most in all cases principle of natural Justice were observed so much so, sometimes I say as a student of law, I am not saying that I was the judge or I am a judge, I am a student of law, sometimes it is very difficult to conceive a

situation, conceive an order which is passed by a Court. For instance, I will give you one instance, what happen a lady appeared in the examination, University examination and after she appeared and papers were written and were sent to University, somebody might have complaint that she was not in a position to attend classes because she was out of India. And her result was withheld. It was declared. And they said we will not declare your result. Nothing, no opportunity but they came to know that she is out of India and would not have attended classes. When the action was challenged it was said that it was perfectly all right, our action is in consonance with law. And in any case the Court can also be satisfied because you must also be aware that some attendance is required under the law. But she was not in a position to attend those classes. The Court No and then said alright we will give opportunity. If the principle of natural Justice have been violated it envies in the mouth of the person who violated the principle of natural Justice or who have not observed the principle of natural Justice, to what prejudice would be go to him or her. Now, to some extent again I am saying I will be wrong, you may have your own views about it. But according to me in such cases what should the position would be, that all right and thereafter this is the law now. Again I may tell you that the principle of natural Justice have not been observed, obviously the order must go. The order has to be set aside and what this to be done alright, this order is being set aside and again an appropriate action can be taken after giving opportunity, after issuing notice and sometimes it may be very difficult. Justice Krishna Iyer saying that it is not like a bull in a china shop. Sometimes such a situation say, in fact some instances are also their. Flight is about to fly, flight is ready, he is boarding the flight, he is having passport, he will go abroad. It would be very difficult, in such circumstances you can say that all right there may be post decision hearing. Or may be some hearing which may be taken afterwards but for the time being, we will hold or we will tell you don't travel. In fact again we have followed English law. In English law thereafter it is said that no there some test, for example prejudice test. It is true that it should not be empty formality. It is also correct if you have prejudicial issue then in that case giving of the notice, affording opportunity would not serve any purpose. But if you're open, if you want to really comply with the principles of natural Justice and which is very well known to say fair play action in that case the opportunity must be given. Then after this prejudice test had been developed.

Several English judgments are there, several Indian judgments that there. In fact, I was there in the Apex Court, it came before our Courts also. We were hearing the matter wear in a lady who was working in some PWD Department. From a particular day she ceased to attend office. And not for a few days or few months, about 11 years she did not attend the office. So, everybody thought that she has left the service. After 11 years she went to the office and wanted to put her signature in some muster roll, some book is there. You must be knowing that normally the practice is after 3 years the officers, the peon on staff is transferred. Almost everywhere this is the position. So nobody could realize that who and lady was and obviously if I come here and take some register, obviously I would be prevented. That what you're doing. She said that I'm working here and she was not allowed to sign muster roll. She went to High Court that my services is terminated without an impliedly terminated without issuing any notice, without giving any opportunity of being heard. Notice was issued, affidavit was filed and it was stated that on particular day she left the service, several letters were also addressed to her. Some did not come meaning thereby it has been received. And some came back. And that she has left India. Probably she has gone some Arab country and there for about 10 years and then there was some dispute and thereafter she came back and want employment here. And before us also the same argument was advanced. And it is said that this is the position. No opportunity was given. No notice was issued and how my service can be terminated. High Court said that there is nothing so far as the report is concerned that in fact you were interested in service and you have gone there several times though assertion was made. You should have come earlier also. And the Court has said that even now also, you can show something. He also reiterated what High Court said that even now before the final Court if you have something, show to us. And she was not in a position to show and thereafter it is said No, in that case we will also not interfere. According to us the High Court cannot be said to be wrong. For that prejudice test, limited extend. Prejudice Test was also applied. Again then there are several principles also came to be developed? Say for example doctrine of estoppel. Now here also estoppel was very well known. Even in The Indian Evidence Act section 115 and 116 if you're aware. General principle is section 115 and tenant landlord is 116 etc. these are very well known principles. Earlier the law was that was something like section 53 of Transfer of Property Act, section 53A speaks of part

performance and it was said that it should be used as a shield and not as a sword. So if you are put in possession though there is no registered document, but say for example agreement is there, in pursuance of that agreement you are put in possession then he can protect your possession as a defendant not as a plaintiff. Before the first time the question arose, before Lord Denning why it could not be used as sword also. It can be used as is sword. If there is an estoppel, if something is done to me, if some promise was given to me, I had accepted that promise, it had acted to the detriment in pursuance of the said promise then it can also go to the Court of law. Not only that he can go to the Court of law, I can also go to the Court of law and defend my action. I can be plaintiff, I can be a petitioner. Several judgments also came that all right you can you can become petitioners also or plaintiff also... Doctrine of legitimate expectation is, it can also be said as comparatively a as in one judgment it is said that it is a new recruit to this jurisprudence. It was also comparatively a new principle. It is not that you can expect everything but legitimate expectation means in due course of time according to your service condition or according to your position, if you think enough in a particular way, in a particular manner, then the law say it is right. In fact in judgment is also including High Court judgments, Supreme Court said that say for example you are a senior most High Court Judge. Then the Court has said then you can legitimately expect that you may become Chief Justice. In a given case you may not become, there may be something, some other factors have come in your way, that's a different thing. But it is something like legitimate expectation. So, there is some reasonable certainty. Now this is also a comparatively a new concept. Unjust enrichment that also you must be aware that unjust enrichment means a person cannot be enriched at the cost of others. Now this mainly, of course there are other principles also. But this main principle is invoked in either in service jurisprudence sometimes and mainly in taxation matters. Now, you know, direct taxation and indirect taxation. In case of direct taxation, normally such question generally would not arise. For instance, the income tax authority says that you are liable to pay "X" amount. It was competent to pay it paid it. It challenged it that no it was not X but X -1. Over the weekly my petition, my appeal, my application whatever is allowed and it was stated that amount will be refunded to me. Because I have paid it. But suppose it is indirect tax, suppose it is sales tax, suppose it is octroy, suppose it is custom duty. Now, if stay is there it is a

different thing. And if you challenge that law. But you recover from customers, you recover from consumers. And you challenge it. Earlier the judgments given by the highest Court also that all right if it is challenged and if it is finally held to be made, everything must be restored to you, everything must be returned back to. One can certainly say, what is the logic behind it. How that amount will be appropriated by him..In Shiv Shaker Lal case and a well-known judgment of Mafatlal industries, you must be aware. Supreme Court said that No if there is evidence that he has not passed over to the consumers, obviously he is entitled. But if he has passed over then in that case he cannot not retain this amount because it is something like unjust enrichment. And some way has to be found out to be paid in some special account or in public treasury so that it can be used as a larger interest. Power coupled with duty that judgment Rat Lam municipality case you must be aware that some time it is stated that government may do something, authority may exercise the power. Now, it is said that May means not shall. English language is very clear. May cannot be read as shall. May cannot be read as must. But then there are certain cases, there are certain situations, though the power, the enabling power is conferred, conferred but on the facts and circumstances you are required to exercise it provided conditions are satisfied. ..A very well-known judgment I think English judgment, 19th century or 18th century it was held that in such circumstances you will have to exercise that power.

Now, look at part three and part four also. You know that part 3 is the fundamental right of the citizen/persons. Part 4 is the directive principles of state policy. It is also very well settled that part 3 justiciable and part 4 is not justiciable. If you bought to earlier judgments, of 1950 early 50's. It was said that something like, compartmentalisation. Part 3, Part 4. Part 3 justiciable, part 4 is not justiciable. If there is any conflict part 4 must give way to part 3. And part 3 must be observed. By passage of time I think in 1976 onwards after 1975, it was said as far as possible, see it is true Justiciable is part 3 and non-justiciable is part 4 for in case of clear conflict between the two obviously part 3 will have to be observed, Part 4 will have to give way. But as it is said in interpretation of statute, there also you must have heard this several times that when a statute is made that statute is made by a competent legislature by Parliament and it must be read as a whole. It must be read harmoniously so as to give effect to all the provisions of law. It is said that with

the same pen and ink the chapter is written or the book is written or that Act is written. Now, if that principle is to be applied then obviously part 3 is written maybe earlier. But then the part 4 is written in the same pen and ink. So, as far as possible part 3 must be so interpreted that is fundamental right must be so interpreted, so as to give effect to part 4 also. And if this harmonious construction is applied in that case as far as possible part 4 can also be implemented.

Then, again say for example article 14. Of course we will be considering this also. Article 14. You know article 14 speaks for equality. It says equality before law and equal protection of law. But look at the development as early as in 1952. And Anwar Ali Sarkar in that judgment it was said that if an action is arbitrary, it is violative of article 14. Now, strictly speaking and again for the time being we forget that we are judges, we are some enlightened law students, we are ordinary human beings, ordinarily say educated person; Now, if the law says or if a provision says that equality before law and equal protection of law doesn't speak about arbitrariness, it doesn't say that arbitrary action is illegal or say violative of article 14. But it was so held continuously Royappa and thereafter several Jai Singani, in service matter and several others cases it is said that if any action of the Court or any action of the authority is arbitrary then it is violative of article 14 of the constitution of India.

Again look at article 19 and 21. A K Gopalan in think 1950 or 51 Supreme Court. A K Gopalan, very strict interpretation that yes, this right means this right. Say for example, at that time you were aware that seven classic freedom was there because right to property was also there under article 19. So in 19 there are these 7 classic freedoms and for that purpose Article 21, life and liberty, the law developed and now as a matter of fact it is said that everything on earth can be perceived under article 21. Article 21 in the words of the Supreme Court is all pervasive. Everything would come. So, apart from life and liberty, two expressions have been used. What is stated is that the right to education, pollution free environment, medical treatment and several others matter. So much so that Chief Justice of Bombay telling me that the petition came to be filed by an advocate PIL and he said sir I am practicing advocate, I am practicing in the High Court and my main working is PIL and all those matters. My working method is that after about 11 or 11:30, first after

coming from court I take rest. After 11 or 11:30 I start my working at about 3 or 3:30 etc. and in that point of time train passes and disturb by working so in fact in that extent..and in Himachal you might hear that leading case of From Himachal Umedram Sharam. There was two ways and a river was there and the road was constructed upto that river by one passage for Taluka known as Tehsil and the other side was also by one Tehsil and there was no bridge. A petition was filed in the High Court, PIL and it was said that authority must be directed to complete this bridge because the right to road and particularly in hilly area can be said as part and parcel of right to life. And that held to be part and parcel of right to life. Of course, partly the judgment was set aside by the Supreme Court saying that High Court has passed the order was that the government would make the provisions for construction and it will report to the High Court etc. The Court said that there was some extent it is encroachment on the part of the judiciary because we are one of the organ of the governance; legislature, executive and judiciary. Therefore you must keep yourself the limits of law. And it what the court said is that would have not been done. In fact in Baba Ram Dev the right to sleep is also held to be part and parcel of the right to life and in fact right to sleep can also be held to be part and parcel of right to life. So, this is how the law developed.

Then again judicial review. See you know that judicial review and particularly at High Court and the Supreme Court level, one of the fundamental principle is that while exercising power of judicial review the Court is not concerned with correctness or otherwise of the decision. Legality or illegality of the decision. Legality or illegality is certainly open. Not the judicial review may be in appeal or..But the Court is concerned with process, decision-making process. If decision making process is bad in that case the Court can interfere. Of course Lord Denning has said in his book and according to me rightly said that there is some principle and which is very well known, you know and every law student must also know, that when a person or a authority has a jurisdiction, it has jurisdiction to decide the rightly as well as a wrongly. Now, as a lay man I can certainly say that No, this is not correct. When you have jurisdiction, you will have jurisdiction to decide only rightly. You cannot decide wrongly. But when it a jurisdiction level we consider then it can be said that when person has a jurisdiction, it can decide rightly and it can decide wrongly; if he had decided wrongly then some other remedies are available, may

be appeal or revision or writ whatever it may be. So, decision-making process can be challenged. Now in judicial review, in certain case powers are conferred only to higher Courts. Say for example, declaring of particular statute to be ultra vires, and constitutional. Now, that power is conferred only on High Courts and Supreme Court. Now, as you know this is totally unknown to England. In fact in the lighter way it can be said by Parliament can do anything, make a woman a man and a man a woman. You must have heard this expression also. And that also physically, in fact illegitimate children has been treated as one legitimate for the purpose of succession and inheritance. And it is certainly open to Parliament. So that concept is totally unknown to England. And that we accepted from America. Judicial review is very well accepted principle in America. Now, what is the ambit and scope of that principle of judicial review? It is said, and again I'm saying this is strict doctrine, the traditional doctrine, is that one of the fundamental principle in which judiciary must bear in mind. Judiciary cannot become wiser than the legislature. Legislative wisdom lies with the legislature. If any statute is challenged, if validly is placed before the Court, the Court will apply its mind, the Court will consider certain principles, the Court read constitution, the Court will read the relevant statute, and either declared to be as intravires or declared it to be ultarvires. The end of the matter. But then there also the law develops. And you can also say it as judicial activism. Sometimes it happens then Court also feel that the action which has been taken by legislature, rule-making authority or some such authority which is for the larger interest of the people/ public. Not that it can be saved and the Courts had accepted several principles. Say for example, one is reading down. Now reading down is otherwise totally unknown traditional judiciary. It cannot read down. Reading down means become wiser than the legislature. It is not permissible. Oliga Telis, you must be aware that it was stated that though law says that without issuing notice a person can be removed from pubic path or public way etc. The Court said that we will read into it. Sometimes the Court have said, if you remember this after amendment, 2nd amendment particularlyly 323 A and 323 B came and inserted in the constitution. And one of such tribunals Central administrative Tribunal known as CAT that a person can go to a Court that as CAT. CAT decision is final and in fact actually I had studied also, then the Act was enacted, it was said no, the Supreme Court must be given power. Say for example, after that Act came into force, it was stated that original authority will be CAT.

No appeal, no High Court even 226, 227, no High Court only Supreme Court. What was the effect, one Chief Justice of India was telling me that we are treating orders passed by CAT something a decree under section 96 CPC. 96 you know that it is first appeal. All questions are open. Questions of fact, questions of law and mix questions of law and fact. But in Sampat Kumar Court upheld it. Of course as an student of law, I have said that I am not able to reconcile that Barbara is under article 226 can be taken away. But they taken were away. The provision was held to be good. It was stated that in the words of the Supreme Court that the Central administrative Tribunal is substituted of the High Court de jure and defacto. Now, if it is really a substitute of the High Court then obviously the Court was right. But can it be said that it is de jure and defacto, substitute of the High Court so as to take away the jurisdiction? And again so far as article 226 is concerned, the jurisdiction is not given by any Supreme Court or by any authority. It is given by the makers of the constitution notwithstanding anything in article 32 a High Court may issue an appropriate writs, orders, directions etc. Fortunately in Chandra Kumar, earlier judgment was overruled and again the Supreme Court has said that again as an student of law I may be wrong but one observation which has been made by the Supreme Court according to me does not laid down correct law. I had a discussion with the author of the judgment also and he said Justice Thakker you're not right. I said it may not be right. What was stated was in that judgment original jurisdiction is with CAT, High Court jurisdiction cannot be taken away. So, High Court will exercise the power under article 226/227. Because virtually 226 and 227 the distinction is so thin, it is very difficult to aptly explain. And particularly either you have from south Maras or that side and Bombay this will be realized in Latent Patent Appeal. Because whenever the question arises and that whether it is in 227 or in 226 the judges are really lost. But what the Court said is that after the original jurisdiction of CAT a person will go to High Court under 226 and 227 and thereafter under 136 before the Supreme Court. One or two more sentences that there. What is stated by the Supreme Court in L. Chandra Kumar was that after the decision of the Central administrative Tribunal a person must go to the High Court and to that extent jurisdiction of that Court must also be understood and Article 136 must be read in that line. I asked to the author of the judgment that how can you say that, you rewritten the constitution. As you must be aware in several and particularly in income tax matters

because there are several points. Income tax matters there are several reference, in favour of the revenue or in favour of assessee, several matters come up before the Court and sometimes some judgments are governed by the High Court. And thereafter the matter is decided by the Tribunal. In such matters or in such tribunals point is concluded by the High Court; then from industrial tribunal or from Income tax directly a person goes to the Supreme Court under 136. Supreme Court may not entertain that is a different thing. Two things are different. I will not exercise my power is one thing. It cannot exercise is totally different thing. In several matters, particularly at High Court level, I may say, what happens before the lower judiciary. In fact we are having power under article 235 of the constitution i.e, High Courts. So, sometimes some actions are taken, that regular inquiry is held against the judge, suppose the judge is removed or suspended or compulsorily retired, whatever it is. It comes before the full Court. Almost everywhere. Initially, there is a committee particularly of 2 or 3 or may be 4 or 5 judges are sitting together. Normally, by a 2 or 3 judges of the disciplinary committee. And sometimes the papers were placed before the full Court. And virtually, either it is approved or not approved. But suppose it is approved, it is the decision of the Court. Now, many a times it happens, that the person may feel, he will be right also in a given case that he may not get Justice now from this Court. Say for example X High Court has decided a case before the full Court and the full Court said, yes the brother judges has taken the decision and generally looking at the punishment or proportionality whatever it is, it is alright and it is conformed. So he said that the judges has decided. The settle law is that the administrative side is different and judicial side is different. At first you go there. Before us also such matter came and we said look you must have faith in your High Court. Judicial side of the High Court. And in many cases the decisions are set aside also. And it is said that it is illegal. But you cannot say that High Court has no jurisdiction or Supreme Court has no jurisdiction in such matters. So this is how in L Chandra Kumar said.

Now L Chnadra kumar has certainly said that High Court has a jurisdiction. That jurisdiction is maintained. Sampat Kumar to that extent has not laid down the correct law. Sampat Kumar is overruled. But if you closely read the judgment, one or two sentences are there against the decision of Central administrative Tribunal, you cannot directly come to the Supreme Court. Now, I may leave it to you and you may also apply your mind.

According to me that is not correct... Say for example, Central administrative Tribunal order you went to Supreme Court, the Supreme Court said No, you first go there, you must have faith in your High Court. But you cannot say that no, unless you go there I have no jurisdiction. My reading of the judgment is that you have rewritten 136. Or it is said that while giving primacy with regard to appointment the judges has rewritten the constitution. And that is now, how we are considering. I'm also told, of course that is in the newspapers also, on 16th we will be having the outcome. At that point of time the Court has also said..

Participant:- There is some revision coming today.

Hon'ble Justice CK Thakker:- I don't know. It has come..tomorrow. Probably from tomorrow there will be a vacation in the Supreme Court. You must be aware that in North India, generally Dusshera holidays. From Saturday onwards the Supreme Court will be closed. So I got SMS may be tomorrow... I don't know.. But I was told, when the matter was argued, the Court has said that you put up all the points. And as a matter of fact I know, this reading down principle and all those principle, sometimes directions are issued. Say for example, when in Sampat Kumar case came up before the Supreme Court, as I told you validity was upheld. But when the Court said that No, so far as the appointment in CAT is concerned, we are issuing certain directions. That he must be a judicial officer, so as the main member, the concurrence of the Chief Justice is to be.. Something.. So certain guidelines are directions are issued. One matter from Punjab and Haryana went to the Supreme Court. What happen was some fee was challenged. Now, you know the distinction between tax and fee. In tax there is no written anything. Larger written is there. Your law and order, your safety, suppose you are paying income tax, directly you're not paying anything. In fee, services are provided. You know, it is known as Quid Pro Quo. It is not exactly 50-50, but Quid Pro Quo you pick something and in view we are rendering services to you. By enlarge it should be 50-50, but not exactly. Now, when fee was imposed by some Punjab committee, agricultural committee, some market committee, the matter was went to the Supreme Court and Supreme Court was satisfied yes, that something was necessary. But it thought that it is not actually 50-50, but it was little substantial more than that. Court said alright we will uphold the law but you something; you do this, you do that etc. Andin judicial commission matter also I was told, the Court

is said that if we declare it to me ultra vires there is an end of the matter. But you also put or make your views say for example reading down or some such directions. Suppose some person is there in a committee he must be having some legal background because if he totally unaware of something with regarding the legal field. Maybe his intention may not be malafide but he may not be in a position to understand. I don't know what will happen. So, that is how the point was argued and ultimately tomorrow we will consider.

So, finally say in the matter of writs. I have dealt in my book also. See habeas corpus. Now the normal practice of Court was that whenever a petition is filed, as soon as the person says or on his or her behalf somebody says that his or her detention or imprisonment is illegal. The rule issued. And it is well written and developed in a particular period. On that day the court will hear the government pleader or public prosecutor and if it finds that it is illegal immediately the person will be released and the order will be set aside. And if the Court finds that no there is some substance in it, in first case it will be made absolute otherwise the writ petition be dismissed. If in the meanwhile the person is released the court used to pass the order that a person is already released and now the petitioner has become infructuous and dismissed accordingly without entering into the merits. Now, sometimes the power said to be abused. Say for example, there is majority or the minority in-house, one vote here or there. As far as Goa government is concerned, it has been said whether you meet every third advocate is either today's advocate general or former advocate general. So it is something like this. Say for example, confidence vote of no-confidence vote. Two votes, one here or there may change the table. What they use in some cases of course not in all cases. Alright, the person in custody for 2 days. Say your exam on tomorrow, day after tomorrow you release. And when such questions came up before the Supreme Court, the Supreme Court said no, we cannot shut our eyes. This fact has to be taken into account. Two things are different. One A files a suit against B for recovery of possession of property or refund of money or recovery of some amount a private litigation. So far as writ remedy is concerned you must be aware that it is a public law remedy. Now if it is a public law remedy if a person has approached us by invoking public law remedy and if our conscious is satisfied that here the power has been abused, merely by passing the order that now nothing required to be done cannot be done. And Court use to pass order regarding payment of compensation you must be aware.

There is a personal pleasant incident also. If you're aware I revised Law of writs by Vegi Ramchandran. I revised it. I had a regular correspondence with Lord Denning. Of course, it would have never seen him. And I want to dedicate it to Lord Denning. I was comparatively a junior judge. In 1990 it became a judge and the first edition came in 93. So I have completed about 2 years of service. There also I felt that on one hand Lord Denning and on the other hand comparatively a junior judge of High Court so I must seek his leave. I wrote a letter that sir I have written a book. At that point of time this email and other things was not there. And the book was also not completely printed also. But the Eastern Book Company, they said that if you want to do it we will do some small binding and we will send. I send the book and said that I want to dedicate it to you, if you approve. He approved and I dedicated him. He could read something because he reached about 94 or 95 years like that. It was read over by someone else also. And he wrote me a letter that I will be very happy if you dedicate it to me. And he stated that so far as the writ jurisdiction are concerned it is our contribution. It is English contribution. We know that there is no doubt about it. In fact so far as our Shastra and Upanishads are concerned they had taken note of such autocracy..But so far as writ remedy is concerned it is essentially English law. And Lord Denning has said that you, your that is Indian course has always followed it. Now after looking at the topic covered of compensation I'm very much pleased, I appreciate it. Now, let us hope that our course may follow this practice. And as an English citizen I liked that very much. But that is how the habeas Corpus. Mandamus you know, generally final order is passed, nowadays practice particularly at High Court level were PIL is taken or at the Supreme Court level judges appointment of lower judiciary, appointment case and service conditions. Generally, the Supreme Court does not dispose of the matter. M.C. Mehta and all those cases why? Because once you finally pass the order, issue writ of mandamus the Court becomes functus officio. And it'll be very difficult. So normally what the Court do is that if this matter comes alright issue the direction, do this, do this or that something like monitoring. Traditional judicial system did not approve this. Traditional judicial system approach was to dispose of in one way or the other. That is how we are doing it. Certiorari is certiorari. You set aside the action. And there is the end of the matter. Say for example section 10 A of the industrial disputes act some order is passed say totally unacceptable. In that case you can set aside the

order. At the same time you make a reference, normally it is not in your power and it may be in the power of the state government but sometimes we have to do it. I will give you one case, when I was in Gujrat it came to us. Normally, you know that normally, unless class IV servant, normally on the basis of seniority the promotions are not given. There are several test. Say for example seniority cum merit or merit cum, or seniority selection process. Therefore, when the question regarding promotion arises, the Court may not issue the writ of mandamus to promote him. In fact in Mysore case then the Court said the person should be promoted, the Supreme Court said No, you cannot issue the writ of mandamus direct in the government to promote. You can say consider that case for promotion, pass an appropriate order and if some passage or time has gone, consider the position when he became due etc. But that is how, you'll will have to pass such order. But sometimes it is very difficult. In one case what has happened that the person case was not considered. The High Court passed the order that consider of the case thereafter pass an appropriate order. Thereafter also same order was passed. Second time the Court said that there is non application of mind, nothing on record whether you have applied your mind not. Then you record the reasons. Nothing was done. There are no reasons therefore I passed the order. The Supreme Court also said that in the given case it can be done. Again if I quote Lord Denning, the question comes before the Court that the reasons are not required to be recorded by the priest, by clergy or some religious head. He recorded reasons. And then it was objected. When it was objected that it was said that No, they were not required to record the reasons .If you not required to record reasons and if he recorded reasons you cannot interfere because normally he is not require to record reasons. The Court may say yes, he is not required to record reasons but in a given case may be one out of hundred, the Court may consider or form an opinion that there are no reasons which could be recorded in support of such order. It can be said that no reasonable man would come to such conclusion, something like that. Or the English judge say the decision maker must have taken leave of his senses. So it is something like that. So in that case the Court can certainly interfere.

And finally defacto doctrine that also you must be knowing, sometimes what happens a person's holding the post defacto and not de jure. And mind it the first leading cases from judiciary 1981 Supreme Court some boka Raju.. The person was holding the post of

district and session judge, the petition was filed and it was finally held, yes he was not qualified. Now there other several decisions. Now in the circumstances, what will happen to those cases, there are several cases English, American cases and then it was said yes defacto doctrine was applied that whatever actions he has taken all right, we will not interfere. Similarly, the Chief Minister from one state she was convicted, she could not have been made Chief Minister, she was made Chief Minister and finally the Supreme Court said that this cannot be tolerated, she had to go but meanwhile some decisions are taken. One case came up before us in Supreme Court from Punjab and Haryana also. Interesting facts were there. A person who is not sitting MLA can be made a Minister but within a period of some 6 months he or she must get elected. Now, as we know there are Yaya ram, Gaya Ram so one person has to be taken by the Chief Minister and was made Minister. He contested the election and lost. Now, obviously he has required to.. What Minister did was that before 6 months were over two, three days resignation was taken from him and after four, five days again he was inducted. And when the matter of came before us we said this cannot be tolerated. This is what we say virtually circumventing provisions. Now if you cannot circumvent statutory provisions, you cannot circumvent constitutional provisions. But that also we have held that whatever actions he had taken in the capacity of Minister obviously those will not be set aside and will not be held to be bad. So this is and finally, mind that, that is why, I said rule of law is the principles so far as dicey is concerned, he was be the believer and the first person in that sense. He said supremacy of law, equality before the law or equal protection and everything and last he said that it is judge-made law. You know that in England there is no written constitution except Magna Carta or some Bill of Rights. And all rights have been safeguarded or protected. We are having written constitution, We are having judicial review, 32, 226, fundamental rights everything and look at the position, if in a given situation what is to be done you must be available in 1975 election of one Prime Minister was set aside by one High Court. Appeal was filed, interim stay was not granted. It was said that you can go to the Parliament but cannot work as a Prime Minister. 25th of June emergency was declared. Several persons have been taken behind the bar. As many as nine high Courts held that in such circumstances Habeas Corpus petition is maintainable. Overruling all high Court's majority of the Supreme Court in ADM Jabalpur the Court said No, as if article

21 is so repository of the right to life. As if before the Constitution, we don't have right to life. In fact, it was said that if a person was shot dead then also nothing can be done. To me as a student again dicey was right. Written constitution or unwritten constitution does not mean any difference. Eternal vigilance is a right of liberty.. If you are unaware, if you are not enlighten then nobody would save you. Now, so far as article 21 is concerned it will be never be taken away. But that also one does not know. But this is how the law had never developed. And this is how the general jurisprudence and general principles of the constitution has developed.

Now you can also ask some questions. I will tell you, that I am here as one of the students.

So, I may not be able to reply or I may not be able to give the answer of all questions to all of you, but we will try and consider.

Participant: – we have judgments which talk about educational institutions. Can We translate such a proposition of law that other establishment which is not in educational sector but we have like insurance sector.. And a mandamus can be issued on the employer of insurance sector like as in the educational institution?

See anybody can say.

Participant: – In the Institute is governed by the statute then fundamental rights are there and then mandamus can be issued.

Hon'ble Justice C.K. Thakker:- I may tell you, in fact it is possible. And I will give you two to three instances also which has actually had happened. Say for example, if you are aware contractual contracts are one of such fields. Now, if you go to 1977 there is one judgment of Radha Kishan Agarwal. In Radha Kishan Agarwal case the Supreme Court approved the distinction made by High Court of Patna, Bihar. There it is said that there are three stages of a contract. One, before the contract was entered into; now before the contract is entered into writ jurisdiction is maintainable because at that point of time it is Sovereign power which is to be exercise by the court. And if A is eligible and B is also eligible. You'll will have to consider the case of B also. And if you do not consider it then in then that case it is violative of fundamental principle because of article 14, 19, and unreasonable etc. Supreme Court said that the blacklisting, that you are aware, the Court

said that we can interfere. Then the 3rd field the Court has said we're of the statute intervenes, save for examples some forest laws. There are some laws that so and so is to be done, there also Court can interfere. The Supreme Court said that the middle category, once the case is considered to all eligible candidates and the contract is awarded. Suppose A, B, C, D and E. Contract is awarded to B. And thereafter there is some dispute between B and state, No, the Court will not exercise writ jurisdiction. Now, as you say what is the position in education field? The law developed and that lady named.. Government pleader Srilekha Vidyarthi. In Srilekha Vidyarthi speaking before the Supreme Court, the Supreme Court said Justice Verma at that point of time, Justice Verma enlight that it is not proper on the part of judiciary that once the contract is entered into now we do not consider article 14. So, as you say insurance company or co-operative Society or co-operative banks, so as far as banks the position to be is Nationalized Bank. Otherwise other banks are concerned they say that no writ is available. It is quite possible. Gujrat cooperative yes they said no. But in a given case it is quite possible that Court may invoke such principle. Say for example, Delhi transport case 1990 Supreme Court. For that water in land Corporation. If that contract or agreement is voidable section 16, 17, 18, 19,20 etc unless for the side has committed ever then in that case it can be said that we will exercise our power, prerogative power under article 226 also. Of course to what extent the Court will go is a different thing. But otherwise if it is a total illegal action in that case the Court.. Say earlier you might be aware of all those judgments, prior to 1960 it was said that.. No reinstatement, hired and fired. Yes, The Court Said No, in appropriate cases labour, government service, statutory provisions, yes that also can be done. So it is quite possible the Court may proceed in that direction. Again I told you the natural Justice to some extent you may come back also. Similarly in Ajay Hasia the Court proceeded.. First in 1960 Rajasthan electricity case then Sukhdev Singh, Ajay Hasia, Som Prakash Rekhi, Several judgments came and this Pradeep Kumar Biswas and then there cricket control board, personally I like the view of dissent judgment because if you apply functional test that yes functions are to be seen as it has been done in other cases and in my book I have written that this minority judgment laid down the correct law point... But I have no problem whatever they say...

Participant: – Some of the judgments of the Honorable Supreme Court do create a bit difficulty for us. Uma Devi is one. We don't know what to do with that judgment.

Hon'ble Justice C.K. Thakker:- I may tell you an instance, I was the sitting Judge of Supreme Court, now I am retired, I will tell you what happened. It is really necessary. You may consider me an order old man giving some advice. Wherever I go, I say two things, one, never afraid of your judgment. See, in fact this is a sovereign function which you are exercising as a judge. Because otherwise, if he has some grievance against B, how can you are concerned. How can you decide it? But because sovereign authority, State otherwise it is a state power. Earlier Kings and Queen used to exercise that power. Now, it is conferred on us that this judges. So, you are exercising sovereign functions. But Sovereignty has something to do with power so forget that. We are exercising the divine functions. That is why it is said that you are not interested in A or B. If you're interested slightest, remotest then also you would not take up the matter. Now, there are several additional judges, joint judges, earlier in district there used to be only one Judge. The district and session Judge. Now sometimes serious allegations have been made against the DJO, District Development Officer, collector, district magistrate and the person may be knowing him and the district Judge may be knowing him and he used to write a letter to the Chief Justice that sir, he should be transferred to somewhere else. And when you are deciding the matter, objectively say considering the facts and the circumstances without any other extraneous consideration, deciding but then you decide boldly. So, my one advice to judges is, particularly to lower Court judges is never afraid about your judgment. Secondly, never chase your judgment. And this weakness I found in many judges. And to tell you frankly, at High Court level and also a Supreme Court level. Supreme Court level may be there is no appeal. But what has happened. You delivered the judgment, many times judge say, did he file the appeal. Let him file, you must know the final outcome. Why? Not that your order was set aside or conformed. But suppose your order is set aside then you may not commit the same mistake. Suppose it is confirmed that now it is not only your view but view of the appellate court also. So never tried to justify your judgment. Never try to convince. In fact as brother says, then I was the sitting Judge of Supreme Court, I use to come here and one Punjab and Haryana High Court Judge has asked one question and said sir, you were party to that state of

Karnataka V/s Uma Devi. I said yes I was the party. He said you don't want to say anything. I said I don't want to say anything. See, ultimately we are human beings. I may tell you must be aware that sometimes what happens is that a judge may put some questions to the counsel may be defense counsel or defendant counsel or prosecution or plaintiff counsel. In one matter several questions were put to the accused counsel by the Judge. Such matters rightly or wrongly sometimes, the clients and advocate feels that judge has predetermine the issue. That is why I also use to say to the judges that you may certainly put questions but at the same time, a person should not feel that I have already decided a matter. But suppose some questions are proved and he may feel that No he may decide against us then in such cases you must be aware that transfer application is filed. Now, when such transfer application is filed, the appellate court, revisional court or writ court, if there is prima facie see the substance is nothing it will be dismissed. But suppose there is something, then it may issue notice to the other side, it may also call for remarks of a judge. In Delhi, a prosecution was filed against accused under Prevention of Food Adulteration Act. And several questions were proved by the judge, the defense lawyer felt that judge will decide against me. So, he filed application for transfer and finally the matter went to the Supreme Court. Now, when the matter came up before the Supreme Court the remarks were called from the High Court and files were there, reported judgment again and court said according to me some questions were necessary and therefore I proved the questions, I was neither interested in A party nor interested in B party and if the court feels it may go somewhere else. I have no objections. Obviously, it is expected then he said the evidence of the complainant etc. The Supreme Court said that that itself is the good ground for transfer. So, mind it a judge is not supposed to say anything about the judgment. And if you say a particular judgment, My judgment, or any other judgment a judgment may be right or a judgment may be wrong; in fact I may tell you that when I was in the court, again when I was in a Supreme Court, I do not go to any functions or any other place. But there was one function held under the auspicious of press, some trust of India; Justice Ray was there at that time. Yes Press Council of India, Justice Ray was there and he requested the Chief Justice of India and Chief Justice said that Justice Thakker you may also go. I could not say no to the Chief Justice of India. So, I was also there. I was there, my brother colloque was also there.

And at that point of time probable be the Times Now is comparably a news channel. I was very much impressed by that channel. So, a lady was there and I congratulated her that your channel is really good. At that point of time there was some controversy of Musharraf and I said that your channel had telecast everything. Then she asked me sir, of course it was academic question suppose sir I read your judgment and I find something that it cannot be reconcile or there is some error, can I come to your chamber. I said that you could certainly not come. It is your prerogative whatever my judgment is about. I will not allow you in my chamber and there is no doubt about it. So suppose if you say with regard to Uma Devi or for that purpose any other judgment; then you can certainly hold your view and I cannot object.. But there also I will tell you, when we are here we are not bound by any judgment and you can hold your view, but if you are in court you are bound by it. So much so, that judiciary and particularly higher courts are sensitive also in such matters. And according to me court must be sensitive, I will give you two instances, two matters came up before the Supreme Court, one from Orissa and other from Bombay. Rightly or wrongly Supreme Court felt that the matter requires to be remanded so the matter was remanded. When matter came back to the High Court. The High Court said in our opinion the remand was not necessary but since the highest court has passed the order.. and when again the matter went the Supreme Court said that High Court should not have not made such comment. Mind well, that highest court is highest court. Similarly High Court is High Court. In one case our tribunal said that Gujarat High Court has decided this matter and set aside such order. But in other case it was not set aside. When the matter came up before the Court, The court said the tribunal should not state that. I may tell you my personal experience about one judgment as a student of law, for many judgments I have said that this judgment have not laid down correct law. Of course, in proper language. That in BCCI the larger view and L Chandra Kumar, I said that it has not laid down correct law and also said it is better that the matter may be placed before the larger bench so that correct view can be taken. Now, when I was sitting in the court a similar question came up before the court and the advocate said that sir I have come with your book and you said that the judgment is not right. May be an author has said something. But at present I am a judge. I am a judge of a particular court too and the law is binding. Now I cannot obviously say that I cannot follow it. And to what extent the court are touchy. You

must be aware that Charity commissioner posts are there for under the religious and Endowment Act. Now they are normally, at least in Mumbai, Gujrat I am aware. They are normally in a retired judicial officer. Everywhere know, almost everywhere. Retired district Judges or session judges.. Yes.. Judges are there. In Orissa some orders were passed and the person holding was a retired district judge. This was the reported judgment again. He refused to follow, the matter was spending, this thing that thing, when it came to the notice, contempt notice was issued. See, if I am the layman I may say that I don't understand, is Supreme Court said all right apart from, irrespective of what Supreme Court said I will do this. But when I am a judicial officer, I know something about it. What issued contempt notice, in fact conviction order was passed may be with regard to fine. And Supreme Court upheld it. So, when you are exercising your judicial functions in a court, mind when.. I will give you one more instance, Bardakanta is leading judgment. Supreme Court said that High Court is absolutely right in passing this judgment/ order. Another case, a person was convicted under 302, so life imprisonment was awarded. Those may were not the days were bail were sought. In fact, when I started practice our senior used to say that file a bail memo but don't say with regard a bail. Because once conviction is ordered you cannot ask for bail. Because he held to be guilty. So, he was in jail for about 10 years or so. The filed an application stating that I may be enlarged on bail, I means client, otherwise then if after 5 or 10 years of jail if he acquitted then of course prejudice will be caused. High Court rejected the petition saying that, in queue. He went to the Supreme Court, Supreme Court also dismissed the petition but observing that if proper application is made again the High Court will consider it. Again application was made again rejected. When again matter went to the Supreme Court, the Supreme Court said that the Court must understood but the honorable judges and earring Judges and High court has not done this, that was the certificate give. Mind it in the latent patent appeal also if you read the order passed by the division bench, generally we request the learned single Judge, the reason is that they are equals; even the Supreme Court and High Court judge, I tell you all are constitutional courts . So, whenever the Supreme Court said that we have said that High Court will consider or we request the High Court, it doesn't not mean that you ignore it. The courtesy requires when one constitutional organ sitting in Delhi to another constitutional organ will not order the other organ. But it should

be taken in proper prospective, if you do not do it then the Supreme Court may say something which you may not like it. I used to tell judges that I liked this profession because of this. Many a times it happens, I don't understand. Quite possible as we don't know everything. The lawyer will say that as I am not clear to your Lordship. The fact he want to say that you don't understand. But I tell you that I like it. The reason is that this is the etiquettes. May I put a question to myself. In fact he is putting question to you. Courtesy requires, No you don't require to put question to the Court. You can say, may I put a question to myself. This is the etiquettes. But of course now days but in any case.. may I put a question to myself and it appears that I am not clear to your Lordship. But in fact he want to convey though I am clear either I am unable to persuade or you are unable to conceive it. But these are all etiquettes.

Prof (Dr.) Geeta Oberoi:- So may I put a question to myself that can we go far a cup of coffee.

Hon'ble Justice C.K. Thakker:- This question you may put to our self also

Prof (Dr.) Geeta Oberoi:- Ok so we decide to come back at 4:15.

The theme of Session 4 was Equality as a tool to achieve Justice: its use by Constitutional Courts

Prof (Dr.) Geeta Oberoi:- Welcome back. For this last session we do not have much time. It is only for 45 minutes. We have a pleasure of hearing Justice CK Thakker again though on a different subject: equality. I would request each one of you to start with your experiences, your issues on adjudications related to equality, how you have approached in your jurisdictions. After hearing your experiences on adjudications, we will have Hon'ble Justice C.K. Thakker's views points.

Hon'ble Justice C.K. Thakker:- I can give you another instance also of Uma Devi..If you aware of section 11 of Arbitration and Conciliation Act 1996 my judgment is there Supreme court. It was section 11 applications. The question before the court was whether power under section11 will exercise by the Chief Justice of the High Court or by Chief

Justice of India is administrative or judiciary. Now constitution Bench of five judges held that it was administrative. In fact we were hearing the matter two judges and we refer to the larger bench and it said no earlier judgment did not lay down correct law and it was placed before seven judges. I was comparatively a junior judge at 2005. It was heard by seven judges bench. Six is to one. According to six judges, again they might be right I may be wrong, they said it is judicial function and earlier judgment was overruled holding that earlier judgment did not lay down correct law. I consider the position in the light of what is the intention of the Act and I felt that no the earlier judgment was right and it is virtually a administrative function. The Chief Justice of High court or of India merely makes an appointment. Six versus one decided so obviously as per my version or view is to be considered there is no legal efficacy. After few days in High Court you must all aware normally Chief Justice does not decide but one judge is get allocated. In Supreme Court it comes to all judges. It is through rotation. Several matters are there so the senior judge will also get, junior judge will also get. So I got one matter. And normally on Friday we hear such matter. So, court master said that sir there is one matter were lordship may hear. I said I will go to the court and I will not hear in chamber. I was junior judge, Justice Ruma Pal was senior judge and she was occupying the court then of course I will hear in my chamber. Both the advocate came to my chamber and one advocate said sir lordship has taken one view but I am directly covered by larger bench that is six judges. My application is thereby is to be allowed. I said if it to be allowed I will allow it. I cannot say that I will follow my judgment and ignore six judges view. Judicial discipline say for example by civil judge (Jr.) Division or by Chief Justice of India discipline should remain the same.

Participant (Hon'ble Mr. Justice V. Kameswar Rao):- I and my senior judge was sitting together with a cup of tea. We were just discussing regarding what happened to your judgment. He said Rao if the appeal is filed either your view is upheld to that extent is fine otherwise if it is not upheld and set aside at least what you have decided in terms of the higher court and a correct view has come so that it can form a precedent.

Participant (Hon'ble Mr. Justice K.T. Sankaran):- Whenever a judgment of a single judge or a division bench is taken up by the Supreme Court we get an intimation. It get

circulated and for that if the judgment is set aside you get a file so that we know what happens.. That a matter to be taken very seriously no doubt so that mistake cannot be done again. So that it is likely to be followed that we may follow our own judgment because by the time it set aside by the Supreme Court it may not be reported.

Hon'ble Justice C.K. Thakker:- I remained words what Lord Diplock said once that when I was in court of appeal. Court of Appeal means High Court and House of Lord virtually mean Supreme Court .They said that many a time while in court of appeal I felt that House of Lord was wrong and you may feel also ..in many cases I am as a student feel that but House is House. So ultimately they may be incorrect but..in fact in Gujarat I come across such matter also. I think in contract there is a section 128 or some section, that liability of debtor and creditor is coextensive.. Now such question came up before me. And I feel that the provision is very clear but he said that earlier there was on judgment that first you go to the debtor and if you are unable to recover it then others. I told it no doubt about it but ultimately Supreme Court later overruled it. But you cannot say no. As a student or as an author you can say no this is not correct. Virtually the section is rewritten. But otherwise you cannot say that.

Participant :- I have one curiosity, Prospective overruling.. Can a High Court exercise that jurisdiction?

Hon'ble Justice C.K. Thakker:- Now Normally, I tell you this is the fundamental principle Statute or legislation is always prospective unless it is expressly made or by necessary implications is made retrospective. So, suppose an Act is enacted today, it will come to operation from today. So far as judicial decision is concerned it is always retrospective. So suppose something was decided 10 years, 20 years and today I am deciding contrary, this was the law even at that time. It was misinterpreted or misapplied or misunderstood but it takes retrospective effect. So far as Indian system is concerned, British system is concerned, legal system it would always implemented in such a manner. Golaknath the question came up for consideration first time for the Indian courts. Sajan Singh, Sankari Prasad 1951 for the first time the question arose whether fundamental rights can be amended or not. Five judges' unanimously held fundamental rights can be amended. Seven judges 65 Supreme Court five versus two held fundamental rights can be

amended. Earlier judgments laid down correct law. Golaknath again the question came up for consideration and majority by six to five Justice Subha Rao a very well-known of his view regard to fundamental rights. Rights of citizens and particularly fundamental rights..if it takes a retrospective effect what will happen to all those cases which is been decided. Now what is to be done. First time it was held applying American doctrine not an English law was prospective overruling. This will be applicable but from the date the judgment was pronounced. Common law is different than American Law. Therefore, they said that this has a limited application to the constitutional law. But thereafter Supreme Court has applied at several such cases. That appointment this is prospective etc. but this is the principle. Now as you said that this can be exercised by the High Court or not. Similar question came to the consideration before the Supreme Court. Such cases come when some serious consequences are likely to ensure. There is likely some vehicle tax or imposition of some tax. It was held to be ultra vires. Now if once the tax is held to be ultra vires, obviously it has to be refunded. As I told you either to the petitioner or it is to say unjust enrichment or whatever it is you cannot retain it. It has to be given, May from special fund etc. So Madhya Pradesh High said this will have retrospective effect. The matter went to the Supreme Court. Both are constitutional court. But the Supreme Court said that you have no power. Certain powers are possessed in almost all countries possessed by the highest court of the country and that is for the larger interest. 142 is there. You must be aware. 142 says that Supreme Court may for the purpose of complete justice between the parties may pass some orders. Now, according to me again as a student of law such power is actually necessary also. I give you one or two instances which has actually happen. One case came before the bench headed by the Chief Justice of India Justice Lahoti. After some laser operation the lady conceive and she said the operation was not successful, I must be paid compensation. Some few lacks amount was paid also. High court also upheld it. Stay was not granted, amount was paid. When it came up before the Supreme Court, of course we are not expert in medical line several books were cited. It is a reported judgment of Justice Lahoti that even there is no negligence on the part of the doctor in a given case the operation may not be successful Or operation may be successful thereafter may be in few cases but it cannot automatically ipso facto you can come to the conclusion that there was negligence. So it was set aside.

Such cases some time a situation may arise the person has to give back the amount, it becomes very difficult.

In the second case the question before the court was that whether insurance company is liable or not because insurance company you are aware limited defenses are there and one of such defenses are taken are rejected by the court. The amount was paid, no stay was granted, and amount was given everything. The insurance company on principle on interpretation of law. Now they said of course they made statement also that they don't want to recover the amount. But suppose is not such statement is made, it will be very difficult to make Because otherwise ipso facto the court cannot say that now don't pay the amount because it is paid by him and he can certainly recover. It is something like section 144 as a principal it must be paid to him. In the given case the court may say that is the highest court of the country that as per the facts and circumstances we say don't do this. But then there also I believe the court will have their own limitations. Say for example I was hearing the matter and 307IPC they said we have compromise the matter. Now, 307 I think is not compoundable. So we say that this cannot be compounded because ultimately contrary to law how can you do that. So apex court also in my opinion has to keep all these things in mind. Of course there is no further court, so if you pass any order it stands. We also pass some orders and I might have also passed in several cases that in peculiar facts and circumstances of the cases this order is passed but sometime there are even no peculiar facts and circumstances also. The only thing is that it cannot be cited as a precedent you can pass such orders.

In one case so this minimum punishment in prevention and corruption Act is provided six months or so and it is said that the special reasons to be recorded it can be less than that and the matter came up before Justice DA Desai in Supreme Court he said in special circumstances he will lose his job, of course he will lose his job..if he has taken bribery or if he has taken money he will lose his job. And then he said that his family will suffer. He is having two children. Normally a person will marry the children are there. Now these are not special circumstances...But in some cases Supreme Court said that this will not be cited as a precedent. As a student I have my own doubts. But Supreme court passes such orders. And it can be said that under 142 you can say that this cannot be cited as a

precedent. In one case it was cited in spite of that and High Court and when the matter went to the Supreme Court the Supreme Court said when we said that it cannot be cited as a precedent but it is also law declared by the court. When I was there for administrative side something like in full court..You must aware about the judgments and orders. Judgments are pronounced and order is then and there are recorded and dictated to stenographer. As an administrative side as in full court we may say that it may not be cited as an precedent. And since I have written some books my opinion is also how you can say that an advocate cannot cite an order of the Supreme Court in the Supreme Court.

Sometime we summarily dismissed in page or two But Sometime some judges use to give long dictation and orders. There are some judgments. So they say that no they are not very well conceived but I said that I have my own doubt that a judgment of the Supreme Court so and so page or reported in SCR, SCC, AIR will not be cited in the Supreme Court..Of course that idea was given up but sometime such incidence also take place. But according to me one copy to very well considered provision, in larger interest of the Nation and the judiciary. And that can be exercised by only that court. But there also you prima faice you cannot ignore a statutory provision and pass any order. Say for example if it is not compoundable you make it compoundable. Or you say if the party agree make it compoundable. Virtually you are circumventing the section 320.

Participant (Hon'ble Mr. Justice K.T. Sankaran):- It was in 1975 or 73 the matter for execution was taken up by the Supreme Court. The Supreme Court found that the judgment that become final..The Supreme Court exercise the power under section 142 and set aside. But the Supreme court was correct..

Participant: - It may happen in this way also that in one appeal identical issue the matter comes to the Supreme Court and Supreme Court say SLP dismiss. In any case that doesn't have a binding feature and it doesn't get merge in the order of the Supreme Court.

Hon'ble Justice C.K. Thakker:- Normally what they do is that on special facts and circumstances something like that but sometime it happens. In fact in my book I have given one case in which I think 3 or 4 persons were convicted under section 302 read with 34 or so. At that time it was prior to this exceptional circumstances this rarest of rare

case. Normal rule was capital punishment and exception was life imprisonment. Now whenever, such appeal are filled normally the Registry also take care that all matters are kept in one court at the same time. Now some matters may be isolated or kept whatever. But appeals were filled, appeals were dismissed. I think that President also reject the appeal if the person got executed. And if the capital punishment was imposed he was executed. Thereafter, another matter came and then it was said no it must be converted into life imprisonment. It is really unfortunate but sometime it happens also.

Participant:- Even I have seen the Supreme Court said that the question of law is kept open.

Hon'ble Justice C.K. Thakker:- See it is also necessary. And sometimes I tell you because the reason is that sometimes ..say for example land acquisition..such a question initially happened in England. A small suit was filed for few pounds and decree was passed. Appeal was filled and appeal was dismissed and there were several such petitions were filed. It was said that in a given case the court may reconsider. Similar question was arose from Bombay in land acquisition matter. And in land acquisition matter for example a small piece of land is taken and say 35000 or 50,000 or one lac was awarded. So at that point of time you do not take up other matters. These are the ways and means. Sometimes it may be with bonafide intention or sometime it may be malafide intention. Now one matter only one lac or few lacs were awarded. Matter goes to the Supreme Court. Supreme Court said why we should interfere and therefore we dismissed it. But when it was use to be argue before the High Court that is covered by the Supreme court judgment therefore it should be dismissed. Therefore, Supreme Court thereafter use to say, Yes leaving the question open or it is said that considering the smallness of claim we are dismissing it. In fact in Bombay I came across such case. You are aware that in 2004 or in 2005 that now daughter has also become coparcener. So, the question came up before the High Court of Bombay as to when that code apply. Earlier before lager bench we came recently before that a division bench of the High Court said that the benefit can be claimed by a lady or by a daughter who is born after 2005. Now such matter came before me for the purpose of opinion and I had studied the Supreme Court Judgments also and I said that if on that day daughter is there she can get benefit. But

this judgment was also brought to my notice. Of course it was not judicial decision but was for the purpose of opinion. I said I have my own reservations of course so far as Bombay High court is concerned the matter was from Bombay, I said my own reservations about the judgment. But since you are from Bombay it is covered by this. Thereafter the matter was placed before the larger bench. And larger bench we were not right with the earlier judgment and now we overrule it. But that earlier matter itself has gone to the Supreme Court. And Supreme Court has said that without entering into the merits of the matter leaving the question open from the facts of the case we dismiss SLP. Now if this the position then question remains open.

Participant:- Can a High court can pass a contrary order. Or it has to refer to a larger bench...full bench.

Hon'ble Justice C.K. Thakker:- No No you are right. If they say But when it came the larger bench they said our earlier view was not in consonance with law. Therefore, full bench decided and some principle was also retrospective and retroactive...Chief Justice Shah..I like the judgment also. It was a good judgment. In fact I did not know about the judgment. That party has send a copy to me.

When I was in Himachal some central agency has appointed some persons on some daily wages. Few people went to industrial tribunal and their petitions were allowed and they were continued in service. Few people went to CAT they were dismissed and both the matters went to the Supreme Court. Supreme Court dismiss both the SLP. They said sir what we will do. So order passed reinstatement is confirm, dismissal was also confirmed.

Participant (Hon'ble Mr. Justice K.T. Sankaran) :- Sir may I put a question not on this subject but on a preventive detention. Now under cofeeposa if that is challenged either order of detention or continued detention is challenged. What is required is considered is whether it is safeguard under Article 225 has been complied. Now there are hundreds of decisions of Supreme Court as to what is the meaning of the word communicate and also the word on the opportunity to make a representation. Now the net result I have seen is that arguments will go on for hours together on a question whether a copy of a documents supplied is eligible or something like that without touching on the merits of a case. Now merits of the case is not look into and only on technical grounds the matter will be argue

for days together. Now I am just making a doubt or a suggestion. Art 225 does not say that what manner the High Court or Supreme Court should decide it. Only safeguard is provided. Nowhere in any Statute has it said that merits of the case or the prima facie case cannot be looked into it. Now instead of embarking upon an inquiry on all these minute procedural aspects, why not the High Court consider the gravity of the case and say that prima facie this is a enough good ground for the detention. I will give an example, see in a particular aircraft one man has brought one gold bar another man has brought 25 gold bars. 25 gold bars man is a powerful man. Sometimes he may be able to manipulate things and seek that one document is not supplied. Both the orders are challenged. With one gold bar man every procedural safeguards has taken care off; therefore his detention is upheld. 25 gold bar man on the contrary one document has not supplied or not legible he comes off. What will a common man think? And last six months through Cochin International airport statistics says that more than 600 kg of gold were brought. And we have also seen a stage where a person who is in detention challenges the authority. On Monday my man will bring 500 kg of gold. It has reached such a stage. So it was necessary at that time after the emergency to deal with the particular situation that all these things are taken care off very minutely. So, instead of this confining that attention to all these minute matters, why not we shift and look into the grounds of detention. Say there is a good ground of detaining either uphold it or set aside.

Hon'ble Justice C.K. Thakker:- You are right. But see I may tell you, So far as preventive detention is concerned. I have seen the approach of the court. As a public prosecutor also, as a defense lawyer also and as a judge also. See normally we are also human beings that we will have to bear in mind. Preventive detention means by enlarge you have not committed anything wrong. You are likely to commit. You are likely to effect either law and order, public order or security of the three circle. If you aware of Justice Hiyatullah judgment. Now, normally when it come across any judge he say he is not culprit or held guilty. Now in this Supreme Court said jurisdiction of a suspicious nature. So as far as possible the court will try to salvage the situation by granting relief in his favour. And according to me the approach is not bad. The approach is not something uncalled for. Sometime you may say normally the person who has to get benefit don't get. Because everything is clear and the other mighty person done something. But normally in such

circumstances the courts approach would or be..again in government or professor who so ever is of the opinion and it is known as the subjective satisfaction of the authority. You cannot objectively substitute your opinion for the subjective satisfaction of that authority. If it is so very few grounds are available. And we can say so this is not legible. In fact so much so that how abuse of that power or provision is. In fact original letter is given, they get it zerox and put it that this is not legible. In fact in one matter we have shown that sir this is not true and I was public prosecutor and I have shown it. Then the court said alright.

Participant:- This counterfeiting.. Tonns of counterfeiting currency notes is coming. We get counterfeit currency notes even from ATM. All these money is use for smuggling, drug trafficking, terrorism is the greatest evil our organization is facing.

Hon'ble Justice C.K. Thakker:- It is possible but ultimately as far as possible. For example, before TV, or before police authority, they admit and People used to say and ask who know us. Sir he admitted now he acquitted. We know as a matter of fact, a police statement 161, 162 not admissible, section 25 and section 24. They do not know, they say what had happened to your institution. And in fact you must also be aware that I produced a particular weapon from which I have committed an offence or I killed.. You must be knowing that part is in admissible in evidence not to be read. Now, people do not understand it.

Participant:- We're seeking the latest film Talvar, now the people are saying that how can we be victor of parents. That is the opinion the people is framing.

Participant (Hon'ble Mr. Justice Raghvendra S. Chauhan):- One thing I want to say that in investigation the legible copies has not been supplied and this man is possessing 25 gold bar and somebody is helping him. So if one particular case you can let him go but the action against the person because they people exercising the power for copies to be supplied, legible copies is to be supplied, how can they be negligent in that. Take strict action against them, so that it should not be defeated again.. So when it is pointed out for Talvar case, I want to say for the last conference I was here and Justice Lalit was here. So I said when the question came about investigation, why can't we take them to task. How can the court monitor investigation. If you have to take the fingerprints, if you have

to take the photographs, how can they say I had not done it within time? Take action against them so that it should not be repeated again

Hon'ble Justice C.K. Thakker:- Recently, when the witness become hostile after that zaria that from Gujrat, now the Court use to issue notices, in many cases they had issued notice and taken action.

Participant:- Last year Hon'ble Supreme Court has said that the strict action get the taken even by the district courts.

Hon'ble Justice C.K. Thakker:- Administration of criminal justice was one of the subject...some principles of course, again I'm not saying this I am 100% right but some principles are required to be changed. For example, virtually before few years there was no expression like victim in criminal procedure Code. As the Act is only for the protection of the accused. Secondly, if a person is acquitted and no appeal is filled by the prosecution/State. Sufferer may be individual but are offences is always against the Society. However, civil is personal. State never files the appeal. Only the remedy is available is relation under 400 or something. Now subsection 3 that is my opinion as a lawyer or student that if such revision is filed.. In that case and if the High Court is convinced that acquittal is wrong, you must be aware conviction cannot be awarded. At the most pretrial can be ordered. Now I can understand the fundamental principle of law that when no appeal is filed and revision is filed, and authority or person cannot do indirectly if he did not do directly. The forward two views are possible and if you are of the opinion that this view this is also possible that you may reject the revision. But once you are convince acquittal completely wrong, then and then only you can pass an order retrial. Why retrial? I said in my book at that time that prima facie the authors are of the view that this is arbitrary and violate of the article 14. Now, right of appeal is also given. See, the 2nd thing I have also said at Jaipur, some provisions have been made which I as a lay man unable to understand. For example, certain directions can be issued on restrictions can be posed, say for example granting of bail that you will have to surrender your passport. Correct. You may not enter into the radius of that particular village. You will have to make your presence Mark in police station at particular date. I can understand. You would not interfere with the investigation. You will not threaten witnesses as if

otherwise it is open to you or you will not come with the same or similar offence. So, suppose accused has committed 302 case, murder; he do not come with the same or similar offence. Suppose then some robbery is permissible, there is no such bar? By there is such a necessity of granting such... See an order can be passed or restrictions can be put that otherwise you cannot do or it is open that I cannot understand. Otherwise you can keep that passport, otherwise you can enter into that area. Otherwise you need not to go the police station as the required to go. But you will not threaten witnesses as if it is otherwise open to you. In fact in the lighter way, when brother Judge said that after Vaisakha case we came to know that we could go this. No..You will not do this, you will not this, as if upto today it is open or it is permissible, No. Now, unfortunately apart from Court orders now also it is said that such conditions can be imposed. Again I plead my inability. I fail to understand with regard to such conditions.

Participant:-....If our fundamental right if at all clash then we have three fundamental rights that is 14, 19 and 21. We should inclined to go with these 3 fundamental rights....

Participant:- Rajasthan High Court judgment Santha Ram. Now the Santha Ram now been open and Pandora box.

There is also I tell you my person in view that 309 you must be aware 309 was held to be ultra vires by one bench. I think two judge's bench. When there was a positive right. Then there is right to life, right to die should also be there. According to me, it is not necessary to get always positive rights, you get negative rights also. In my book I have said the subsequent judgment is right. Then you are grown you owe something to your parents, you owe something to the Society, you owe something to the nation. Now in such circumstances you cannot say that my right to die is also my right. Say for example section 377, it is held to be ultra vires, and Supreme Court said that it is not ultra vires and constitutional. Several questions have come up before the court. And it is quite possible..

Participant:- They are plucking the hair of the child, four in a day or ten in a day.

Another participant Hon'ble Mr. Justice Raghvendra S. Chauhan): - That the right of renunciation, you are renouncing everything from the world.. To think that I hereby break all my relationships with my family and now I enter into nun hood .

Participant:- But is not the barber coming, it plucking each and every hair and blood is oozing out to a 4 year old child or 6 year old child. Then it is important to understand that right to child is higher or right to religion. But we are very sensitive towards other Society.

Hon'ble Justice C.K. Thakker:- A larger question that in a given case it will happen that two fundamental rights gets collide. In such a case larger public interest is to be seen. ..I would be right or wrong but this may happen.

Participant:- That we were discussing in the morning. What were the constitutional values. Right to life in the paramount right in and then to religion as to take a backseat.

Participant:- It is said what you feel right you do it.

Participant:- Article 21 in the heart and the sole of the constitution. Right to life have to take the paramount position.. Right to religion have to take the backseat.

Participant:- said I had another doubt, that Delhi rape case in the running bus,

Participant:- Nirbhaya

Participant:- and thereafter harsh a punishment was provided. But after such an incidence, increasing incidents are being reported. Incidence of such rapes and even murder after that. The number is increasing. Is it because the punishment is provided to a person is accused in such a case get some sort of publicity. We don't know how the criminal minds work. ..An ordinary man, a rapist or a thief...

Hon'ble Justice C.K. Thakker:- In that criminal jurisprudence workshop, I said that this police statement, not taking signature, it is now outdated because at that time there was illiteracy, they don't know anything, they were uneducated, they were very much afraid of police. Now they take signature.. You must be aware in 376 cases..earlier there are judgments also. That she is an accomplice and the word evidence must be corroborated, unless it is corroborated in material particulars it is not reliable and cannot be accepted. Thereafter the court said no as she is a victim, you may not believe that's a different thing but not that she cannot be believed. Police cannot be believe, interested witnesses why? Our criminal law our interpretation frankly speaking has really adversely affected the society.

Participant (Justice R. Mridula Bhatkar):- I have an other view..Sorry but we Indian people are big liars considering the other country witness. As a witness we go there and the manner in which we lie before the court. Because I was a trial judge I have seen so many witness coming before the court and they just lie.

Justice C.K. Thakker:- Sometimes on the one hand victim of rape was described as accomplice and the lady of adultery is described as victim. Now, we know unless her consent is there obviously the act cannot be done and yet she is the victim. In fact it is the other way round. So far as in rape she is victim and rightly described as victim in several cases.

Participant:- Then we also tangle into the issue of marital rape.

Participant (Justice R. Mridula Bhatkar):- I was in Warrick and I and Upendra Baxi were taking a class and that time he put up the issue for discussion and I oppose and about the marital rape as in India it is quite difficult because we have very different complexion of the Society. So that then that time he said that after so many years once that issue was placed before the decision of the legislature and Nandani Satpati has opposed. In then he said that again of woman is opposing. So he said that why woman should say no this law should not be there. But I have seen that how our people speak the truth, it is very low and you can easily make out as the judge that they are lying or not. That you can assess. Because when we sit in an appeal in the higher courts we have faceless evidence. There, there is a person stand you can easily make out .So, even in the rape victim, if at she is true you can easily make out. You can say that really she is sexually abused. Even if she is denying you can easily make out... In my practice I have gone number of times to the police station and I've seen that police are really scared of Court and they are not scared of anything. And 95% or 96% our police Department is corrupt and unless the statements are truly tested we can't believe. We can't believe. That is very sad. And that is very pathetic.

Participant (Hon'ble Mr. Justice K.T. Sankaran):- The change is required to stop. See if you hear hundred criminal cases, the arguments are seen as if the police station opening in the morning only for the manipulating the records. FIR and all those things.

Participant (Justice R. Mridula Bhatkar):- They should be put in the box and asked questions

Hon'ble Justice C.K. Thakker:- If they give false reply they cannot be prosecuted. Why they cannot be prosecuted? And if he does not reply on does not give any explanation or something...

Participant:-By body language you can make out.

Hon'ble Justice C.K. Thakker:- Exactly.

Participant (Hon'ble Mr. Justice Rakesh Srivastava):- Last time I have the raised the issue. I said two things. One part was investigation. So I said why not make it mandatory or it should be inbuilt control. For example, I give this example in last occasion; I said I have a cousin who is a doctor. He says that when emergency patient comes so we have 15 minutes time. Within 15 minutes the perform this this this tests. It is a inbuilt mechanism. Similarly if you see in certain cars, it is a screen were you can see a video. But as soon as you would remove the handbrake the video will go off. When the handbrake is on the video is there. But it is there that while driving you should not see. But they don't say that don't look at the video. But made an inbuilt mechanism. So this kind of mechanism can be built and impose on the investigation by investigating agency. This is number one. And number two that call the witness and accused and asked the question. The reply was no no this is not a mechanism and you cannot call him. The ground reality is that if the moment Magistrate call the accused and asks some questions the transfer application is moved.

Participant (Justice R. Mridula Bhatkar):- Difference in mortality, I'm very sorry to say that we take morality below the belt. That is our concept of morality. That meant I have an opportunity to be in England and interact with some judges there in the Birmingham, they told me that this particular judge is commendable because he is overburden. So, what is he at present? They said that he is the one who is dealing with corruption case and I asked that judge. He said that it is a very complicated case it is going on very lengthy. I asked him how many time it is going on. He said that the last 6 weeks I'm trying that case, it such a very big trial. Then he told me that it is a corruption case. And there

was only one corruption case .Then he asked me a question that in India too you have corruption cases. And I have to give true answer, I said yes. Then he asked me how many? Then I told him in Mumbai, I am a special judge of anticorruption Court, I have 250 cases pending. There are three Courts who are dealing with the same kind of cases. We have separate court of anticorruption bureau. And there are two courts who are dealing with the cases of CBI corruption cases. 5 Courts dealing with the corruption cases. Total 1200 cases is in Bombay itself. This is our morality. How can be expect witnesses will speak that truth. That is the problem. Even if he make any change in the law it will not work unless there is a moral fiber.

Prof (Dr.) Geeta Oberoi:- I think we had great discussion and a great day. And a leave it to you all to discuss about the equality or non-equality. I request you to clap for Hon'ble Justice C.K. Thakker. Thank you so much sir for coming. In fact, I learnt one thing today that author can do something and write something big than judges.

Participant (Hon'ble Mr. Justice Rakesh Srivastava):- There was an officer at Lucknow, he was having dual charge. He was appointed at a higher post and also simultaneously at the lower post. Two charges were there. So sitting in the substantive post he will approve the matter and when he goes there he reject it.

Hon'ble Justice C.K. Thakker: - In fact I came across such case in one PSU is a managing director and also holding the post in government. So when he was holding the post in government he said that amount which is liable to be paid for some entertainment tax or so and so required to be recovered that was placed before him in one capacity and said should not be recovered in another capacity. It is quite possible that..

Prof (Dr.) Geeta Oberoi:- yes, in our country everything is possible. We actually land up with the possibilities. So with this we say goodbye to each other, we will meet tomorrow. Hon'ble Justice Dr. B. S. Chauhan has given some documents that have been circulated. He expects your response on those documents tomorrow. Therefore we request participating justices to kindly go through his documents. Can we give a big round of applause for Hon'ble Justice C.K. Thakker. Thank you so much.

DAY 2

The theme of Session 5 was Debating NJAC

Hon'ble Justice BS Chauhan:- Good-morning everybody. Before we start, I may request everyone you all may introduce yourself. Introduction of the participants taken place.

Dear friends the first subject NJAC. And it is only an academic exercise. The real judgment will come at 10:30. All of know that under what provisions we have been appointed, what are the provisions in which enables the executive and higher judiciary to us to the other higher courts and how the judges of the Supreme Court is been appointed. Earlier it was the consent of the executive and judiciary for making the appointments in High Court and Supreme Courts. But in 1993 this collegium system was introduced. In 1998 in this is third judges case, they further advanced the theory of veto power which was not there in 1993 judgment. If two judges in the collegium do not agree or find a person not suitable for appointment either in the High Court or Supreme Court he shall not be appointed. Or if the Chief Justice is in minority and no member of the collegium do not support you then person cannot be appointed. So views of the dissenting judges has to be sent to the executive and they have to record the reasons why they are not in favor of the appointment of a particular persons. Effect of it came to that when the High Court Judges are appointed or even the judges are of Supreme Court are appointed. In addition to the members of the collegium one plus four or one plus two judges who have worked in that concern High Court are also consulted. So this veto power which was given in 1998 judgment, there are two persons, two judges, if I don't agree. if there are 6 judges who had worked in a particular High Court as maybe outsider but they have worked as a chief justice or gone there for as an transfer that one occasion all the other, do not support though they are not the members of the collegium, they are neither one plus four or one plus two judges, but if two of them say No, then the case of that person cannot be not be considered by collegium. So, one problem that this veto power has always been there since 1999,if you read paragraph 22 of the judgment or in 1998. It is explicit that if two person don't agree that person cannot be appointed and President is not bound to consider the case. Even if the recommendation is made by the Chief Justice. Because there may be difference of opinion chief justice is very much interested to get a particular person to be appointed. So, this is one problem of veto power which is being now discussed. Second

question is now after this I have faced this problem in 2011. A case came before me, saying that this collegium system is a fraud on constitution because this word is nowhere in the constitution and it is a judicial legislature. I was sitting in a two judge bench. so I have recorded and raised 10 questions and referred the questions to the larger bench. Saying that the petitioner does not have any local standi he has no right to come to the court, he is neither a lawyer nor a association, it is a trust. But the question raised by him is so important that is requires to be considered by a larger bench. But nobody wants to lose the power. Chief justice dismiss that petition, holding that the petitioner has no right. No locus standi, therefore this petition cannot be entertained. Ultimately this NJAC came. It has 3 to 4 problems. One is Veto power of two persons which is always there. Not only with the collegium members but with the non Collegiate members also. Second is eminent person. Eminent, who is eminent. The eminent person may be Lata Mangeshkar, Somebody may say Sachin Tendulkar. And in every City there is famous chat wala and famous mithai wala. This is everywhere. So what is the meaning of. This issue was discussed in 1961. state of Madhya Pradesh vs Baldev Prasad and subsequently in K Abbas. The question arose in 61, that under this Madhya Pradesh Goonda Act., the district magistrate has a power ask him to leave his district and go out. But everything was defined except what is Gunda. And the Act was struck down only on the ground that Act is very vague because it does not define Gunda as eminent in our NJAC Act. But subsequently in K. Abass case in 71. The Supreme Court held that the provisions merely of been misused it cannot be struck down. Firstly, it can be struck down only on 2 grounds. First, legislature did not have the competence. Secondly, it violates any of the fundamental rights. No other third ground. Now in K Abbas they further explained that Baldev Prasad case Gunda was not define and the Act was struck down. The court ought to have define Gunda. Filing the gaps. Though there are various judgments where it was said that Court cannot legislate. Cannot fill up the gap. So, all controversies are there which are going to be resolved 10:30 and we have to conclude before that. Now whatever may happen, So these are the basic issues.

Because independence of judiciary, corruption in judiciary, See Magna Carta was celebrated 800 years ago. Article 39 and 40 are very important for Judicial review and

all these things because it Lays down the foundation of civil Liberty and due process of law and human rights. Article 40 specifically speaks about the Magna Carta, Justice shall not be sold meaning thereby this corruption always prevails times and immemorial. so it affects the independence of the judiciary,,... to what extent the law minister the eminent person. First nobody knows who will be the eminent person. Secondly, weather the involvement of the law minister, In the collegium will amount to the interference of the independence of the judiciary. And the independence of the judiciary is itself is a very vague term, what is judicial independence. And thirdly, consultation of the chief justice in selecting this eminent person may compromise with the integrity of the institution of the CJI. When the Supreme Court has itself expressed the opinion that in the appointment of high dignitary and constitutional and statutory authorities Chief Justice should be consulted and recently in this appointment of CBI Chief Justice was a party. If our Chief Justice of India can sit in a meetings selecting the CBI director. What is wrong for him, how does its integrity get compromised if he sits with the along with the prime minister and leader of the opposition for selecting who will be the eminent persons. So these are the questions. Now, I will request Prof C Raj Kumar to explain at least these problems and we will see what happens at 10:30 Thank you.

Prof C. Raj Kumar: - Good Morning to all of you. It is indeed my privilege to come back to the National judicial Academy. When we have decided to have this session on this date that this will be the day when Supreme Court will pronounce the judgment, even the time is.. But we have 45 minutes to spent, really thinking about and then the world would come to know what Supreme Court of India thinks about. In fact justice Chauhan has beautifully summarizes the key issues and I don't think we need to; so what I would do is I have written a few article on the subject which we will share with you. But we will raise few issues and the major issue is in relation to this is when you are looking at the key on the constitutional validity of the NJAC Act, as well as 99 constitutional amendment, it is important that from my point of view to recognize it from the very beginning that they are not going to justify the collegium system. There has been so much written and so much has been said both by judges themselves and by academic writings that the collegium system is suffering from the high level of biases, potential prejudices, the law is

arbitrariness, some of the issues that Justice Chauhan made and all these I think is valid. And I don't think that we can sustain the collegium system of selecting judges in a country where the judiciary itself is the vanguard of ensuring fairness and non-arbitrariness in the decision-making process. If I want to quickly draw your attention to a very important statement made by the then leader of the opposition party, opposition leader of the Rajya Sabha Mr. Arun Jaitley during the impeachment motion against Calcutta High Court Judge Justice Sumitra Sen, and I quote the word of Arun Jaitley who was the leader of the opposition at that time. He was talking about the need of having objective criteria in the selection of judges in the Court. What is your academic qualification, how bright he was bright during the academic days. What is your experiences as a lawyer? If you're a judge how many judgments and have written? How many have been set aside? How many have been upheld? How many juniors have you trained? How many cases you have you argue? How many cases are being reported which you argue? Have you got laws laid down? Have you written papers on legal subjects? I say this because one of the starting points of this political consensus in relation to seeking establishment of National Commission Appointment Bill. It was to recognize that collegium system in its practice had of huge problem different forms of prejudices infuses in the selection process, there is high level of arbitrariness in the process and none other than Justice Ruma Pal, again I will refer to her speech which she talked in the Court, the very secrecy of the process makes inadequate input of information and to the abilities and suitability of possible candidates and as an appointment of the judge, a chance remote, a rumor or even 3rd hand information will be sufficient to damage the selection process. Contrary wise a personal friendship, or unspoken obligation may colour the recommendation. The consensus within the collegium is sometime resolve resulting in dubious appointment with disastrous consequences for the litigants and the credibility of the judicial system. Besides institutional independence has also been compromised by not growing Sycophancy and lobbying within the system and court. This is Justice Ruma Pal speaking. So, I would like to start my remark by saying that the institutional design of the appointment of judges in any country is a very critical complement for our effort to develop high standard of the judiciary. And in Indian context, it become even more important because huge history that we have which culminated the first judges, 2nd judges, and third judges

cases. I'm not going to discuss those cases to this audience. But the starting point is we are developing a new framework and new into institutional framework which is expected to challenge the status quo of the collegium system and address some of the most fundamental problems that are effecting the collegium system. And I believe clearly not only in violation of what I would call a constitutional framework, but indeed would not achieve the objectives on which we have passed the legislation and the amendment. And there are lot number of reasons, to start with the very nature of the clauses In the Act, as Justice Chauhan talk about eminent persons. In fact, arbitrariness is so deeply embedded into the definition of as if there is no definition as such for the word eminent persons has been used. So, in some way not careful thought in reflection; if you remember, the Supreme Court of India itself nullify the appointment of the Central vigilance Commissioner some time ago. In that gentleman the Court talked about institutional ...which is the concept very critical. So, to have the provision of that kind without sufficient guidance to the people who exercise that power is indeed problematic and is indeed arbitrary. It is more interesting to see that the word eminent person has been defined over 60 other legislations; so I don't think that we should have any discomfort for using the word eminent persons but the problem is that there is absolutely no guidance and the legislature guidance on providing some sought of perspective as how would you measure eminence of some kind ought have been the particularly when they are addressing the issue of arbitrariness in the collegium system. The 2nd aspect is what already said veto powers of that two members of the NJAC. Personally speaking that I'm very uncomfortable with the veto powers. Even in international law, the UN Security Council the one example that where the veto powers are there and it has been discredited there and the new expansion of the Security Council of the International framework is rejecting even if the Security Council get expanded there was no new question of new member of the Security Council. It is one thing for the collegium system to develop some in-house procedure to have been some sought of veto power that in fact have also separate problem all together the collegium system or appointment of judges system that historically developed a range of informal criteria. There is an entire book which I will invite you to read which is called "Informal constitution" written by Abhinav Chandrachud. He talks about the underwritten criteria in selecting judges for the Supreme Court of India. He systematically and very very

carefully examined the appointment of over 180 judges of the Supreme Court over last 60 years in which what he talks about besides the criteria that is given in the constitution, age, seniority, diversity all these factors have been infused into the process which has not been laid in the constitution itself; but without going into that what they really want to bring home the point is that the veto power is hugely problematic. And idea that the two individuals as a part of NJAC will be in a position to exercise and in fact the Law Minister was a member of an NJAC can simply exercise the veto power and personally I believe that we are to a potential crisis in relation to appointments. So that is one major problem. The 3rd which is not been sufficient or articulated by the lawyers will have argument before the Supreme Court for the NJAC which is much more deeper and probably for me it is the most discomforting aspect of this entire process is the fact that I have mentioned about the appointment of CBI director in which the Chief Justice of India involving in a discussion relating to an appointment with the Prime Minister as well as the leader of the opposition. Now we know about the various subcommittees and serving the committees is about accommodation and is about negotiation and negotiating processes; it's about even carefully evaluating candidates and determining the suitability through a negotiating process. Now, a negotiating process works when there is fair amount of equality among the negotiators. In this case we're talking about very very awkward situation which the Chief Justice of India representing the entire judiciary will be negotiating with Prime Minister and the leader of the opposition. Now why it becomes significant now we know that over 70 or 75% of the cases that are pending with the Courts are government itself and litigants. The stake of government in litigations and the government policies and many other things are indeed determine by the Courts. That is not the case in several decades ago and clearly it was not been understood by the constitutional framers that the power of the judiciary will be so much in relation to determining the constitutional other forms of validity of this legislation. In that context the Chief Justice of India to engage in a deliberate process in committee sitting and is indeed problematic and I believe that it will compromise independence of the judiciary because clearly the Chief Justice will put in a potential awkward situation. Now the ideas somehow, that the Prime Minister and the leader of the opposition will be a part of the committee and will ensure fairness is already disproved. We have several committees already, the Prime Minister and the leader of an opposition

serves together including the Chief vigilance Commissioner appointment which was invalidated at the Supreme Court, the chair member of the National human rights commission, in that committee also the Prime Minister and the leader of the opposition party serves; and our experience has not been very positive. So we should also recognize that we have this past experience of institutional design in which merely by having the Prime Minister and leader of the opposition will provide this checks and balances is not right. In fact there're a number of instances where potentially people who not to be appropriately to be selected into these bodies have been selected by the both Prime Minister and leader of the opposition party together serving the committee, now politically one could argue that political of accommodation of different interest is part of the process of appointments. But I am not sure whether the Chief Justice of India would become part of the process in which political accommodation of some kind is needed in relation to appointments. This is independent of the criteria which is quite legitimately can be apply for promoting diversity of all kinds including religious or caste or even geographical. But the fact remains that the Chief Justice of India is part of that deliberate process, it is entirely possible that certain degree of discomfort is introduced into the Chief Justice of India alone as opposing the two other political actors while in the committee and in my view it will undermine the independence of judiciary. And I will also see that clearly, these 3 factors I believe is sufficient to declare the law unconstitutional, not only violates the basic structure of the constitution but it also needs leads to institutionalize form of arbitrariness which cannot be remedied in any other manner. I also think, that there is an urge and the political level and at the societal level and in the judicial level the judicial system has created a fair amount of.. Judges and that has to go; but to replace the collegium system. Somebody said we have tried for so long let us try something new. Sometime I'm afraid the constitutional amendments and legislative process are not trial and error methods, we need to have more rigorous and more profound understanding the impact of the legislative and constitutional intervention and I believe that these provisions are not going to give us the result and object for which the law and the amendment has been introduced. So as awaiting the judgment of the Supreme Court I hope and I believe and I sincerely hope that the Court declares this as unconstitutional. And I think that that would be the right thing to do. Thank you.

Prof Sandeep Gopalan:- Thank you very much. Justice Chauhan and Prof C Raj Kumar. After Justice Chauhan has completed his introductory remarks, I was little apprehensive to say on the topic because it covers key points specially pertaining to the constitutionality of NJAC. If you read around the debate of constitutionality of legislations proposed amendment you will see a lot of heat rather than lot of... Think about what similar attempts were attempted in other constitutional structure such as United States, United Kingdom, Ireland and so on. Even in those countries where such proposals were meeting, the judiciary, the bar similar levels of apprehensions that there will be a compromising judiciary. And so on. But despite the lapse of the evidence did not clearly indicate in their deliberations or derogations in those countries with the notion of judicial independence or functionally in terms of the content or quality of the judicial decisions that are emanated since the new system put in place. So looking at a complex situation it sometime, it is helpful to remember that you are not alone, many of the system has tried similar methods with varying degree of success. And it is often useful to compare our own efforts of reform with those who have gone before us to see, which ultimately try us to understand whether the challenge that is mounted in this morning is sustainable. So what I'm going to do effectively propose counterpoint whatever my colleague has proposed. In doing that in brief of what I have to put an brief overview of comparative studies of United Kingdom and Ireland which adopted substantially similar proposals. And had a track record of a decade or more to show you how they have working in practice without any the deterioration in the system. 2nd I will outline the broader context some arguments made against the proposal; some theoretical understanding of the limits of judicial review. And related options that Courts primarily the United States to attack the harsh consequences of judicial review to the modern notions of the democratic governance... And in doing that I seek to facilitate on the principle of constitutionality, which one of the principles I think evolved to limit judicial reviews and to cabinet within manageable limits so that we may not have harsh outcomes and finally in doing that I have some remarks to say about whether the system is constitutional or not. So something with some comparative observation. So it is much useful to look at the Irish system which is embodied in the Courts and Court Officers Act 1995, which in its key section, section 14 provides for the appointment of judicial appointments advisory board. Note the title advisory. So, it tells you that nature and scope

of the power of this board which is advisory to the Minister of the Justice and therefore it limits that the services provided by that Board. In section 13 which provides for a how that this board is to be constituted. You will see a certain kind of quota system emerging in how this board is to be constituted. So you have on one hand the presentation designated board judges for the High Court and the Chief Justice of Ireland, the President of the High Court, circuit Court and so on. Designated representation of the attorney general and then you have few representative positions for the professions which are ultimately has a huge stake in the role of making the independence of judiciary and finally the key singular final portion of members that form is the three members appointed by the ministers. So the people who are largely representing the public in the sense of democratic accountability and governance.. The president of the High Court means Chief Justice of the High Court.... There is a Court of Appeal.

Participant (Justice Mridula Bhatkar): – Nomenclature is different.

Prof Sandeep Gopalan:- So you can see that on one hand it is an institutional stakeholder that is the judiciary. They have attorney general, a professional. But that key of the whole provision is the participation of the main members to direct appointment by the Minister. Democratic appointment by participation, so it is important virtue for the appointment of high constitutional functions. Yes, yes, then I'll persons from, commerce, finance, administration and all those persons who are experienced of the consumers and the service providers for the Courts. So the language is not specificatory the expertise as much as capturing various constituencies of public bodies. It is not necessarily saying one has to have a Ph.D., it is think that only they should have a good experience of commerce, finance or administration; and therefore the key point is that it is more democratic.

The 2nd point I want to me about the Irish system is the procedure of the board is unspecified in the legislature system. Meaning there is huge amount of discretion vested in the board to design and adopt such procedures as it thinks appropriate. Secondly it is able to deal such other things as the board things necessary for the performance of its functions. The third point is that the board through this legislation enjoys a huge amount

of delegated authority, without giving much specifications in terms of that detail that how such a delegation is to be actually applied. And that is not fatal to the legislation.

The 3rd point I want to make about the JAB and the system of appointments of Ireland that since the passage of the Act, to be sure that there are many criticism how the powers has been used by the executive etc, etc. as the case it is in Indian system. But fact of the matter, the Council of Europe audit of the judicial system and specifically the question is about the independence of judiciary found that under the European standards the Irish system of judicial independence is extremely high. There is no problem with regard to the functions under the Irish system, there is no serious concerned that independence of the judiciary is compromised, there was no doubt that the system of judicial decision-making in Ireland is influenced by executive power etc etc. Therefore, the system works.

Two, the United Kingdom, so we come to the UK Constitutional Reforms Act, the key to remember before we go to the actual point is section 3 t of the statute, which enjoins the principle of judicial independence, remember if you can 2005 reform came about during ...the Lord Chancellor was substantially changed the historic office. The question of changing the Lord Chancellor was undermining the principle of the independence of the judiciary and the system of English common law that evolved over hundreds of years ago. So it was so necessary to include this provision in the statute, that here you have a specific obligation imposed upon the Lord Chancellor to maintain with independence of the judiciary which are according to the statute is continuing to be guaranteed. And 2nd thing that there is a specific provision which is in clause 6 were Lord Chancellor is required to have regard to the need of public interest and with regard to matter pertaining to judiciary or it is to be administration of Justice.. So while preserving the independence of the judiciary clause 6 specifically brings the democratic participation by making an executive officials including the need for public participation through this mechanism.... The provision of clause 6 (3) provides for the public interest in regard to the matters relating to the judiciary or otherwise to the administration of Justice. Now specifically with regard to the commission itself section 61 of this constitution of this Reform Act provides that there is a body corporate called Judicial Appointments Commission. But the section is completely silent about the specific provision. The actual working of the section is been

dedicated to the schedule.. So in schedule there a detail.. The key provision which is here in UK and contrary to our own provision in India is that the chairperson of the commission is the layman. It is not the Chief Justice. It is not a judicial member. But actually it is a layman. Once again highlighting the point I made about the clause 6 and its importance for control of democratic participation... If you see the schedule there are specific process of appointment of members. It has to go to the due process. With the layman means who have never been practicing. The idea behind is that the person who will come from the same area may come with basis. We want to eliminate that. So you see in clause 3 the layman is just a person just a resident in England and northern qualification required. Just a couple of provisions I want to highlight in the context that has been laid down by Justice Chauhan and by Prof C Raj Kumar about the consultation with the Chief Justice with the executive. You'll then see number of provisions in the statute where there is such consultation and yet such provisions does not undermine the independence of the judiciary. Because it is meant accepted that it is a constitutional functionary's can engaged in such consultation with other coordinator branches of government and each branch is expected to perform its functions appropriately.

Hon'ble Justice B.S. Chauhan: – We have the system of the appointment of lokayukt..

Prof Sandeep Gopalan: – So that set-off idea of consultation does not automatically entail derogation of independence... So in that country it is not been found a problem. Secondly, If again the Lord Chancellor had rejected a suggestion made by the commission that person may not be brought forward upon consideration. So, the effect the Lord Chancellor may exercise the veto power over the appointments as long as the Lord Chancellor is able to articulate some reasons to be appointment commission. So that's the only limitation. It is perfectly possible for the Lord Chancellor to reject a name would forward by the commission after the appropriate processes. And that's the end of the matter. The commission then do not put again the name of the same person...

Hon'ble Justice B.S. Chauhan: – Have any of you who have seen that seven judge's bench of Pakistan Supreme Court. Upholding the constitutional validity of, the same kind of commission, they have the same law Minister, they have copied other NJAC and seven

judge of the Supreme Court has held the validity. This was perhaps in August; but none of the Honorable judges had the copy of this judgment. But they have said that there is nothing wrong. Before we were discussing so many of appointments, lok pal etc., so many consultations are going on what is wrong because they are also representative and earlier they have a role.

So I want to frame a question big problem in this context, if the about limit of judicial review and the exercise of power of judicial review with regard to the questions which are been discussed and debated and framed by the Parliament. What is the legitimacy of the over exercising judicial review in modern democratic politics. So this notion has capsulated in constitutional law theory and the counter majoritarian difficulty. And the stream of article referring counter majoritarian difficulty goes on the line of the fact that essentially in United States that you have legislation which is passed by the.. After due consideration.... So given that problem a logical question many judges, advocates, academicians has raised is judicial review is itself legitimate. Is it constitutional in itself in a sense? To the extent it is bound to be necessary as a system of checks and balances. How do we mitigate...The ways and the means this is to be done is through the limitations presented by the presumption of constitutionality that if you are a Supreme Court has sense of abstention doctrine. Supreme Court has typically said you Congress have enacted this law making a determination as to that requires a legislative solution. And we the judges will presume that it is constitutional. And two as Congress you also a coordinate branch under the constitution with the authority to make determination make a part constitutionality for yourself. So, the Court essentially say that under the presumption of constitutionality that once congress has made legislations it has come to the decision that it is constitutional to make legislation in this form. And we as coordinator we must keep some deterrent to other constitutional arms,judgmentupon its constitutionality.

I have a quick question whether court begin with the presumption of constitutionality?

Prof Sandeep Gopalan: – Correct, I have to get to that

Honorable Justice BS Chauhan: – One need to understand that there is a chapter on presumptions; court can presume and proceed.... So one has to show that power has not been used in this manner. But you can sit in a Court with a mind

the US Supreme Court said that there is a doctrine which says begin with the presumptions does there is a shift in the burden and it has been argued in the Supreme Court of India that the reservations should be imported in India and the Supreme Court has rejected it but in US..

Prof Sandeep Gopalan:- You are exactly right. Let me..So the presumptions of constitutionality in American constitutional law extended to all exceptions. So, the judicial arms are extremely cautious with using this power of judicial review. So if you look at the records, we will see that 159 statutes were declared unconstitutional. So basically less than one per year compared that what you got here. And that some of the principal initially applied.... The first phrase of judicial review... In 1971 the first resumptions were used... so, typically to see that only see that 159 statutes were declared unconstitutional. Between 1789 and 2002. So that But you see the first use of phrase in the case of Comeron... Which dealt with the judicial review the state statutes in 1890 we're of the presumption is used to uphold the statute which was challenged. But what happened over time is that degree of caution.. Was built away and certain category of challenges came up for upholding the statutes here the Courts starts off the presumption that something which is volative of fundamental rights is presumptively unconstitutional? And then the government has the burden of proving... So these are the key scrutiny that is given to the constitutional challenges. Broad points remains that the principle presumptions of constitutionality is an extremely weaken one where it seems to apply that the presumptions operate that a very thin level so as to only see that it is only a tie breaker. So in other words, if there is something which is constitutional or unconstitutional, the presumptions may operate as a tie breaker to mean that the statute is constitutional.

The current position can be captured by Smith V Deo where Justice described the presumptions, and said presumption of constitutionality normally accorded a state's law. The reason by I making this theoretical argument about judicial review, its limit and

presumption of constitutionality because that is the assertive by the government in this case saying that this enactment should be given the presumptions of constitutionality. And should therefore be upheld. The facts suggest that the law on presumption of constitutionality is law weaker that government seeks to itself especially when it implicates fundamental rights and key notions such as the independence of judiciary. So to the extent of the presumptions of constitutionality should be applied in this case. It should only be as a tie breaker. So the government should not have a free pass on relying on the principle of constitutionality. Now applying on what I have just said very quickly one or 2 minutes to NJAC and the arguments made about that it is unconstitutional. A quick survey of US case law and other laws wavelengths suggest that it is a very very high Bar for the petitioner to weigh that the statute fails of the constitutional test because the Courts have been quite willing to fill in the gaps, when the term is said to be vague by reading in language to make a constitution. Most recent example, the Obama decision were many judgments are done by Chief Justice Roberts; Chief Justice Roberts there in making a finding what constitutionality has... Made what is the meaning of word penalty. If it is to read that down penalty does not mean punishment in a criminal sense but just a tax which is acceptable... The there are challenges which are unlikely to succeed and therefore challenge based upon the use of the word eminent persons is unlikely to be successful because eminence to the extent of that it vague is capable of being expressed in the statute to the extent that it need to be.... Read by the judges.. We haven't have any instance of somebody appointed as an eminent. The Seller in the Lucknow or something like that as Justice Chauhan has mentioned. So if the standing requirement is dominant, a question about vagueness is easily is resolved because you have concrete evidence. If because if this case arise after some Methai Wala appointed as an eminent person, we have concrete fact to show that the vague language of eminence is not been constitutional and is an unconstitutional exercise of power. At present we don't have. And as long as statute is capable of being read in a constitutional form and applied in that constitutional form the vagueness is void. I have already addressed the arguments about the consultation. So the fact the Chief Justice had been a part of the committee to discuss is not a problem. 3rd the veto power is not a problem, many of the system possess similar veto powers. And a final point I wish to make in closing let not get to obsessed about, the

evidence in the United states in history showed in the chart that has no matter which political party appoints a person and USA the most politicized system of judiciary appointment. The judges are perfectly capable of functioning after appointment with the independence. And often contrary to the political instincts of the political of appointers. The longer they serve the court more liberal they become. So, even those Conservative appointments at the Republican presidents.. eventually turn out to be a high Pragmatist. So regardless of how political or politicalize appointment is it does not automatically mean that the system of independence judiciary is functional independence in terms of making decision. The actual conduct of judicial functions exercise through Court rooms and decisions there is now automatically compromise. The true evidence that happened or not is ultimate in the judges himself. No system is capable of eliminating all bias, eliminating on political election, eliminating of all possibilities of interference, corruption, on flaws etc that happens. All we have is ultimately we have system which is in turn fallible. But the question is that whether the unbalanced in a way as to maximize independence. My submission is this system specially if we compare it with other countries and the system currently in place is certainly been proved but the question of constitutionality is not about the wisdom of designing by the legislature; it is about the unconstitutional because it violates some provisions of the constitution. Clearly it is not possible to say that it is unconstitutional as it violates the constitutional provision. Thank you

Prof khagesh Gautam:- I have a permission on the vagueness point that you make, Mahboob Ali Beg during the drafting of the constitution made a very important observation about the nature of parliamentary democracy, and he says if a house comprise of hundred seats the one who gets 51 seats win and within that 51 one who got 31 wins. So basically one person who won will whereas is a.. Grant of power which you may and that grant of power the misuse of power cannot be attached to. This is of the first kind. About what eminent person means your argument is not answer that objections. I hold my questions now.

Hon'ble Justice B.S. Chauhan: – I know I was the Chief Justice and I was the member of the Collegium, my experience is whatever may be the law it depends upon the person who are.. exactly. If we appoint a person whatever may be, whether he may have the

legal background or.. Now in the Supreme Court say and eminent person means belonging to field of law, suppose they don't know what will happen so then it will solve our problem. So let us see what is the judgment that will today. This comparative study shown by our director is very good, But we have a different kind of status in India, we have to give the representation... Till today we don't have a single representation / officer and then the house passes the resolution, let post may get advertise of the deputy collector exclusively reserve for this caste. How it is permissible, even a reservation is also not for a particular caste. Or for this reasons that they don't have any representation whatsoever and post was advertised only persons belonging to this caste can apply. Eight persons applied for this. One was selected. His appointment was challenged on the ground that is post is to develop by the promotion and not by direct appointment. Secondly, this post, this advertisement cannot be, there cannot be 100% reservations in favour of a particular caste. There are different considerations for that, but the High Court says whatever is the rule it was the resolution of the state assembly, what can we do? It is as good as the rules framed under the 309 of the constitution. And period the appointment. Now, it came before me; I said that this appointment cannot be supported, cannot be approved, but in the facts and circumstances of the case we refused to interfere because democracy means the you are not your slaves forever. We must also have some share in the power. Now, who is the Honourable Judge from the Andhra Pradesh? You are. You would have Justice Swami. Most of the time he was writing and getting information on caste basis what is the percentage of particular caste judges in each High Court. And then wrote a book, revise it every year, showing that this particular caste has no representation. Why there is a monopoly of a particular caste. If we are dealing with this kind of situation, we have to think when we are here, we have also to give some share. That is the whole concept of reservation, whatever it may be. Therefore, let us make for the judgment and then let us see then we will make the comment and invite all of us again..

Participant:- In a lighter way to conclude that narration, as the circulation this book, so the contempt was initiated against a Justice Swami.

Hon'ble Justice B.S. Chauhan: – I know that, he was in touch with me always.

Participant:- Then what happen, he said I am ready to face the Court. The case was posted before the chamber. He said chambers not the place, you have taken Suo moto action, I have no problem to stand before the Court. He further said it shall not be by two judges, it shall be by three judges. Separate bench should be constituted to have. They said better not touch it and thought about it. Matter went so many adjournments. I have been listening this story for last 8 years.

Hon'ble Justice B.S. Chauhan: – I give you an example, client appeared before the person before Supreme Court and he said please don't hear my case if any of you is Brahmin. And all the 3 judges were are Brahmins. Now, unfortunately we are living in a different atmosphere. Altogether. So it is a question of keeping them together and we must have faith in the religion, caste etc. it will not work. So let us wait for the judgment and have a tea....

Participant:- Rule of law is deeply entrenched in the government of UK and Ireland which is not in India. The decisions that are coming up in India, I don't think it is appropriate for us to compare any of these legal system and to see that in the Indian context.

Participant:- I can say in a layman language. They are always in a queue, they throw garbage in road, they don't urinate on the road, and they don't take years to decide a case, so there is no comparison at all.

Session 6: Evolution of Statutory Regulatory Authorities- Implication for Separation of Powers

Hon'ble Justice BS Chauhan:- If the Act is struck down on the ground by legislature did not have the competence to enact it only in that situation the Old Act revives. Otherwise the Act goes and in such a situation the government has to come out with the new Act. If Act is struck down Suppose on a particular ground that you have not define what is eminent person, this is the problem then the Government may come with an Act defining what is the meaning of eminent person. Resolve this problems come within two three months and let the lawyers challenge that Act also we will see. but don't worry for the time. Now let us now come to this regulatory authority; Implication for Separation of

Powers. Now, we have to eminent speakers on this Dr. K.P. Krishnan and Prof Sandeep Gopalan.

Hon'ble Justice BS Chauhan:- Now the other things, what is the problem with the regulatory authorities with Separation of Powers doctrine. Separation of power has been the subject of discussion from several centuries; in other Time Blackstone always favours judicial legislation being based on experience. Bantrom opposed it and transgression of powers of others. Montesquieu, the French philosopher in his book spirit of laws said no organ should transgress the powers of others and if you confer upon a judge, the power of the executive or the legislature; he will play havoc and he may behave with violence and operation. When American constitution has been drafted one member of the consequent assembly said find the powers of the judges because judges may feel over and above the law. They can lay down anything and they may violate the constitution. But another member Alexander Hamilton said legislature, judiciary, executive all are agencies of the people. Power lie with the people of the country. Therefore people will take care of it. And asked them to behave properly; so don't worry, the Court of the judges may behave in an arbitrary manner. Because ultimately it is the people of the country who can tell anybody, keep yourself with your limitations. Lord Acton says if you confer a power, restrict it. Because absolute power corrupts absolutely. In the constitution there are a large number of articles provided for separation of power. Article 50, 53 (1), 74 (2), 121,122,211,212. Telling everyone what are your powers and don't interfere in the powers of the others, and don't discuss. Parliament will not discuss the conduct of the judges. Judges will not discuss what happened in the Parliament. Therefore, this is the separation of power.

Part VI contains chapter 6 which provides for separation magistracy from executive. Therefore power of the magistracy, judicial powers should not be under the control of the executive. And if we have done it except in some north-eastern states, we are even today perhaps Arunachal, the magistracy is under the executive. But Supreme Court has issued directions several times, keep it separate, there should not be subordinate to the executive and it is under the process. Supreme Court in large number of cases has said that separation of power is a basic feature of the constitution. Parliament does not have

a right to amend in exercise of this power of article 368 to amend the constitution in such a way that can take it. The difficulty in the administrative law is that administrative law deals with has conferred a large number of Powers with economic growth. This globalization, effect of globalization, investment of owners in this country and we have so much economic activity in the state itself; then there had to be certain rules how to govern the executive function. Therefore, to control that the regulatory authorities has been created by the legislature. Their powers have been defined. Secondly there is a restriction on their powers and remedies against the unlawful use exercise of power is judicial review by Superior judiciary. Agencies serve to restrict private rights and can be termed as judicialisation of administrative process. It is required because of necessary economic revolutions. It is created by legislature. It is presumed to provide cheaper and in expensive Justice in the user friendly manner. But it has two difficulties. It violates the doctrine of separation of powers and 2nd legislature cannot delegate its legislative function to any person. If legislature does not have a power to delegate to any one, how these regulatory authorities are performing the legislative work because they frame the rules and guidelines. Secondly, they perform for quasi- judicial function as they are determining the private disputes, rights and liabilities of the parties therefore they are performing quasi-judicial powers. But the question is no Court till today in India has held that the doctrine of separation of power applies with full rigidity, absolutely.

Supreme Court under the exercise of article 145 frames the Supreme Court rules, how to govern the functioning. High Court under article 127(2) of the constitution and 122 of the CPC frame rules even for the subordinate Courts. Parliament while impeach a judge exercising judicial powers. Because constitution bench of the Supreme Court has held that holding a disciplinary proceedings and imposing the punishment is a judicial act. Therefore, all requirements of natural Justice etc. What happens in judicial process should be complied with. Now the president, when deals with the Courts Martial the supreme commander of the Army under article 53(2) performs judicial functions. When terminate the service of the Army officer. Authority using an exercise power of only conferred upon it but the next question is which no Court has till answered. Whether it can exercise the incidental or ancillary powers? Because we must remember this 69 Supreme Court 430, Mohd Unis case; were the Supreme Court has explained that even

an appellate authority This Income Tax Act, while exercising the appellate power may not have the power to grant interim relief/stay. But it is implied ancillary power of the appellate authority, therefore in spite of the fact that the appellate authority does not have specifically conformed the power of interim stay can grant it. Now, in the subsequent case Supreme Court doubted that judgment. But in 2012, I have put all those judgments in my notes; the Supreme Court considered the cases and answered this question that whether the regulatory authority can exercise the incidental or ancillary power. Therefore the question came whether it can grant of the mandatory injunction during the proceedings of the proceedings. The Court said we want to grant it mandatory and final order which cannot be passed in interim stage therefore the order was bad. But this question was left open. So I have put all the 3 judgments in my notes. So, 2 things are there to what extend this delegation of power is permissible under the constitution. And secondly how does it violates the power of separation. And whether the regulatory authority can exercise the ancillary powers/incidental powers in deciding the matters. Because after going through large number of materials what the Courts have commented; rather this academic persons not judges have written much more than the Courts that the judicial mimickery not the judicial function. But if they are quasi- judicial authorities. Now they're performing a quasi- judicial functions which is not a judicial mimickery but a judicial work itself. Mimickery is then when someone does not have the power and at someone else and is remotely aggrieved person can always have a remedy before the judiciary.

Now I will request first Dr. K.P. Krishnan to explain and try to answer is that this delegation of power is more serious problem that this incidental problem because we can understand if they have power to decide they have to power to grant interim relief also. So please explain in your own way.

Dr. K.P. Krishnan:- Thank you. Good morning to you all and good morning sirs. Perhaps I would put presumptuous on my part to think that I will be able to answer to the audience as distinguished questions. What I hope to bring is some experience may submit my own academic training in economics and law on the functioning of the regulatory authorities. I in my previous capacity has dealt lot of regulatory authorities of financial sectors. I used to be on the security exchange board of India. I used to be on the board of the reserve

bank of India. I used to be on Asian finance regulatory development authority which is 2014 legislation but authority came to existence by a executive resolution in 2004. So I have some actual practical experience with the regulatory authorities. So, sir with your permission.. How long I can take..

Hon'ble Justice BS Chauhan:- You can take whole time. We're not in hurry.

Dr. K.P. Krishnan:- Thank you, the structure of my presentation and I will compress it in a lighter way, sir has already covered it. What I have to planned was a very brief introduction in terms of concept on why do we require this kind of state intervention. This kind of state intervention in the form of a statutory regulatory authorities which is Bhrama, Vishnu and Shiva combined into one, in which the sir has explained that creator of the law, the administrator of the law, and well as the adjudicator in disputes relating to law made by that the agency is a very peculiar conception. And while this form of state intervention come along in the first place. This was not peculiar to India.. It has a similar development across the world sir. You is you also the in the all the you so you is the in the use a manner so as to Starting with America, America started this in 1860 specially with the Rail Road regulator, the authorities who have been conferred with power to fix freights. But later on bulk of the world follow this very model. I was spent very briefly 2-3 minutes on constitution of questions that this raises and briefly some of the traditional norms of the subject and how very judiciously, the judiciary has handled the question exactly as sir said without explicitly having pronounced on the constitutional validity of some of these. These arrangements have been allowed to be kept going. So it is a tight rope walk. And I would spend one or 2 minutes on financial sector legislations in India. And this is a very interesting sort of the broad spectrum. The first of the legislation is 1934. The Reserve Bank of India Act is pre independence legislation. And the most modern legislation on this is PFRDA Act 2014. So we have the acts standing about 30 to 40 years. I attempt to solve similar set of problems but with the knowledge of economics, public policy, governance and the jurisprudence of all most of a century. How these have been infused into different legislations and obviously it throws up a whole bunch of problems and issues. And to look at many of these issues, in 2010 that then finance minister Mr Pranab Mukherjee announced the creation of the financial sector legislative reforms commission which got

constituted about 8,10 months later. It was headed by Justice Srikrishna. And it is a eight-member commission. Justice Srikrishna was the chair. It has former bank Deputy Governor. It has former regulators. It has academics. It has one civil servant and it has two ..market participants and that commission has very detailed two volume report has laid down now as to the best way to carry the requirement of this formal intervention of the statutory regulatory authority which is exercising this combination of 3 very different types of powers marrying it with Indian constitutional role of our requirements and suggesting an entire new setup legislations and the way forward. This is a very broad sweep. So necessarily I would be very shot on many matters on which you have greater familiarity then I sir. Quick one-minute on. Economic to the tells us that ordinarily, purely in an economic sense I am not talking about societal larger sense; the only in economic sense; a reasonably well functioning market will produce outcomes which economics call's efficient outcomes. These may not be necessarily what we think our equitable outcomes. This may not we think are fair outcomes. All that economic theory claims is, if market in certain circumstances are allowed to function freely they will produce efficient outcomes. Then it goes on to make out the case that there are likely situations where there will be a market failure. Markets would not even produce efficient outcomes. Typically those are cases where in use language we call natural monopolies. There are large number of activities were the average cost of producing a service comes down very steeply when the volume of output increases. For instance Telecom is a classic example, or take railways, it does not make sense for us to have 25 railway lines between Delhi and Bhopal. It make sense to have only one line. Because if you keep this line running 24 by 7 it reduces the cost of travel. The average cost of travel will come down to paissas per kilometer; whereas it would be thousand of rupees per kilometer. Economics tells us that there are likely to be activities which are in economic called natural monopolies. Namely there are the most efficient when there are only one or 2 providers of the service. But we all know the monopoly by definition tends to work for profit maximization of the monopoly. And monopoly therefore tend to produce less than what is considered socially optimal or desirable. Hence, typically all these monopolies which are normally the utilities, Telecom, Road, railways, typically these are used to be in the hands of government. Typical use to be public sector monopoly. Over a period of time variety of reasons which

need not detail here. Private sector participation in these activities has been increased. That is the starting point of very complex laws to be dealt with privatization, the increase in the competition that the necessarily require. For example technologically has rendered the argument that Telecom is a monopoly in the sense been there redundant. And this point it can be called as oligopoly. May it require 6 to 7 providers. So the relentless march of technology, new managerial developments had lead to need for complex laws which deals with evolving market conditions continuously. Therefore you need specialized regulation clearly is not any longer is a matter of generalization. Whether it is Telecom, securities market, whether it is payment system. The complexity of the activity has made it necessary for it to be a specialized branch of knowledge. And complexity also requires that there is flexibility because the rules would need to keeps on changing. Because the evolving situation is not something which can be envisaged, but legislation is being crafted by the legislature. So the rules have be kept mineable plus multiple stakeholders increases scrutiny and therefore need for specialization is reinforced by this development. There is also in the case for instance central-bank, namely the equivalent to Reserve Bank of India over a period of time then was not a literature to show that if the Central bank whose formal function is monitoring policy is also a hand made in the government; it will typically lead to be very sub optimal outcomes. And then there is an excellent economic theory now sanctified by at least 2 noble prizes; which conclusively established the case for the independence of central monitory authority in absolutely rigorous technical sense. Independence from the government. So, we to handle conflict of interest if this activity were to be hosed inside the government led. This is the 2nd reason which has led to the development of what I call SRA namely Statutory Regulatory Authorities. And third part taking the example of recently for instance the Ford security and standard Authority of India. If this authority is perceived to be opt and borrow of Ministry of health, the credibility of this body when it gives a view on Maggie v. a domestically produced product is a likely to be question. The whole question is of credibility of the agency beside the conflict of interest. These are essentially very short summary of three or four reasons the world saw development and evolution of larger and larger number of Statutory Regulatory Authorities. The US example I've mentioned. I jumped through this. There aren't many many models of crafting of the regulatory authorities. For instance, in Italy

and Germany nominees of legislatures are part of the regulatory authorities. Going back to the point rigidity of the separation of powers even in jurisdiction where separation of powers otherwise followed very strictly doesn't seem to be followed in practice, short point of this slide is that proliferation of Regulatory authorities across the globe, it's not merely confined now to developing countries, it is also seriously extending to the developing countries. One quick.. Development that taken place in UK, I find typically on the lot of these kind of issues, the concepts and the jurisprudence in UK is actually far more evolved. Then I find with the other jurisdiction, in the 80s this excellent report written by a former cabinet secretary of UK Sir Leo Pliatsky who came up with this phrase called non departmental public body. The argument was many functions of a modern state need to be performed by agencies which are it arm's length from the government proper, from the state; but these bodies are not necessarily all alike. For the instance, Sangeet Natak Academy also needs to be at arm's length from.., so is the for Reserve Bank of India and is TARI. They are very different in terms of requirements. The Sangeet Natak Academy may require a form of operational independence very different from the operational autonomy which the reserve bank of India requires. So this report of the UK which is accepted by the cabinet does an 8 fold classification of NDPB's and then puts government structure in terms of how will start the appointment, what will be the kind of audit? What will be its independence from government? What will be the accountability to the people to Parliament? We in India did necessarily go down this route. We have typically in the literature, sir we have a concept called grant aided institutions or autonomous bodies. But this classification is actually a complete nightmare because you have all kinds of bodies the IIT's are classified in the same category as The Reserve Bank of India, National Law School's are put in the same bucket, so we have done a good job in this autonomous bodies. But in India to focus only on the regulatory authorities, we have a smaller body as I've mentioned earlier go back to the independence in 1930, typically in pre-1991,92 the regulations in bulk of activities was done by government departments themselves. For instance I used to be in 2005, I used to be occupying the position of joint secretary capital markets. My grand predecessors was control on capital issues and ex officio joint secretary. Till 1992, the control of on the capital issues who were an officer sitting inside the North block actually was discharging all of the functions that are today be discharged

by SEBI. In fact many of you would be horrified to know that pre-1991 of control of capital issues had the power and actually decided if a company wanted to go public that CCI decided when can that company can go public. The CCI decided in that company allow to go public and sell shares to the public what day? What time? And at what price? Who will be allowed to buy and who will be allow to buy how much? Why? 1944 under the Defense of India rules we have passed to the control of capital issues order which got converted into the Controller of Capital Issues Act 1965 and that pre independence World War II legislative framework govern regulations of the security markets of India till 1992. So, departmental officer was actually a regulator. Likewise the Department of Telecom till the creation of TRAI was all what we now see TRAI doing..So, typically pre-1991 we saw government department directly regulating economic activities. Post 92 when we actually break with the past and really first modern legislation which is in tune with the spirit of the times is the SEBI Act 1992. Far ahead of its time, extremely well drafted. Subsequently lot of the other Acts had cut and paste the SEBI Act, not realizing the things will change considerably but I will not go into this at this point. I have also mentioned body like NHRC, National commission for the backward classes etc here because typically in Indian academic as well as semi judicial literature, all these get classified as regulators. For instance the pay commission reports were all of these bodies are classified as regulators. Whereas half of these bodies do not do anything as the Reserve Bank of India and other bodies do.

I will skip this slide. I will be now focusing on only bodies that have executive, legislative and quasi- judicial powers and given my own knowledge I will stick to financial sector regulators. Little research that I have done, the only locus SRA that I could find in the constitution is Article 53. 53 (1) talks about exercise of the powers of the executive by the President through officers subordinate to him. 53 (3) talks about the Parliament to confirm by a law “functions” to “authorities”. It occurs in the chapter dealing with the executive. But this is the only article of the constitution that I would find there you can try and locate statutory regulatory authority. Interestingly the constitution does not define functions or authority in that context. The part dealing with fundamental rights again uses the word authority but it is for the purposes of its part. And I can suppose that we can extract that

principle even for other parts of the constitution. Equally interestingly executive powers has go and has also not been very explicitly defined in the constitution.

I point out some judicial pronouncements, of course for that you know better than we residue the government functions left after the legislature and judiciary is what we typically categories as executive and power to make subordinate legislations, when such power is delegated by law has been held to be part of executive functioning. Limited judicial functions, when such functions are delegated by law. All these are explicit statements that I picked from judgements which I can refer to later. And the word authority as a said is not defined in this part of the constitution but we have a series of very clear judgements on what constitute some authority going back at least to 1967 Rajasthan State Electricity Board case and clearly RBI, SEBI, IRDA, TRAI etc would constitute parties under article 53 (3) and the short outcome of all this is exactly what Sir said at the beginning; a body created by law which is a new type of agency with all pre powers of state in the sense as some of my colleagues in Ministry of finance is to call this is Quasi-state. This body in itself is amalgam of all the functions of the state. Now, separation of powers I will not at all go into this except to make one point which sir made no jurisdiction has adopted the separation of powers in its very rigid and all original form. We all have adopted all that doctrine and typically it has tended to shift from the strict demarcation of functions to checks and balances. And in that spirit the three functions, I've mentioned already the SEBI explicitly. So there is skeleton legislation, all of the detail regulations of markets or of banking or of pension fund authorities is not done by the legislatures. It is actually done by this body. How much capital is required to start the bank? How much is the liquidity that a bank needs to keep? Are all contained in these are examples of the regulations that are made by regulators and these are very fundamental questions which ordinarily 60 years ago the view would have been that these are the matters which only the legislature cannot legislate upon. So these are legislative functions and in executive list they license, they exempt, they investigate, they prosecute and in judicial they adjudicate including imposition of monetary penalties. And theoretically we know that these be separated and article 50 of the constitution in the directive principles has an explicit exhortation on continuing to keep executive separate from judicial functions in the same spirit which are mentioned sir in the case of Arunachal Pradesh. On the rule of law again I will not spent beyond half a second standard principles that we are aware of and the reason I am mentioning is to go through individual regulators and show that a lot of peace

and solitary principles are not necessarily actually being getting followed. What has been the judicial pronouncements broadly is have not been held to be in invalid. So, I have used it in a positive phrase, constitution and valid. And quote the specific judgment of the Supreme Court of 2000 were they renounce the individual case to be perfectly fine, but leave a question mark on the larger and more philosophical question. Courts have also emphasized the need for independence of regulators such as TRAI. This is in the Science Forum case. Courts had said issuing directions for instance section 11 of the SEBI Act. CCI powers to make the enquiry under 26 are valid. And Monetary fees which are advolerm in nature. That is the fee which is related to the quantum of business that is carried out by the entity though it is almost akin to tax have been held in the Bombay DSE Forum case. Supreme Court by the unanimous judgement has held all these powers, regulatory authority has been permitted, the Court has upheld that they can licence regulators, supervisors. Clariant International an interesting case were the specific question before the court, the Supreme Court said everything is fine, we don't want to interfere in this case, Clariant International lost the case, but it in leave of very philosophical question open and hanging namely separation of powers clearly a part of the basic feature of constitution of India and integration of powers by vesting all of these in the same body in future may raise several public law concerns as the principle of control of one body over the other was the Central underlying the separation of power. But they also go on to say deciding on this is not central true issue before us and therefore we are not pronouncing very explicitly on this point and this is the point I keep making with my colleagues that in one sense the Courts have given you along rope. They had seen your behaviour from 1992 to 2004. And by enlarge they won't have too many of apprehensions, but clearly in the creation of those bodies there is a potential seed which can be destructive and Courts will continue to watch on which is the appropriate balance in terms of separation v. checks and balances. So I think we need to be clearly on this. And this is exactly that point that Justice Shri Krishnana picks up. I've made this point sir. Act of RBI goes back to 34, Insurance Act is 38. Securities Contract Regulation Act of 1956. I have not put there one more act. The FCR Act, the Act which deals with the commodities regulation an act of 52, it is really very interesting. The preamble of the Acts says, an Act written for the purposes of banning, I repeat banning/prohibiting the future trade and

commodities. That was the purpose of 1952 Act. And what do we do in 2001 we amend that Act to create opposite the entire legislative framework for regulating the forward trading in commodities is contained in two sections of this Act whose preamble is to ban the trading in..commodities. Fortunately that Act now stand repealed because the FMC has now been merged with SEBI. So, the purpose of that example was on legislations which were product that times, it was the thinking in India at that point of time. Stand-alone amendments that been carried out leading to an enormous confusion. For instance many are familiar with the famous dispute that occurred on ULIPS, the Unit Link Insurance Plan which led to lot of bloodletting. The insurance act of 1938 explicitly says that there can be insurance product with no insurance cover. Now, this is hilarious because an insurance product without an insurance cover is the mutual fund product. Mutual fund product is regulated by SEBI, but the insurance act explicitly a product which is not an insurance product but is regulated under the Insurance Act. The logic of 1938 was clear, in 1938 there was only Life Insurance Corporation of India. There was no other financial sector player but by 2008 there was SEBI, there was mutual fund, so there was a right royal conflict off, explicit conflict of legislation which led to all the problems. So in short regulatory same product dealt with differently in different Acts. Huge gaps of legislation over lapse in different constituency. Now, 2 slides to just drive home the point that this is not to take either from the RBI or the SEBI. Enormously the good quality work that they have done, but there are fundamental problems that derive. For instance, under the RBI Act if the RBI cancels the bank license, the Act says the only recourse open to the effected person is to file an appeal before joint secretary of Ministry of finance whose decision is final. Now clearly this piece of legislation if it goes before any Court to day, it would be struck down in one minute. Not providing for an appeal which is a lifetime should be given to applicant as an consequence. The applicant clearly could not be constitutionally permissible. So, I have listed here to go through each examples, they had are number of examples of legislations. For instance, the only sentence that occur on bank licences is you may grant a bank license in public interest. And the RBI has not framed any regulations on what constituted public interest? What is the ideal be degree of competition because typically if I given such extensive powers, I would have not want to curb my own discretion and tie my hands. So, typically our legislations have been very loosely worded.

One more example, SEBI truly the adjudicating officer is Bhrama, Vishnu and Shiva formally. The SEBI Acts formally makes him who investigate, who finds the first round of guilt against the accused. He is the guy who hears, he is the guy who decides, he is the guy who adjudicates. Clearly this is not the streamer would stand validity and I quickly run through this 11 (B) of the SEBI Act is an interesting section. It broadly says for the interest of investors SEBI can pass such orders as it thinks fit. Now, what would Public choice theory tell us. If you who have a section like this and if who have under 38 sections which are very specific in terms of what is the requirement before you do this? The agency tend to use this. Largest number of SEBI's regulatory orders as you can guess will come under 11(B) because under 11 (B) you can pass literally any order on anybody because it is so broadly worded. And the largest number of regulations has been made by SEBI under 11 (B). Largest number of individual order also comes under 11(B). Now, one more example of vague powers, we have this Payment and Settlement Act. What is the objective of the Payment and Settlement Act. Regulative payment system. Had that should be the objective? The objective has to be some end goals that I want to achieve; so very vague objective and it contains a similar such act as may be considered necessary in the opinion of Reserve Bank of India. Excellent wording 35 years ago. Not in today's India and vague powers and vague objectives... These are bunch of.. I have taken examples on in the public domain, in terms of exiguous orders of the regulators. FEMA say that I must regulate FDI by regulations. 95 % of regulation of foreign direct investment is by press notes. The law does not recognise anything for the press notes. The law does not use the word circular. I keep clarifying endlessly entire retail FDI till this whole debate to place in Parliament contains serials of press notes which all been upheld by the Courts very surprising. In 2012 after that whole debate that took place on Parliament. For the first ever time the retail at least, we have now drafted under regulation. So, I'm taking lot of these examples to just drive home the point that there is vague powers, lack of clarity in terms of what is the objective of the regulation. And I now conclude in 3 minutes what Justice Shri Krishna says in his FSLRC report. Financial Sector Legislative Reforms Commission is the full name. That is the name of the commission. the report is in 2013. The report is on the public domain. The Code that they drafted is in the public domain. It has undergone all types of consultation. The final version

is also in the public domain. Extremely very written document were he precisely worded and it is simple English drafting. It is not the drafting than by nonhumans for nonhumans. This is drafting done Human's who no simple English for others who understand simple English. But extremely precisely done. And the essential principle is the regulator must have a separate wing which should only perform quasi- judicial functions. The point which you made early sir some of the answers that if these functions have necessarily to be performed by the agency there are designs by which you can eliminate the conflict of interest. I am sure Sandeep will cover it. USA has done this very well. The administrative law hierarchy in the SEC is completely separate from the non-administrative law hierarchy. Administrative law is been headed by member of the board and will be accountable to that member and prescribing qualifications of that member that he is at least trained in law, the current SEBI law does not require anybody in SEBI to be trained in law. So, you may have a member in charge of this who is a Ph.D. in microbiology and typically the people drawn from the civil service not necessarily letter in law. Member of the administrative law will not do any other functions, this is the part of the Code. I am giving just one or 2 example. Investigation is to be done by the wing that is completely separate from the adjudicating wing and it goes into, for instance standard processes; if there is requirement of the notice it prescribes a form of notice. So, the code itself is an enormously lengthy, in large volume were almost nothing has been left to chance. Taking exactly the model that US and UK follow that whatever needs to be detailed in administrative law needs to be detained in order of magnitude that leads nothing to chance. I've not spent your valuable time on explaining on all of this. So, in short there is a part of a FLRC which is purely about financial sector reform. Unfortunately there is a part this got highlighted in the newspaper; all the public debates have been on financial sector reform part. Whereas I think truly path breaking part of FLSRC is all regulatory governance, regulatory accountability, keeping in mind the constitution of India and what today's India requires. That part unfortunately did not take the attention. My attempt goes into to draw your attention in that part. Hopefully that is the part on which we will move forward. I conclude here sir. And so much for your patience.. Thank you very much.

Need to have all functions in one body is already accepted. Executions of those functions would need to separate.. You are right sir. The act itself, the proposed Indian financial Code has very explicit the recommendation on the qualifications. And it also gives a right to prescribe these qualifications, for instance in payment system which is also one of the regulatory agencies required to be change. So, instead of writing it to the law, it prescribes the method by which you prescribe qualifications in the rules; but for the main regulators which are more permanent, it prescribes the qualification in the code itself.

Hon'ble Justice BS Chauhan: – Now I will request Prof Gopalan please..

Prof Sandeep Gopalan:- Thank you Justice Chauhan and Dr Krishnan for the really comprehensive view of the India. Given the short time available; I want spent a lot of time in the regulatory state, what that means for separation of power and constitutionalism. Broadly is a topic that'll requires several days, literally there are thousands of articles covered in this topic. So I will use about 10 minutes to just give you comparative sense of 2 key decisions of the US supreme Court which may be of practical help to you when you conform the case involving a separation of power challenge to a regulatory structure in this country where the principles involved to similar cases may be helpful in giving you guidance on what to do in assessing the constitutionality. But before I get to 2 cases, it would be useful to have a brief pause over this slide their Prof Waldron disaggregates the notions of separation of powers into ..constituted notions which one can understand what is actually meant in a practical sense by this concept of separation of powers. So in the very beginning you'll have separation of powers in the sense of separation of functions meaning by actual activities which are entailed by separating these powers into the constituents demarcating twins. The 2nd principle that disaggregate pertaining to the checks against concentration of power in any one arm of government because the idea of from history is concentration of power in any arm.. is bad bases upon historical theories. The 3rd is the principle of check and balance or the veto, one of three arms the other 2 arms get wrong or perform the functions in impermissible manner. The 4th principle is that the laws are enacted through a constitutional or legislative structure that involves concentration of across the legislative bodies that are bought engaged in the deliberating democracy. So the lower house, the upper house this country and house of representative

in the US and so on. The idea of once again being that power of legislation is so strong that within its one arm might be fatal to proper exercise. And the final principle which comes up is one federalism; the idea in modern states where there are constituent Federal units which have their own aspirations; which in turn have to satisfy their own democratic mandates. So, separation of powers is also ultimately gear in achieving this aspiration of federalism. So, that kind of framework is helpful to us to understand the practical implications of separation of powers were one is confronting in the context of regulatory bodies. It is also probably useful to remember this phrase from Locke which again deals with the historical cautionary note on why separation of powers is all important. Locke is writing at the time when history shows problems that come on concentration of powers. That come when one organization has both the authority to make laws, implement those laws and interpret those laws. And histories have shown the problems. Justice Chauhan has quoted Montesquieu. Montesquieu at the time of separation of powers was conscious in France at the time was the current example, and were Turkey went to despotic Justice. So there are historical context within which separation of powers doctrine emerge. I think it is always handy to remember that because although we quite far moved from those problems today. But there may be similar kind of challenges; in fact the reason why I am citing to US judgement which I will explain is because unlike in India wherein experience of regulatory bodies and legislations which is being is salutary and upheld by the Courts in this country in contrast in United States a lot of these regulatory bodies came after the great depression. So, the securities, exchange commission and number of economic governance bodies that are set up in 1930s there designed to fix specific problems created by the depression and huge amount of discretionary regulatory space to these new bodies because.. And the Courts awarded and attend a lot of their actions to be constitutional permissible. But now in the most recent 5, 7 years; the time is changing and the Court is now much more conscious of the problems of the regulatory state and this parallel universe that is emerging and the separation of powers no longer exist the same bodies making laws, adjudicating and often is a law into itself because there.. It's not very clear as to whether if at all these bodies are accountable to anybody. So, for instance the most recent controversy in this area centre around the administrative law judges which are the key part of security and

exchange commission's regulatory enforcement machinery. So, these judges are appointed by the SEC itself. And a of the transgression of the SEC Act are decided by the.. So for the first time one of the Courts tend that L n J were unconstitutional. And now the people are waiting to get resolved this controversy in US Supreme Court and if it is it will actually help.. Potentially hundreds of, thousands of the adjudications by these judges.. Similarly in immigration contest a lot of immigration judges are appointed by the Department of immigration. Not by article 3.. So which means there that essentially an executive branch agencies performing judicial functions. Potentially with life changing consequences; example for detention, or people in the refugees, asylum system, or people who have been grant temporary status for committed a crime and therefore have been detained. Massive liberty questions determining not by judges under article 3, but actually by civil servants... favoring the executive branch But some of these cases comes before the article 3 judges they finding what is going on here... How it that people are detained?. And the cases are potentially under that the radar in process through decades without any oversight or accountability. So, this is likely will be a big life problem for you in the future so far as it creates scrutiny. So I think it is useful to look at 2 key American cases, how the evolution of the law is happening in that jurisdiction. So, at one hand and important case in this area is Chevron, you might heard of it. Chevron is pragmatic case on judicial review with regard to the administrative regulatory bodies exercising functions which, especially with statute is not fully specified. So in Chevron the case involved an interpretation of the Environmental Protection Act and whether lack of specifications meant that it was fatal to the exercise of the authority by that body. So in Chevron the Court said that even though Congress has not directly specified this category of cases and the EPA is not directly accountable to the people. As long as there is an accountability through the Chief executive...an.. Powers has the ability to exercise accountability it is constitutional and permissible. In coming to this conclusion and Chevron.. This is 1984 decision, is evidencing the kind of deference that what Dr Krishnan talked about here. Where the Court is saying judges are not experts in this technical area of environment protection rather Congress is created a body to built that expertise. So, we the judiciary has have to give deference to that expertise placed decision, even when the statute does not specify to the degree specifications.. So for example, look at the first bullet point there

you are dealing with the statute which has deliberately left the gap. And that has been filled by this regulatory body. In the previous session you saw this controversy about eminent persons, about the lack of specifications as to what happens etc. and in that exactly what the Court does in Chevron where it says as long as the agency is able to exercise its discretion to fill that gap; it's not up to us as the Court to substitute our decision to how that has to be filled for the agencies, high degree of deference to what the Court is doing in relation to exercise of the power of judicial review. It also said that there is a considerable way to practice which give discretion to the executive branch. and how this discretion will be exercised by the Statute and the delegates. And when there is a doubt as to whether the discretion exercised properly or not, it is appropriate for the Court to defer from the regulatory body. So this is not the principle of deference that is normally accorded in the ordinary case; but the court is willing to do this to the regulatory body. Suppose sometime technical expertise of the body is superior to the judicial review type function that the Court is performing. And therefore one should not make judicial review substitute; The judges opinion in technocratic area for the decision.. The court action explicitly says; judges are not experts in the field. Secondly it says that judges are not the part of the political branch. So they are not accountable in the sense that the other agencies of government are. And therefore it seems to imply that there is legitimacy government, the Court exercises its judicial review in substituting its judgement in this context. It also says where the Congress has delegated the policy-making functions to the regulatory body through this imprecise the specified legislations; it is appropriate for the Court to step back and let that body exercise its policy-making choices; because the Congress itself either deliberately or in the burden free has led the policy-making space to the regulatory bodies and not to the Court. Even to the extent that statute is silent, the Court is saying, we are not the person to fill that gap. It is Congress to fill the gap. Because either deliberately or burden free Congress has made a policy choice design this legislation in this form. And we will not use our power of judicial review to substitute our judgement and fill this gap when that gap is itself is a policy choice. Extreme about the avoidance to find that unconstitutional. That used to be the tendency of the courts from Chevron. Because of the fact that the Court is saying that policy-making can be done by the best by policymakers and not by judges. If that bodies get that wrong, there is another mechanism to hold

them accountable which is still an executive branch hiring and fire; also the legislative branch.... And therefore changing legislation by the regional legislation. In the contrast the Court said judges not enjoys those benefits, and they are not answerable to the political.. So it is a very interesting approach to constitutionalism and power of judicial review. Contrast this perhaps most significant judgement in separation of powers context for regulatory bodies which is the PCAOB of the case..In 20 10 several cases of the Roberts court that once again the technical expertise argument is ..significant. A very very important case So, in PCAOB (public company accounting oversight board) what happens in the statute which was challenged was passed immediate after month of the....of 2001. The act contained a provision of creating PCAOB, which is meant to be a regulatory body for accounting profession to prevent.. So here statute created this body which comprise of 5 members is to be appointed by SEC (Security and Exchange Commission)...So, there is a two layer protection for the members of the board merely accountability was not very clear in a sense, the President could not directly hold the board accountable... In the initial stages the district Court summary judgements in favour of the government and held that the statute was constitutional. It in turn into Court of appeal. And the judgement which wasn't written by Chief Justice Robert's. So, Robert Courts to analyse separation of powers, it speaks about article 2 which speaks about executive power in the President. And how that in the modern state means that the president does not need to perform all the executive functions himself. But could exercise that function through other functionaries which are appointed as long as he is able to hired and fired in exercise of accountability over those functionaries. So, that the scheme under which the modern state this working. So that's the case of Roberts and some of the case of the Roberts which was held delegation to be permissible... Especially in the context of independent agencies such as for example the RBI of what Dr. Krishnan has talked about. To one analog the constitutionalism was upheld was the case of Humphrey's which dealt with the Federal Trade Commission which is again an independent agency, which evaluate the companies like manager and requisitions. In that point the Court held that were independence is necessary for the functioning of that particular body; it is not necessary that the president not require to remove the officers.....

Hon'ble Justice BS Chauhan: – Dear friends and this will be subject which we would have discussed more elaborately. Then I never dealt with this issue either as a lawyer or as a judge. I read it first time and Prof Mehrotra asked me, that this is the subject, I read a lot and lot of materials and in American literature and I came to know, that it is against the constitutional scheme itself. But we are tolerated because of economic compulsion necessity. Not otherwise, it can't be legal. Minerva Mills the constitution bench held that Parliament is not supreme, it is the constitution which is supreme. How it can create any authority taking away the or affecting the doctrine of separation of power or delegating its own power to legislate. So, this requires more elaborate and the request to have some other, we will also come. We will collect material. But I really doubtful about the constitutional validity of any of these authorities. Unless you interpret these authorities 52 and 52(3) is same as in article 12. Then put it in the level or height of that pedestal that article 12 authority means, what does authority means that become the state within the meaning of article 12. Unless that is put there. Somebody has to study what is the co-relationship in article 12 and 53 (2), whether this authority 53 (2) can be put at the pedestal of authority under article 12. All these arguments should be upheld by the Court. And I have never seen any discussion by any Court because the Court realise that of course it need the expertise in the subject; we cannot deal with it. How does the executive authorise his own officer to adjudicate upon the private rights. We can understand, delegate its power to its own officer but those officers adjudicating upon the rights on the person's should not be under the administrative control of the executive. Let there be independent tribunal. They should know, they shall not be transferable back to their original Department. Let there be independent body to adjudicate upon the rights of the parties. Then we can understand that there is a freedom. How does the Departmental authority comes and decide and adjudicate upon their rights; they will decide on raise in the favour of their own Department. This is the biggest problem. Anyway think over it and I will request Madam, you may discussed this subject again. And give us some time and invite all our experts. I've read it first time in my life. Never dealt with this issue. And I did not find any judgement were this issue has been dealt with by the Court. The Court realise that it is the requirement under the economic compulsion; therefore alright let us tolerate it. But how long they will going to tolerate it when there is a absolute ban. When the

Supreme Court says these are the regulations, these are the guidelines till you frame it. Either Vishaka or Laxmikant Pandey, International adoption or so many guidelines have been issued from time to time. And there is a criticism what is this to be judicial legislation, and is this NJAC...and Collegium is also a judicial legislation. If there is so much criticism of the judicial legislation, how this kind of legislation is permissible by the delegate.

Prof Sandeep Gopalan:- Sir, one point to add to what you said, this is becoming a really a..problem, one of the most recent legislation in the US was the conflict mineral rules. There was a new law passed called.. Frank Dolkstreet reforms. In one of the sections in that statute which is about during the problems of... was a provisions to saying if you buy numerals from conflict Africa which is in few of the country's, you want to make a disclosure about that what minerals are involved in the product. Thats all the section said in the statute. It gave entire power to frame regulations to SEC. So, SEC frame really broad law, which effectively captured something like 300,000 companies. Not just in United States but in Europe and in everywhere else... This is not passed by Congress or regulatory bodies.

Hon'ble Justice BS Chauhan: – Today what is the report that NJAC is been struck down.4:1, Justice Chelameswar dissent it. If they can struck down the Act of the Parliament then where is the question about the Act and regulations of by the regulatory authorities. I read the subject first time in my life. This is the subject which requires considerations. How this kind of the reason is permissible?

Participants:- Both the speakers have opened a new windows for us to understand us better. Different perspective...

Hon'ble Justice BS Chauhan: – No he should be independent, conferring the power does not matter, they may be an administrative people. All of them should come from administration. They must belong to executive branch; but to make them independent of the governing body in the executive. Keep them separately. Constitute a tribunal. All members of the tribunal must be experts. They must come from executive but must not be under the administrative control. That is the issue. Why do we need an expertise? See under the Armed Forces, see what happen in the army, one member is from the Army basically lieutenant general. I asked to the chairman's, I know all of them who were till

now; and they say whenever they start listening the case, they talk about discipline; and not of law because they have been trained in that way. From the beginning, their carrier started with the discipline. They think discipline should override the constitutional rights and fundamental rights of the citizen's. You ceased to be a citizen once you've joined the army. Therefore discipline will come first. But those persons who come from judiciary they think that independence, liberty, fundamental rights, article 21 must prevail. So, this is always there.

Participants:- But we have to see that how much public interest is achieved.

Hon'ble Justice BS Chauhan: – That's why it is economic compulsion and that is why we are tolerating. Under this scheme those IAS officers who are not good at administration, who could not ask for Lathi Charge were put in the judiciary. Because they are not fit to administer. So let us have tea break, thank you very much.

Session 7: Striking down Administrative Orders/ Circulars Impeaching Civil Liberties

Hon'ble Justice B.S. Chauhan: Any way we are happy that whatever Mr. Rajkumar has argued has accepted, has been accepted by the Supreme Court now we come to the next session striking down administrative orders circulars, impeaching civil liberties and we have professor Gautam to address us on this subject but i introduce you have all these written notes I just cite three or four examples that Magna Carta 1215, 800 years ago has also assure that nobody article 39 shall be arrested on imprisoned except by the order of the court or as per the law of the land so this laid down the foundation for civil liberties, rights, human rights, civil rights and due process of law three things basically it was never followed never accepted even in England but it become a base a foundation now another judgment of 1772 slave trade was very common, a slave was captured from south was captured from Africa and was taken to .. United State he was put in a cage when the ship....he was not served food therefore he was crying a lawyer was passing from that area he heard his cry went there ask him why are you crying he filed a writ petition for his release the question arose before the court where is the prohibited of slavery trade

because there was no law so lord masfield ask where is the law which permit it. It is not a question see today it is otherwise what is offence as define under section 41 to 43 of IPC what is being prohibited by the parliament by any law is an offence but just to maintain civil liberties a new concept was developed by saying show me the law which permits the slave trade in England and therefore in common law the concept of civil slavery is not acceptable now drag Scot v. Stanford 1856 United State Supreme Court held a Negro is not a citizen he is the property of his master, he was denied of any civil liberty and dignity or even recognition of a person being a human being this is our judgment a very strange judgment delivered on 16th 26 Jan 1810 this was delivered 205 year ago there the question arose the woman filed a suit for restoration of her married daughter who had been sold by her husband for rupees 50 and she wanted that the sale deed should be declared the matter came before the English judge so he referred the matter to the two judge bench so two civil judges sitting in a civil bench he was also another English man they say no refer to the larger bench not like our judges bench so three judges bench was constituted after hearing the argument they were not able to resolve the controversies all argument of human dignity and all other were discussed.

...matter referred to Pandit and they decide the case. because if the right is being violated and court is satisfy that the liberty is restrained for any kind of restrain is there it can prevent it but it had already being violated court may struck it down the order and restore it the liberty so large number of orders are there and i quoted all that I am not the resource person Professor Gautam is here to enlighten us on these subjects so please start.

Prof Khagesh Gautam: Thank you So Much Sir. The topic that I've been given to speak is a striking don't administrative order circulars impeaching civil liberty. Justice Chauhan has very elaborately spoken about the criminal or the political side of civil liberties. And I don't think I can make any valuable addition to that sir so what I'm going to stick to is an idea that has been around since the drafting of our Constitution. And even from before. And that has been raised in the Supreme Court. By the likes of Nani Palkiwala... But it hasn't gained currency. Except in one case that Palkiwala was able to successfully argue before of five Judge Bench headed by Chief Justice Ray.....how chief justice wrote that

judgment. He said that if you take away the property vested in the owner of a person who owns a printing press than what freedom of speech are we speaking about. And arguments elaborating this point were made when I started looking into this for the first time I was a very young lawyer..

I'm still young I was a younger lawyer. I was younger yes sir thank you. I realized my mistake. I'm still young mostly. I'll have to earn that one. When I was a younger lawyer I have twenty four years of age. I was given my first brief to work in Panjab & Haryana High Court it was a very simple case. The commissioner had issued a notification. Increasing the rate of tax on big guilds. It's a big business in Haryana and we were representing that there are many as associations of Brickell owners. A couple of them of my clients most of them are seniors client we had signed of got numbers in the case will only only this can this notification be issued by the commissioner. There were two issues one was a can evade the rate of tax the can you do to the retrospectively. Nobody had any doubt that that retrospectively bid had to go. Because that can only be done by the legislature.

The question that I struggled with quite a lot against the advice of my senior was. He said We will not be able to convince the court that the commission cannot raise this tax. So let's concentrate on the retrospective Brit and. Let's get at least get that much relief to the client. Since that they have not stopped thinking about that one problem. And I think I'm very close to finding an answer. A very famous very respected political scientist in the USA men kure Olson who wrote an article in The American Political Science review in nine hundred ninety three and he makes a very compelling is in my opinion the compelling case for why. All taxation is theft. For all the people who insist that all properties threat is purpose in response with all taxation is theft as well. And the reason why. Olson says that is that. I'll just read this bit to you and all sincere and I quote.

The typical individual. In a society would say a million people will get only about one million of the gain from a collective good. But will be of the Will cost of whatever he or she does to provide it. And therefore have little or no incentive to contribute to the provision of the collective good..... Successfully monopolizes the theft in his domain. To cut a long story short this point is very simple. If I am a bandit. I come and use force of on you I've

argued. If I do not allow you to multiply your wealth eventually I will have nothing to rob. So it isn't mine trust. As well as in yours. For both of us to reach an agreement whereby I impose a tax on you and allow you to multiply your wealth. Because without you having wealth. There's nothing like in the wrong. It's a very pessimistic world view I take it but it's a. It's something that we have to can take very seriously.

The things that I'm concerned and I looked at the judgments that have been compiled. Most of them on the nature that Justice Chauhan has spoken about what. Troubles me personally is is that there was a period of time in India about twenty years. Where total of three banking licenses were granted. This was a period of time when economy was growing. People had cash people needed banks to keep that cash in capital. Needed to multiply. We needed jobs. And yet only three banking liciencewere issued. In a period of twenty years. There are many more capable minds than mine. Grappling with the problems of political liberty so I have decided to concentrate on the economic part of it.

It is accepted amongst historians. Historians as well as economic historians. That it was on the bedrock of economic liberties. That the foundation of political liberties was laid down. If we give some thought to the process it with recall Palkiwala argument in settled case we will realize that that is actually true. If I do not have the right to property. For example to ensure that my press isn't taken away from me. There isn't much I can do with my right to freedom of speech. If we as Practitioners and students of law do not have an assurance that we will have a writer for the audience as we do. In all the courts in India. What exactly are we going to do with the banking license without a license to practice law? Right now. The the point here is due process of law as justice Chauhan also mentioned. At some point of time. In fact in my opinion since the day ram jayata Kapoor case the very famous judgment has been cited. Hundreds and thousands of time.

..it was the very first case where there is a group of people publishing textbooks and selling them in the state of Punjab. Since pre-independence era and with one stroke of pen by the head of the government. Not even the lead there was no legislation that says their entire market was destroyed. There entire business was taken away from them in shadir ahmed case. The government does the same thing the pass the legislation and then they come and say well we have taken away our license to ply your bus. We haven't

taken over your bus. What good could my bus... without a banking lessons... And this was a prediction or who had a capital of going to large invested in one hundred fifty five years don't be an actual one hundred fifty five. In order to protect the civil liberties that we have an economic and political liberties both will be a part of it we need to begin by asking a very fundamental question.

What is the structural separation of powers? That has been set up in our Constitution and why it has been set up that way. The most important judgment. The doctrinal judgment as they call it in the U.S. and the point is Ram Jawaya Kapoor case. You can pull up any any judgment you want and you will see cited and decisions being made on the authority of that judgment. In my respectful opinion, the judgment perhaps got it wrong. This is how I believe the Judgment got it wrong. It was argued in that case... By Mr Pathak another eminent lawyer. That you cannot create a system whereby you take away all the rights vested under article 19(1)(g) the freedom of occupation and freedom of property vested in an individual a citizen nonetheless and you cannot do all that by just passing an executive order you have to have legislation.

The idea that in civil liberties can be taken away exclusively by legislation was an idea first thought of by Alexander Hamilton and James Madison in Federalist number forty seven and federalist number 84. Hamilton was asked you passing a constitution it doesn't even have a bill of rights what are they going to do with this constitution. And he comes under response he said. The Constitution itself is a bill of right the fact that we have restricted the power of the executive. To do anything that impedes negatively. The list civil liberties most of vested in the citizens of the US is itself a guarantee that no such thing whether we've done. Subsequently an amendment was made. The Indian Supreme Court begins with the idea that Indian Constitution resembles the one. The system that is prevalent in Britain and therefore.. It absolutely cannot have anything similar to that of the US. My contention is that this position is incorrect. Indian system is not the same as the British system. And it's not the same as the US system. It's a unique system in it's own. I've written an article recently. It's coming out next year in Column Journal of Asian Law establishing this point. I'll build on that point and say here. The idea of separation of powers The idea that decisions that impede our negatively affect economically would

these of the people they should not be taken by an authority which is centralized is an idea that has been around in economic literature for the very long period of time. The rise of Nazis. Was first predicted by the Nobel Prize winning economist Frederick von Hayek in his book. The hopes of the which I happened to get here with me in this book Frederick von Hayek first predicted that the moment you're going to create up Authority Where by You have a a planned economy. And only one other group of planners. Sitting in Washington D.C. or Moscow or New Delhi. Planning the whole economy. You cannot have the institution of rates a recent paper published. In a very prestigious journal, Constitution Political Economy argues. And I believe convincingly that the first battle as Rajiv Dhavan call it Between the Supreme Court of India and the parliament. On the right to property. Was a result of this. Planning Commission will come and say we want these authorities and that therefore these rates have to go.

Petitioner will go to court saying no we have the right s Court will uphold the rights. Back comes an amendment. And the same cycles keeps on following itself. Until we have the basic structure case. Economists like one Hyde. Most recently Richard Posner beyond that Adam Smith. They have all argued on two very fundamental points I can elaborate them but for the paucity of time. I'll just state the principles in the principles are these? It is not possible for the central planner. To actually predict the needs of every single individual in a society. And there is a point that has been made in this book another book by the same author the constitution of Liberty. You cannot a single planner kept that's why the judges. You judges decided cases based on facts. You cannot lead on as Brandon principle because you don't know how one play out does. There's what we have easy scary keep on coming back to the court. Because you need a determination based on facts and economic planner and the moment he decides. This is the way the economy has to go. This is the way all the money has to be invested. That is the moment of time.

You take away the authority of the citizen. To spend the money the way they deem fit and a whole host of economic studies there is a book economic liberties the constitution written by Professor Bernard Seguin where he very systematically catalogue. Fifty three economic studies that show a positive link between Constitutional preservation of economic liberties and economic development. I have four and the four of them on my

laptop right now and I'll be able to share them with you. The point again is. When Hamilton and Madison imagined the idea that economic liberties whenever they are going to be taken away they will be taken away after a deliberation in a legislative body. They were making economic sense before high came along I guess the one who short. Economically it is a bad idea. These are the people who short on the first principles of human dignity and that this is not a desirable idea... When we have two very strong reasons then the insistence of our Supreme Court... That decision of the sorts. Upheld in Ram Jawaya Kapoor case subsequently in Shakir Ahmed Case I can keep on taking the names. We have to rethink this entire law. Because sixty-six years. We have experimented with a particular strain of constitutional thought. It's not that we are the only ones who played it. Other people have. What have to show for it. We have the basic structure doctrine we have to show for it a vibrant democracy..... But there are proponents of the view that this is the system. The best that we could have under the circumstances. Then the constitution was and I'll conclude by saying this when the Constitution was written it was written by certain people who had an agenda and economic ideology in mind they played their best to take this nation. In a direction that they at that point of time thought is the desirable way for that they need authority for that they needed simply planning..... And we have to start giving economic liberty is the duty attention they deserve Magna Carta. Listen gentlemen ..as written as it is held to protect the rights of property Civil liberties followed. Thank you. If you have any questions I'll be happy to take that. ..Oh. No no I'm not I'm not insisting on. We have the Planning Commission that we had begun a body that started dictating the laws. The laws are to be written in the legislatures. Planner should not dictate the laws.

So the question this hour with the there's greater the question would not be whether we have to have planning. The question would be a how are we going to decide to what ends we must dedicate the limited resources that we have one way is to have one person. A Maybe a group of experts. So to speak decide that this is the way. They're going to expand our resources I don't have any problem with that mood of decision making. However that is a not a sustainable model and it works in leases in it works in instead. Instances where efficiency is not a concern. For example you cannot run a war in that manner you have to have somebody who has to decide. You cannot have judicial decision making that way that those are the institution inefficiency in build.

And it is that inefficiency which makes that institutions what they are. Whereas when it comes to markets. That is to say how many banks should we have how many kinds of insurance policies should we have. How many bags of chips should we have those decisions have to be taken? Historically have been taken and Economic Research Establishment can efficiently only be taken by free markets. You cannot regulate and said. Only two brands of just chips will sell... It will never work.

To make a very complex problem very simple. If I was to take hypothetical example, Loans were being approved without proper documentation. When the government comes in says and the government says that in consultation with private bodies that these are the documents you must have before you approve a loan. If the body that has to issue that loan doesn't follow that law. Then that doesn't mean the law is wrong. Not the Americans... just let me finish sir, the Americans never at any point of them.. never read through the history of this depression. Not at one point of time the American government came and said please do not sell these kind of products on the markets.

For example they never said please don't sell derivative on the market it was the regulation of derivative now the question therefore becomes where will we stopped the regulations. And that's a question of which informed debate can take place. Whereas in India the debate. Used to be and it still is. Unless the government says you are not even allowed to do something.

It's a basic fundamental human need. If it exists in the state of nature you cannot remove it. Therefore that is the reason why medicine said. We have to use ambition to conduct the mission. You're going to create you going to remove some new state of nature with good luck. We tried it 1991 we were almost bankrupt.

Question by Participating Judge: Not clear..

If a person comes if a petition A comes before the court and says look at this order has been passed by the government. First point of course they will make you feel there is some law. And this is outside the jurisdiction those points I don't think that I have to elaborate. But there is another argument which is made. Which is given a complete dismissal by the judges. Always reading Ram Jawaya Kapoor this decision could not have

been taken by the executive branch of the government this decision could only be taken in the legislature.

And that is with the people cover the judges comes Have a look here we have Ram Jawaya Kapoor case in that case it was an executive decision. And the judgment has been cited for fifty years. So, you have no case now I'm saying. But that this. Perhaps some something that needs to be revisited and re thought. I'm not saying over ruled the Ram Jawaya Kapoor right now I am saying at least go back to the drawing board and try to revisit what was going on now. There I say Now let's be construct the whole thing for just a moment and see what's going on on Legal principles we have doctrine of delegated legislation which we can use.

We have good economic sensible reason to do that now I go to the court and say how can you take my right away. By doing something so drastic and taking away my entire article and even freedom without passing an legislation. Shouldn't you at least let the people in the legislature decided this is reasonable before the court steps and and the Cabinets of the of the states they don't do it because they know will have Ram Jawaya Kapoor.

Whereas economists' very senior said. You keep on doing that. You keep on taking away from the people the very liberty the Constitution was written to uphold. So there is a clear political science constitutional element to it. I'm saying the rational is economic. And I am saying..... it makes sense to do that but whether to do or not is the next debate. When people have to come with their thoughts

Amongst ourselves whatever we can maybe I don't want this notepad. Maybe you do they do. What happens then is everything in the room the money believes in you remains the service. Same but the satisfaction goes up. There is not one libertarian economist that I have read or have been able to discover that has helped. Except Herbert Spencer who was an economist.Said that look give the poor a short shrift. Or the know the floor the short end of the stick. The question is you want to hold problem for the poor we want employment; we want electricity we want all those things. However, what we believe is. Well the people are the ones who have given the power to the government. Remember the debt wrote the Constitution that is the basic foundation of basics of the case. Upon

which pretty much every post gives one another but he stands. Not if the people wish to do it in a certain way. How can the government come and say well. I who has the support of thirty-one people in the House of hundred. I'm going to dictate my will against you on first principles of libertarianism that doesn't make any sense. Now let us. Let me just conclude by saying well the markets can take it off this problem on their own.

Session 8: Constitutionality of Unequal Representation in Public Sphere

Hon'ble Justice BS Chauhan: - Dear brother, I know how difficult it is to sit after a lunch. So, Our next resource person is here and the subject is most interesting; the reservations much been argued in behalf of elections than any be in the Court.(Laughing). Actual our constitutional provides for equality. Equality before the law and equal protection of law. Article 14 and 16, every kind of equality whether that it is public employment or educational matters. But there are certain provisions in the directive principles, particularly 41, 45, 46 which provides state to take positive steps for securing right to work in occasion assistance in public employment, Old age, sickness, and to take care of economic and educational interest of the weaker sections of the Society. Now, these are the part of the directive principles but they put an obligation on the state to take positive stand to protect or to encourage these things. Part 16 of the constitution, particularly article 331, 332, 333 and 334 provide for the reservation of seats in parliament, in state legislature for SC and ST. Initially it was meant only for the period of 10 years. But it has been extended from time to time and it appears now considering the political scenario that it will perpetuate forever. Because no political party has a will power to lose its vote bank, whatever may happen to the nation? It is to avoid exploitation of the weaker section.. But the best thing of argument of the reservation is it encourages... And the defeats meritocracy and violates the right to equality. This is the basic problem. Because the most meritorious person feel frustrated, he does not get the work, he does not get any kind of employment or any preference to him. And in spite of the article 335 says the reservation cannot be given to any person, if it adversely affect the maintenance of efficiency of the administration. Competition for backwardness which has become opium for the Society, people want to remain backward forever; considering to be a super fundamental right. So, there is a always a competition in backwardness. Nobody wants to claim status, whatever may be

the higher caste, whatever may be there economic condition everybody wants to get the advantage of reservations. And they want to claim that they are the most backward persons in the Society. And it is all become now in the hands of political people to get the political support. In Indira Swaney's case many principles were laid down and one of the principle was that there could not be more 50% reservation. Immediately thereafter in 1993, Tamil Nadu passed an Act. And took the assent of the president so that it may not be challenged and it may put in part 9 of the constitution providing for 69% of the reservation. In 1995, article 16 A was added to provide reservation or schedule caste and schedule tribes, if they are not adequately represented. Now, many states they have promoted without considering whether they had an adequate representation or not only whether it will adversely affect the efficiency of the administration as required under article 335. In N Nagaraj 2007, Supreme Court upheld the validity of this provision amendment but putting a condition that who have to examine three things: there must be not be adequate representation; article 335 is not adversely affected and they are really backward people. That is there should be that extent of backwardness. Unless these 3 conditions are fulfilled 16 (4) A will not apply. It is merely an enabling provision, in the hands of the state to enact the law if these 3 conditions are satisfied. In Ashok Thakur 2008 constitution of validity of 16(5) which permits the reservation in an educational institution except those of minority covered under article 30 of the constitution was also upheld. But the problem in this reservation is that under the OBC and SC, ST, the benefit have not been taken by the lowest Strata of the Society. Very few family, suppose the person comes under the reservation and become the member of the administrative service or become, whatever he becomes his children continue to take the benefit. Other people who would not get the benefit because of a huge poverty, or not education; they could not get the benefit of this reservation. Now, the problem is to what extent this reservation has been upheld to consider that equality cannot be there unless this people come up to the higher level. But the way the reservation has been provided this lower strata of the Society will never be able to come up. Only those who have taken the benefit, will take the benefit. They have to monopolise the benefit under the scheme. So, for this purpose we have of a Prof Gopal Guru to explain us what is the advantage and disadvantage of this reservation policy.

Prof Gopal Guru:- I am from economics discipline and I have different protocol of addressing the participants.

Hon'ble Justice BS Chauhan: - We all are students. Teacher is always a teacher.

Prof Gopal Guru:- Thank you so much, I will exchange my views with you, I must be very thankful for the laying down the problems of reservations. And what you have described is not an individual description of the problem; it is the general perception in this country that the reservations do have deep problems. And what has happened with the reservation after getting its implementing in whatever manner. There are four category in employment.. So, there are problems we have to handle. But anyway I must have the Academy for inviting me to share my views about this very very exclusive topic, problematic, exclusive the way it has been articulated in different parts of the country recently. Unless it is being debated in the context of reservation as it is very rightly said. I would speak about 15 minutes and we will have more discussion. Two clarification's are required. One is that when I teach the classroom or when I read in the newspaper, even in the reading material that is given. There is some misapprehension about the reservation. Is reservation is an affirmative action; is in affirmative action is the reservation? I am sure you are clear about this distinction. Affirmative action is an enabling condition not reservation. Condition which empower create capability in a person so that the person.. level playing field. And then there is competitive principle which is practice in the US. But then the mix point is once a person from historically back down then the preference will be given to that person while appointments. Now here it is a moral, no nothing and no command. No legal consequential provision; it's a moral discretion under the committee to use that reference principle. Everything being equal you have to give preference to that person and that actually depends upon a commitment by the appointing or preferencely hiring a person in US.

But we have much radical position in our country. Better then I guess in America. Because we not only have affirmative action to prepare the people to take advantage and become competitive so as to eliminate the idea of inefficiency, and all that. We have that. We have coaching classes, remedial classes, special training. Now we have woman.. The notified tribals and OBC. CentralGovernment has actually started a training for coaching for the

students coming from the socio economic backward conditions. So, we are very careful for taking efficiency and merit. It is different thing that we are really evaluated them as meritorious or not. We need to have that data. Yet we have reservations why? Reservations means that we have fixed quota. 15.5, 7.5 and 27. Not beyond 50%. Despite the fact of affirmative action yet we have quota. I have not got the answer why there is quota? What kind of liberal democracy or liberalism do we have? Do we have robust liberalism or we don't have so robust, therefore be required of fixed quota. We don't really trust the appointing authority. So, this is the question I have not been able to answer myself. I would like you to reflect on this.. Not only that you also now started appointing observer a different level. Affirmative actions and the reservations are two different in other country but it is one in a country. And we have used to them in overlapping manner. And so we are in a confusion. 2nd point of clarification is this, as who have very rightly said that reservation under article 334 were only for the period of 10 years initially. Those were only legislative reservations and not reservation in employment. So, I have this book, I'm sure you have this book in the liability. The book is so important for studying the reservations. Competing equality by Mark Galanter's. That really is making a point that a reservation in employment do not have any cap of time. There is no time termination for the reservations in employment. So, then there is a rider that in the egalitarian country... and sustain our democratic vision; we are supposed to structurally liquidate information like caste, gender. So the other asking deeper question; whether asking question to the judges or to the legal system as we have to very positively liquidate this information and therefore there was no time cap on this particular provision of reservation in employment. So, these are couple of clarification I will share with you. Now, the 3rd point is this is an interesting topic that is given to me; constitutionality of unequal representation in public sphere. Very interesting. When I was going to the literature, I was comprehended to the constitutionality. Several people have define this would called constitutionality. But I thought there is one more meaning and does not simply a legal authority or legal mechanism to really produce balance between aspirations, how people and politics of the party.. Everybody want to be part of reservation now. And we have only seen that SC/ST, we have now Maratha's from Mumbai, Jaths and even the Brahmin of the Rajasthan they actually apply. So, there is a pressure on this particular thing. Ya, Patel of course; There

are Rajasthan Brahmin who are asking for reservations for the poor Brahmins. So, these are all legitimate demands. No one can discount on them. But the problem is were to accommodate of them. So, the constitutionality is about find out how to really restrain our control, reasonableness in terms of political regime or governing classes populism in the sense that you can't be extraordinary popular to give reservation to everybody. Promise reservation to everybody. That is called unreasonable populism. We have asked this question are they doing unreasonable populism under the article 16(4). The important function of this legal constitutionalism is maintained balance and level... Persistent political demands of the parties to use those aspirations for political gains. The Court has to really introduce some kind of reasonableness so that the demand themselves do not become unreasonable, ruling parties are kept within the parameters of the constitution. This is a very important work and function of the judiciary has to perform. And we have done it. Even in mandal commission and creamy layer. Judiciary is important in terms of balancing the between social desirability and merit of the efficiency. To put it differently to slowly, gradually, structurally eliminate the element of the mediocracy. We have data now sir, the data about the entrance in medical Colleges. What is the difference between the two. Earlier it was 50% but now it is so competitive that there is only 2%, 3% margin. We have data about it. So, merit is been defied only by this 3%. We should have a fresh look of what we mean by merit.

Hon'ble Justice BS Chauhan: - There are judgments of the Supreme Court that if the reserve category gets more marks than the general category candidates from Rajasthan then they have to compete in general category candidate. And 2nd question which I request you to explain it, if the constitutional scheme provides reservations only to those could not have sufficient, adequate representation; how this reservation

based on economic condition is permissible? It is a debatable issue, whether it can be introduced now because there is no such a scheme in the constitution.

Prof Gopal Guru:- Ya, so I was coming to that point. Those candidates are not treated as a reserved candidates which is good at. I mean you are actually fighting the stigma of with your mediocracy and inefficiency. Ya.. Definitely. The other point is article 341 which is actually fixing caste and the sole criteria of defining reservation. Now, this problem you

see how gone into it actually because of the mandal. But other schedule caste forms the example, minority religion if you want to call that minority for example Muslim, Christian have not been able to take advantage.. But in Maharashtra you get 3%, 4% reservation for the Muslims. So that possibility is there.. But 3,4 does not permit anyone to get into it. For the classification based on caste is not permitted.. There are 2 points one in the 1956 Dalits, untouchable got into it and the 1990 this.. The justification's are very interesting. One justification if you want me to dwell I can do it, schedule castes we're given reservations because it was necessary. Secondly somebody argued that Sikhism is a part of Hinduism. For the Buddhist, Bhuddism is a part of Hinduism. And then it is not a conversion. Conviction of faith. These are the argument, interpretation. Because any genuine conversion of faith when always lead to conversion. But conversion done symbolically. 5, 6 persons are converting without following any protocol procedures and there is something politicaly involved in this. And that conversion cannot be called as an genuine conversion. So, Bhuddist are getting this benefit from 1990. Otherwise no other caste can become the part of 341. So everybody is saturating on 16(4). And there you find that this is the most debatable article of Indian constitution. Now, the question is whether you are actually trying to promote the vision of Indian constitution. I am in favour of reservation plus efficiency. Reservation plus secularism. Now in Indria Swaney case another important point was that the reservation given to OBC using caste as a basis might undermine secularism. Now, they have define secularism in a particular fashion. Can the Indian Courts can define secularism in terms of caste. Is caste has a proper adequate reference point for define secularism. We have no idea, I think caste can be seen as the obstacles of secularism. But secularism is not defined in terms of religion. Secularism is given in terms of modernity in terms of universal principle of equality, social equality. If you really want to define secularism in terms of caste, you perhaps have to have a different criterias to define secularism. Modernity is one, which is universal. But religion means you are separating religion from state. That is the point and therefore we have no idea whether that case was really finalized on the basis this understanding. And if you really use caste, as the obstacle to secularism and eliminate caste; you have a problem of social Justice. Very interesting judgments have been given on reservations. If you're constitution is aimed at producing egalitarian society, Society which is without

caste discrimination, without any kind of purity, without any kind of hierarchy. Kind of, sort of liberal principles applied by people as individuals.. Then, I'm taking a specific example now an upper caste female candidate marrying the dalit candidate who is enjoined reservation, was getting benefit of the reservation by virtue of marrying the lower caste candidate. Reservation beneficiary. But this provision was struck down. Now, there is a judgment recently. There are the plurality of opinion... By Delhi High Court judgment, somebody has actually.. I've to see.. The point of raising is this that what happens, if you give reservation to both the sects what happens to equality principle. Whether it really harm or it will promote. So, provision of reservation let us carry additional burden that is a different thing. It already has so much of burden. What I'm suggesting is that in judicial practice and other political practice we have complicated problems, if you really make economy as the criteria for reservation... For example if you give reservation to all women and women is not a fix criteria to determine the reservation; You call as SC woman or OBC woman, you have to act is something. Okay if it is a general woman and if you have also given reservations to her, which is now that demanding in the Parliament now..

Hon'ble Justice BS Chauhan: - No, no sir, that would be a different issue. But suppose in the local laws this village panchayats, Zila panchayat, so, 30% of the Gram panchayat Pradhan. That would be for the woman. But further classification is the reservation is only for SC/ST woman.

Prof Gopal Guru:- But I am using the point, are to really made this social Justice point more salient in our own imaginations. Suppose who have this..

Hon'ble Justice BS Chauhan: - No, no if it male get married with the scheduled castes woman is degraded and not upgraded. It degraded it.

Prof Gopal Guru:- No, no. In Indian Society, I want to learn from you, you put so much of.. honour, dignity on a woman; she is the one who should defend this. Honour killing and that all are going on. So, if it is an upper-caste woman and if she is marrying under or caste person, she is actually causing so much of damage to the whole social prestige of that community. That is the understanding. So, an upper caste woman marrying a lower caste person is much more objection able than lower caste woman coming into the upper caste and the bride. Therefore, I think giving a reservation to this person who is actually

bearing so much of social cost is actually important. Because she is actually stigmatised. No one accepts her. Lower caste family will say look you brought upper caste woman in-house. So, that is one argument I making. How to handle this? But that of course can take care when you are becoming a part of different Society altogether. A Society which is anonymous, Society which is a middle-class Society where you are not known by your caste but by your consumption pattern, modernity, and other things. So, actually that advantage can be given to this person who is actually making some sacrifice. One argument could be this.

Hon'ble Justice BS Chauhan: - Relationship without marriage...

How it is permissible after the commencement of the constitution. Now I give you another example, which is prevalent even today. This Dropdi vihah is prevalent in some part of Himachal Pradesh. Right. The only purpose is not to have the fragmentation of the property. The division in the property. It may continue as the same. But whether it is permissible under the constitution, how this kind of custom is permissible because custom is also a law under the provision of article 13(1) of the constitution we're of the definition of the law has been given. That custom, notification everything comes under the law. Whether this kind of custom can be permissible? It is most in dignified for the woman to have so many husbands or Dropdi vihah. This type of the recognition. But it is prevalent even today. So, will do something let us be silent for some movement and let sir completes arguments and then we will have question and answer.

Prof Gopal Guru:- In secularism as the say state intervention is not permissible. That's why it is through this state intervention. In secularism as we see state intervention is not permissible, that is why it is secularism. State and religion are kept aside. How? So, in one sense religion, secularism is given in terms of separation between politics and religion. State is as neutral agency. Here we are actually soliciting state intervention, I mean judiciary is making a suggestion; look here it is not simply a passive constitutionality, judiciary's is stepping out to say you have to define secularism differently. Create such a situation in which the two people really shed out their caste background become individual. And become the part of the Society which is known by its modern principle and not particular identification of caste, religion and other thing. One of

the small ways of achieving is to grant the reservation to this person of upper caste. Just to achieve some kind of anonymity. Actually, I would say how do we really describe a caste that is a theoretical point. You would have historic caste within exploring them from within. And creates some kind of economic basis and not class. And in internal differentiation. And that is already happening. Andhra Pradesh ABCD Chendra Babu Naidu in the Haryana, internal division they introduce this. But The internal division was quashed. The board is in Haryana and in Andhra. Even in Karnataka. The point is reservation is also a mechanism. The expression is still coming up. The internal dynamics of all these movements and very new. We want some lexical principle to get in those people who are deprived. But we need to follow rotational principle. That those who have gone up should be excluded and those who at the bottom should be up. This is the principle we have bought from Ashoka Bhuddism. So we already have a very progressive kind of rotation principle.

Hon'ble Justice BS Chauhan: - He was also a BC belonging to Kushwaha, therefore now votes are being demanded on the ground that he was OBC and therefore all Kushwahas should support OBC's. So, we should not read this great people whom we call greatest and great to this reservation and caste politics today....

Prof Gopal Guru:- If there are 18 cores schedule caste you should have different policies for the upliftment. Reservation is one small response to the backwardness. But somewere who have said you are actually implementing the reservation. This is the problem. If you are introducing any reservation keeping in view, deficiency, merit and deservingness. Individual becomes a prime location. Not the consequences that... I'm making this point, individual becomes important in this kind of positive.. I am just a reading HLA Hart. But Ronald Dwarkin said don't look for immediate benefits or assets that you create in an individual. But the kind of social impact that individual create is important. He said that one individual going up will not benefit the entire community; but clearly create our social impact. He or she will become a benchmark, reference point, example. And people will therefore really take the things seriously. So, reservations are not really going to uplift you; But to create a solid, social impact. And that is how we have to look at. So this is one point. So, there is internal dynamics for the reservation is... Within a liberal

principle and not the communist principle. What we're doing is actually making a balance between extreme scarcity and extreme abundance. What we're arguing is that the reservations are required not to achieve revolution because they are not been for that. But they are creating a general.. Even private sector never achieve complete transformation of the Society. So why we are actually throwing everything in the basket of legal procedure and sates because there is a promise there. They are creating ideal type. And slowly, gradually you actually transform yourself. You may not get the benefits, outcome is one thing. But the equality of opportunity is the first thing. No state in liberal society will give you 100 percent. The law is not aimed that. It only creating conditions there you feel that there is possibility of opportunity. We work of on possibilities not actualities. And that's why real and ideal. Ideal is to be there in preamble. Ideal becomes ideal because it get supported by some kind of the practice. Otherwise it is illusion. So we have to maintain a balance between the real and ideal. We cannot possibly redeem real and ideal. But there should be practice in accordance with ideal. Therefore, the reservation is a small practice in accordance with the egalitarianism. There are limitations; we know what is to be achieved, and what can be achieved. Lok Pal, I mean except the politician everyone says that everything is possible. That's why constitutionality is also to put restraint on your unruly and unreasonable aspirations. That's why in a given conditions legal system plays an important role in really, actually keeping you reasonable, rational....

Hon'ble Justice BS Chauhan: - Unfortunately, in spite of the fact that the constitution is being enforced for such a long time, we could not achieve the goal. Because political reasons are there. Courts have also not decided the cases properly. So, there are many problems. If you read this Madhu keshwari 1996. In this case saying that the girl or daughter will not get the share in the immovable property of the father will not violate article 14 because custom will prevail. It is a customer right. What about article 14. If something is contravention to the fundamental rights that custom would not become continue. So, without taking into consideration the majority view in the Madhu keshwari is against them. There is a provision in Delhi Land Reforms, section 354, same problem, daughters don't have a right in the property. I referred the matter to the larger bench. Because I felt bound by this Madhu keshwari. And there is 3 judges judgment and the

judgment is to 2:1. So, we have to refer it to at least 3 judges bench, I have not decided that case, but to think that this stage after 68 years for whom and for whose the constitution work. I will tell you my experience, as a Supreme Court judge I only heard bail and anticipatory bail for white collar criminals. Article 21 is meant only for them. Not for a poor man. The other not worried about Ram Lal and Shyam Lal waiting in the jail when there appeals will be heard. There appeals will come only when it becomes infructuous. And then lawyers come raising the hands in the air as if they will bring something by magic. Haven is going to fall, it will hardly takes 2 minutes and we start hearing then and it continues for the months. And we are hearing only anticipatory bail. Nothing else. So, we have to be serious think about this poor man.. See what Roosevelt has told the court I will pack you up, go home, I will bring the judges will know the law and decide the case according to law. If this situation come and people refused to obey our judgment, we don't have any police Constable to enforce your law or order. What will happen? It is our responsibility to work with sincerity, with sense of responsibility and think of this poor man. It at least out of 13, five Courts in Supreme Court hear only cases of 5, 6 big business houses of this country. No other case, no work. It is nothing to do with common man, what is constitution and we judges had ever given to the poor man of this country, they are same. Rather worst position. So, this reservation etc. would have been over by now had the constitution has implemented in the spirit from the very beginning. That is the difficulty.

Prof Gopal Guru:- It might actually for and the jurisprudence, it might lead to some kind of support. You have just commenting.. The legal system and our judges active because he or she is doing efficiently, so that things will change. I was appealing to your wisdom to say that we all are very activist and definite on child labour, migration, people foeticide and all those serious problems; can we really step out and give direction definitely. Therefore I read your comments and your strictures that impressed so much, wonderful...

Hon'ble Justice BS Chauhan: - For the simple reason, that we have a problem of migrant labour. They are migrating from Bihar, from Rajasthan, from UP, from one state to another state, working on construction and building etc. if parents are migrating these

children also follow them like the annexure in the petition. There were the petition goes these annexure also goes. How to manage their fundamental right? What is the meaning of article 21 A for them is very difficult to enforce any constitutional provisions as far as the children are concerned. It is very difficult. So, therefore for such a large number it is very easy equality, how would there be equality whether the child is born in the Gatar of Bombay and in other born in a seven start hospitals or in Delhi. So it is very difficult, it is right to say what the constitution wants to provide equality but practically it is very difficult to enforce the law. Most of the people sent the children to the school so that they can get one day mid-day meal. Not for education. And what is the quality of education? Teaching the children alphabet does not mean we are educating them. Education means all sort of development. That we are not providing so what is the use? You must have read that the book written by some English Lords letter to the teacher. Those children be sent in Italy, education was made compulsory and David compulsorily taken away from the working in the factory and taken to the schools. After completing the 10th examination they could not get any employment anywhere they went and they wrote a letter to the government. The beer already in employed, why you have taken the employment under the grab of educating us. We were doing the job now after getting this education we have lost that job also. So the providing that kind of education therefore that the book should be made compulsory for every person who sits in the Parliament or who decides the fate of the children in the country. This is the difficulty.

Prof (Dr.) Geeta Oberoi:- Today evening at about 6:30 we will be showing a movie called Lincoln. It would be in the auditorium followed by dinner.

Session 9: Innovative Interpretation of the Constitution

Mr. P.P Rao:- Hon'ble Justice Chalmeshwar and hon'ble judges and the director geeta oberoi another members present. It is refreshing opportunity for me to meet you and interact with you. There is hardly anything new which I am going to say. But always I benefit my interaction and particularly....here my addressing much more so it is indeed remarkable event. As all of you know perhaps some of you know I did'nt have the means to straight away practice law after doing my law course next option was get into the academics so I did two more years in the law college got my llm degree then searched

for the job unexpectedly delhi university pick me up and that has opened various opportunities. While teaching constitutional law the famous lawyer m c chaterjee father of somnath chaterjee whose name is more familiar being recent. He wanted some assistance from some academician to help him in his academic pursuit preparational speeches and and also in important constitutional cases. Somebody mentioned my name and he called me to his house and requested me to help him. That association ultimately led to disseration of my teaching line, which I liked very much although my desire from the child was...I have seen my uncle and elder brother practice in small court to work as a lawyer. He revived the dormant aspiration in and said you come and join my chamber. This is after a view years of interaction and during which he suggested to write a book emergency and law and we did that received very good reviews infact it was related to receive a letter from lord Denning from england who had seen his book and who write few appreciating lines. So thats how now you have taught enough its time to practice law join my chamber. It was a great opportunity for me I learnt a great deal. He treated me like a father and tremendous increase he gave me and confidence too. So thats how it began and very first appearance was a murder appeal i the supreme court before Justice Hidayatulla bench. During a summer, we were at Nanital for a conference that was soon after Golaknath judgment came. You know when a path breaking judgment comes all intention is on that as it is today about yesterday's judgment. It was much awaited. So, I criticized the judgment in a series of two articles published in Indian express and passed that on to him. Then he said let us go two for a walk so started walking and all that by the time I made up my mind to start practice after the summer break this was during vacation. Everybody said you are practicing law since when I said I recently got enrolled and resigned by job. Is this your first appearance I said yes. In a final hearing of an appeal I said yes. I know you have been a good law teacher let me start how you argue. I cant tell you how grateful I am to this day for his kind words which filled me with tremendous confidence and the initial start was very auspicious I thought. So I am here today to interact with you and I had the good fortune of assisting the supreme court, the highest court in shaping law and the way it has been shaped after I joined was totally different from the way it was being shaped earlier. If you recall the very first response of the Supreme Court to agrigarian reforms was very cold, unappreciative, conservative and

unexpected. Directive policy of the state policy as such unnecessarily, advocate general raised the relied on the article 46 in champaka duryarajan case which all of you are familiar. Kamal Lal Jee was the one who was under attack high court struck it down....said caste wise brahmin some many seats, christian some many seats, muslim so many seats community caste wise it was reservation. He said this was done because we have to promote the interest of the weaker sections education of weaker sections. The court have simply said this absurd why should we divide them caste wise, community wise to promote. You may reserve for the weaker sections but why forward sections also split like this you could have said it finished it instead pompously declared that directive principle of the state policy are not enforceable therefore they are subservient fundamental rights therefore your plea is rejected. Un-necessary argument and resulted in un-necessary proposition of law which halted the progress of the nation on the economic front. Prime Minister Nehru was daises all through the freedom of struggle they were to restore the right to the land ownership rights that they were frustrated they don't know what to do they went using their power article 31 A 31B 31C all that the point I want to drive is later on when judges of different temperament came in 70s who appreciated the directive principle better and incidentally mention the first one to criticize champaka duryarajan judgment was professor of law p k tripathi. He wrote an article in 54 published int he supreme court journal in those days. He said no this not a correct approach to interpret constitution when two parts are there harmonised one is subordinate to another and thereby future growth of the nation because the rights which are principle which are mentioned there are fundamental to the governance so shape the future of the nation. So when these new people came they got stuck which champaka duryarajan seven judge bench so on so forth. So how to do it. We had justice Bhagwati, Justice Chandrachud, justice I am must mention in seniority... desai, Chinappa Reddy. Once they came in they came like a fresh breeze to supreme court they change the shape of the supreme court, shape of the constitution and try to get over the earlier judgments. What was the path left for them innovation. Innovative interpretation of the constitution has transformed the court throwing out the balance ought to be achieved by the division of power, seperation of power between different institution of the state. Initially executive was very keen, parliament was very keen to reform but after as yield crop of new leadership the priority

changed. Vote catching become more important than reform in the system carrying reforms like that. Directive policy of the state policy took a back seat. So these groups of judges with their innovative ways started giving expansive interpretation. They literally started reading directive principle of state policy into fundamental rights that how you find right to life, right to shelter, right to education. So this is the way of innovative interpretation to get out the obstacle created by the earlier generation of judges and taking the country forward but unfortunately what happened was when the court became active and arrive to that state policy and trying to push them through all of sudden become cold and different to these principles thats why the nation got stuck. Now what do you find environment protection is the responsibility of executive and legislature. Some laws have been made. Ultimately who is implementing them ? Supreme Court is implementing them. Take remaining areas: mining areas, mining leases...state government will grant leases without consideration to environment...leasee with their influence they keep on entering into the forest areas, prohibited areas and it was exploitation of our resources beyond permissible limit is going on ultimately the court had to take on how they do it? right to life means life free from pollution. It is life of dignity free from pollution. I was an eye witness when justice P N kirpal was pushing for the reform to change and compel the vehicle...public transport in delhi to switch over from diesel to compressed natural gas. The resistance of the government tragedy today is infact the challenged faced by the judiciary. The institution of governance which are meant to take care of this problems are not...responsibility on one hand and resisting the efforts of the court, the judiciary to push through the constitutional agenda. That is not in the contemplation of the framer of the constitution. What they have visualized was there would be concerted effort on the part of executive, legislature and judiciary toward common goals but where is the concerned efforts. In fact in 1973 thats why the court had to innovate and in process of innovation it is evolution of law. Parliament can amend any provision of the constitution including fundamental rights. Again Sajjan singh's case..question came up this time they re-ierated Shankari Prasad but two judges express reservation and one of them is justice Mudalkar and another is Hidayatulla. Mudulkar is the one who raised a question I want to give this two lines from his judgment he is the one who said preamble is epitome of the basic feature of the constitution can it not be said I am quoting his...can it not be said this

intention of the constituent assembly to give a permanency to the basic feature of the constitution. Whether making a change in basic feature of the constitution can be regarded merely as an amendment or would it be in effect rewriting a part of the constitution and later would it be within the purview of article 368. This is the seed sown by him in 1965 and it took 8 years to sprout in keshwanand bharti. Why it become necessary because parliament amending the constitution as it liked and which was affecting the rights of the people and people had no where to go except the court. It will go to see...we call the legislature the representative bodies of the people but do they have the occasion to hear the grievance of people day to day as the courts have...legislature do not have that no citizen...present his grievance except through the representatives and executive does it have occasion to beat the people everyday that grievances? No. The only body which does it is the judiciary. You have a better appreciation of the ground realities they go to....election time they all dissent like locus they go listen their then try to which they would not carry on mostly and they repeat everytime and all kinds of methods are adopted for word catching and democracy is polluted beyond redemption this is the situation. The only position for which no qualification is required is member of legislature. No qualification except that you should have that minimum age and citizen of india nothing beyond that and the amount of power they wheeled is immense without capacity and experience and equipment. The only institution which can think of reforms is the supreme court which has to do it. But innovative interpretation.....it enlarge the area of judicial review. The larger the judicial review more and more people will come naturally they would like to avail the remedy and more and more people come you are crowded. Therefore under the weight of this growing petitions the court has to functions. PIL is a great innovation. PIL has transformed the country but PIL again is a great innovation which brought in its tail tremendous volume of work and misuse of PILs is another problem which judiciary has to tackle again you have to innovate there is no other way. Now look at what is happening some of the PILs what I notice is PIL is the person present in the case does not present it objectively as a not adversial litigation. He gets involved with that as if he fighting the enemy that should never be the approach and you people have to take care of the aspect according to me so that to streamline control it within limits. Take one instance, moulding a...is a very important aspect. In some cases moulding is more

important than adjudication of the dispute. The Supreme Court in two judge bench in 2G spectrum case rightly quashed those licenses but it did not pay attention to moulding of relief to took control repercussions. You know the result, foreign investment stopped. One judgment because court did not...experts to moulding the relief they could have moulded the relief in a manner that foreigners ...are not affected and culprits are the indian middle men and burden fell on them but no body argued and analyse the economic consequences otherwise what would be very much restrained and perhaps would have done its better to mould the relief. In 1960, a case came up I think it was certificate granted by high court that is a fit case involving substantial question of interpretation of constitution regarding article 14. The Subbarao speaking for the constitution bench said: article 14 has been interpreted suffciently, interpretation established there is no scope for further interpretation, classification has come to stay and what do you find in Maneka Gandhi's case? Maneka Gandhi has expanded the scope of Article 14 by revising the test they did not abandoned classification test that remains but they brought something more as super test i.e test of reasonableness. Whether the impugned provision is just fair reasonable and right. This was 1978 but you know the seed was sown by vivian bose in State of West Bengal versus Anwar Sarkar. I would like to read few lines from justice bose the judgment that...how he hold, dealt with it what I have to point out is some judges with great vision and deeper understanding of the constitution provisions and their object they able to figure out what interpretation should be his was a lone voice at that time and this what he said the question with which I charge myself is you remember in that case anwar sarkar case a special court...of west bengal give power to state government to pick up cases which should go to special court in a shorten procedure, a summary procedure for trial. It could pick any case and transfer it there and accused is compel to suffer that disadvantage by going before a special court. This was supposed to expedite the important cases. This was challenged as arbitrary powers.

The question with which I charge myself is can fair minded, reasonable un-baised and resolute man, who are not swade by emotion or prejudice regard this with equality and quality just and fair regard it as equal treatment and protection of defence and liberties which is expected out of sovereign democrat republic. What a great mind it was and incidentally as you all know these judgments read like literature thats so clear and so

emphatic and so impressive it is and again coming up innovation you find when you come to article 19, the supreme court try to innovate, enter into areas which are primarily meant for the legislature, the area of political reforms and electoral reforms. In the PUCL case, its the birth, voters right to know the antecedents of candidates came up for consideration article 19 1 A had to be repeated. Initially the democratic...case they said yes voter has the right to know antecedents are part of article 19 1 A. After that look at the attitude of the legislature...what they have done what they could not do. All the parties lined up as what they are doing today after this judgments line up to undo the judgment. Then that was challenged. When court again re-iterated they said that once interpreted the constitution by law you cannot change it. You need an amendment to the constitution. Now the amendment has to stand the test of basic feature, basic structure. You can't easily amend it. So therefore they said article 19 1A later on article 14, 19, 20, 21 they constitute the core of the basic structure of the constitution. So in the basic structure they constitute the core most vital part like the heart. So therefore after they said appearing for lok satta...I said please ask for one more thing you spell out...I said two things please do two things add more things what is that I said no. 1 ask them to disclose what their assets were when he entered politics and what they are today. So people have better appreciation as to how much of sacrifice he has done for the country and how much of service he has rendered for the country and what they have been doing all the while. If a person files a false affidavit say the election shall not be valid. Again they said no not in the result what happened is you have gone some way but you could not carry the thing to the logical conclusion. Same thing happened, innovation good but it is half way house, lily Thomas case. The situation has come today if the country has to progress you all committed to rule of law. You are there to protect rule of law, protect rights, and protect democracy. So how to do it? There is no escape from taking one added responsibilities to save the constitution to save the people and to save India. This has to be done. Look at article 36 initially supreme court started in the 50s saying that we are the central...which is our duty to put away our fundamental rights and so on and so forth. But absolutely they found it is not possible to put a fundamental rights with expansive interpretation of article 14 and all that. Therefore most of the things ultimately land in your lap you have to handle this pull over from the supreme court you have to handle and initially...in your courts you

have to handle. So your hands are not only full it is the fullest possible extend you have to stretch yourself. Now in this situation we will have to innovate new methods of disposal two my mind. If the court, every judge insist in vast majority of cases on both the parties through lawyers represent the parties consult their counsel identified the problem find a solution. A kind of mediation approach partly put it to them this a problem that we have to solve help the court to solve it as quickly as possible talk to them. Once you identify the problem put it to them in most cases things can be resolved in the court itself. If it can be resolved, please do that. In delhi everytime there a amendment barring jurisdiction of the courts, there will be immediate strike. Therefore this is the one where we have to again...and look at the unfortunate aspect of it that every elected system in our country take it bar council, take it medical council intially we had excellent leadership but today we have got vote catchers emerging as leaders. one who can catch more votes he becomes our leader. The methods of catching votes are different from the methods which politician follows. The result you are not able to get proper leadership. There is crisis in the country with all that there have been bar council not able to control and help the disciple of the bar what is to be done. They are part of the court system and officers of the court. So you have added responsibilities to mildly discipline the bar ..and try to ...need for them to help the system it is in their interest if the court is able to dispose off more cases, more case will come for hearing lawyer will not lose anything in fact quicker the justice later it will benefit everybody. So thank you all I have taken more time than I should have its a pleasure speaking to you. Thank you. Clapping.

Prof Arun Thiruvengadam:- Thank you. Good morning its pleasure and privilege to be here. I don't want to be autobiographical but I think Mr. Rao's starting made me reflect on a few things I I'm very excited to be here partly because I began my legal profession career twenty years ago almost to the date. My first real job was as a law clerk in the Supreme Court of India. I work with Chief Justice Ahmedi and looking back I think it was a formative experience as a fresh law graduate as working in the Supreme Court and one of the things I was appalled by having worked as an intern with judges with lawyers at the bar was how little academic support research support the Chief Justice of India had and it's something that I've thought about and know that now there are more institutional mechanisms I think

of it Supreme Court and some high courts judges have access to research support. But it's something that I think a lawyer of just ten years standing in any high court can afford to have six or seven bright young juniors who could provide support but then judges have to decide on a very important and consequential questions. They have a little support for that. So I think it's NJA's initiative of having dialogue and conversation is very useful because it allows you to think about these things in a collective setting and without in mind I'm going to be speaking in the second session and have a substantive presentation there. So I want to Forster dialogue and in that spirit I will try and engage with what Mr Rao had said...he started by saying that he's appeared before the nine Judge bench not before thirteen judges. I happened to be in the court as a law clerk when Mr. Rao appeared in NDMC vs State of Punjab It's becoming obscure ruling in many people's focus and it is seen as a taxation case but actually involved many important questions of constitutional law and innovative interpretation beyond the basic issues that are at stake. When I heard him that I felt sitting in the court that you must've been a law teacher because he expounded at length and covered so much ground in the time that he did and later I asked him and it was confirmed that he had been an academic. In some way that made the reverse journey. I think I started as a practicing, I started as a clerk at the court I practice for a few years and then decided to move to academia partly because I think that Mr. Rao mentioned. I think the Academy is very important if we are to deal with many of the changes that Mr Rao has highlighted and if the lawyers in the bar are not living up to the mandate of previous generation's perhaps some of that we have tribute to the academy and the kind of education that they're getting. So with that sort of desire that I want to make up an academic...I'm going to use that standpoint to to respond and go quickly to the questions that I had. So in some ways and do it very respectfully and I'm sure Mr Rao will engage but I had as I was listening to his account which is by now if the familiar account I had some questions one thing that Mr. Rao said in the beginning is that we had like addictive he used describing the conservative old court which was hostile to a great injuries on and then some post emergency becomes this wonderful People's Court upendra baxi has called it...it has become a court for the

people that's how it began a very important sort of piece. But again even in Mr. Rao's own account that narrative he himself questions it at some point. If justice Vivian Bose gave us the seeds for many of the things that came later. Surely his interpretation was not called and conservative. And that broad sort of narrative I think there are other questions one can ask so he mentioned what Uday Lalit has called the four Musketeers every judge who brought in social reform after the seventies but amongst them is Justice Bhagwati who is a fascinating figure he's the author of the ADM Jabalpur judgment which exemplify coldness and conservativeness and restraint and thankful abdication as he himself has now come to recognize that this is the same judge who an S.P. Gupta talks about how judges can rewrite the blueprint of the Constitution which with great respect I think is completely unacceptable. As a rule for a judge to take on in what is a constitutional democracy. So it's the same judge can be called and conservative in interpretation can be extremely innovative. So the question one has to ask what happened. What happened between 1975 and 1982, 1983 did the circumstances changed the text is still the same. What leads to what is it a particular time and not innovative at another time Mr Rao also said post emergency if you had this very expansive activist progressive judiciary. He mentioned being in court for when chief justice Kirpal was pushing through pollution changes and respecting the right environment. At the same time again if you're going to describe labels of restrained or activist or progressive or regressive. Justice Kirpal is not loved by progressives. This is the same judge who in Patel said getting a slumdweller providing them relocation is like rewarding a pickpocketier. That doesn't speak very well of values of humanness and dignity. This is the same judge to the environmentalists to consider justice Kirpal a great champion because he is the author of the judgement in Narmada case which for the environmental movement was a big step and they see that as a huge step back. So I think it's not true just to nitpick but to ask the larger question how do we assess this important task of innovative interpretation and what is innovative in the context of free speech I am grateful Mr. Rao raised justice Bose's judgment in Anwar Ali Sarkar case even if you look at other cases that earlier generation seem to do much more than the

later progressive expansion judiciary has done for instance on free speech. So that same core conservative group of judges. In the 1950s when Nehru was prime minister had I think the temerity and the constitutional vision Romila Thapar and Bridg Bhushan to say perhaps you're going too far. And what was being the innovative interpreted it was to point to the text of the Constitution and say that the Constitution gives a certain right and what you're doing goes against the text of the Constitution. So sometime it may be the most innovative thing you can do is to do the conventional thing which is to say this is the text of the law can we please implemented it. I will give you one example not not from India from the US of that kind of reasoning so the US Constitution famously in the First Amendment says that the Congress shall make no law abrogating restricting speech and of course this is not true because the US Congress has historically almost from the very beginning of the drafting of the Constitution passed laws and in the constituent assembly in India dr. ambedkar pointed out and in next session is on speech and get into a concrete era where we can test some of the questions. He said that was what the Indian Constitution had thought to do and what they drafters strive to do is that they would frame the right broadly so for instance in 191A you have people will have a right to freedom of speech and expression and then in 19 2 they put in place restrictions of those rights and parliament had the competence to restrict these rights on these grounds and he said that because he was attacked and his draft was attacked saying you're Bill of Rights takes away more rights than it gives. And he said this is absurd all that we have done and he said we looked at the U.S. Constitution because at that time was one of the leading competition in the world. What we had put in place in 92 is merely to ground the restrictions which US Supreme Court has evolved through the centuries right up to the 20th century. So there's nothing to really regressive about it we just try to be clear as to what the U.S. Supreme Court can do that because they have to live with a text that says you actually can't restrict it. But the U.S. Congress has done. So as a Dr. Ambedkar said that's what the settled understanding in the U.S. to the early twentieth century. But along comes a judge court judge called Hugo Black who comes in completely upturns nearly two centuries of free speech though in the U.S.

by saying the Constitution says Congress shall make no law it's just a speech and therefore these laws are our unconstitutional. Now this created paranoia because everybody said no no no we know that that's what the text says but that's not what we understand and constitutional law is just not text also precedent it is also jurisprudence it is what is academics think but justice black resolutely said no I am only bound by the text of the Constitution and no law means no law. Initially he didn't find many takers but over a period of time there are many people who subscribe to that view and US free speech law was transformed. Which is why today they have no contempt of court law. They have the most extensive free speech law in many other areas and not a great fan of all aspects of American free speech law and I think it may not be suitable to certain other contexts. But I give that as an example for saying what would seem like a very conservative approach to text alone and not taking into account purpose or anything else in the US is a very radical very progressive measure and Americans today. If you are asked to identify what is there aspect of constitutional law which is most distinctive and most true to them they will say it is their free speech law. So I think I'll end here. My point is only to spur a dialogue and ask these questions of when we talk about this important task of constitutional interpretation. I would suggest that we be a little bit skeptical of what would be progressive and what would be restrained in particular context I think the text and judges of course all of you interpret the Constitution in India it has now become and after yesterday's will the debate is whatever be the constitution and what it means its judges who have the final say now on what it means. So you obviously very important players when it comes to interpret in text. But I think one of the interesting things for me to look at how the constitution has become an important feature of our national landscape is when I was watching this satya meva jayate end of the first season Aamir khan says what can hold our country together and he read from the preamble of the constitution. Now gladen my heart is a constitutional lawyer and as someone who has to teach this subject. But I think what he was doing is a popular actor was also representing what many people have come to see in this country. For the longest constitution in the world often very dense technical had over time become something that

people respond to and think they have an attachment to and I think that's a very important development. And that's why when we as judge academics lawyers engage with it we owe it also to the people who have the hope binding on this document to treat it seriously and to ask these difficult questions and engage with them. Thank you and I hope that that will help provoke response from Mr Rao but from rest of you also.

Hon'ble Justice Jasti Chelameswar:- Good morning. Let me before I speak which is a little unconventional procedure. Can I ask the hon'ble judges assembled here one question? According to you what is the legal position in this country where the citizen has a right to vote or right to contest an election if he has a right or a constitutional right or a fundamental right. I would like to know the views of this house. Today I am asking it with a purpose I'll explain it later. Statutory. So as of today what is the position. It is a constitutional right. Any other view? I would like many things you would like this place to be heaven that's not the point but is it a heaven. I asked this question I'm sorry if I sounded a little offensive or condescending. That's not the idea. When you are talking about innovative interpretation of the Constitution first of all of how we interpret the Constitution is my question to what extent I'm not saying that when have not interpreted at all. There was more activity in the country. Sixty-five years after the event of the Constitution even today an assembly of high court judges still don't prove whether it is statutory right or a constitutional right undoubtedly it is not a fundamental right. Now it is declared more than once by the Supreme Court. There is one judgment I'm sure you would have notice is PUCL. Three judges of whom Justice P V Reddy...to this question at some length and declared that there is a constitutional right with which Justice Dharmadhikari expressly agreed and fair judge justice shah made no comment and the judgment otherwise...In spite of it still I find judgments of Supreme Court later to PUCL saying that it's a statutory right. Well it could be statutory right. My personal view of course I've already on record in a dissenting judgment that is a clear statutory the constitutional right otherwise whole gamut of articles dealing with the creation of Parliament two houses of the parliament. Legislators heavenly and in some cases Legislator Council in some

states. And a whole chapter dealing with Election Commission and articles dealing with qualifications and disqualifications to be members of the parliament in legislature and articles dealing with creation of single electoral role or article 325 or each territorial consonance and article 326 which declares that a citizen has...election shall be an adult franchise. Anybody whose office had a little used to be 21 earlier and reduce later. All these articles ultimately mean nothing and there's no constitutional right at all to vote our contestant the election but simple statutory right I feel sad to say this but then there is nothing innovative about if it is simple non-application of law and mind in my view. On the later when on the other day I commented when one of those cases actually going on that Haryana election matter local bodies election. If this is the legal position Mrs. Gandhi and I took the names I had not with any other intention just to drive home the point. Mrs Gandhi and Siddharth Shankar must have been very ignorant people they could have simply repeal RP Act all the problem would have solved. The amendment of the Constitution which led to Mrs Gandhi's case in 1975 the full supplement of SCC was not necessary. Repeal the RP Act all problems are solved not body could have questioned anything about Mrs Gandhi's action. But 65 years later I'm not leaving you I have to blame my own institution the idea is not to blame since academic discussion on interpretation of the Constitution. Constitution interpretation in my view is very serious business but question is how serious it is and what is your definition of seriousness. It's not another statute or is not another set of rules or subordinate legislation to interpret it. That different parameters if you recollect SR Bommai one of the question in SR Bommai was whether examining the legality of the presidential fiat in and posing the presidential rule whether the test evolved by the supreme court in Barium Chemicals are relevant. Supreme court clearly said no. What is meant for structuring the power of administrative authority is not apt from the context of constitutional authority. Parameters are totally different. My dear brothers ahh...innovation is certainly welcomed but it was jocularly said by one of those American Academics the question nowadays is not as how to read the Constitution but rather to read it all. Most of the time what happens is I'm sorry to say all this thing but then that matters of regard we're going to skip this things

regardless at least in-house with four walls in a family of the legal world. If we don't discuss these things we'll all be doing any great academic progress. I want to mention whatever fresh in my mind there can be new good examples bad examples in these matters. As another judgment matter came from Bihar to the Supreme Court in the context of the legislative council election of teacher councils. And there's seven qualifications only those teachers who are teaching in a particular class of education institution are entitled to vote for the teaching for a particular duration of time. That was the question. And the challenge was that some of these teachers were teaching in institutions which are not constitutionally qualified to be an qualified institution's tempering the right of voting on them. In that context unfortunately the supreme court reversed article 326 as the basis of that it unfortunately the plain text of Article 326 deals only with the lok sabha legislative assembly's. Rajya sabha and legislative council are not referred to article 326. What happens is when you do not look at it in the name of innovation all of us are willing to innovate. All of us are willing to attract the press next morning. The point is in the process first of all are we faithful to the...I am not talking about textual interpretation don't mis understand me. But at least we must know first of all what is the text and then start interpreting if you start interpreting it without knowing the Constitution without knowing the text that will lead to lot of problems. At this stage I will stop it here. Now its time, the most important think in my view is see as a friend Mr. Rao was pointing out Constitution doesn't speak a word freedom of press it only speaks of freedom of speech and expression. Supreme court innovate it then on based on past experience, the american decisions it is a sense innovation but not first time. It is already innovated elsewhere, But there are areas where the interpretation of the Constitution fell short of the basic minimum caution. So as judges of constitutional courts it becomes our please remember ultimately the new talk about Supreme Court. It's you ultimately some of you going to reach tomorrow which one is a different story. Some of you will reach then prepare yourself for that. Prepare for playing the in the correct legal position. Innovate where the where the constitution is silent. But

where the Constitution is eloquent first understand the text of the constitution and then interpret. Thank you.

Session 10: Freedom of Press and Libel: Constitutionality of Gag Orders, Criminal Defamation etc

Prof Arun Thiruvengadam:- Thank you it is a very nice to have some conversations with a few you and I I feel guilty that I may have gone on too long and and prevented a discussion and really very eager to to hear you and to have a dialogue. What I will do is for this I've prepared a bit of a presentation there's a power point. My apologies I'm not a big fan of powerpoint presentations I'm a bit of a misfit in contemporary academia were everybody comes of with slides perhaps it's. It's having started at the Supreme Court and having heard people like Mr Rao to hold forth. And keep everybody mesmerized that. One sort of hold on to a certain way of doing it but but as we know and we were talking about text and sometimes the best way to do engage with text is to read it. So this is twenty slides I won't take you through all of them. But I just put some of this is about text so very quickly I want to thank Dr Oberoi for asking me to come for a very specific session I have..she said this this is an issue that a lot of people have expressed interest in and of course this is a very topical issue in contemporary India. So the topic is Freedom of Press and Libel: Constitutionality of Gag Orders, Criminal Defamation. I sort of thought about what would be the best way I could engage with you. One way to do it would be to. Perhaps the talk so one-way to get into this discussion is to look at all the relevant law at issue so this would be at a minimum the provisions of the Constitution on freedom of speech. In the previous session Justice Chalmeshawar refer to the fact that freedom of press is not explicitly guaranteed in the Constitution. But it's from the very beginning and for the first two decades there was a clear understanding in the mind of Supreme Court judges at least. The freedom of press was very much. Something that was in the mind of the framers and although article 19 1 A money doesn't explicitly included it was very much something with the framers had in mind and you can find evidence for this if you look at the Constitutional history in the constituent assembly. The drafts were very much about that it's not very clear why the freedom of press was left out in the final draft. But the court very quickly stepped up and said very much and just as the justice chalmeshwar

said said relying very much an American case law to say that this is very much part of the vision of the framers. But again we talked about innovative interpretation one of the problems of not having a textual footing is that is open to doubt so along comes the current attorney general and says the right to privacy is not guaranteed by the Constitution which seems a bit faddling to those of us in the academy who I mean there I think there is a point to be said that even but in the various Supreme Court judgments that have put down the principle and been applied in many different contexts. But for for many years people have taken the right to privacy as something that the constitutional order in trenches. So perhaps the attorney general is his questioning of that consensus and the government moving it to a larger bench will lead to some clarity on that and perhaps the text will also reflect that which may be good but that's that's the fasteners we were discussing the last session, the fascinating thing about constitutional interpretation is things are never set in stone. Even if they are set in the text. The text can become irrelevant or everybody comes to a certain consensus that it doesn't mean what is that and he says it means to me that in mind. I thought to discuss the provisions on criminal definition. You would look at section 499 or 500 of the I.P.C. which are currently under challenge and the court the Supreme Court a siege of the matter in the Subramaniam swami case so I thought was one way to do that would be all discuss the provisions at stake and then look at the case law and then try and come to some discussions about whether that's what we think of it. But as you're all judges and the matter is before the court I thought a more fruitful way for me to intervene would be to bring in things that as an academic I focus on so not just questions of constitutional text of precedent but questions of constitutional theory and questions of constitutional history. So this I sent this morning to Dr Oberoi paper which I wrote five years ago in the conference at the University of Melbourne and the premise of the conference is very interesting in the idea was that the right to free speech is very entrenched in Western liberal democracies. And they invited me as someone who focuses and constitution in Asia to ask because they said it's puzzling but across Asia the right to speech is not really very entrenched or respected and they were thinking of course of contemporary China or countries like Singapore and Malaysia or Taiwan and Korea which have more recently become constantly democracies and entrenched speech so of course as an Indian, I was quite

affronted by this and I said you know we had a strong commitment to speech from the beginning and every Indian law student knows we can cite these wonderful passages from many judgments. But as I studied more closely it turns out that free speech is a very problematic area and then the court has been very inconsistent. Sometimes it takes a very liberal stance to uphold speech but sometimes it backs away from it and if you think of sedition and I spend a little bit of constitutional history. Even within our own constitutional history it is particularly ironic that the sedition and provision is not only alive but vibrantly being used. Given the fact that all the nationalist leaders were prosecuted for sedition under the Colonial Authority and one of the great things we said when we become a free and independent nation is even have the speech. How do you explain that this sedition provision is being invoked so often in the recent past we've seen that being invoked against cartoonists against people who say anything against a particular person in government that that's taken a seditious speech. So to understand that puzzle I thought it might be more useful to go back to you know first principles in terms of theory and why do we protect speech and perhaps some history on why these things are particularly relevant for a nationalist tradition and why it is very much part of our heritage so here I was responding not just with a foreign observer who is a bit skeptical that in India you take speech seriously but also there is a growing strand of people and that strand has always been there so..austin study of the framing of the Constitution says a consistent critique criticism of our Constitution from the very beginning was this is a foreign Constitution. These are for an idea that had been imposed on our people and of course there are many people who keep resurrecting notions of ancient India...and there are a respectable judges as well so justice rama joys authored a book where he argues that the basis of Indian Constitution is in can go back to Raj dharma and you can sort of trace it from there. I suspect that's partly responding to this perception that this is a foreign constitution and the draft persons cobbled the things from other constitution. I was trying to show in the paper that is simply not true that the right to free speech has a very important role to play in framing the nationalist movement and people who sort of came out of that. So what I will do here is and maybe in the discussion we can talk about the relevant cases but this is likely away from that and goes into the terrain of constitutional theory and constitutional history. But before we do that let's just take a quick look at the

provisions. And this goes back to my point in the previous session the text by itself doesn't help us very much. Because the text is quite bare so 19 1 A all it says is all citizen should have the right to freedom of speech and expression. 19 2 gives us things can be grounds on which the freedom can be restricted. And there's a long constitutional history towards it. So if you look at for instance the word reasonable was brought in by the First Amendment. The First Amendment to the constitution is generally cast as a regressive measure because as I alluded to in the previous session it's the court's decisions in Romila Thapar and brij bhushan which causes which causes the nehru government to come in and say no no we are going to rein in things. If you remember the context of the fifty's the economic deprivation, the post partition, refugee crisis and a very severe economic crisis and the conviction of the Nehru government that communist forces were alive across the country so they were concerned about restricting that and the First Amendment did have certain regressive sort of aspects. But these are the grounds on which you can restrict the freedom of speech. Again they broadly worded and how does one make sense of them what does friendly nation..relations with foreign states for instance mean. There is of course case law on all of these but I want to just focus on on the bareness of the text for now. So two judge perfectly conscious judges can come to very different interpretations if you rely only on text. Because text has that inherent quality of being open ended and then going that. So the kind of discussion we had previous day the same judge can look at a particular text and take it in direction A, judge B comes and takes it in a different direction so when we engage in the in interpretation we talk about other things so that's why after a period of time people have come up with the idea of purposive interpretation. So you construe a text according to its larger purpose and some interpretations are therefore a legitimate and some because they further the purpose are more legitimate. There are again within that there's a whole range of people that are strict textualists No no don't don't bring in purpose to take away what the text means and those debates I suspect endless we are never going to come to an end of today in and you can't expect someone all for instance for thirteen judges in this room to absolutely agree that this text means only one thing. So then if text has that quality how do we come to some form of consensus? When we typically do that by by relying on philosophical underpinnings. And say well what's the theory of guaranteeing that surely there is

something else and can we agree on that. Perhaps if we can then we can resolve disputes about interpretation and what this means. So taking the context of NJAC what is the purpose of the NJAC. How important is independent of the judiciary and can judiciary independence be guaranteed by anything other than primacy of the judiciary these are the larger set of questions which underpin whatever is the text that controls the particular situation. Let me just I won't go into this maybe just put it on the slide in case we need to come back to what is the text of the criminal provision which prescribes defamation. And there are peculiarities of texts there are some things which you have to ask. Why the day. And what is it sort of doing to this is Section 499. This is section 124 A the provision which deals with sedition and in explanation one there is very interesting constitutional history to this provision. Legal history it came up well before the Constitution did as that number signifies it was not part of the original penal code in 1860. It was brought in if so it is not part of the macaule's creation but stevens and got it in 1870 and I think of the period 1857 war of independence. The British government is now formally in charge. They're very concerned about what is happening in the country in the sedition provisions in the country comes In here it might be useful are going to talk about our text it's so open. This is Mohandas Gandhi's famous sedition trial in 1922 and we often forget that he was a lawyer and lawyers haven't there's only one recent book on Gandhi the lawyer and how it framed his thinking about other issues. But he was also a very competent and very innovative interpreter in some ways. When he talked about how should you hear that if you look at the sedition provision. It talks about disaffection and this is where words have meaning and words can be manipulated and words have great rhetorical effect so what Gandhi says in that famous and many of you may be familiar with I thought in our context it might might make sense to just read it he said Section 124A under which I am happily charged is perhaps the PRINCE among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Is affection cannot be manufactured or regulated by law. This is he going on the idea of disaffection. If if one has no affection for a personal system one should be free to give the fullest expression to his disinfection. So long as he does not contemplate promote or insight to violence. But a section under which Mr Banker and I have been charged is one where mere promotion of disaffection is a crime. I have studied some of the cases tried under

it. I know that some of the most loved of India's Patriots have been convicted under it. I consider it a privilege therefore to be charged under data section. I have endeavored to give in the briefest outline the reasons for my disaffection. I have no personal ill will against any single administrator much less can I have any disaffection to add the king's person. But I hold it to be a virtue to be disaffected toward the government which in its totality has done more harm to India than any previous system. And of course this became celebrated in people at my descent lawyers could help admiring the way they were disaffection has been deconstructed and put across in such a powerful way but not to get to what I was alluding to earlier So how do we if we can't agree on what a word means in what does disaffection in section 124A mean and if you look at the legislative history of section 124A it went through a lot of changes because they kept having to add explanations and things because they were worried that some judges might be more liberal. In the colonial period many instances a very liberal judges. So on on the Constitution theory of free speech. I've just given a brief kind of thing again this is at the Melbourne conference were Invest in liberal democracy these are the justifications you would give for why speech is necessary. And so looking at it from first principles you would say that three broad arguments and if you. Someone who wants to advocate for speech you can drop from any one of these. So the argument from true believes and this draws from a long line of thinking in western political thought. Going back to Milton Jones two admitted and kind of Popper that speech is important because it furthers the word true of truth. So that all of us are desirous of finding different aspects of truth we are committed to reason. Rationality. And you must have free speech. So that you know you don't have the medieval practice of people being burned at the stake for saying blasphemous ideas you're going to a church teachings verb but you know saying that the globe. The world is round Internet been flat. People were put to death for that. But if you're interested in scientific truth or objective truth. You need a culture of free speech that. That's one kind of argument. Invest in political thought the argument from Autonomy or self-fulfillment is a powerful goes back to its total. And the idea that encourage speech because it allows us to feel for ourselves in a very fundamentally alter will bring in more recent justification for each the argument from the mark from democracy. That in a democracy. You need speech. To keep the political system pure or to allow for citizens

to to ask questions of government which is always going to be in a more powerful position so this traces its origin to an American scholar called Michael John. But many people have adapted to different context. So if you look at constitutional theory so this is best and political thought. And this is the justification for it. So the people who will really against the foreignness of the Indian Constitution would probably say I just look at 191A. All it says it's freedom of speech and expression. This is clearly taken from from western society. And if India is not a classic Western society is this constitution being transplanted. By a narrow group of elite. So Austin himself or who is a very celebrated and a very celebrated the account of the making of the Constitution talks about an oligarchy within the Constitution in pan indian. It had people from every region dominated by lawyers. But all of these lawyers many of these lawyers were Western trained lawyer one that Gandhi was not part of the process. But Dr Ambedkar with two doctorate from from both the US in the U.K. Nehru...many other important people in the assembly were Western trained to that's been a consistent. Critique of the Constitution which even now surfaces. Every time you have an important issue and it's important to address that. So what I will do in the next ten minutes and I have ten flights and I quickly go through than is to just say that the the consul history is very important and I'm not talking about AKHAND BHARAT kind of constitution they may well be and people like this is a majority who are much more familiar with sanskrit can well come up with why right to speeches is girder in that I'm not someone who's familiar with sanskrit intimately he had studied for three years and I think have a basic understanding of sanskrit not enough to to engage with dharmashashtra as a scholar. So I will use my English language training to look at more recent history. And in that it's fascinating So if you go back to the eighteenth century. On which is when the nationalist movement really starts up it's very important to recognise and it's extremely unfortunate that we're living in a culture where books and learning are being banned. This is particularly ironic because the introduction of the printing press in India and the first printing of the book in India and seven hundred seventy eight really unleashed a whole range of forces which even today are not studied enough we have anecdotal evidence most of us have an understanding that this is important but now there are scholars who are studying how this happened in the paper that I sent to Dr Oberoi. I've given references for those who might be interested in that. So what the

introduction of Brook books and remember this is still the colonial period in the company is still in charge. But as soon as the printing press is introduced it leads to a flurry of people who become native intellectuals. Now these are typically people who speak of vernacular language would probably have not been reading it but because they were from families where they had tutors. They were good access to it and they would all start the and this happens across the region it started and bengal. But then it spread across you have it in Maharashtra in in other parts of the country where people start saying this is interesting and we will start doing things that. Typically and it's very common across a range of actors. They would start putting in western education. They would start schools. And then they would start magazines and newspapers and people forget that the founding generation were great journalists. Everybody you think of whether it's the tilak It's nehru. It's the never comes much later Gandhi might before him but even before that there was an earlier generation of people who engaged with the masses through newspapers and that becomes and if you look at the languages they will use initially it started later on I have some statistics about how much. This is available now. Today in the world India is still a bit of an outlier. We are still a country where people read printed newspapers. So this caller called Robin Jeffrey. Who says India is an anomaly in this time and every moving to print two webs and all magazines that sort of getting into the very British and only in India particularly in the heartland people read newspapers magazines and they're profitable. They're not shutting down. And they at least for the first perceivable future this seem less likely to be thriving. But it's not just a robin Jefferies looking at modern India. What's interesting is this is not a modern phenomenon if you go back to slightly. What we know one consider modern but with the eighteenth century with certainly appeared with of very much from and when it comes to this. So they say the end what this did this introduction of the press. The printing press and later into printing of books and magazines and newspapers. It created this group of intellectuals who focused both on Indian and Western thought and discourse. A great example is Raja Ram Mohan Roy now we think of Ramon Roy today mostly in the context of another and other aspect are left out. So and he's often portrayed as a person who got influenced by the rest and is a controversial figure because he aligned with the British. But if you if you engage with him more deeply he's the person history's fascinating. So is one in one thousand 1772 in a

moderately well off family. He has access to and he was a multi-lingual. But he started a journal in Persian which also tells you that there was an audience for a newspaper in Persian across India or parts of India which is fascinating. But he started a school for boys in English in 1860. And in it in 1820 he started a Bengali newspaper. Now some people think that may well be the first vernacular language newspaper in India but it's 1821. What is also fascinating is he at that time. We think today we can find out what's happening in the US you can read a judgment of the Supreme Court. It's not as a people in earlier as didn't have that kind of vision that kind of exposure. So it's fascinating that of the Calcutta town hall between 1820-1823 Raja Ram Mohan Roy would host public meetings to discuss what was happening in the Spanish and Portuguese revolutions. And so they had a real connection of of what is happening in the rest of the world. And this group of intellectuals becomes incipient nationalist movement. We tend to think of The Nationalist Movement really with the found palming of the Congress party. But you really have to go much before that to think of what led to these kind of thing. The political scientists who know Khilnani has a very interesting piece where he's saying. How is that generation thinking about issues. So these are all people who are trained in an Indian language. But they are learning English and then they start engaging with the wider world and their ideas are coming up and they start asking questions about as Gandhi does wonderfully in Hind Swaraj. Where my what does it mean to be from this country and why are we dominated by. If foreign power and where does that it's so these ideas of nationalism a sort of growing amongst these people. Independently across different parts of the country. And one very important thing in 1824 the Colonials regime got worried about what is happening in Calcutta so they started including press restrictions. In 1824 Raja Ram Mohan Roy along with a group of other people wrote a petition to the king of England. Historians think that may well be the first time an Indian native is directly addressing the power hold an England. And that's a fascinating little track. So Ram Chandra Guha has a book called makers of modern India were includes extracts from the original. So he's brought part of that. It's fascinating as specially if you read it with a lawyer. Because he's making an argument for free speech. In a very interesting loyally sort of way. Ram Roy was not a constitutionalist as we today understand. He his views may seem quite conservative to us because he was a supporter of monarchy he was a

product of his time. He believes that in Bengal there are people who on property he came from that class. And that property group probably had some kind of divine right to rule. So he would have for instance asked for it right to information or even the right to what it really should be given it's not clear that his vision of constitutionalism would have included a very people centric vision. So we must take that into account we want to make the mistake of going back in history and finding people who are somehow giving us a fully formed vision of contemporary constitutionalism. But on on speech he argued that allowing a free press would allowed reason and information to move through society. And this will improve the working of government by creating a reading public. Again you have to think of the context of it in twenty four India. In largely If you do. Culture this is the reformer who wants to bring it occasion to his people and to make people think about the value of governance and and have some kind of discourse. So he argued to the British government. Making a very strategic that it is in your interest to govern this country. That you allow some degree of press could be a helping you. We are helping create publicist e about what the regime once. And how it wants to further its policy. So I started Ram Mohan Roy he was of course not prosecuted for sedition. But it's interesting that he was making arguments for speech and free speech in the 1820s. And I said earlier after 1857 after the War of Independence and when the British government takes formal charge. From the East India Company. The British become quite concerned about this whole flurry of these intellectuals who are becoming critical of government. So the I.P.C. originally did not include the sedition provision is intruding as I said in the 1870. The first prosecution for sedition is J C Bose who had a bengali paper called Bongo Bachi and that ultimately didn't lead to. He it was sort of settled out of court which in the criminal context is interesting but he pleaded guilty and they reach some kind of understanding that interesting. And again for a lot of people who hold this idea that the Constitution is foreign and they will need to this sort of use. It's somewhat ironic that. Leading figure in this is Bal Gangadhar Tilak who today is really a hero for a certain section of people who want to talk about the glory of ancient India. Now the Tilak may well have had ideas of that that very interesting. Today Ganesh Festival in Maharashtra is seen as evidence of something that has been there for centuries. But it's actually something that tilak particularly championed as a way to mobilize the masses. And it's actually a fairly recent

tradition of the modern ganesh festival in Bombay happens and people have written about how he thought about it how he constructed it. And How It then became a mass movement but he obviously use the power of culture and religion very forcefully. Now tilak was by today's standards a very avid journalist. So he started a caesarean marathi, maratha in english. He was prosecuted thrice for sedition. The first trial in 1897 was on the original section 124A. And Justice truckie really extended the meaning of sedition. We beyond what the text allowed for and he was sentenced for 18 months in rigorous imprisonment. Ironically his imprisonment made him a national figure. And further the nationalist movement. He was then tried in 1909 and again in 1960. His lawyer in the third trial where he was acquitted was nominally Jinnah which to people outside of Maharashtra would be a bit puzzling because these two are now seen as very different political figures representing very different visions of India but they work together and where allies are part of the process. So I said statistics So let's look at this today we live in a one point two billion countries of the statistics may not seem dramatic but if you remember that at the time of independence the only three hundred million in 1907 we were less. So between 1907 to 1947 shows the concern of the colonial gene. The British then said two thousand newspapers and sees between eight to ten thousand individual Titans. That's by any yardstick quite a quite a large number by 1905 there were one thousand three hundred fifty nine newspapers across India with two million subscribers. And of course given that we were poor nation. One subscriber would probably mean at least one family and. There's a wonderful tradition of papers being circulated to people who could not afford to have them to sometimes reserve much larger communities which are being radicalized as they read about what intellectual thing. They were publishing twenty vernacular languages. Which of course we know the linguistic diversity of in. But even by that yardstick it's quite stunning that in one hundred five people than twenty languages. I'll skip are with us a little bit because some of the. This is Gandhi and I can share the slides later. The number of newspapers he started and the weeklies he would. He would initiate in again in which are out in English. He would write in Hindi as well as you can see from the collected works. And one thing we don't recognise Gandhi's writing which is also pivotal in making him a national figure. And if you're going the nationalist movement. So he's charged with sedition in one thousand twenty two and give you part

of that which again. Catapulted him beyond the stage that he already enjoyed in the national sentiment. The other thing again we tend to talk only of the constituent assembly. It's very important again to remember that the constituent assembly. Much of that represents a tradition of a number of people. We had discussions about a Bill of Rights and constitution much before that. So the first evidence that we have of the Constitution of India bill is from 1895. We don't know who the author is but it certainly believe it may have been to luck and the timing is interesting. This is just a year before the prosecution petition to collect was already getting feeling that the colonial government did not like what he was sort of engaging in. And if you look at that constitution of India bill of 1895 it had a pretty strong provision on free speech right. If you trace that in the paper further...consistently for meeting ninety five all the way to 1947 the Nationalist Movement is demanding both rights and particularly the freedom of speech. It's there in the commonwealth of India bill 1925. The motilal nehru of 1928. And of course what's happening in this also the colonial regime is consistently cracking down on freedom of the press and bringing in a host of restrictions. The press Emergency Powers Act of 1931 had this we're requiring owners of presses to furnish security deposits. And if they didn't get the security deposit. They would have to forfeit the presses. And so this continues all the way till you come to the constituent assembly. And I end in a couple of minutes. This is my last couple of slides. So as I said earlier the paradox of speech in the assembly and we look at the human is debates about them. You have two groups of people one group other people who are going to form the government are already in government. And they have suddenly realised that they have to they can be as expensive as they were when they were drafting the right against a nationalist movement that already alluded to and Austin does a very good job of explaining to us. What the condition of India was in 1947 and getting up to 1950. So these leaders because they're going to be in power suddenly became very alive to the concerns of the colonial Regina the need public order and stability. And we need to stop people from fermenting community riots or communism. And then there's the other group of people who were consistent with their principles and they keep asking if you look at the debate is about how can you do this. Many of you spent years in Colonial jails for these very same offenses which you are now going to continue in this new constitutional order with sanctions the keeping of that. That

seems like a paradox but you know one could argue and say that you know it's being in power gives you a different perspective on things when you're the outsider railing against the system. And then when you move into it. You suddenly become very aware of why those restrictions need to be there. And I won't get into that. But I will say that the framers partly because of the opposition they were getting in the assembly did try and strike a balance and Dr Ambedkar in particular would often say we could have had many motorist actions we've not. And we've tried to sort of keep that one example I gave you even in the First Amendment is Nehru insisted on putting the word reasonable in which is actually an improvement on the original text of 1902 because the US judges then get to determine whether it is a reasonable restriction on the right to speech. I will say and I thought that refutes I want to leverage it. I do think that the courts in India. Haven't done such a great job of protecting that that important right to free speech the kedarnath case where a sedition provision was challenged an independent India. The Court came up with. It apparently constitutionality. But it said that it should be used only in cases where there is a direct threat to public order. And that may not be the courts for it because if you see the evidence of where judges of tradition have been pursued in the recent past. They don't stick to the kedarnath description. Off of X or deeds that will immediately be incendiary and that is not being put to maybe that's a question of law and practice not measuring up to the law. In the books on law in reporters. So that may be a problem so I conclude very much and I'm sorry if this is completely beyond what you were expecting that you're probably had a rich doctrinal discussion. But my point was to bring in that that history. Which I think it's quite crucial in our context to say why speech is important and it's got not ...nothing to do with just a foreign implant. It is something that some of the most respected leaders of our nationalist movement. Really spent a lot of time thinking about and trying to entrench within the text of the Constitution. Thank you and I look forward to your engagement.

Plan out one thing when sita was rescued from the clutches of ravan and brought to the mainland. What people told rama and what rama did. Brings out two things. One freedom of speech and expression of the people. Two the will people should prevail. And nobody was targeted with sedition.

And publish it and you'll probably find a huge following. Instead his impulse is to stop it from being disseminated. And it's deeply concerning the newspaper report I don't know how accurate it is that this person has been put in a position where he did advise government. On on what textbooks...Students and young Indians should be reading and then that's the matter of deep concern which militates against as you said. Some fundamental notions that we've conducted.

Now there is a judgment of justice chalmeshwar in the kerala high court about the freedom of press. What is happening in courts there can be reported or whether they can be prevented from reporting all these.

That I have exercised my freedom of speech. When challenging the....indian penal code with defamation section 499 500. They were waiting for the judgment. Lat line I was going through justice K D Desai memorial lecture the last lecture delivered this month in Bombay by Queen's counsel. It is very interesting the way he has gone deep into the Indian law starting from mcauley and before and also tilak's case he dealt with and ultimately he touched briefly noting the judgment is elevated in the defamation case. He said that the fact that the Supreme Court granting stay of criminal trials in these cases give some hope that they will set right the law and So I just wanted to mention to you an interesting point raise in this. Defamation is the ground on which reasonable restriction can be imposed on the freedom of speech Article 19 1 A gives right to freedom of speech and expression and 19(2)specify the ground on which state make a law imposing reasonable restriction. Defamation is mentioned. Then in number of decision Supreme Court said right to reputation is a fundamental right but they trace you to article 21. One question arose whether this defamation against whom this right is guaranteed in the constitution. In defamation cases or involves speech, exercise against another citizen or non citizen. If right itself 19 (1) is not against giving benefit to citizens but only permitting state to exercise restraint. Can a citizen taking the benefit of this law restrain speech right to speech confirming 19 (1) A because it is settled now all the right fundamental right available against the state action not against individuals. if you say it is fundamental right of a citizen then it should be

enforceable through writ. Can a writ be issued? He said right to reputation is....is a fundamental right. Can you curtail it. So unless you go to logical conclusion yes writ can be issued...then were to we land in one of the issue raised but court it appear to be seriously interesting question. For a Speech made by him commenting on chief minister of the state no. of places complaints are filed they are registered and he has to appear in a very court and answer that point registered in mindset of judges and as you know this cannot go....done. So we are all expecting what the court would do. In Shreya Singhal case you remember the court has strucked down the particular provision objectionable provision and also mentioned in the memorial lecture....and that is...now the tendency all the world is to enlarge ambit of freedom of speech and curtail the restrictions. Beat in the area of contempt of court or beat in the area of defamation. But how india will respond that we have to see so that is one aspect which I want to mention. Then when statement of chief justice if that is the case then we have to close down the court and contempt petition. I was reminded of another incident when justice venkat rama iyer another great judges of supreme court he made his speech in one of his speech outside the court that 90 % of lawyer judges are indulging in whinning and dinning with lawyers is not a good thing etc. A contempt petition was filed in Bombay High Court and ultimately offcourse the contempt notice was discharged and nothing happened. But judges also have to be...to avoid this contempt petitions. But law of contempt in itself is very seriously contagious issue. There is a dilemma there. Dilemma is this without this power of contempt how you maintain dignity of the court. How you enforce your orders? at the same time if you liberally use that power they it will loose it vitality. It cannot be so therefore you have difficulties at the same time freedom of speech is very important thing in life in a democratic life in a particularly. Without free speech how there will be creative ideas, exchange of ideas and then you have a....government. So therefore there our things but then general trend now is to restrict the power and allow more speech generally court also do not of every allegation of contempt they are very selective. But serious cases they have to deal with at the same time one thing I would like to mention to you it is not a good thing for judges to direct appearance of the chief

secretary in very frequently. We have to respect the coordinate authorities allow them to function. The moment you issue a direction that the secretary shall appear in the court and if it becomes frequent it sends a very wrong signal. It paralyzes administration under fear of this what particular notice they will do whatever the court wants to do indicates them court should do it. Right or wrong and innocent third party suffer in the matter and second thing is in fact I mention to a chief justice took over in supreme court rules. The rules says as soon as notice issued to a contempt petition the alleged....must appear in person in the court. I think it is the other way round. Why every body should come and appear in court in person and leaving aside you are the person against who file contempt are file chief secretary, secretary, head of the department so on and poor fellow he will not be personally involved at all. But that's how it is so I said please change the role and say that unless directed to appear he did not appear represent himself. Even in the case of defamation...provides for it. Person personally need not appear he can appear only for examination purpose the court otherwise....all this have been pointed out and we are waiting for the judgment let us see what happens. But I remember also one court of Allahabad from Lucknow bench one judge immediately banned the news being published about troop movement. There was a story in Indian Express when justice previous chief of the admin staff his age question was there, correction of date of birth in supreme court case is going on then there was a news item in the front line of Indian Express there is troop movement towards Delhi from another place nearby and almost suggesting the army to take over the but that was a...filed in Lucknow bench this shall not be published any where issue direction to everybody. While dismissing the petition the PIL then justice Markandey Katju was the chairman press council so requested me Rao we want to take this in supreme court against this order I request ...I pointed out I said in the case of moment of truth along the borders etc etc there can be sensitivity about it but a true what is the great thing about it is that's what happen and that should not be ganged and court appreciates it ultimately set aside that order so point is this while exercising your jurisdiction particularly contempt jurisdiction or matters involving free speech we must appreciate the global trends

and a sense of democracy lies in free speech. Therefore we as much restrained as possible in exercising the powers like this passing gage orders or issue contempt notices. Thank you.

See this criminal defamation subject to what is going to be judgment one aspect which I will give you one example so that you may appreciate the problem I have known a case in Andhra Pradesh that criminal complaint for defamation is pending in particular court now infact sorry its old andhra pradesh now it is pending in a court in hyderabad city telangana. The accused and complainant belong to present state of andhra pradesh. The complainant lives in hyderabad. The Accused lives in old state of present state of andhra pradesh that part of the world. The allegation is accused made a statement there is a small temple in a village all the people complainant and accused belong. Allegedly the accused circulated a letter the complainant happens to be one of the trustees of that temple the accused alleged to have circulated a letter saying that this man has misappropriated the temple funds so therefore there is a defamation this a complaint and according to the complainant that letter was addressed to somebody in hyderabad some 300 kms away from the village....entitled under law....now summons were issued. The point is one of the accused is lady of 97. I am not on individual case but these are the dimensions of this problem. And the magistrate is insisting that person be present before. One certain possibility if the accused above makes and attempt to comply with law she may have to comply with higher law of departure 97 mind you. And eventually we don't know the allegation may be proved may not be proved we don't know anything and knowing our system, knowing our problems of the system this case takes a few years and how many appearance the accuse will have to make in this matter or this...I mean procedural fairness is required from the desirability and consistency of this provision with the substantive provision of the constitution freedom of expression so on and so forth. Even the procedural fairness is aspect which is required to be kept in mind in administering this fact. Certainly they are not murderer or dacoits whose presence is all that necessary for every hearing more particularly you know nothing is going to happen next year I can understand the presence of the person being insisted upon last hearing. Even that aspect

which is required to be kept in mind by all of us when we deal with this matters.
Thats all.

Regarding the appearance in court of a high ranking officer there is a judgment of the supreme court which is circulated to all the high courts we have got copies of the same. Yes. So there should not be any direction to appear in person otherwise it.

Session 11: Constitutionality of hidden cameras and hidden truths.

Mr. Anup Jairam Bhambhani :- Hon'ble Justice Chalmeshwar, Hon'ble judges of our High Courts, members of the faculty of the national judicial Academy, ladies and gentlemen. Asking the right question is half the answer is my firm belief, so before I address the subject of session May I just invite your attention to certain questions and try to pose on the topic of constitutionality, hidden cameras and hidden truths. The first question, it is on the side of projection system, as a society what value do we attach to truth, is the pursuit to truth is a basic unit of a constitutional morality. Now very briefly, we all aware of Our National Motto Satyamev Jayate, So do we actually live that principle, that truth shall prevail, this is the question, the second question is, is Constitutional sanction necessary for permitting the disclosure of truth in our society so, every time we wish to speak truth, do you have to check back with the book the constitution of India what came first, the pursuit of truth or our constitution, the third question, is within the public domain is to relevant all around or is it relevant only when truth is disclosed in public interest, so there may be matters which are true or substantially true but they are not necessary in Public Interest, as we understand public interest. Are such truths worth expressing, let me take small example our Bollywood actor Salman Khan has an adopted sister who he marries off and in the process of marriage he gave a Rolls Royce car and an apartment in Mumbai. Now this truth at one level as I said is a trivia, is there any harm in disclosing it? Is there anybody's is right being violated by disclosure of such truth. So is public interest test is the only test of truth. Then the big question, profound question what is Public Interest? How it is different from what public is interested in. Now again let me cite an example, Tiger Woods the famous golfer he was at the peak of his carrier he was worshipped by people across the board, of all ages because he was an excellent

golfer. He was like God, until it transpired that he was the serial philander, he had some 10 12-15 affairs, why should that have been relevant at all. After all it's something so personal to him doesn't affect his game but the fact is that immediately after such disclosure came about his reputation nosedive peoples hearts were broken. Now therefore question is, what is the public interest in such information or is it just something that public is curious about and is interested in. So, people may want to know about the families, about the personal traits, eccentricities, fibers of people in position and power, is that relevant. Then the next question on my list is does a public person even a person who enjoys a recognition in the society at large. Does he sees a part of his privacy? So, there are no free lunches so if you have public prominence in if you enjoy a certain status and station in life, are you entitled to less privacy than an ordinary citizen or person. May I just give another instance Mrs. Indu Jain is one of the co-owners of the Bennet Coleman and company limited you know the owners of Times of media conglomerates of the country. Forbes India magazine published her name in the list of women billionaire in India. She brought a suit for injunction before the Delhi High Court. Her Claim was that I may be a billionaire I live a life of recluse and totally devoted to religion etc. I do not wish the world to know that I am a billionaires. The Delhi High Court rejected the injunction saying that if you are in that position and it's a documented fact, if people want to know. If people want others to be informed you can't say no to it. Then comes another question, does our society permits free speech. Do free speech is for public interest on we value free speech for our own sake. So if it is truth in public interest only then we can speak or we can speak otherwise. Then in our democracy is it expected that what is conveyed to the medium of free speech must be called brought the whole truth in the very first go. Or do we recognize the the truth may emerge from open public discourse. So, the question is truth gathering a one short exercise. Should I first go out out collecting the whole truth and nothing but truth and and then open my mouth or truth made up of small parts of truth or substantially true parts and that the final conclusion will be discovered from open public debates. That's the question. And finally is the motivation for discourse of information is relevant. Or it is the intrinsic worth of the information and not the motivation with which it is disclose that counts to us as a people. So are we gone to tell a person look what you say may be relevant, it may be interesting, it may be truth but you are malafide. So, please

keep your peace we do not wish to hear you on any matter at all. Now, these questions obviously raise several overlapping issues of societal philosophy and constitutional principles and also includes certain juristic and jurisprudential principles and bases that we have followed and to which I will come. But let me quickly run through some recent example of last decade or so of sting operations that we have seen because we say hidden truth and hidden cameras. The first sting operation that we remember is happed in March 2001 and it is conducted by Tehelka magazine and it concerned then president of the main stream political party well place defence personnel who caught on spy camera indulging in corruption in relation to Defence deals. Now the sting operation culminated in the prosecution of the President of political party by the CBI. Four years later march 2005 a television channel carried a sting operation involving a Bollywood actor and the intention was to expose the casting couch phenomenon which was ram paned in Bollywood. It later transpire that it was a mere case of entrapment and have no public worth or value. Two years later in 2007 May a very important case came up where a very renowned advocate and a Public Prosecutor special Public Prosecutor were practicing in Delhi was caught by a sting operation conducted by prominent English news channel showing how lawyers were attending to suborn a prosecution witness and this was highly publicized criminal trial and it finally ended culminated in the concern lawyers been stripped of their seniority designation and also been restricted with other consequences under the Bar council rules. August 2007 also saw a very alarming string operation which involve school teacher in Delhi were the sting operation purported to show the school teacher was in indulging in a prostitution racket involving young girls who we're attending the school that she was teaching in. The sting operation put to be a total disaster because then the Delhi High Court took it up on a suo moto motion, it was found that the operation was fake and it was a result of some monetary dispute between the school teacher and certain people to whom she apparently owed money. The television channel was shutdown. Then in February 2010 and other significant sting operation invoved a professor of Aligarh Muslim University who was caught on video tape having sexual intercourse with another man. The University held him guilty of gross misconduct, suspended him, dismissed him. The Allahabad High Court ordered reinstatement saying at that time since consensual homosexual intercourse between two persons had been

struck down. Section 377 had been struck down, therefore it was not an offence and in fact offence was installing a camera inside the person's home which was a breach is previously. Therefore the expedient Smith sting operations has been mixed batch. Some been applauded in some being severely... There are certain juristic principles which as of now I want to draw your attention to, which throw valuable light on this whole constitutionality aspect of hidden cameras and hidden truths. The first such principle would be Satyamev Jayate. So there cannot be any confidentiality as regards disclosure of wrongdoing. So, Satyamev Jayate is of cause of a national moto. It derive from the mundak upnishad and what he always said truth alone goes and not falsehood. The cognate fundamental principle of thinking is that truth should out which means that nothing could perhaps being greatest public interest than the position where our legal framework should assist in the disclosure of truth to the people at large. But what is there is a contest between truth and confidentiality. So, what happens then to Satyamev Jayate. Now, one of the interesting cases that I would draw your attention to one this is a breach of confidence came that happened in England and on which Lord Denning passed a judgment. Now, the case was one Mr Fraser was a consulted with the Greek government. And the contract between him and the Greek government had a strict confidentiality clause whereby he was never to reveal any information on any report etc or any work that he did for the government. However, a version of the report of Mr Fraser was published and was obtained by Sunday Times newspaper of London. And Sunday Time wished to publish that report. Mr Fraser brought a suit which worked its way up to the Court of Appeal in England. There were 3 contentious issues raised. One was the issue of libel. Mr Fraser said that if you published this report it would be liable for me. The Sunday Times newspaper said yes, it might be libellous of you. The 2nd was of copyright violation and the 3rd which is the main domain for our discussion here was the breach of confidence. Now, in this matter in spite of the newspaper admitting that it may cause.. And it may be that each of copyright and all that. Justice Denning cited an earlier judgment of Justice woods and held on the principle that there is no confidence as to disclosure of in equity. A person cannot claim a confidentiality of privacy in relation to wrongdoing. Therefore kindly consider the subject of hidden cameras and hidden truths in the context of which is meant accepted that there cannot be any confidentiality as to disclosure of

wrongdoing. Now, a related concept of flipside of the coin is privacy. Whether or not privacy is a fundamental right under our constitutional scheme is a matter which is not pending in our Supreme Court. Two days ago a five judge bench disposed of certain applications which is related to the use of the Adhar Card and issue was the privacy of the right of the government to collect information including biometric, fingerprints etc. But the main matter has now been referred and in fact we would now then the order comes whether the matter is going to the 9 judge bench of the 11 judge bench. However, if you see the last decade or so the concept of privacy has very least been considered to be part of the ..region of the fundamental rights under article 21. And one of the celebrated cases where it was so held is that of R. Rajagopal v/s State of Tamil Nadu (1994) 6 SCC 632 where the issue was whether a biography of the convict, Auto Shanker who was a serial of killer could be published without his consent and whether it will amount to the violation of the privacy. Now, in the case of R. Rajagopal, the Supreme Court has quoted Stanford Law Review article and has said that one of the theories for protecting privacy of home is that an individual needs of place of sanctuary where he can be free from societal control, can drop the mask, desist for a while from projecting on the world the image he wants to be accepted in, and image that makes the values of the peers rather than the reality of his nature. So privacy has in layman's terms has been interpreted to me that right to be left alone. This is the long and short definition of the privacy in traditional trend. Today, however with the onset of the Internet, age and World Wide Web; this concept is little bit got coagulated once information and World Wide Web it is very difficult to retrieve it. It is very difficult to erase it completely. Therefore, today the people are asking for the right of privacy in the sense is a right to be forgotten. I might have done something, I have served the sentence, it is reported on the World Wide Web; I am now out of it; I have paid the price what Society wants me to pay. But even so if the person name is entered in a search engine you would probably get the first reference to whatever culpable act did. So, privacy has now evolved from right to be left alone to the right to be forgotten. In the case of Rajagopal the Supreme Court also quoted article 8 of the European Convention on human rights and said that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety

or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others...

Now, a very interesting part which is very relevant for string is the observation of the Supreme Court. In fact it is the law which has been laid down in the Rajagopal that although the right to privacy may be deal to be fundamental in the sense that it is implicit in order liberty. In the case of public officials the right to privacy is simply not available with respect to their acts and conduct relevant to the discharge of the official duties, unless the public official establishes that the publication was made with reckless disregard for truth. Therefore, public officials when acting in discharge of public duties simply do not enjoy any privacy unless they can show either it is not in relation whatever is been recorded in, is not in relation to the of issue duties... The public officials or the government Department cannot even bring claims in civil law for damages claiming breach of privacy. And furthermore it has also been indicated in the same judgment R. Rajagopal that this principle would apply to the public figures. One of the important paragraph that I just quote a portion of it is para 21 and the member would kindly bare in mind is happening in 1994 and we are sitting in 2015. Supreme Court said over the last few decades, press and electronic media have emerged as major factors in nations like. They are still expanding and in the process becoming more inquisitive. Our system of government demands as do the systems of government of the United States of America and United Kingdom constant vigilance on exercise of government power by the press and the media and others. It is essential for the good government.

So, the Supreme Court emphasizes that an inquisitive media is in fact demanded for the sake of good government. I may say although article 19 (2) of the constitution decency and defamation are specific grounds available for framing of the law to curtail the right to free speech under article 19 (1) a. But so far there is no law has been enacted by Parliament specifically to cover sting operations.

Now, second-core principle which is well accepted by our jurisprudence is that evidence is admissible so long as it is relevant, regardless of how it is obtained. We place no importance as to how evidence is collected. Now, there is one caution

which the Supreme Court has included in this principle of evidence which is that this entire principle is subject to a judge having the discretion to disallow evidence in a criminal case is strict rule of admissibility would operate unfairly against the accused. And for this reference may be have of paragraph 24 of the case RM Malkani v.s state of Maharashtra 1973 (1)SCC 471. In fact in the subsequent case of 2013 I will just give the citation the court goes on to say that evidence is not to be rejected merely because it has been of been illegally even on the premise that it offends article 20 (3) and 21 of the constitution since acquiring the evidence by such methods as a not procedure established by law. So, even the right of self incrimination which is a constitutional right would not stand in the way of evidence being admitted regardless of how it was collected provided it is relevant. And as the Court has held in Umesh Kumar v.s state of Andhra Pradesh 2013 (10) SCC 591 paragraph 35.

Now, I come to the next principle which you'll find on the slide and this is in the words of Justice Krishna Iyer actuation by malice is not legicidal. Now, these are his words in the case which arose from a land acquisition proceedings and it is essentially a principle that Justice Krishna Iyer applied to administrative law where the allegation was that the land acquisition though otherwise legal had been informed by malicious conduct on the part of the governmental officials. And Justice Krishna Iyer says and I quote "legally malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice.. So, legally malice v. personal vice. These are two separate things and the juristic clarity is required to be brought to bear on this. He goes on to say if the use of the power is for the fulfilment of the legitimate object the actuation or crystallization by malice is not legicidal. Meaning there by merely because of an action by an governmental official has been informed by malice does not make it legally legicidal.

Now, although I said that this is a administrative law principle which is been enunciated by Justice Krishna Iyer. But I would think if the other requirements of legitimate object to be fulfilled are satisfied, then there should be no problem in applying the same principle to the disclosure of wrongdoing by any person.

Whether the law enforcement agency or by a private individual and it should not be the basis of rejecting material which discloses wrongdoing. After all the must bear in mind that it's not friends who will tell all friends. It is the enemy will be complain. Therefore we must pay due heat through this phrase actuation by malice is not legicidal.

Then comes the issue of whether public interest is or is not the same what public may be interested in. Now, I briefly alluded to this the public want to know what goes behind the door's in this man's house. However, that may be something the people are interested in but that does not what we understand this public interest. Something which is in the general benefit and welfare of the Society at large. So this has been eluded to at least in the judgments I could find one in 1987 Justice Sujata Manohar in the case of Javed Akter verus Lana Publishing Company pvt. Ltd. AIR1987 Bombay 339 paragraph 14: there is the issue was of famous poet Javed Akter marrying Shabana Asmi and certain reports came to be published. And Justice Sujata this enunciated this phrase that public interest is not what public may be interested in. These can be totally private matters. Again you find the same thing in the later case of 2005 by the Delhi High Court where Justice Manhohan sareen say something to the same effect and this judgment is mother Dairy foods and processing Limited V. Zee Teleflims Ltd,. Volume 117 2005 DLT 272 para 33. Now, on the basis of these four principle where do we stand today insofar as the judgments of our Courts are concerned particular Supreme Court. Well no parameters norms or guidelines as such have been laid down by the Supreme Court has to what would comprise a legitimate sting operation and what would be illegitimate or unacceptable. However, in the course of rendering the judgment in RK Annad case the case is 2009 8 SCC 106 RK Anand v.s registrar, Delhi High Court, Where the Supreme Court found that the sting operation in question was laudable. But what gives us an insight is the point is that are put across during the course of submission and what the Court has held. So, one of the argument raised in the course of the proceedings was since sting operation by its very nature is based on deception. Bona fides cannot be assumed in the case of sting operation. That was one of the argument. The second argument was that the content of the

sting operation must be viewed separately from the act of its publication or broadcast. So, the point being that you may conduct a sting operation and then handover material you collect to a law enforcement agency or to an appropriate authority acting on it. Why do you who have to telecast it or to publish it. So, these two are separate things content v. the publication or telecast. And the 3rd issue of course was the consequence in sense of trial by media. Now, in this case in the R.K. Anand matter, the Supreme Court said that the first of all no prior permission of the Court was required for conducting a sting operation, since that the Court said that it would be repugnant both from the point of view of the Court as well as the media. The media would not want to act as a special vigilance agency or the snooper for the Court. On the other hand the Court should not need to employ the media for setting its own house in order. So the Court said no question of any prior permission required from the Court.

The 2nd thing the Supreme Court said was that at least in this case there is no question of trial by media either because sting operation did not talk about the accused, his guilt or innocence at all. In fact what they spoke off, what they showed in the sting operation was about the lawyers and the witnesses. So, therefore it was not trial by media. Then the question was also raised that the conducting of this sting operation was an interference in due course of justice which shot down by the Courts saying that if anything being sting off help to prevent interference in the cause of Justice because it expose the connivance and the complexity between the prosecution and the defence. Therefore sting itself do not obstruct due course of justice and also the Court held the sting was in question was very much in larger public interest and serve an important public cause.

More recently in 2014 there has been a judgment by the name of Rajat Prasad V.CBI of the three-judge bench of Hon'ble Supreme Court has taken a different view, a slightly different view in the facts of the case on sting off. This was the case the sting of but reported to expose a union Minister accepting a bribe in exchange of mining rights. Now, the people who we're conducting the sting operation themselves made accused in an FIR. They approached Delhi High Court quashing

petition under section 482 CRPC. The quashing was declined. They went to the Supreme Court. The Supreme Court says that contention on behalf of the accused was that the secret video was prompted by journalist desire to expose corruption in public life. But Court opined that the essentially a deceptive operation, even though designed to nab a criminal, a sting operation raises moral and ethical questions in every case. Wherever a sting operation is conducted it does always raise moral and ethical questions. The Court further held that the approval of the Court of sting operation in RK Anand case cannot be taken to be an approval of such method as an acceptable principle of law enforcement, valid in all cases.

Then the Court drew a distinction and this is an important distinction between conducting of valid alleged to made sting operation v. entrapment. Now what is the difference Court said: the distinction is between the trap for the unwary innocent and that the trap for the unwary criminal. The Court said the distinction was explained as between a law enforcement agency providing a person with an opportunity to commit an offence v. inducing the commission of an offence, and the later of which may even give raise to the defence of entrapment. So, the point here is this that if you know that the wrongdoing is underway and you try to capture that the wrongdoing by ...means, that is okay. That is the legitimate sting operation provided it was not possible to capture that wrongdoing in any other way. So that wrongdoing would have happened whether or not the camera was there. That's okay. But to induce commission of an offence which means that you lay on the whole.. You have not really testing the culpability of the person, you are actually testing his self-control. If you give that kind of inducement then that is entrapment. And entrapment is not something which the law wili..yes its 2014 6 SCC 495. But the Supreme Court finally said in that with the matter that such operations sting operations by law enforcement agencies argued to be experimented or tested in India and the legal acceptance thereof by our the legal system is yet to be answered. This is in para 18.

The Court also went on to say that the acceptability of legitimacy of such a sting operation by a non-state agency would depend on circumstances. A sting

operation gone wrong the person conducting the sting operation may also expose himself to an abatement charge under section 107 IPC or the offence of criminal conspiracy under section 120 A IPC. But one thing was the Court has also said where the journalist or other citizen has no connection even remotely and no stake whatsoever in the wrongdoing sought to be exposed, a sting operation may be held to be legitimate. So, it is the distance, arm's length principle, if I may say so which will decide on the legitimacy or illegitimacy of the sting operation.

Now, I would attend this submission with a wider rather philosophical principle which I would comment for your consideration. And this is a principle of liberal democracy. It's not restricted either to press or Justice system or our constitutional morality which is that the theory of the press. And I am reporting Lippman who is an American political commentator and author. He says that the theory of the free press is that the truth will emerge from free reporting and free discussion, not that it will be presented perfectly and instantly in any one account. So, truth is the process of discovery. If a person put something in the public domain to expect specially the media, to expect at the very first shot he will have the whole truth is something which is neither ever happened nor desirable in liberal democracy but truth emerges from free public debate. Thank you.

Is there any questions that?

... It would answer the concept that free debate should be allowed and just because the camera was hidden doesn't mean that it was deceptive. Today we know from the fact that unless the information comes through the democratic process can be completely stopped. And then the point which is very valid even what is true and what is untrue is the matter of perspective.

Participant: – Many of them are concerned about is trial by media. Jessica Lyall trial was going on. The most public trial I could have ever imagined saying if you believe he is guilty dial this number... As far as the judges are concerned the truth are in our file. We cannot go beyond that the Court.

Mr. Anup Jairam Bhambhani :- I may say trial by media is offensive to the law only when it purports to adjudicate. The guilt or innocence. So, it overtakes it becomes a super Supreme Court. Putting information in the public domain is not always harmful. Sometimes it can be. In fact the most recent case of Vohra murder case, if you ask me what went on in the television channel was the of line, in the sense that there was no trail but what was out of line they were going ahead in terms of the collecting evidences, interviewing witnesses, exposing them to the public. Now that was interference in investigation. Nothing to do with the trail yet. But trial by media issues is offensive when it tries to come to a conclusion which they ought not to do.

Participant: – Swedish is the democratic country. It says the moment the FIR is lodged. The media cannot support a trial until and unless the judgment pronounced by the trial Court. Then the veracity of the judgment can be discussed. If you look at the press counsel guidelines. It is amazing. It talks about this and they said that this should not be so irresponsible.

Mr. Anup Jairam Bhambhani :- From the time of justice Sawant Letter has been written by chairpersons to the government of Ministry. There are draft amendments pending for the longest time but no amendment has been made to give teeth.

Participant: – 65 people has been sentenced to life. Justice has been done. As by convicting the people concept of Justice is relates to only conviction... Question is where to draw the line. Truth is limited for the judge and is confined to file.

Mr. P.P. Rao:-In Sahara Case Chief Justice Kapadia was initially inclined to issue notice to the press ..One fact we have to take note of is today the press has become the commercial commodity. It is the only in simple business house. Whether it is TV or printed media. The concept of the paid news never heard. But now it is a reality. One safeguard if you have to safeguard the system.. And you see in the TV that they have all the moderated trials rarely find objectivity. Time has come judiciary cannot escape itself taking the challenge to save the constitution, rule of law and do whatever you can.. Courts are building up.. System has gone to the vested interest.. So you'll have added responsibility. Also in

disciplining the press... Self-governing is best but if it is not working what you'll do?" Community interest will suffer and who will correct it? Legislate is not interested, Parliament is not interested, executive was not interested who can do it? The election commission and judicial system are the two institutions which are still struggling to maintain democracy and try to help it. But time has come judicial activism has to cope with challenges. Otherwise all would be drowned and passive force will take over. Therefore, the press control and paid news to control is very important today. Supreme Court has given now many guidelines in the form of Vishakha, DK Basu and so on. Court said that this must be followed otherwise contempt will be there. This is now the necessity. Only Court have never thought of this. But now the vacuum which has been generated is increasing that has to be tackle by judiciary. Politicians don't have the spine to take off the judiciary as public confidence is vested here in.

I must confess, that there is no straight answer to that question for the reason that everything has to have limits. I all in favour of wikileaks Provided the information does not affect the interest of the Society in the sense of plunging it into total anarchy. Now, where does that line get drawn is the question which I don't have the answer. I will never oppose wikileaks but if it going to result. What is the purpose of it, purpose is that nobody has a right to false reputation or a false image. So if the President of the United States thinks something of the President of some of the country.. No it may be exposure of wrongdoing but if it is going to lead to Anarchy then of course, we won't be able to control. So, that is the difficulty. It is a profound question. The answers...

Prof Arun Thiruvengadam: - In the previous session we were looking for what would be possible theoretical justifications for the free speech. My concern is only if you look at the philosophical justification. There is an argument from autonomy on self-fulfilment that you want to do it or an argument from democracy.. Your entire talk is based one argument that this argument of truth. And I think you are consistent in putting your argument. But one would take the argument from democracy is a separate basis of it then some things can come through...

Individual may not get harm.. Whether it is anarchy is a tough question.. If you take the argument from democracy, and the problem of argument of truth is there is an moral and ethical question. If you are basing the argument on democracy then they will expose this everything, including what Mr. Rao is talking about. The way of corporate media is entitled.. And the Raj gopal test as you pointed out the public figure test that is been incorporated was in the context of public officials. But the larger questions also comes up is how far to the extent the public figure test. In US you know it has gone out to celebrities... Especially in the in respect celebrities culture and celebrities are endorsing all kinds of products, Public-private becomes difficult to find out, if the celebrities are also endorsing projects with some moral basis or saying endorsing excellence in every spear.. I may be a cricketer but I am excellence in everything I do. Then I think it is legitimate to say when you're holding an absolute power as an exemplar.... And we can't escape because it is a everywhere, if you put the TV or....

Mr. Anup Jairam Bhambhani :- Certain aspects which I think are so private that it is a question of how far you go. So, quote a something relative Justice as Justice Verma used to say that even if you think that I am paraphrasing it, this is not exact words, even if you say that there is a person who is having an affair and we are entitled to know whether he or he does not have affair because personal morality at some level is always relevant specially people holding high public office. You can walk up to his bedroom door but you can't peep inside. Where the line can Cross between what we need to know. And what the prurient interest we need to know is to be drawn. And that line is quite clear. Tiger Woods doing his Flandery , now all this is icons are getting shattered. The thing is that people don't just look at as kind of wood as a good golfer. They worship him, children worship him, they want to be like him. And then suddenly something coming crushing down. But nobody is entitled to false image. So, they can't say look this is my entirely personal affair please don't try to get into this. One of the best example or one of the worst example what they said is of Mrs Indu Jain. You never find her in public anywhere. She is a billionaire. But she wants to do her pooja. That's all right but yet they said as far as you're net worth is concerned it is a matter of public interest. It is in the

public domain you can't stop that. But if these answers easily to come like that we would not be debating these questions. And another important aspect that does it impact public function or not.

Session 12: Judicial Activism v/s Judicial Restraint

Hon'ble Justice Chelmaeswar:- Good afternoon everyone I don't know after a good lunch is really called for I don't know but then anyways we are supposed to go to it when we talk about judicial activism versus judicial restraint. I don't know there is a troublesome topic as far as judges of constitutional courts are concerned and these two expression are vague in my view what is judicial activism is something which i really never understood honestly I don't know what is meant by judicial activism. There are many variety of activism right our own opinions into law is certainly an activism because aaa jurisprudential right thing and a permissible constitutional practice are not are the different question now morning we had some debate about innovation, innovation is also an aspect of activism point is i personally believe these are all fashionable phrases invented by aaa more enterprising lawyers before that it is simply judging according to me. Now while judging do we or the judges of the constitutional courts are we simply to go by the precedent are ...open for us to travel beyond the existing precedent and explore the possibility whether the case on hands demand the new principle, refinement of existing principle.

Whether the existing principle are adequate to handle or to resolve the dispute before him and if its come to, if he or she I am sorry aaaaaaa if the judge comes to the conclusion that the existing doctrine is enough to resolve the dispute before the judge then there is not much of problem but occasionally one of us must experience

I be cases where the existing aaa precedent or the existing doctrine established by the precedent may not be adequate to handle the situation on hand in which case a judges job necessarily is to formulate a doctrine, formulate a principle you can simply say look here I believe aaaa at least this not part of the job which we are in we cant issue fatwas,

look here I like this man face therefore I allow his appeal or dismiss hi appeal. We need to give some reasons, reasons based on some....principle so formulation of such a principle is part of a job, part of judging and if that activity is to be called activism, yes it is activism that is required but the same time activism is different from adventurous, adventurous is that you create adhoc principles which can perhaps be applied in any other situation and even the situation on hand there is no great jurisprudential support and merely because you believe that in the given case in fact this is one area I am on record on this number of judges ahhhh who is very unhappy on jurisprudence of pecuniary...what I called pecuniary fact jurisprudence at least those High Courts where I worked I have a good fortune of working in three different High Court across the length and breath of this country my colleague from this course ahhh bear me out I always ahhh little sarcastically use this expression, pecuniary fact jurisprudence that means we are noton any principle we feel that there is something like what is otherwise calledwe think in the circumstances this is good, this is right that all we are not and then the worst is then make a further caveat this shall not be treated as a precedent for any other thing it is a obvious. That you are not deciding on the basic of any principle but by your own. I remember one of the academy writer saying don't panic saying that any judge who says that what he is deciding shall not be treated for a precedent for any other future case is committing an indictable offence and perhaps reasonably good view also ultimately in a system.

If you define activism as warming new doctrines or new principle yes perfectly right you will be doing a great job But then what the real activism you undertake. And of course the other kind of activism is what Mr Rao. was mentioning the summoning officers and this is allAiming at the next period next day's headlines in the newspaper. This is if that is activism. I'm certainly not for it and then I would advice at least all of you not to involve in this type of activism.

Restraint is another concept and you don't really tell you restraint is recognizing our own constitutional limitations. What are the boundaries set up for each one of these institutions and more particularly our own institution. What are the areas which are which are the

limits of judicial review recognizing look says they've. I mean I can on the later when I can tell you something.

With this I will stop here and leave the discussion for the house to deliberate upon.

Prof Sandeep Gopalan :- It's really. Once again of a privilege to be on a panel with as distinguished a chair and a lot of the discussion we had yesterday would have probably benefited from some of it in the mentions particularly given how how how how the judgment actually turned. What I propose to do with this afternoon is instead of a given that we've just come from a lunch break and I understand that people. The last thing people want to do withand difficult questions I thought we'd keep it simple and try to analyse the two competing visions of judicial activism and judicial restraint.

Once again with the help of two American cases. Giving you a sort of a methodology to walk through how the two cases. Both activist, But for different reasons. And the kind of methodology go to the judges use in those cases. To get to an activist conclusion much criticize One decision Well over two almost two centuries old. And another of a recent vintage by the Roberts court which is received sustained criticism since it was was about five years. In doing that. I'm hoping that we can get to expanding a few minutes. On some why don't you care to theoretical proposition about judging and theories of appropriate judging. In the context and again there I don't wish to spend a lot of time but just to flag for you. A couple of theories of judging by Justice Scalia on the one side and justice Posen on Judge Posner on the other very dueling conceptions of a judges role.

..... We will get to an understanding of what that means. But before we do that I thought we'd get to the origin and look at the Federalist number seventy eight. The words of Hamilton which sets a backdrop for what Judging and judges are meant to do under a constitutional structure. Speaking there in the context of the U.S. Constitution but largely applies in our own context here as well. So for Hamilton writing in the Federalist the judge the judges will and some of you might be scared of reading the words there seems to be an extremely minimalist one right. The judiciary according to Hamilton has neither the power of thought no purse and is limited in his words to take no active resolution whatsoever that seems to be the very antithesis of activism to take no active resolution whatever is effectively in Hamilton's words quite a minimalist conception.

Both of which have received a lot of attention and scholarship and perhaps that will give us some context within which to engage in a wider discussion. In doing that just as the justice said the notion of judicial activism is a quite a controversial term and one which is not capable of always very precise and For walked the judge his mentor and Hamilton write this because he says the judge ultimately depend for the enforcement of any judgment upon the goodwill of the executive which is charged with the duty to enforce it. So to the extent that a judge is acting in an act of a sense that is always the risk of law enforcement and ultimately the undermining of the institution of the judiciary which with what might be called adventurism or activism in a very expensive motive So So that's probably a good marker to understand how to view. Activism or restrained within our Constitution sheme to bear in mind the inherent limitations of the judiciary and judicial office. Because it possesses neither sword no purpose and therefore is not capable of actively enforcing its own words. The origins of the way term judicial activism can be traced to an article in the Fortune Magazine so you'd be surprised it wasn't in a lot of you article or in a textbook on constitutional law or anything of that such a does actually used in a popular writing in the magazine which obviously in those days fortune was more than just a tabloid it had a lot more readership.

Given the importance of things media thought, by the very famous author artist Schlessinger or as many of you might know won the Pulitzer Prize was a positive story and wrote a lot about courts, Legal history and so on and in the article that he was writing in in this magazine. The term judicial activism was used almost as a counterpoint to another town that he called and called the imperial presidency. So these dueling terms are Imperialdescribing, Sort of the post lacunary are up one hundred forty seven and in some for some critics the term was used to glorify Felix Frankfurter who was the exact opposite of the activist judge which was and had a well established reputation for judicial restraint.

So less longer who was also a friend of Felix Frankfurter was writing this piece to some for some people as a criticism of these activist judges of the four other judges on the court and using Frankfurter as a restraint and the excesses of activism so that's probably the historical origins of how the term came to be used and in that context It's not surprising

that judicial activism is frequently used as a Nobody uses judicial activism as a complement. Its use usually to slam a judge of the judiciary as occupying Kerry that is not properly given to it under the Constitution. Especially in the United States, So if you recall fairly recent American history given dating back to Nixon. The one of the big political agendas in the campaigns themselves was to limit activism by judges. This goes back even to the George W. Bush campaign for example where basic questions about cases like Dred Scott with post of the candidates to offer what their views were about activism. The same thing happened with Obama where he was asked in the campaign as to what he thought about activism. What kind of judges he might appoint a set or so but it's judicial activism is very contested, very political and very prejudiced of especially in the in the in the light of US Constitutional law and practice. And it's in that context that the term is got to be understood. When we use it rather than likely use. It's a term locked.

If that's the oldest of the term it's by no means certain what it means today. Many people use it in different senses and it's not very precisely understood as as to what is meant by activism activism most interesting and thought so I thought we'd use one definition which I think is fairly. All in the Professor Young from the United States where he defines activism. As including five and six constitute elements. The first of which is second guessing the other coordinate branches of government specifically Congress and the executive. To where a judge departs from the text or history in making a judgment. Three where the judge departs from Precedent either by distinguishing it inappropriately or seeking to overrule When that a little is not necessary. Then the four issuing broad are maximalist kind of rulings when much more minimalist kind of holdings might be appropriate given the fact that our dispute number five exercising very broad remedial powers when those are not necessary to resolve the dispute at hand and finally deciding cases according to more partisan or political ideology, rather than strictly based upon the text of the law. That is called into question so I mean this is probably whether this is capturing all kinds of activism acan agree that this captures most kinds of activism that we're talking about in the context. It's also important to know that activism doesn't necessarily mean overreaching always activism can also result by the judge refusing to exercise properly convert it already. So excessive deference what also result in activist outcomes. Classic examples in the US context are the cases of Korematsu and

Yamashita which where in the post-war era where the judges basically gave excessive deference to the executive and refused rights of people who had been illegally removed from the West Coast and put in essentially internment because they were Japanese or Germans and so on and so so Korea was an example which is much criticized and in fact the south it Since then in the government apologizing saying that creation but that is so there.

The activism was not because the judges granted new rights and created new constitutional principles. But rather because they did not use existing constitutional principles to uphold rights of these marginalized people. So if that's the broader. So remit I thought we could. X. and or stand and analyse how activism or restraint might play out in terms of methodology by considering two case one is Dred Scott which we've I think the first day mention. But here I'm suggesting that case to a little more detail scrutiny to show how this is an example of activism much criticised and it's a different kind of activism. Than the other case that I'll explain Just a few minutes later,so that's caught was slave was born I think in Virginia are around seven hundred ninety nine and had been purchased by an army surgeon was his owner and moved to Illinois and ultimately ended up in lives of this misery ultimately misery.

But during the various periods that he had been owned Scott had been transported to various states including place which is in modern day Minnesota which gives rise to a lot of these fact fort Snelling which gives rise to a lot of these controversial claims. In the ultimate holding in the Supreme Courteight hundred twenty by the misery compromise, Congress had prohibited slavery in certain designated areas and the question was whether Dred Scott by virtue of transport into these areas which were designated as anti slavery areas became free, and therefore possessed a certain rights and what we before we get there some other factor relevant. The owner the surgeon John Emerson also purchased another slave called Harriet and Scott and Harry married and had children while under slavery. Rahm's Emerson died by the traditional norms of property. The slaves the Scott family pastor his widow who then became the owner Scott apparently asked, the widow whether he could work for money and use that money to buy himself freedom which is a Bentley a common practice as at that time. The widow

refused and as was also becoming common at that time Scott approached the court under the plea that he was being illegally detained.

So this is the context within which the original litigation commences, So he suing for false imprisonment so it's not a constitutional law case at that time when it starts off it starts off as as a false imprisonment tort type action and a claim for battery in the original proceedings the widow of Emerson was able to win a technical victory. Because it could not be shown to the jury that he had actually been illegally detained so the the fact of imprisonment was not shown to the satisfaction of the jury still the widow ultimately succeed there after sought to approach the misery Supreme Court for a new trial which is granted and there was a temporary period for which Scott one freedom, But this in turn was reversed by the Missouri Supreme Court and thereafter Scott's lawyers approach the federal courts, Which held initially that he had standing to sue from the Interesting. But the fact that allowed this federal diversity jurisdiction to be triggered which was the move off the widow to New York which is a different state and therefore the federal court's jurisdiction is triggered because it was an interstate diversity case rather than just a pure state claim.

So that's how the federal court came into play and then once Scott lost in the federal court the matter went up to the U.S. Supreme Court. The U.S. Supreme Court decision is much criticize of the activists and you will see why, when you read Justice Tiny's opinion, because what tehy does there is go well beyond what is the controversy in dispute so he seems to feel compelled to apply in on whether black men specifically, African slaves were covered as possessing the rights under the Constitution and very controversially sorrows that because people of African ancestry were not contemplated by the drafter of the Constitution. They were not intended to be covered under the word citizens and therefore could not claim any of the rights of privileges under the Constitution. He specifically says the legislation and histories of the times in the language used in the Declaration of Independence sure that the class of persons who had been imported as slaves from Africa nor they had descendants were acknowledged to be people so he conflates people and citizens and finds that these were not intended to be captured by

the what people and therefore not possessed of rights. In the Constitution then he's come to this conclusion. He doesn't stop there he seeks to go to the legality of the constitutionality of the misery compromise itself which as you recall can So here Taney designs a substantive due process right in property and says that somebody who was a slave was a prop or the property of the owner.

And that owners right to property cannot be destroyed by virtue the of the property being moved to another part of the country which Congress has now said is free from slavery. OK So teny saying Congress cannot act in theto deprive a property right by designating an area as an anti-slavery area. When the slobbery property right existed in misery which is along the which Scott had been made a slave OK so you can see how hard brought a reading of a finding that were unnecessary to a false imprisonment case, which is how the Scott Case initially started. So massive complex consequences, completely unnecessary for the controversy a dispute and finding due process substantive due process rights and property. African slaves and their descendants were not people therefore were not possessed of constitutional rights etc. the implications of that and Dany apparently was acting. To prevent the civil war and the massive losses that it eventually cause showing that good intentions by a chief justice supposedly acting to prevent conflict and loss.did result in in the Civil War and all of what followed their after.

Consider the mixed example which is Citizens United once again, Much criticized one of the mostexample of judicial activism. By the Roberts court, so this is a decision to twenty ten and once again in the early days of the Roberts court. what'shappening in Citizens United is that Citizens United is a nonprofit corporation which had a very small budget of about and made a movie called Hillary as you can imagine the obvious purpose was to attack Hillary's campaign prospects in the two thousand and eight election and just before that. So citizens united Lou that just a small distribution of this movie you the likely to achieve its objectives which is to eliminate such odds of success. So they sought to have wider distribution through,television medium and wanted specifically to distribute it as a video on demand, to anybody with a cable T.V. connection they entered into an agreement with the cable provider which was willing to distribute it for a certain sum of

money in order to raise that money to distribute it to the video on demand service. Citizen United created certain ads which were some extracts from the movie. But also a statement about how Hillary was horrible that you can have a country run by a woman blahblah blah all of this kind of sort of by generative language about Hillary and the idea was that these ads would be run on cable T.V. stations which will raise money and then ultimately they would be able to pay for for the video on demand service distribution of the movie ok and the problem was there was a statute which had been passed in two thousand two to the Bipartisan Campaign Reform Act the object of the that statute were to reform the way in which U.S. presidential and other election campaigns were funded and as you know the campaign funding is a major topic of dispute in the U.S. because big donors Influence the selection of candidates.

The way the advertising is conducted and without massive advertising you can be a viable candidate in the US system so like you're so it's not unsurprising that is a major topic of controversy specifically there were two provisions to and for forty one which prohibited certain kinds of election Electioneering communication and the question

Was whether this film and the ads to promote the film were captured by this election year in communication which is prohibited within thirty days or sixty days when the candidate was a US presidential candidate. So that was a question that had to be a result so it was purely a statutory interpretation question of whether election community electioneering communication and the distribution of the electioneering communications which under the statute had a specific term publicly distributed which in order to be publicly distributed had to be distributed to fifty thousand people. I mean that was that your life question is whether this video on demand distribution met that public distribution of electioneering communication the original argument before the court was that we could have aInterpretation.

Just on the statute without touching any constitutional questions. But for some reason the Roberts court resisted that and wanted to be briefed on the bigger question as to whether corporations had free speech rights. Because as you recallUnited is a corporation. So they wanted to ask the question whether corporations could fund elections or be part of election funding and whether that was part of the freedom of speech of a corporation

much bigger question than the one initially course well the problem was that there are already certain precedent of the Supreme Court which held that it was permissible for Congress to restrict the abilityto influence elections spending. The idea in these cases in the statutes was that if companies could invest their money in election campaigns that would have a destructive effect on election year. Because they would not be individuals this would be big lobbies etc etc. So there was also a view that you'd would corrupt the electoral process. Because then you would have a quid pro quo type arrangement of thought that that was the theory.

So there were all these precincts which were in can move into the Roberts court, If it wanted to find that corporations have free speech rights. That's why they want to be briefed on this big question as to whether corporations of free speech rights. Rather than just letting the statutory interpretation point. The other interesting thing to remember is that the statute did not bar all corporate spending all together. It allowed for corporations to create a specific entity called P A C a political action committee which would then invest in elections. The only limitation was that it had to be to donations you can't use the company's gentle money. But you can create a set separate fund which shareholder employee, unions that that could contribute to which the corporation could then use to fund elections.

So when Citizens United came up in argument before the Supreme Court and as I said the narrow minimalist approach was rejected and Justice Kennedy wrote

the majority opinion for the court and there the court rejected the narrow view and the many i make us Keep Curie petitions also said you could have found that, because the video on demand is only capable of being viewed by one person who makes a demand by clicking sudden buttons on the remote. It's not publicly transmit, because it doesn't meet the fifty percent fifty thousand person room. I think it's video on demand it's not like general T.V. you need to either it's like you pay for the viewing it's likeas different so potentially you could have read it to mean that this is not covered because only one person or one family or some group of people less than fifty percentfifty thousand is doing it. Kennedy rejected this by saying no it's not one person or one family, but potentially thirty million people within the domain of this Citizens United distribution possibility Could

potentially download and view. So therefore it meets the standard ok so it finds that the fifty thousand requirements is met because it's capable of being viewed.

Another approach might have been to say we're not looking at capability. But whether you could actually be viewed by so. He could have been viewed would have been a narrow requirement. Whereas the capable of the Being view is a much lighter one. So the correct use opt for the much wider approach which then allows it to reach the bigger question as to whether the corporation free speech rights are violate. Because if it had held on the narrow point.....to decide whether corporations of free speech rights get so through this device now the court has an open field to decide whether corporation to free speech rights or not so in doing that look at the words that the Justice Kennedy uses that the court cannot resolve this case on a narrow ground without chilling political speech. Speech that is central to the meaning and purpose of the First Amendment and specifically to a point about judicial restrain he says it is not judicial restraint to accept an unsound narrow argument just serve that the court can avoid another argument with broader implications of very interesting exposition of of judicial district. So he's saying you can't use judicial restraint to accept an unsound narrow argument. Just in order to avoid the unpleasantness of the implication of a broader argument, which may be solved.

If it means I'm pleasant or unpalatable consequence follow the soundness of the argument is what controls whether it is restraint or not important point so if this is because according to Kennedy the quote would be remiss in performing its duties. If it were to accept an unsound principle just to avoid making a broader the court for Kennedy has an obligation to address sound arguments and make conclusions. No matter whether it is difficult on not so once it says that it's Querrey has to decide what to do with precedent that are contrary to what it wants to do not as I said they were to presedent is one of the case of Austin and the other it was a case of Mc Connell and the reason I'm I'm going through this case in this detail is because it shows you the distinction between activism and restraint in its very clear manifestations that's what to do with the constitutional provision with the statute and with precedent which are not.....What a judge wants to do so bear with me. So Which isn't in communion preceding specifically held.

That up a statutory provision which bars corporations from spending money is permissible. Because it has a distortive effect on elections. You have to over rule as if you now have to find that corporations have free speech. But that's the sort of Kennedy's trying to do it and it has distorting effects because corporations obviously a much more wealthy than individuals. So allowing corporations to invest money will be distorting according to the Austin court. Similarly McConnell which relied on Austin alarm for the punishment of speech that specifically delineated kinds of prohibited speech by corporations and it said based on the corruption rational which is accepted by Austin's distortion premise we can ban speech which has the effect of corrupting by donations. So Kennedy says we have to overrule Austin and McConnell. Because for first forty one B which is a provision in this statute is a ban on corporate speech. Even during all companies can invest in elections through PAC Kennedy says it's a ban because creating PAC requires a lot of work and look requires a lot of compliance requires additional steps which are more burdensome than just allowing the company to invest its own money. Because of these burdens. According to to Kennedy it is of it is a breach of the first amendment.

Similarly Imposing restrictions on corporations affects the free marketplace of ideas and the free market place of ideas. In the Constitution of the United States means all kinds of speech and ideas must be allowed to compete in this market and it's for the people to decide which ideas are more worthy and not so limiting any from the market is an impermissible intervention with with the with the free speech Doctrine ok so Kennedy concludes that It's not sufficient the anticorruption the anti distortion principle are not sufficient to take away the free speech rights of corporations and companies like people are entitled to the free speech protection of the US Constitution. Specifically on the precedent he says a precedent should be respected unless the most convincing of reasons demonstratives that a difference to it puts us on a course that shows an error, so you follow precedent unlesscreate a sure error.

So it provides relative elucidation by saying the relevant factors and siding with or to a deal to the principle include three things. The antiquity of the precedent so hard earned. Is the precedent to the reliance interests at stake and finally where does the decision was well recent the route the first round. The antiquities pretty obvious to me very interesting reliance interests a stake and that's what Justice Mentioned earlier which is whether the parties have formed expectations on what are a lot of rights and obligations were based on the previous lot. But as he said certainty and predictability of a very important what use in our legal system. So reliance interests. Must be respected according to Kennedy and if your lines in trees were not produce then perhaps because I could not. Could be moved. Departed from. And finally whether the decision is well reasoned So this is where becomes really problematic for activism and restrict like deciding whether a decision as well read in the not obviously has potential ramifications for status ISIS. So he's not able to dispense with Austin and McConnell on the first two things. And instead use of the well reasoned. Which is obviously the most capacious dumb to find that often and McConnell must be overruled. And in doing that he comes up with the idea. Which is much criticised that corporations are free speech rights. And should be and..... spend in elections. As individuals do much criticize because you can imagine in the U.S. How much money can flow into the elections if companies can be allowed to invest. So consider those two cases. And then finally in closing in the in the next couple of minutes I just want to spend a couple of minutes to show you the hypocrisy in Citizens United when you consider that the majority included. One Justice Scalia whose views on just on judging and judicial reasoning as you will see here are meant to be extremely minimalist and textualist, But in in free speech in Citizens United that didn't stop them from being in the majority..... You can have this why brilliant thing judicial power. Because to do so would be as he says that intellectual fun all of this it consists of plain common law judge, which in turn consists of playing King. The rising out of the Brandon the ones earn money and there's wells that are to govern man kind.

So scary as a massive critic of judicial activist judges and judicial activism in general because he says that means judges are playing King. That's not the job of the judge and rather although it is exciting. The job of the judge is to be textualist because to do anything else is incompatible with democratic government or with..... meant. And you can only as

a judge. Rely on this on the text of the law before you. And interpret it. You can't do anymore because to do anymore..... In contrast to this. You have the theory of prisoner. Which is. Pragmatism. And where those are says. That was mirthfully of judging other than to pragmatically find conclusions based on the facts before you. You can't rely on any constitutional theory. You can't rely on any moral theory you can have any other theory of judging. It has to consist on coming to pragmatic inclusions based on the facts before you and others that is all. To make Tim Taylor and. It allows for the dilution of rights. It allows for the dispensation with P.C. didn't. It allows for a lot of accommodation of executive action. That may not be permissible under the other theory such as Earl congressional statutes are prism to be unconstitutional because they takeaway rights order is on the other end of the spectrum. So for him things like military commissions, Detention of Paris that said I would be permissible because the pragmatic Responses to Terrorism play the song. This is these are differing contrast NG scales on what the role of judges is and I don't think there's one answer to it but in with the help of these two examples and speaking to show you the hypocrisy.Claim to be extra Listen the other what it shows is that activism or restraint.

What do with our mortal activism we are talking about or all that I meant to say that may interact with our use. Please explore. But do it on the basis of a principle. Don't do it on the bizarre where the hogs. Try to formulate a principle forced into which more than one cares can show Either way it becomes Which is good for the institution or work for the side. That's all that's the entire thing we can.

Thank you so much.

Session13: Rationale behind Constitutional Mandate for control over Subordinate Courts

Hon'ble Justice Sujata V. Manohar:- I am very happy to be here to meet all of you. It's not often one gets a chance judges of different high Courts in the same time. We can have more informal, frank discussion about the problems which we have. We are going to discuss the rationale behind High Court control over the subordinate judiciary. I found it little difficult part of the rational as historic because as different high Courts were constituted the subordinate judiciary were brought under that High Court's control. But

basically it also, there is a practical reason behind giving control over the subordinate judiciary to the high Courts because it means decentralisation of administration and it would be a better control over subordinate judiciary. Now, we have to see whether how far it has worked or whether we can change it or improve it because mere changes are not enough unless it is not improved. But ultimate test of course is welfare of the people. You know that famous Latin maxim *salus populi est suprema lex* that is the ultimate test for any law or any system. So we have to see that whether the subordinate judiciary has function under the control of the High Court in a manner which is given satisfaction to the public. Because that is the first court in most cases public comes in contact with and what impression public gets that is it a correct, Is it fair to the subordinate judiciary to that what in public perception about it. So, these are some of the questions do arise. Now, I will not refer to the problems of arrears because that is an endemic to the entire system. If we concentrate on other aspects of subordinate judiciary, first of all do we have judicial officers competent who know the law, who have access to judgements, who has access to good legal assistance. Secondly, do we have judicial officers who are by enlarge honest. Then there is also a question of representation with inter lower judiciary because they deal with lot of the cases in different ways in the sense that they may have to deal with matrimonial disputes, motor accident claims cases, the rent Act cases, custody of children, maintenance and so. Have they been sensitised to the various issues which are involved and that is the High Court responsibility to give them the correct sort of training. This is also associated with the problem of transfers. Say with family disputes and if that group get transferred you are retraining your people again. So do we have system which gives continuous training to the judges in different matters they deal with. Say motor accident cases for example; I came to know that senior advocates are appearing in those courts and judges know nothing about it. I have to teach them the law and this is not a happy situation. We have to think about it. So that is the 2nd aspect. The 3rd aspect is do the session judges have the requisite sensitivity to crimes against a woman and children. What about dowry deaths? Sexual harassment, now we have sexual attack on children's, then there are issues related to trafficking.. Do the judiciary have sensitivity to all these issues. I will tell you why but it may be necessary to have more women judges from this point of view. Because in one matter I was sitting as a junior

Judge with a senior judge and We were dealing with the case of incest, the trial Court has convicted the accused. And the judge said sister we must do something about it. This is not right. In our Society this doesn't happen. This is the wrong idea, I'm sure the man is innocent. I said that in our Society these things do happen. So, just look at the evidence and don't go by presuppositions that this cannot happen. So, this attitude is still there. So, this is another aspect where we have to see whether we have stood by the subordinate judiciary as they should have because ultimately its success depends upon the support of the High Court gives and the control which the High Court exercises over it. Now, I found this lot of difference in the subordinate judiciary of different states. Some states have an excellent group of subordinate judges; most states don't have it. And for example Kerala, I think it is one of the best subordinate judiciary in the country. And I asked myself why it is so? Reason in my view is because the selection of subordinate judges is by the examination held by the High Court itself. They have succeeded in getting the rule of state public service commission out of this process. So, they have the examination and interview by the High Court itself. The 2nd thing that Kerala has done is that High Court judges have direct contact with the entire judiciary of the district with which that Judge is associated. They have conferences where the problem faced by subordinate judiciary are discussed and everybody present. Look the very good idea, calibre of judges who won at different stages in the district and it makes it more knowledgeable about whom to promote and whom not to promote. Now, this system is not geared in all high Courts. I think there are public service commissions examination with one High Court judge being there for that interview. It does not work quite well. I would like to know what is your experience about your High Court? Whether you think the selection process is such as to make it possible for competent people and honest people to be appointed as judges. Of course judging the honesty of a person is very difficult but this is an aspect of the control of the High Court. And how you should deal with the subordinate judiciary. You would have 3 or 4 cases which are there before you were this question of how to control this exercise has been questioned and it is a part of administrative law. And Justice Sharma will also have a lot to say about it. But for proper exercise of control; most of the High Courts have a system of administrative committee which looks at complaints against judges and probably you'll have a cell of registrar who examine the complainant and then you decide

whether it is enough material to hold any inquiry or not. And then appoint a suitable person to hold an inquiry and then High Court takes decision on punishment. There are cases where the High Court recommended the dismissal of the judge, a judicial officer and the state government that is the Governor sat on it for four to five years, and so that is also a situation in which one should be more vocal about it that this should not be done and High Court decision has to be implemented quickly. The other problem, I think it is happen in Madhya Pradesh; is about the judges were selected as inspecting judges for the subordinate judiciary, they were assigned in different districts to go to those districts and inspect the Courts. I like the Kerala system where the same judge is not appointed from the same district more than 2 years at a time. Judges who are appointed in charge of districts should look that there should be proper and fair treatment of subordinate judiciary.

Handling of complaints is extremely important because there always have this difficult task maintaining the confidence in the judicial system and at the same time taking action against whom there are serious complaints. If one investigates every complaint against every judge; I think we will totally undermine the public confidence in judiciary because most of the complaints are filed by the interested litigants who have lost the case. So this right balance depends upon the quality of control which the High Court exercises. And I think that is the matter with which all High Court and High Court judges have to be concerned. So that subordinate judiciary has control, has confidence in the High Court, so that they can come to you with the genuine complaints without fear of being laughed at or disregarded. I think that is extremely important. So these are some of the matters which we have to consider. You will also find that each state has its own different rules relating to subordinate judiciary and when you can compulsorily retire a person and when you cannot and various such other matters. In my view it will be better if we have some kind of uniform set of service rules for subordinate judiciary all over the country.

Now I am talking about the last aspect very generally which is about that whether there should be all India subordinate judiciary or not? First of all it will make the area of the appointment much wider; you would have wider choice or wider selection. I am not sure that kind of selection is prevented even now. I think there is no bar for anybody to apply

to anywhere. I find a little problematic if we have all India subordinate services from the point of view of exercising proper supervision in control over the subordinate judiciary. Because today ultimately it is a High Court which does this. Now, who is going to do this work on all of your basis. See, we are very big country, even if it was a small country one would have understand that this is feasible. But different states have different traditions also a part from different systems. If we have all India judiciary, who will decide the posting, who will decide where to send a person. For example, at least in some of the high Courts, in my High Court example we had of full data about judges, a judicial officer performance whether he was fast in the disposal or whether that he was slow, whether his judgements were good, not so good or sometimes bad. What was his general reputation. We used to make a report apart from confidential reports. And based on that posting is were decided. I judge who can be send to place where there is no much work. I judge who speedy can be send to a Court where there is heavy work. Similarly, a person who is reputation is good can be send to place where there is lot of litigation specially real estate litigation and like that where the question of indemnity becomes very important. So, depending upon the calibre of the person, ultimately everybody is not at the same calibre, so, depending upon the calibre of the person one would decide which is a good place or suitable place for that person to be posted. We have bought various criteria based on which we decide posting. So, I am little worried about it from the point of view of control over the subordinate judiciary. Because ultimately the proper functioning of the subordinate judiciary depends on the kinds of control which the High Court exercises over it. So these are some of the process and cons. I don't want to say more I think. Justice Sharma will have more to say. So, I have given just a broad outline of..

Hon'ble Justice Mukundakam Sharma:- Good morning to each one of you. So far the district Courts are concerned you are fully aware that is the backdrop of our judicial system being at the grass root. Litigation starts at that stage and therefore district Courts must be managed by the best of the talents that we have. So, therefore this recruitment process promotion and all other ancillary service condition of the judicial officers are very important. Now, then the constitution was framed the judiciary was barged into the executive. And that is why a directive principle was incorporated in the constitution under article 50. Where it said that judiciary should be separated from the executive. And that

being the position of that point of time. Two level of district Courts were constituted. One was the higher judicial service, the other one is judicial service. And the provisions were also framed at that point of time for selection process, article 233 for example is for the selection of the district judges under the orders of the Governor but in consultation with the High Court. Now, what is this consultation? These questions of course has been raised recently also day before yesterday judgement very elaborately; I don't have to go into all those aspects. Now, you all agree that judiciary must have its independence. Without its independence it cannot exist, it cannot function. Now, if the appointment process is given to the executive; they would not know as who are the most suitable person to Mann the these.. Although in some of the judgement it says that High Court can give advices or its the recommendations but that is not binding on the government. Meaning there by that High Court advice or recommendations subject to the Governors order. But later on, subsequent decisions have come were it says; the consultation means the high Courts recommendation must get primacy and if it is rejected the governor must give strong reasons why he has not accepted the recommendations. So, this I believe this is the correct position as of the provision stands of today. In consultation is a very very complex expression and has been properly interpreted by the High Court and so far the appointment of the recruitment of the district judges are concerned as you know there that 3 elements:-one is the promotion of the judicial officers; next is accelerated promotion and the 3rd is direct recruitment from the advocates. Now, so far the promotion part is concerned Court will know better, it is the High Court and the judiciary would definitely know better as how he has function; whether he is suitable for promotion or not? The Governor would not have any idea. So, therefore you see there was a judgement of the Supreme Court in 2008; this is a very famous judgement Malik Mazhar Sultan and others Vs. UP Public Service commission and others . I will come to it through this judgement little later. Now, so far the promotional aspect is concerned that is this law has given us how it should be recruited, also said about the direct recruitment as well. Now, so far the 2nd aspect is concerned that is the accelerated promotion. Now, a accelerated promotion is 10% or 15% . But I don't think that any High Court has been able to make this accelerated promotion provision effected or implemented because there is lot of difficulty in doing that. A person who is serving as a junior becomes the senior. You see exams

then taken in some of the high Courts, I know but nobody has come out successful. So ultimately I don't think that is going to be implemented but so far as the recruitment from the Bar is concerned; now the question is whether it should be done by the PSC's or by the High Court. Because if it is PSC then in the interview board there will be a representative of the High Court of one and 2 whatever according to the rules and now his opinion could be in the opinion of any other member. **So** unless the view of the opinion of the High Court is given some primacy or some sort of credence over the other members, it is a very very difficult; you see the needs and the requirement of the service is known to the judiciary only non-else. So, therefore in Malik Mazhar Sultan case, it is 2 judges bench, the Supreme Court said that we may however note that the progressively the authorities concerned would consider and discuss and eventually may arrive at a consensus that the selection process be conducted by High Court itself or by the public service commission under the control and supervision of the High Court. Many of the high Courts have taken over the process of the recruitment whether it is at that level i.e. the higher judicial service level. Delhi high court for example I know about that High Court; it is the recruitment that both the level is done by the High Court alone. I deem Italy, the order comes from the Governor but the recruitment process and all other things; setting of the papers, examination of the viva voice, examination of the .. All are done by the High Court. So, therefore I believe this process which is earmarked in this decision, this is a very detailed decision, I think you should go through this because you were also dealing with these service matters of the judicial officers to some extent. So, therefore a part of those who are the member of the administrative committee. You should go through this judgement, it has given a detailed analysis of the problem that has been faced by the judiciary. Then it gives its own recommendations that it should be done by the High Court now. High Court should be the process and should be implemented as of today. Now, so far to 233 is concerned, this is the provision; so far to 234 is concerned; that is the recruitment of the judges other than the district judges. That means, recruitment process of the judicial officers. Now, there is a provision is little bit different, it says the governor will appoint them after consultation with the High Court and PSCs. So, public service commission have been given a say and that is how they are also recruiting in several states; although in some state High Court is doing it under the service rules which are

amended. But in most of the states, in most of the high Courts it is the public service commissions which is doing. But in my personal opinion that even if it is done by the public service commission, there should be a monitoring of the High Court, total monitoring including setting of the papers itself. The process should be given to the High Court to monitor examination even if it is conducted by the PSC's and in the interview I believe there should be a representation of at least 2 judges of the High Court to see that the best person is coming to the judiciary. Otherwise you know what is happening all around. This public service commission is failing in its duty to recruit the right person. This is what is happening but I'm not saying that if it is given to the High Court will do it in the best way. But when there is a case of recruitment there will be some reservations in some way or the other. And I will tell you that no system is perfect. Therefore, there can be some sort of complaints and all that. But I believe that if it will be monitored by the High Court and conducted by the PCs I think that is one of the best thing that we may have. So far the control is concerned article 235. Now, control of the High Court is not in the judicial side. There cannot be control on the judicial side because independence of judiciary also is in district Court as well. Therefore there cannot be control so far as judicial side is concerned. But this control means, control of the district judiciary by the High Court so far administrative matters is concerned number one. And number two the disciplinary matter are concerned. It should be exclusively done by the High Court because it is the judges who know how a particular officer is functioning, its suitability and if he is misconduct himself the High Court know what is to be done with that particular officer. So, therefore there is one matter. Now, when you control district judiciary, you want to control the ACR as well. Annual confidential report. Now, how to report the annual confidential report has been the subject matter of cases at the level of Supreme Court also at various stages. A very recent judgement is incorporated in your basic papers. It is a judgement of Justice D.K. Jain and he has said that so far the recording of the ACR is concerned, he said it should not be done hurriedly and the way it is done in the present moment and at the present stage is far from what is desired. So this is what he has recorded and I think to some extent it is correct also. When I was in the High Court, there is no self assessment report given. But now I believe on most in all high Courts self assessment record is also included. From that the officers own views are also reflected

and we get the views of others as well. Now it says the ACRs are recorded casually in a hurry after a long lapse of time (in some cases even after the expiry of one year from the period to which it relates), indicating only the grading in the final column. The ACRs of such officer hold supreme importance in ascertaining his conduct, and therefore, the same have to be reported carefully with due diligence and caution. We feel that there is an urgent need for reforms on this subject, not only to bring about uniformity but also to infuse objectivity and standardization. So, these are important aspects which you must keep in mind while discharging your duty on administrative side. I believe presently the Supreme Court has laid down in various judgments, I believe we will be able to achieve the supremacy of the judiciary and its independence. Now, the rationale behind the mandate appears to be because all these judgments have been pronounced so as to free the judiciary from the executive's hand. To give a judicial independence all these decisions have been rendered so that the district Court also enjoys similar type of judicial independence as it is being enjoyed by the High Court's and the Supreme Court. The next is probably there are some contentions that the governor when he exercises the power of appointment, whether he is assisted by the Council of ministers in that respect also and if he is assisted by the Council of ministers in this then there will be lot of difficulty. Executive directly into the appointment of the judiciary and their functions. So these require some discussions and some considerations. And we have another session today where there is a session on amendment of the constitution, we can discuss in that also some amendments so far as judiciary is concerned is necessary or not. As it was dealt with by Justice Venkatachaliah has given some recommendations in that regard. So, these are broadly some of the aspects I thought discuss with you. Because it is mostly for the independence of the judiciary so that you see the district Courts can also function independently free from any difficulties and so that there should be no undue control of the High Court even of the judicial officers. This is also made it clear in some of the judgements given by the Supreme Court. In one of the decision it was said that I just read out one part of that: this is in 1988 (3) SCC 370 Iswar Chand Jain Case it was said that Under the Constitution the High Court has control over the subordinate judiciary. While exercising that control it is under a constitutional obligation to guide and protect judicial officers. An honest strict judicial officer is likely to have adversaries in the mofussil courts.

If complaints are entertained on trifling matters relating to judicial orders which may have been upheld by the High Court on the judicial side no judicial officer would feel protected and it would be difficult for him to discharge his duties in an honest and independent manner. If judicial officers are under constant threat of complaint and enquiry on trifling matters and if High Court encourages anonymous complaints to hold the field the subordinate judiciary will not be able to administer justice in an independent and honest manner. It is therefore imperative that the High Court should also take steps to protect its honest officers. So, there are some directives and observations are also given that there should not be any undue control of the judicial functioning of the judicial officers, there should not be any harsh words used against them because they are the judicial officers and like brothers to the High Court judges. So these are some of the observations is made by the Supreme Court. These are what I wanted to share with you and also discuss with you. So, therefore I would like to have your views on article 233, 234 and 235. So, whichever like to say anything on 233, 234 and 235 you can start one by one. Let us first take 233 the district judges... Yes, Somewhere it is said as a accelerated promotion.. You see at least in Delhi High Court there was some effort to do have accelerated promotion and there were some of the judicial officers who we're very good. So it was thought why they should spend several years here and may not get promotion. But ultimately it could not be done because there were several other factors... Accelerated promotion means you must be excellent. Now that excellent part is again a very subjective part; so how you decide? You may have an exam and then viva- voice that's fine. But it did not materialize and I don't think that it is there in any of the High Courts.

Participants:- Now the people has excellent qualifications; but does not have any experience that all. The judiciary constantly needs experience officers. Therefore, importance must be given to experience also.

Hon'ble Justice Mukundakam Sharma:- That's true. You are definitely allright. Now, for example a lawyer who comes directly to the judiciary as a district judge or as a additional district judge. Now, he has lot to learn. So, in their cases it has to be extensive training before they are inducted and put into service. Number one. Number 2, you see so far recording of evidence is concerned that is an art for the judge also. Examination and

cross-examination is not an art of a lawyer but is an art for judge where to stop and what is to be allowed and what is not to be allowed. Those are decisions which are very very material decisions. And the person who is coming directly.. So there are some difficulty, you're right. That's why I said in the selection process is good and in the right person is taken, the best talent available and they are taken in; as we are also recording evidence in many of the high Courts, so why not at that stage also; it is possible.

Now, there are 2 aspects here, one is a judge get recruited in a very young age. And at that stage as an practising lawyer he must not have much exposure. But you see the provision is now being adopted by most of the High Courts is give them 9 months training. Very extensive training and in all fields. I'm trying to tell you training is theoretical some extent but it should be more practical. He should be made to sit with a judge to see how he is functioning. The law officer as for example, they are associated with the judges now. So they know how the judges function. Similarly, if the young judicial officers who are recruited they should be asked to sit with the judicial officers and asked to go to the police station to see how FIR is lodged and the investigation carried out. They should also go to the jails, revenue authorities. So there are different area there you must get exposure. Unfortunately that's not happening.

My experience in the Delhi High Court is that the young generation coming is much better. But the first option is multinational companies, then the litigation and the 4th is Academics.

Participants:- Sir, may I share my experience at Kerala. Now, so far the selection of district judges are concerned primarily it was the time when Justice Malimath was there. Formerly it was the interview by five judges. Looking at the quality of the judges we have selected. The reason I the person who is having good practice in the subordinate Courts, they are not willing to come forwards for writing the examination. There are institutions were training is imparted only for examination. Therefore, the lawyer go there instead of actually practising. Prepare the examination and do it. But because of the Supreme Court judgement we can't do it now. Secondly, the selection of munsif magistrates are concerned. In the year 1986 onwards, Chief Justice Malimath from Karnataka took over. Originally PSc's selection was there, now shifted completely to the High Court. Now, selection is in three stages: one preliminary test that is objective types, then final test,

three types of objective as well as short answers plus essays. And then after the interview is going on. And so far as training is concerned we give compulsorily one year training of which three to four months practical training; sitting along with judges. Then we take them to FSL laboratory i.e. forensic science laboratory for the post-mortem, to jail, to revenue office, to police stations and all these are given under the Academy. Training by High Court judges and sometimes by the Supreme Court judges also we invite them. And the best training is been given. We give one year training. The only minus aspect is.. The only aspect I want to mention is...

Hon'ble Justice Mukundakam Sharma:- In that one year he has to go to various places also like a revenue office, jail, police station.. So, curriculum has to be decided accordingly

Hon'ble Justice Sujata V. Manohar:- We should have continuous training programme

Hon'ble Justice Mukundakam Sharma:- We are having continuous training programme.

Participants: - There should be training at entry level and then comprehensive training after that. There is a suggestion sir that it higher judicial level there should be a training accommodated with the High Court judges so that they can have a true research. Commissions can be appointed for recording the evidence also. So that they may require the art of recording the evidence.

There are one two things were National judicial Academy can also create its role. We have State legal services. What we can have the conferences of state legal services authorities also. So that it can go to the Society and can spread the message.... And educate the Society about the ill effects of drugs, in effect is what is going on basically on the Internet. They try to teach them. That is one aspect. Mediation process has been very effectively done. We have initially mediators came from outside, these mediators have trained and become trainers, trained further mediator is also. There are many cases which are disposed of at that level also. Why I'm saying this, that at least if you can bring them over there, trained them. So that when they go back they can train judicial officers also in what way the mediation process can also help in settling the case also. These are the

things, I think we can look at it not only at the training of the judicial officers at the judicial Academy but elsewhere also.

Hon'ble Justice Mukundakam Sharma:- So far the Delhi is concerned, I have some knowledge of it. Now, the judicial officers are trained as mediators. And that should be done. While they are functioning in the Court, sometimes they could be useful for mediation and get the solution.

Hon'ble Justice Sujata V. Manohar:- What happens to the workload? The cases has also to be disposed off....

Hon'ble Justice Mukundakam Sharma:- High Court judges and Supreme Court judges are also taking part in these Lok Adalat system, they are disposing of the matters. Yes, I fully agree that they are overburdened. More than probably the High Court judges and Supreme Court judges. But if they can while sitting in the Court also can take out some solution. It is the part of the function and they are doing that. So, if they have some training in mediation it will be more effective. That's what I'm trying to say.

Participants (Hon'ble Mr. Justice K.T. Sankaran): - In 1960s a system was introduced in our state in the subordinate Courts. What this called special list system. Only two cases would be listed for trial and rest of the cases will be post..These two cases will never adjourned unless there is a compelling reasons for doing so. And it is being scrupulously followed in the state. I must say in the reference of statistics of 2014 we are below 500 officers. 13 lacks 20 thousands was the filling in 2014 and we have disposed off 13 lacks 75,000 cases. Now the balances 40 lakhs. That is the one year work will do the whole thing. Within 2 years we are able to dispose of cases. Criminal Appeal in the High Court level also we are now doing of 2011, 2010.

Hon'ble Justice Mukundakam Sharma:- Yes you want to say something

Participants (Hon'ble Mr. Justice Rakesh Srivastava): - Sir, in Uttar Pradesh the state affair was so bad. This year when the higher judicial officers are inducted. Now, these people get themselves register somewhere in Faizabad like and then they all go to Delhi for coaching to appear in various other examinations. Ultimately they qualify and come here. They have not attended the Court even for a single day. So, the experience of 7

years is null. This time two candidates out of the entire batch. We told them don't tell a lie as you are already an officer now, and then it was said that none of them is experienced. So, this is how they get inducted. No mode of training and they are not interested in training also. They are behaving like an officer. At JTRI I personally go there and try to motivate them. Their attitude is absolutely different as if they are High Court judges or more than that. So, if they are inducted at the lowest level and are made to sit at the division bench in the Courts below, may be then they can have some experience. And the state of affairs is so bad in High Court there is a standing Counsel, an advocate was appointed as a standing Counsel. One day a judge was addressing some case and he ask some 10 questions, he was not be able to assist the Court. So, ultimately the Judge got furious. He said that who have been appointed as a standing Counsel and have you ever seen the High Court before you inducted as a standing Counsel. He said he sir, once then I passed in a bus. This is the state of affairs in Uttar Pradesh.

Participants(Hon'ble Ms. Justice Mridula Ramesh Bhatkar): - I went in 1993, I was getting interviewing for my judgeship. And Justice P.V. Desai Chief Justice and Justice Sujata Manohar.. They were sitting and they interview me for my district judgeship. That I remember. About new batches, new recruits who have never practised for even a one month. I will experience is very good in Maharashtra because we have extensive training of one year. The problem with face is that it is the behavioural problem; how to control the Court? They require a training how to control and how to behave with the lawyers? They should be modest and at the same time they should be firm. That should be trained that they should not be arrogant; then they can come at the respect from the bar. Even young judges also in a position to command respect only because of their behaviour.

Hon'ble Justice Sujata V. Manohar:- She is absolutely right. See ultimately, we are talking about the independence of the judiciary all the time but the problem is far more severe with the subordinate judiciary. Those who functions in small areas where there are three or four lawyers will dominate the Court. In that system to maintain judicial independence is extremely difficult. I was told that we have organisation judges called common wealth judicial officers conference. They discussed this problem of maintaining independence of the judiciary at the lower levels. And they cited the case were one of the

judge recently recruited and posted to a small court. When his car went to take petrol from petrol pump, the man said well I have a case in your Court. I will tell everybody that you are willingly and freely taking petrol free of charge. What is the Judge do? You have to understand the problems of small places and larger places; the kinds of the Court they are presiding over. In that case the High Court support is extremely important.

Hon'ble Justice Mukundakam Sharma:- Rightly pointed out that High Court has to give them support. Then only they can do the best otherwise it is very difficult...

Hon'ble Justice Sujata V. Manohar:- So it is ultimately how high Courts dealing with the matters. That makes a difference. If you support the wrong side it will send totally wrong message. So that is where the High Court controls comes.

Participant(Hon'ble Ms. Justice Mridula Ramesh Bhatkar): -High Court control to registry. So the appointment of the registrars is a very important thing. Otherwise it paint a very different picture. Even if the registrar who is a middle type he will see the senior judge...

Hon'ble Justice Sujata V. Manohar:- It happened in many high Courts. He always complaint about some of his juniors or seniors. So that the senior may not get the opportunity.

Participant (Hon'ble Mr. Justice K.T. Sankaran): -The other area was transfers. We have certain set of rules. There not been committees of High Court judges. One for subordinate judges, two for district judges. They would scrutinise each item. Why he is transferred to that place, why he is not given the first option? Everything is scanned then it is placed before the administrative committee. Administrative committee also takes each item and that comes to the full Court. For last about 5 years at the Court level nobody has ever raised any complaint and this list is placed on the website of the High Court.

Hon'ble Justice Sujata V. Manohar:- You see if the decisions are transparent and everybody knows. There would be no doubt and no complaint at all. The only thing we have to be transparent..If we are open and transparent I believe there should be no basis of complaint at all...

Hon'ble Justice Mukundakam Sharma:- ..The budget is there, we prepare but the money does not come to us directly. It goes and all the time he have to look to the executive. I think the revenue should be given to the judiciary. Anything else that anybody wants to say about anything. We have an another session. And it's all being recorded.

Participant(Hon'ble Ms. Justice Mridula Ramesh Bhatkar): -We need to give some more time to the subordinate judges. High Court should give more time to the subordinate judges. Time to interact that is required. Then you are a Guardian judge and try to understand them.

Hon'ble Justice Mukundakam Sharma:- All right we can have one more session sometime later on this aspect so that we can get more feedback. Thank you very much we will be back at 10: 30.

Session 14: Constitutional Reforms must for India

Hon'ble Justice Sujata V. Manohar:- Are you all here? Yes, Yes, Right

Participant (Hon'ble Mr. Justice Raghvendra S. Chauhan):- One difficulty I believe since I have been transferred from Rajasthan to Karnataka is the language problem. Some of the roster in Karnataka I found it bit difficult to handle. In criminal side all the records are in Kannad in civil side all the evidence are recorded in kannad. So, it has to be seen that how one has to handle all India service.

Hon'ble Justice Sujata V. Manohar:- Also stated laws are there. Each state has its own laws.

Participant (Hon'ble Mr. Justice Raghvendra S. Chauhan):- They have different words. Even in district level same weapon is called by different names in the same state.

Hon'ble Justice Mukundakam Sharma:- You see when I was in the Supreme Court, there was an exercise by Law Minister to discuss on the subject on creation of all India judicial services. And we visited number of places, state capitals and invited the Chief Justices of the different high Courts. But I believe there was objection to it and then probably it was stopped.

Participant (Hon'ble Mr. Justice K.T. Sankaran):- Recently in the Court a letter from the law Minister. It was again discussed. And the discussion process is still on.

Hon'ble Justice Mukundakam Sharma:- At that time it was stopped because of number of difficulties. Particularly because of language. For example, if person comes from Punjab, it will be very difficult for him to pick up telugu or tamil on any of the language. So it'll be difficult for him to record evidence. There are practical difficulties also.

Participant (Hon'ble Mr. Justice V. Kameswar Rao):-We have to see who can govern it or who can regulate it? The executive cannot do it. Unlike India service. We can't talk about one particular state to regulate it all over India. It has to be Supreme Court or something like that of those lines.

Hon'ble Justice Sujata V. Manohar:- Supreme Court is not set up for administrative work

Hon'ble Justice Mukundakam Sharma:- There has to be an independent body. That would be possible. You see some retired judges also get associated. That may be possible but then the language problem. Possibly it cannot be implemented. That's my view. Okay we can start the next session.

Hon'ble Justice Sujata V. Manohar:- Yes, actually I was surprised when I saw the subject that we need constitutional reforms that must for India. I don't know, I want to learn from all of you what sort of things we need. We have a huge list of suggested reforms that are there in your reading material. But let us just look at it broadly. We have the longest constitution in the world. It deals with all kinds of things. It has already been amended more than hundred times. Now, what kind of reforms to be need which will involve amendment of the constitution. Ultimately constitution is your fundamental law of the land. It lays down not just law which can be amended like any other law, it also embodies aspiration of the people. You see the preamble, we want, we the people of India and we want justice, equality, fraternity. These are all aspirations. And the constitution has framed given shape of these aspirations in the way the consequent assembly at that time thought important. Now, I thought the most important thing about the constitution document is how you interpret it to make it valuable to your time. It is not

any other law. It is a law which is of all types. It embodies certain documents. For example you see chapter of fundamental rights. It was in 1950 when the constitution came in, we have the universal declaration of human rights which was internationally accepted document. Then we have UN governance on civil and political rights, social, economic and cultural rights and so on. There are international treaties which dealing with human rights, which deals with what the Court in the constitution fundamental rights and some of them form a part of the directive principles of state policy. So now how would we interpret these constitutional mandates is very much a matter which the judiciary can decide. What is the ambit of those rights? And you have not only the judgements of your own country, you have judgements of other countries also that you have look at to see how certain rights are interpreted in those countries. And can we also give the same way or not. Now, for this point of view if you can consider the document which shapes the nation for all types to come. I think, it is the responsibility of the judiciary to make a constitution workable. And we should not wait for the legislature to amend the constitution. Judiciary should as far as possible make it workable. And for that we requires slightly different norms of interpretation. For example, I would say for the African countries, they have a tradition as we have article 12, we have interpreted article 12 in a very peculiar way, in some way it is also created problem. Now in some constitution there is a provision that fundamental rights of the prevail not only on laws but also on local Customs. So, we have African states like Gosvana and Ugandia was strucked down the local Customs on the ground that they violate the basic doctrine of equality, non-discrimination things like that. I was interested to see the case of Nepal High Court. We don't look that judgements normally there is a Durgayana v/s State, they have the same penal code that we have. We have interpreted it to say that in modern times when protection against women has been formulated in International documents; we look at those documents to interpret our penal code. And then the marital rape was prohibited under that penal Code.... We have to see were it is necessary to amend the constitution and why. As we started with the traditional notion that civil and political rights can be legally enforced but socially and cultural rights cannot be. So we had the fundamental rights which would be enforced by the Courts and we have the directive principles which we said is the state obligation to have a policy which will produce these results. And you see over the years how the

balance is shifted. You are well aware with the history of both the two. Now, we have come to the conclusion more or less, you cannot have civil and political rights; you cannot have rights under article 14 and 19 unless you have also rights which are social and economic. So, the two rights cannot be separated. So, this is not be amendment of the constitution. This is one kind of possibility which is there if you want to bring some changes which are not, if I did you is that word now that famous phrase which don't affect the basic structure or which are such as which enforce the basic structure than destroy it. We have to amend the constitution in some matters where you think it is not possible to interpret the constitution in way which is conducive to the result you want. So for example, what should I say.. Recently we have constitutional amendment which was struck down. We could have constitutional amendment which deal with say the jurisdiction of different Courts, or if you want the Supreme Court to be separated into a constitutional Court and the Court of appeal. Now, that kind of the basic change would certainly require constitutional amendment. The question is that whether we want that kind of change or not. That is a matter of debate. And says that these are constitutional amendment in my view; it cannot be a prerogative only of the legislature, you have to have some kind of a public need or public demand for this kind of basic change. Ultimately it is a constituent power. Although you may call it an amendment. But basically it is a will of the people that we want to change the structure of the constitution then that is the matter there the problem arises who will change it and how? So, these are some of the basic issues relating to how you can have constitutional reforms. Are they are necessary? If they are, how you will decide, what can be incorporated in the constitution. I thought, I will just give you a broad overview and then we can see as you discussed different types of reforms which you think may be necessary. Whether to amend the constitution for that purpose or not? Ultimately you cannot make the basic change in the constitution; the basic structure doctrine is universally accepted. Many countries outside India have accepted this doctrine of the basic structure of the constitution which cannot be changed. So, it is something that we should be proud of. And within this limitation what kind of reforms is required. I would like all of you to say on the subject.

Hon'ble Justice Mukundakam Sharma:- I will just say for 2- 3 minutes and then handover mike to him. Now, as my sister said the constitution has to be workable. And

this workable constitution depends upon the interpretation given to the intention and that is the role where judges come in. Judges have too interpreted in such a manner, the provision of the constitution or any other act which is emerged from the constitution itself, so as to give effect to the salient features of the constitution which is in the preamble and also in the directive principles. So, it is completely within the domain of judges to give proper interpretation of the constitution provisions as well as the statutory provisions. Now, so far the division between the constitution bench and the Court of appeal. Now, this aspect come up before the Supreme Court in full Court two – three times. Once when I was the member of the Supreme Court bench and then subsequent there too. But Supreme Court, full Court was of the opinion that it is division is not possible in the Indian context immediately. But later on it can be seen what could be done. And so far as the basic structure is concerned; there is already a decision it cannot be changed. But so far as the reforms are concerned probably there could be some discussions on those. Now, there where certain reforms suggested as you know by Justice Venkatachaliah in that commission in which he was appointed and he has given certain suggestions which have probably you will have in that compilation. Now, for example as my sister has pointed out; the definition of other authorities; article 12. Now, there are a lot of interpretation on that. And I believe those interpretation have complicated to some extent. But Venkatachaliah ,for example in his recommendation, he has given explanation to article 12. Giving limited jurisdiction so far other authorities is concerned. It says explanation in this article the expression other authorities shall include any person in relation to such of its functions which are of public nature. So, this is one definition that he is trying to bring in. But this is again you see is inclusive. That means there could be scope of other. It is at the back of your book. The first provision itself explanation of other authorities. So, in a manner that this definition extents all public functionaries. Now, for example there was one decision then it says that BCCI and all may not be public functionaries as such. But later on they have included and orders have been passed. Therefore there is some confusion on the subject. But if there is some concise definition of it that would definitely help the judges to interpret the provisions.

Then one more aspect I am placing before you. Now, kindly see the article 19 (1) A and (2). 19(1) says all citizens shall have the right. Now the suggestion is freedom of

speech and expression which shall include the freedom of the press and other media; the freedom to hold opinions and to seek and receive important information and ideas. Now, so far freedom of press and other media is concerned it is now recognised that there is a right invoked, vested on them. But this is not by the constitution. Constitution does not give such a right to the media or the press as such specifically. But there are decisions of the Supreme Court which interpreted that the expression of freedom of expression. The explained that and said that press will come within the definition of that. So it is practically the Supreme Court which is given this right to the media and the press. But now Justice Venkatachaliah has right to make it specific by bringing in there.

There was one more, so far the contempt is concerned. According to him the power of exercising the contempt jurisdiction should be vested only in the Supreme Court and the High Court and no other Court. Now as you know now the administrative Tribunals they also have the power to exercise the contempt jurisdiction and they are playing havoc some parts. I know for the fact, I have a occasion to deal with such matters in the Supreme Court. So, therefore whether such power should be made available to those tribunals or not is a matter to be discussed. But his suggestion is it should be available only to the High Court and the Supreme Court and reference can always be made to the High Court if there is such a case of contempt. One more, he has recognised the right to privacy. Kindly come to the next one article 21 B. Here it says; which is not available as of now. It is recognised by, given by the decisions of the Supreme Court but not a recognised right under the constitution as such. But he is trying to give that right. Every person has a right to respect for his private and family life, his own and his correspondence. So, there are some similar suggestions are given with regard to judiciary also. And his suggestion was also on the formation of the National judicial commission in different form. His suggestion was, there was the Chief Justice of India, two senior most judges, the law Minister and one eminent person. So, privacy of the judiciary was retained by him to that extent.3:2. But that was.. And then you see that the veto power that was not there. There are some more solutions by him for judiciary also. Some inclusions, some omissions. So, this needs considerations by judiciary also. And if we find some point of time that some form of reform is necessary to our power and jurisdiction also; probably we can discuss there is no wrong

in it. So far as rights are concerned the duties are concerned we can always have a discussion on that. We come to the discussion part, now Prof Sandeep Gopalan.

Prof Sandeep Gopalan:- Thank you very much chairperson. What I was do in a few minutes I have again.

Constitution we have with so many constitutional amendments in the history. So one has to consider any proposals for amendments and reforms very seriously and recommend only those which are absolutely necessary to that amendment for reforms. Having said that it would be pity to waste the time we have. We have seen many discussions that has taken place in last 3 days. Specifically the questions about separation of powers, questions about judicial activism and judicial restraint. Justice mentioned positive view of judicial activism in this country contrary to the United states of America jurisdiction. And I was thinking about why that is? Why judicial activism is celebrated here versus in some other countries. All the answers to that question might be that activism that we had seen in this country largely is to doing with is fixing the problems to do with governance. And building around our capability through rights to fulfil the basic expectations of good governance in the Society or satisfactory governance where executive and legislature are seems to be failing the people and therefore the judicial activism is there to fill the gap. To the contrary, in countries like United States judicial activism is being criticized unlikely so in many cases because they're the judges are seem to be antidemocratic and failing in the gaps were .. On cultural issues largely which are not been resolved through elections. So, unelected judiciary trying to solve the problem that people have not been able to solve the problem themselves to the electoral process. Here if we look at the cases, we see it is filling in the gap of governance related challenges. And that's why it is a degree of the acceptability. And that the theoretical and conceptual level sought the problem of separation of powers.. This trial of judicial making or better word rulemaking with the traditional notions of what is the domain of the judicial process.. We got the kind of hybrid system a lot of governance problems had been attempted to be sought out through judicial decisions. But that creates its own problem. So, we can approach the question on this topic most constitutional requirement reforms in the sense of where our system is failing. And asking that question one reference was that one can look at the

developments in the competitive constitutional law especially in the light of new constitutions in US states which had the benefit of experience about its own constitution and have established constitution. And 2nd to look at the development of rights to International treaties and conventions that have happened since our constitution is adopted. Specifically you know there is an tremendous development in the rights through International conventions specifically to do that minority rights, children, woman rights and so on which happens much after our constitution can come in force. So, it is to be seen that what is the state of the art. What is the best practices internationally and in the constitutions were some of the problems can be dealt. Equally we might look at systems where serious challenges through economic crisis and so on have generated reforms in the constitutions. Specially I could say about the Irish constitution we're the constitutional reforms where generated because of economic crisis. And that is the abolishment of senate which is the 2nd house of Parliament. Unlike here the senate is much more smaller body.. Interestingly in spite despite the financial challenges in Ireland the abolition of the senate was put to referendum in that country and very narrowly the Irish rejected the abolition of the senate. But that shows even though there was a big financial crisis those Irish people agreed of senate decision once again showing how difficult serious constitutional reform is and even though it has been attempted because of various substantial reasons. Therefore in this country and the reform of the Parliament and our system of legislature and executive branches with a view to increase in the accountability directly the structural constitutional reform process are unlikely be liable. So that we have to probably accept, in short term. We should see what kind of reforms we can have through rights based approaches from structural reforms. That is the limitation we have. I was just float one idea the jurisprudence of the Court that developed and some of the International conventions that tend to provide some insulation for the judges against claims of the activist, against the claims of the separation of powers. I give you some authority to the constitutional provision to achieve some of the progress of reforms from interpretation. And that might be specifically ideally give right to good governance.. Some of the newly adopted constitution.

The South African constitution for example in section 27 has a right health it says everyone has a right to assess to health care services including reproductive health care.

And B sufficient food and water... 150 constitution contains some aspect on the right to health may be through interpretations .. So, in the International landscapes like to health is seen to be a consensus view across the International treaties and conventions which is recognised as a human rights. So raising the declaration of the human rights of 1965 International conventions, elimination of all forms of racial discrimination in 1966 International economic social and cultural rights to 1979 conventions on elimination of all forms of discrimination against a woman in 1989 conventions on the rights of the child, 1990 conventions on the protections of the rights of migrants workers, and finally 2006 conventions on the rights of the person disability. It seemed that right to health is in all of these conventions. So it is uncontested and those states have right to rectify these conventions including India. So if the most pragmatic example of right to health with economic social and political rights; article 12 says all state parties recognize the right of everyone to the enjoyment of the highest attainable standards of physical and mental health. This is the important distinction made by.. So good governance come from mental health. So somebody who has been harassed of corruption or bribery might have implications on mental health. There for right to health by giving into interpreted freedom to demand good governance to that right.. Similarly the CEDAW Convention on elimination of discrimination of all forms of discrimination of women, in article 12 says that all states that the appropriate measures to eliminate discrimination against a woman in the field of health care, in order to ensure on the basis of the quality of men and women. Access to healthcare services.. And adequate nutrition. Similarly, the Convention on the rights of the child in article 24 specifically mentions that the right of the child is to be enjoyed to be of highest standard of health.

Participants (Hon'ble Mr. Justice Raghvendra S. Chauhan):- Mr Gopaln let me point out that all these points are included in the directive principles and we have to bring them in the realm of fundamental Rights.

Hon'ble Justice Mukundakam Sharma:- To add to this, so far it may not be right to health, it may not be specifically included in our rights, but there are decisions of the Supreme Court's right where it is said that right to health is a part of right to life. Therefore, so far the childcare, child education these are all parts of life already interpreted by the

Supreme Court. Therefore it would be specifically included as I have pointed out Justice Venkatchaliah has done it. But even if it is not there we have those rights available to us. There are many more judgments.

Hon'ble Justice Sujata V. Manohar:- I think it started with Justice Krishnaiyer, article 21 encompasses most of the directive principles, it will include child rights. It also includes right to health. We have that case of Silicon Valley workers and Court said that right to health..See all of there. Vishaka for example said that where there are gaps you can use International treaties to which we are party, We are the party to all the conventions which Mr Gopalan cited and we can use them to interpret and add to the fundamental rights that we have. The more difficult question is should the Court give directions which it may not be in a position to enforce. See, most of the western countries then the oppose judicial activism one of the main reason was can the Court impose financial burden on the executive? Whether the Court has a right? And we have said that when the other parties to the governance then we have right to make the government comply with the directives which may have themselves agreed to enforce. So that is our answer to it. But this is basically a problem which we have because here I'm the only who was given decisions in Vishaka and then human rights commission has to enforce them. So, I will tell you that government although in Court agreed to everything and said he has these are proper guidelines which can be given. To most reluctant to set up any kind of committee in any of the departments or in any public sector undertakings for investigation of complaints into sexual harassment and we had, Justice Verma was also there with me and we had a very difficult time getting the governments to comply that with the directions to which they had agreed in Court. So, these are some of the problems. These are the problems. It is nothing to do with the constitution reforms. So, these are some of the aspects. But looking to the human rights climate in the whole world and how people have look at this International treaties and how to interpret them. I think we need to take few lessons from them. We need not think that we are being over active. In fact I don't know if you have seen that lecture of Lord which have circulated. You see he has said article 19 was diluted and we can make use of article 19 of the Covenant as a social and political rights right to proper interpretation. Freedom of speech is very much internationally recognized as a part of the freedom of speech and expression. It is not something special that we

have done. It is all there in the International covenants. So if you look at what is happening around the world, how people are interpreting these rights and I think we can take South Africa followed us now this time we follow South Africa. Many things have happened for example, we got right to education first, it was judicially recognised before it came into the constitution. But some thing that we did not do for example guardianship of children. Should we would have made use of the constitution. It was a subsequent law, Hindu minority and guardianship Act. If it violates the equality clause we would not have been struck it down? But the Courts new.. All in the case all tribal Customs were not struck down.. You know where the tribal customs said that were a women had three daughters and no son females cannot inherit land the family became destitute. And I think..had challenge to the supreme court and the court said no this is a custom. Should it not be struck down something which is contrary to the constitution. So, in some way we are very progressive in some way we are not. So these are aspects of how you interpret the constitution. I don't think the reform to be required in that sense.

Hon'ble Justice Mukundakam Sharma:- Now there is one more suggestion there, it was said that there should be right of education so far male is concerned up to 14 years and so far female is concerned up to 18 years. I believe it should be equal. 18 years for the Court why not? It is the obligation of the state impart education to the upcoming generation. 18 years only to female and not to male because generally you see that drop out from the school's are generally at the age of 14 years. They drop out at that time. But if they are given compulsory education up to the age of 18 years, they may become a responsible citizen of the country. So there are some areas is probably we can look into it and then find out some sort of solution; we cannot give or recommendations that does not have a job. We can interpret the constitution and when an occasion arises give our inputs there too. As my sister has pointed out we can only suggest. That's all.

Participant: – Vocational training

Hon'ble Justice Mukundakam Sharma:- And if you say what vocational training that is imparted after the age of 18. So, that is one of the may looking into it. And then occasion arises we can suggest that also. There is a thinking that everybody going into higher

education; they can be given vocational training and put them in a particular trade.. Yes anybody else want to give any input?

Participant: – There is a financial implication also

Hon'ble Justice Mukundakam Sharma:- This could be directive principles of state policy. If you give all the students regular course of education as. That is why there is unemployment. How to eradicate that? So if you give **some vocational training**, the short of other technical people in India.

Participant: – This was referred in article 21 A right to education of the children and that's why these words are very important. The state shall provide free and compulsory education to all children of the age six to fourteen years.

Hon'ble Justice Mukundakam Sharma:- The law is enacted. Right to Education Act.

Participant: – But if we are talking about compulsory education till the age of 18 again those words will be very relevant.

Hon'ble Justice Mukundakam Sharma:- You see, the Act provides it would be compulsory till the age of 14. That 14 is to be replaced by 18. But where is the resources to support us. That is important. Now, what is your reaction to the amendment of the constitution so far as judiciary is concerned? Or we are self-sufficient.

Participant: – salary of the judge should be increased....and .

Hon'ble Justice Mukundakam Sharma:- That is the NJAC that is going on and there is a Supreme Court decision.

Participant: – The issue of tribunalisation has to be tackled because there are many tribunals. The functioning and caliber..

Hon'ble Justice Mukundakam Sharma:- Now so far as tribunalisation is concerned, I think it is not good for the country because instead that if you increase benches a day. The strength of the High Court, we have more judges to deal with those matters I think it will work better. Because what happen is tribunalisation, these administrative officers who come as a member of that. Now what did not do it there they are doing in the tribunal.

The act giving relief right and left. At times it is going against the law. But they are giving. I don't know why?

Now, even if you increase the strength of judges, you don't have an infrastructure, no supporting staff, no good stenographers, stenographers are also not available these days.

Participant: – They had spent crores of rupees in SAT and now SAT is abolished.

Participant: – They don't plan very systematically. My brother was telling me they had 100 crores bus stand. Now it is only for tourist buses. And Bus stand is idle.. 100 crores has gone. We have hospital in Faizabad came up in 1989. We took up that matter in PIL so it is from 89 and he ask how it is operational. So, there given a simple affidavit yes 80 crores have been given for the instrument etc. They said machine has been further changes 7 years back. And it is not operational till date. And we have made the provision that if the building is constructed up to a level we have purchase the machinery irrespective of doctors, patients. Now, in UP they are making cycle tracks. On trees are being cut. Cars are been parked and moneys are spent. So they don't invest where they have to.

Hon'ble Justice Mukundakam Sharma:- Now So that is the outlook. We must whatever is possible within the constitution we should act.

Hon'ble Justice Sujata V. Manohar:- Have you read the story of yes Minister and the story of that hospital. He got the award as best hospital. It had everything except patients.

Participant: – So, what we did that day, in that PIL we got affidavit and it has been said that it has been inaugurated by the Chief Minister yesterday. So I made a remark in the Court that hospital cannot be inaugurated by pushing a button. You have to get operated by yourself then it is operated and then we ensured an advocate is appointed and..they went and found that there were two patients inside the x-ray room. 500 beds hospital since 89 they are not able to built and 100 crores have gone. That is the state of affairs. The talked about the appointments in the earlier session; all the selection process these days our the Chief Justice have struck down all appointments in higher judicial service commission, public service commission all appointments have been set aside because of a legal appointments have been made by....

Hon'ble Justice Sujata V. Manohar:- Coming back to the subject of tribunals you know, the main problem with tribunals is that it don't have independent judiciary. Your entire principle without independence judiciary is completely gone.

Participant: – As an practicing advocate then we note that when chairman is an IAS officer, it has a different mental setup. His way of appreciation of evidence quite different from a legal and juristic appreciation.

Hon'ble Justice Mukundakam Sharma:- This is additional hierarchy which is not necessary because in article 226 there are coming to the High Court. Then what is the reason for spending so much time and energy for getting one order from the tribunals and which is also sometimes I see..

Hon'ble Justice Sujata V. Manohar:- Separate set of hierarchy of tribunals with internal independence is a very different thing. It becomes an new system.

Participant: – The other amendment for the judiciary is of age.

Hon'ble Justice Mukundakam Sharma :- Age is recommended. Have you seen that?

Participant: – Again it says High Court 65 and for Supreme Court it is 68.

Hon'ble Justice Sujata V. Manohar:- I don't know it should be the same.

Participant: – I don't understand the logic why different ages? And the other amendment that they shall do is salaries. Salary they need to be..

Participant: – In US there is no age of retirement for the judges. Yes, there is no retirement of judges in Supreme Court. Parliament may make the amendment at least as per the judicial requirement.

Hon'ble Justice Mukundakam Sharma:- So thank you very much time is up. You will have tea and probably there is one more session

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